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

Appeal by: **West End DC Community Association** **of:** **The Zoning Administrator's Decision to Issue Building Permit No. B2401624**	BZA Case No.: 21221 Virtual Public Meeting: November 6, 2024

DEPARTMENT OF BUILDINGS' OPPOSITION TO APPELLANT'S EMERGENCY MOTION FOR STAY AND EXPEDIATED HEARING

Appellant, West End DC Community Association ("WEDCCA"), appealed the Zoning Administrator's ("ZA") decision to issue Building Permit No. B2401624 ("Permit") to the Department of General Services ("DGS") for construction at 1129 New Hampshire Ave NW (the "Aston" or "Property"). The purpose of the construction authorized by the Permit is to modify a former dormitory into housing for persons experiencing homelessness. WEDCCA asks the Board of Zoning Adjustment ("Board") to stay the Permit so construction at the Property cannot be completed. But the practical impact of the stay request would be to prevent persons experiencing homelessness from living at the Property during the pendency of this zoning appeal. It also asks the Board to expedite the public hearing on the merits. The Department of Buildings ("DOB") opposes WEDCCA's motion in full.[1]

Three major questions are before the Board:

(1) whether the Board is authorized by statute or regulation to stay the Permit *before* the Board hears the zoning appeal on the merits and issues a written final order;

[1] ANC 2A is the affected ANC in this zoning appeal. According to its website, the ANC typically meets on the third Wednesday of each month. *See* https://anc2a.org/ (last accessed Oct. 23, 2024). That means its next projected meeting is not until November 20, 2024. Unless the virtual public meeting is postponed until after the ANC has a chance to meet and consider WEDCCA's motion, it will not have an opportunity to present its views before November 6, 2024.

(2) if the Board is so authorized, whether WEDCCA has shown that the Board should impose an interim stay; and

(3) whether WEDCCA has shown good cause to justify expediting the zoning appeal's public hearing.

The answers are clear: the Board is not authorized to impose an interim stay; even if it were, WEDCCA has not shown that relief is warranted; and WEDCCA has not shown good cause to expedite the zoning appeal.

First, WEDCCA must show Board that the Board is authorized to impose an interim stay. WEDCCA's argument is unpersuasive. WEDCCA asks the Board to step far beyond the Board's legal authority—based on a single 35-year-old Board decision—that was issued without any detailed legal analysis and without the benefit of decades of caselaw from the D.C. Court of Appeals describing the contours of agency power. As far as DOB is aware, the Board has never since granted such an extraordinary request and there is no support for it to be found in today's statute, regulations, or caselaw. Because the Board cannot impose an interim stay, it need not reach the question of whether that relief is warranted.

Second, not only are interim stays not authorized, but WEDCCA has not shown that the Board should impose a stay. When assessing whether a stay is warranted, courts consider four factors: (1) whether the moving party is likely to succeed on the merits; (2) whether the moving party is in danger of irreparable harm if the stay is denied; (3) whether the opposing parties are likely to suffer harm if the stay is granted; and (4) whether the public interest favors granting a stay. As explained in greater detail later in the Argument section, none of the factors weigh toward imposing a stay here.

Likelihood of Success on the Merits. WEDCCA has not shown that it is likely to succeed on the merits of the zoning appeal because:

- WEDCCA lacks both organizational and associational standing to appeal the Permit;
- DGS's proposed use constitutes an "apartment house" permitted as a matter-of-right, and a special exception to operate an "emergency shelter" was not required;
- The Property is not subject to a planned unit development; and
- WEDCCA's other arguments, grounded in the Construction Codes, are outside the Board's jurisdiction to consider.

Danger of Irreparable Harm. WEDCCA is in precisely zero danger of suffering irreparable harm if the stay is denied. At best it alludes to nothing but a vague, unspecified economic harm. But the D.C. Court of Appeals has already rejected the argument that economic loss constitutes irreparable harm, unless the loss threatens the very existence of the movant's business. WEDCCA has not alleged anything of the sort, much less proven that it is in danger of such harm.

Harm to Opposing Parties, Public Interest. When the Government is the opposing party, the harm to opposing parties and public interest factors merge. The equities easily weigh against imposing a stay. The practical consequences of imposing a stay cannot be ignored: hypothermia season is fast approaching, and staying construction will mean that men, women, and their families who could have a warm, safe place to sleep and live but for this appeal, would have to sleep on the streets as winter descends—all because a group of anonymous appellants claim an unspecified economic harm. The risk of some vague economic harm pales in comparison to the very real human cost of denying available housing for our most vulnerable citizens as the seasons change and the weather gets colder.

Third, WEDCCA makes no argument at all why good cause exists to disregard the Board's normal scheduling timeframe and to expedite the hearing.

Thus, the Board should (1) hold it is not authorized to impose an interim stay; (2) deny WEDCCA's motion for an interim stay; and (3) deny WEDCCA's request to expedite the zoning appeal's hearing. If the Board decides it can impose an interim stay, it should deny the stay because WEDCCA has not shown that such an extraordinary remedy is warranted in this case.

ARGUMENT

I. The Board Lacks Authority To Impose A Stay Before It Hears The Zoning Appeal On The Merits And Issues A Final Order.

A fundamental principle of administrative law is that "the proponent of a rule or order shall have the burden of proof." D.C. Official Code § 2-509(b). Another is that "[a]n administrative agency is a creature of statute and may not act in excess of its statutory authority." *Dist. Intown Props., Ltd. v. D.C. Dep't of Consumer & Reg. Affairs*, 680 A.2d 1373, 1379 (D.C. 1996). Because WEDCCA asks the Board to issue an order staying the Permit before the Board hears the zoning appeal on the merits, it must prove that the Board is authorized to impose an interim stay as a threshold matter. WEDCCA has not met—and cannot meet—its burden.

The Board's authority is defined by statute and regulation. *President & Directors of Georgetown College v. D.C. Bd. of Zoning Adjustment*, 837 A.2d 58, 68 (D.C. 2003). The Board is authorized to "hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal" made by any administrative office in administration or enforcement of the Zoning Regulations. D.C. Official Code § 6-641.07(g)(1); *see also* 11-Y DCMR § 302.1. When "decid[ing] appeals," the Board may "reverse or affirm, wholly or partly, or [] modify" the decision, "and to that end shall have all the powers of the officer or body from whom the appeal is taken." *Id.* § 6-641.07(g)(4). WEDCCA states these statutory provisions authorize the Board to impose an interim stay. That is wrong.

First, nothing in the plain text of the statute suggests that the Board has the authority to impose an interim stay of the ZA's decision to issue the Permit. The Zoning Act speaks toward the Board's ability to "decide appeals." That simply authorizes the Board to hear an appeal and issue a final order—it says nothing about equitable relief such as an interim stay. The Board should not read powers into a statute "which are not fairly implied from the statutory language." *Spring Valley Wesley Heights Citizens Ass'n v. D.C. Bd. of Zoning Adjustment*, 644 A.2d 434, 436 (D.C. 1994). "Absent express statutory or regulatory authority," the Board cannot impose such an extraordinary measure. *See President & Directors of Georgetown College*, 837 A.2d at 69; *see also Prince Const. Co., Inc. v. D.C. Contract Appeals Bd.*, 892 A.2d 380, 384 (D.C. 2006) ("Administrative agencies do not have inherent equitable power.").

Second, the Zoning Regulations touch upon stays—but conspicuously omit interim stays. The Board, on its own motion or the motion of a party, "may order the effectiveness of a *final decision and order of the Board* stayed pending reconsideration or rehearing, or appeal of the decision and order to the Court of Appeals." 11-Y DCMR § 701.2 (emphasis added). That power pertains only to final decisions and orders of the Board issued after a zoning appeal is heard at a public hearing on the merits. It does not authorize the Board to impose an interim stay of the ZA's decision to issue the Permit *before* the appeal hearing. *See Dist. Intown Props., Ltd.*, 680 A.2d at 1379 ("The purported exercise of jurisdiction beyond that conferred upon the agency by the legislature is *ultra vires* and a nullity.").

Third, the authority the Board does have is tied to "the powers of the officer or body from whom the appeal is taken" and the ZA has no power to stay the Permit pending the zoning appeal. In BZA Appeal No. 15129 *of Richard B. Nettler* (1989), the Board announced it could issue an

interim stay, "just as the Zoning Administrator has authority to stop work pursuant to a permit."[2] That announcement was arguably incorrect in 1989, and it certainly in not true in 2024. The ZA has no authority to issue a stop work order for perceived violations of the Zoning Regulations. Under the District's current Construction Codes, "[w]henever the *code official* finds that any work on any *premises* is being performed in violation of . . . the *Zoning Regulations*, . . . the *code official* is authorized to issue a Stop Work Order." 12-A DCMR § 114.1 (italics in original). The *code official* is the Director of DOB or his designee, not the ZA. *See* 12-A DCMR § 202.1. DOB's Director has not designated the ZA with the power to issue a stop work order.

In sum, nothing found in the statute, regulations, caselaw, or the Board's practice over the last 35 years states clearly that the Board has the extraordinary power to impose an interim stay of a decision made by the ZA. And to adopt WEDCCA's position would create far more burdens for the Board than it would solve. Any disgruntled neighbor angered by a project would be free to move for an interim stay, the Board's busy calendar could become overwhelmed with the related motions practice and public meetings that would follow, and the Board would be required to prepare decisions accompanied by findings of fact and conclusions of law for each one. *See* D.C. Official Code § 2-509(e); *see also* 11-Y DCMR § 604.3. Perhaps for those very reasons, the D.C. Council has never amended the Zoning Act to authorize interim stays.

For all these reasons, the Board is not authorized to impose an interim stay, so it need not decide whether a stay would be warranted.

II. WEDCCA Has Not Shown A Stay Is Warranted.

Not only has WEDCCA not shown that the Board *could* impose an interim stay, but it has also not shown that the Board *should*.

[2] BZA Appeal No. 15129 *of Richard B. Nettler* (1989), Order Granting Stay, p.1.

To prevail on a motion for stay, "a movant must show [(1)] that he or she is likely to succeed on the merits, [(2)] that irreparable injury will result if the stay is denied, [(3)] that opposing parties will not be harmed by a stay, and [(4)] that the public interest favors the granting of a stay." *Akassy v. William Penn Apts. Ltd. P'ship*, 891 A.2d 291, 309 (D.C. 2006). The "most important inquiry" in the analysis "concerns irreparable injury." *Id.*

If irreparable harm is shown by clear and convincing evidence, "the movant may prevail by demonstrating that he or she has a 'substantial case on the merits.'" *Id.* at 310 (citing *In re Antioch Univ.*, 418 A.2d 105, 110–111 (D.C. 1980)). "Clear and convincing evidence" means a "degree of persuasion much higher than mere preponderance of the evidence . . . which will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *Hensen v. D.C. Dep't of Consumer & Reg. Affairs*, 560 A.2d 543, 545 (D.C. 1989) (internal quotation marks omitted). But when a movant fails to show irreparable injury (as WEDCCA has failed here), it must show an elevated "mathematical probability of success on the merits." *Id.*

A. WEDCCA is not likely to succeed on the merits.

WEDCCA has the burden of proof to justify the granting of the appeal. D.C. Official Code § 2-509(b); 11-X DCMR § 1101.2. WEDCCA cannot meet its burden.

i. WEDCCA lacks standing to file the Permit appeal.

The party invoking the Board's jurisdiction bears the burden to prove that it has standing. *See Kalorama Citizens Ass'n v. SunTrust Bank Co.*, 286 A.3d 525, 531 (D.C. 2022). A "defect of standing is . . . a defect in subject matter jurisdiction." *UMC Dev., LLC v. District of Columbia*, 120 A.3d 37, 43 (D.C. 2015). If subject matter jurisdiction is lacking, then the action must be dismissed. *See Grayson v. AT & T Corp.*, 15 A.3d 219, 247 (D.C. 2011) (en banc) (holding that

plaintiff's claim was properly dismissed for lack of subject matter jurisdiction where he failed to demonstrate that he had standing to bring suit.).

To establish standing, a litigant must show (1) she suffered an injury in fact, (2) the injury is fairly "traceable to the defendant's action," and (3) the injury will likely be "redressed" by a favorable decision. *UMC Dev., LLC*, 120 A.3d at 42. An injury in fact must be "concrete and particularized," meaning that it must be real and not abstract, and must affect the litigant in a personal and individual way. *Vining v. Executive Bd. of D.C. Health Benefit Exchange Auth.*, 174 A.3d 272, 278 n. 26 (D.C. 2017).

In its appeal, WEDCCA alludes to two theories of standing: (1) organizational standing on behalf of the organization itself; and (2) associational standing on behalf of the organization's members. Neither theory survives even the most rudimentary inquiry, and the Board must dismiss the appeal.

1. Organizational Standing

An organization, like WEDCCA, may have standing to sue on its own behalf for injuries it has sustained. *See Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1207 (D.C. 2002). In doing so, however, organizations must satisfy the usual "constitutional requirements and prudential prerequisites of traditional standing analysis" described above. *Fraternal Order of Police Metro. Police Dep't Lab. Comm. v. District of Columbia*, 290 A.3d 29, 37 (D.C. 2023). Like an individual, an organization may not establish standing simply based on a mere "interest in a problem" or its opposition to "an unlawful practice[,]" nor a "simple setback to an organization's abstract social interests." *Id.* at 38.

Besides a bare declaration that "*Appellant* and its individual members and contributors are 'person[s] aggrieved'" by the decision to issue the Permit,[3] WEDCCA advances no argument for how WEDCCA—as an organization—is aggrieved.

2. Associational Standing

An organization only has associational standing to sue on behalf of its members "when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of Tilden Park, Inc.*, 806 A.2d at 1207. To satisfy this requirement, WEDCCA must, at the very least, "identify [a] member[] who [has] suffered the requisite harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009).

In *Summers*, the United States Supreme Court specifically held an organization cannot just describe the characteristics of specific members with cognizable injuries; it must identify at least one by name. *See id.* at 497–98. Any contrary rule would, in the Court's view, "make a mockery of our prior cases, which have required plaintiff-organizations to make specific allegations establishing that at least one *identified member* had suffered or would suffer harm." *Id.* at 498 (emphasis added); *see, e.g., FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 235 (1990) (holding that affidavit provided by the city to establish standing would be insufficient because it did not name the individuals who were harmed by the challenged license-revocation program).

In so ruling, the Supreme Court specifically rejected an argument that "organizations' self-descriptions of their membership" would suffice. *Summers*, 555 U.S. at 499. The organization must name at least one member because the reviewing tribunal cannot satisfy its independent obligation

[3] BZA Appeal No. 21221 *of West End DC Community Association*, Exhibit #5, p.2 (emphasis added).

to assure itself that it has jurisdiction if the organization fails to disclose the member or members from whom the organization derives its standing. *See id.*

Applying these principles, WEDCCA has not demonstrated associational standing because it has not identified a single member by name that was aggrieved by the ZA's decision to issue the Permit.

WEDCCA simply does not have organizational or association standing. Because no aggrieved party filed the appeal, the Board lacks jurisdiction over the appeal, and the appeal must be dismissed. *See* D.C. Official Code § 6-641.07(f); 11-Y DCMR § 302.1; *Dist. Intown Props., Ltd.,* 680 A.2d at 1379.

ii. DGS's proposed use constitutes an "apartment house" permitted as a matter-of-right, and a special exception to operate an "emergency shelter" was not required.

Under the Permit, DGS proposes to operate an apartment house with 123 apartments at the Aston for the benefit of clients "who are homeless or at risk of homelessness."[4] An apartment house use is permitted as a matter-of-right in the RA-5 zone. 11-U DCMR § 401.1(d)(1).

The Zoning Regulations define the terms "apartment" and "apartment house" as follows:

> Apartment: One (1) or more habitable rooms with kitchen and bathroom facilities exclusively for the use of and under the control of the occupants of those rooms. Control of the apartment may be by rental agreement or ownership.
>
> Apartment House: Any building or part of a building in which there are three (3) or more apartments, providing accommodation on a monthly or longer basis.

11-B DCMR § 100.2. According to these definitions, four elements are key: (1) the unit must provide kitchen and bathroom facilities; (2) the unit must be under the exclusive use and control of the occupants; (3) there must be at least three apartments in the building; and (4) the occupants must reside in the units on a monthly or longer basis.

[4] BZA Appeal No. 21221 *of West End DC Community Association*, Exhibit #2; Exhibit #6, p.5.

WEDCCA does not dispute that the first, third, and fourth elements were met.[5] But it argues the units will not be under the exclusive use and control of the occupants because the Aston's residents will not be able to exclude the District from entering the units[6] and DGS will not make them sign a "rental agreement."[7] That line of argument is wrong.

The Board's ruling in BZA Appeal No. 18151 of *Van Ness South Tenants' Association* (2011) is instructive.[8] In that case, an appellant association alleged the ZA erred when he issued a permit for an "apartment house" use for 21 units to be leased to the University of the District of Columbia ("UDC"). The Board held "[w]hether or not the units would be in the exclusive control of the occupants was not something that would be revealed in the application process, and DCRA was not obligated to investigate whether that element was met." But for good measure, the Board then explained what "exclusive use and control" meant and held that the element had been satisfied. It reasoned that the 21 units were under the exclusive control of the occupants of each unit because "the occupants control the locks to their individual units, and are thereby able to exclude other residents from their units." It also specifically rejected the argument that the occupants lacked exclusive use and control over the apartments due to restrictions in the "UDC Occupancy Agreement," such as needing to vacate the unit during school breaks, not having the roommate of their choice, not having unfettered rights to an overnight guest, or being required to move to another unit.

Here, the Aston's residents will have precisely the type of exclusive use and control of their apartments described in BZA Appeal No. 18151. Under the Program Rules that the Aston's

[5] BZA Appeal No. 21221 *of West End DC Community Association*, Exhibit #6, p.6 ("[T]he minimum length of stay at the Aston will be one month and the average length of stay will be 3–5 months.").
[6] BZA Appeal No. 21221 *of West End DC Community Association*, Exhibit #6, p.17.
[7] BZA Appeal No. 21221 *of West End DC Community Association*, Exhibit #6, p.16.
[8] BZA Appeal No. 18151 *of Van Ness South Tenants' Association* (2011), Decision and Order.

residents will be required to sign,[9] each resident will be given a key to their apartment and can exclude other residents that do not reside in the apartment.[10]

Similarly, BZA Appeal No. 20183 *of The Residences of Columbia Heights, a Condominium* is also instructive. In that case, the Board was called upon to decide whether a building intended to be occupied by individuals that were experiencing homelessness qualified as an apartment house. In particular, the appellant opposing the permit had argued that BZA Appeal No. 18151 was distinguishable because the definition of "apartment house" had been modified in 2016 to add "[c]ontrol of the apartment may be by rental agreement or ownership."[11] The appellant maintained that because of the change, keys and locks were no longer good enough; only the "legal responsibility of the property, as evidenced by either ownership or a leasehold" could suffice to make an "apartment house."[12] In other words, precisely the argument WEDCCA advances here.

In that appeal, both the permit holder (DGS) and the ZA opposed that argument with a raft of persuasive responses. They argued that the added language of "may" to the definition of "apartment" is permissive, not mandatory.[13] *See Stockard v. Moss*, 706 A.2d 561, 566 (D.C. 1997). Thus on the definition's face there would be no *requirement* that the residents sign a rental agreement. But more importantly, the zoning regulations control *use*, not ownership of property.[14] *Cf. Nat'l Black Child Dev. Inst., Inc. v. D.C. Bd. of Zoning Adjustment*, 483 A.2d 687, 691 (D.C. 1984) (conditions must run with the land because personal conditions regulate the business conduct

[9] BZA Appeal No. 21221 *of West End DC Community Association*, Exhibit #6, p.7.
[10] *See* Exhibit A: Aston Bridge Housing Program Rules, p.10. Pursuant to statute, the Aston's residents will be responsible for "maintain[ing] clean sleeping and living areas, including bathroom and cooking areas" and "one's own personal property." D.C. Official Code §§ 4-754.13(a)(8), (9).
[11] BZA Appeal No. 20183 *of The Residences of Columbia Heights, a Condominium*, Exhibit #33, p.9.
[12] BZA Appeal No. 20183 *of The Residences of Columbia Heights, a Condominium*, Exhibit #33, p.10.
[13] BZA Appeal No. 20183 *of The Residences of Columbia Heights, a Condominium*, Exhibit #38, p.8.
[14] BZA Appeal No. 20183 *of The Residences of Columbia Heights, a Condominium*, Exhibit #38, p.8.

of the owner rather than the use of the property).[15] So "control" *may* be established by a rental agreement or ownership, but those are not the exclusive means of demonstrating control.[16] And finally, even if a "rental agreement" were required, that requirement was met because the residents would be required to execute a written document, like the Program Rules, granting the exclusive right to occupy the unit and setting other additional terms of occupancy.[17]

The Board ultimately voted unanimously to reject those same arguments that WEDCCA now seeks to advance in this zoning appeal.[18] So too should it here.

Finally, the Aston's proposed use cannot be considered an "emergency shelter" because its residents will live in the apartments longer than 30 days, which is uncontested by WEDCCA.[19] The Zoning Regulations define an emergency shelter as:

> Emergency Shelter: A facility providing *temporary housing* for one (1) or more individuals who are otherwise homeless as that arrangement is defined in the Homeless Services Reform Act of 2005, effective October 22, 2005 (D.C. Law 16-35; D.C. Official Code §§ 4-751.01 *et seq.*); an emergency shelter use may also provide ancillary services such as counseling, vocational training, or similar social and career assistance.

11-B DCMR § 100.2 (emphasis added).

The term "temporary housing" is not defined in the Zoning Regulations. But the term is in the definition of "lodging," which is instructive in determining its meaning. *See Ruffin v. United*

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[15] For substantially the same reasoning, the Board must reject WEDCCA's argument that a residential use *requires* a tenancy. BZA Appeal No. 21221 *of West End DC Community Association*, Exhibit #6, p.18. Such a restrictive view ignores the "fundamental rule that zoning deals basically with land use and not with the person who owns or occupies it." *See BZA* Appeal No. 21049 *of Gernot Brodnig and Alison Schafer* (2024), Order Denying Appeal, p.5.
[16] BZA Appeal No. 20183 *of The Residences of Columbia Heights, a Condominium*, Exhibit #38, p.8.
[17] BZA Appeal No. 20183 *of The Residences of Columbia Heights, a Condominium*, Exhibit #63, p.8 (10).
[18] BZA Appeal No. 20183 *of The Residences of Columbia Heights, a Condominium*, Transcript of May 6, 2020 Public Meeting, p.47. No final order and decision has yet been published.
[19] BZA Appeal No. 21221 *of West End DC Community Association*, Exhibit #6, p.6 ("[T]he minimum length of stay at the Aston will be one month and the average length of stay will be 3–5 months.").

States, 76 A.3d 845, 854 (D.C. 2013) (explaining that identical words used in different parts of the same law are presumed to have the same meaning):

> Lodging: A use providing customers with *temporary housing* for an agreed upon term of less than *thirty (30) consecutive days*; any use where temporary housing is offered to the public for compensation; and is open to transient rather than permanent guests.

11-B DCMR § 200.2(s) (emphasis added). Therefore, under the Zoning Regulations, "temporary housing" generally means a term of less than 30 days.

Since the residents intend to occupy the units for at least a month, the units are not "temporary housing." Because they are not "temporary housing," they cannot meet the definition of "emergency shelter." And because the apartment house is a matter-of-right apartment house, not an emergency shelter, no special exception was required. *See* 11-U DCMR § 401(d)(1) (permitting apartment houses in the RA-5 zone matter-of-right).

iii. The Property is not subject to a planned unit development.

Next, WEDCCA argues that the Property is subject to the George Washington University ("GWU") planned unit development ("GWU PUD") first approved in 2007. As a result, WEDCCA claims the Permit could not be issued without requiring DGS to obtain the Zoning Commission's approval.[20] That argument also fails.

The Zoning Regulations "prohibit[] any construction on the PUD site that is not authorized in the order approving the PUD, including development under matter-of-right standards, until: (a) The validity of the PUD order expires; or (b) the Zoning Commission issues an order granting the applicant's motion to extinguish the PUD." 11-X DCMR § 310.2. But the Property is not part of

[20] BZA Appeal No. 21221 *of West End DC Community Association*, Exhibit #6, p.24–25.

the GWU PUD.[21] The Property is located at Square 72, Lot 7, which was not included within the GWU PUD.[22]

When GWU owned the Property, PUD 06-12Q "temporarily modif[ed]" the GWU PUD to allow GWU to rearrange housing assignments for some of its student population while other dormitory buildings underwent renovations.[23] The PUD order allowed that GWU could house students at the Property for a period of no more than 24 months during the renovation, at which time the modification would automatically expire.[24] WEDCCA concedes the Property has not been used as student housing since at least June 2022,[25] the prior Zoning Administrator confirmed in an August 8, 2022 letter to the Zoning Commission that the limited-period PUD 06-12Q was effective expired,[26] which the Zoning Commission acknowledged during its September 8, 2022 public meeting.[27] The Property is therefore not subject to the GWU PUD and DGS was not required to seek approval from the Zoning Commission for work under the Permit because PUD 06-12Q has long since expired and no longer restricts matter-of-right development of the Property.

[21] The prior Zoning Administrator's August 16, 2023 zoning compliance letter incorrectly stated that the Property was subject to PUD #06-12Q. This regrettable error is likely the cause of much of WEDCCA's confusion about the inapplicability of the PUD to the Property.
[22] ZC Case No. 06-12 of *Application of GWU – Foggy Bottom Campus* (2007), Zoning Commission Order No. 06-11/06-12, p.12 (listing the affected properties by square and lot number). The GWU PUD encompasses only: Square 39, Lot 803; Square 40, Lot 36; Square 41, Lot 40; Square 42, Lots 54 and 55; Square 43, Lot 26; Square 54, Lot 30; Square 55, Lots 28, 854, and 855; Square 56, Lots 30 and 31; Square 57, Lots 55 and 56; Square 58, Lots 1, 5, 6, and 800-803; Square 75, Lots 23, 33, 34, 41, 42, 46, 47, 858, 861, 863, 864, and 2097; Square 77, Lots 5, 51, 59, 60, 845, 846, and 864; Square 79, Lots 63-65, 808, 853, 854, 861, and 862; Square 80, Lots 2, 26-29, 42-47, 50-52, 54, 55, 800, 811, 820, 822-825, and 828; Square 81, Lot 846; Square 101, Lots 58, 60, 62, and 879; Square 102, Lot 46; Square 103, Lots 1, 13, 14, 27, 28, 33-35, 40-42, 809, 812-814, 816, 819, and 820; Square 121, Lot 819; and Square 122, Lots 29, 824, and 825.
[23] ZC Case No. 06-12Q of *The George Washington University* (2019), Zoning Commission Order No. 06-11Q/06-12Q, p.8.
[24] *See generally* ZC Case No. 06-12Q of *The George Washington University* (2019), Zoning Commission Order No. 06-11Q/06-12Q, p.9–12.
[25] BZA Appeal No. 21221 *of West End DC Community Association*, Exhibit #6, p.3.
[26] *See* Exhibit B: August 8, 2022 letter from Zoning Administrator Matthew Le Grant to Chairman Anthony Hood re: Z.C. Orders Nos. 06-11Q/06-12Q: Thurston Hall Renovation – Cessation of Temporary Housing.
[27] ZC Case No. 06-12Q of *The George Washington University*, Transcript of September 8, 2022 Public Meeting, p.57.

iv. WEDCCA's other arguments, grounded in the Construction Codes, are outside the Board's jurisdiction to consider.

The Board's jurisdiction is confined to alleged errors in the administration and enforcement of the Zoning Regulations. D.C. Official Code § 6-641.07(g)(1). It "has no jurisdiction to hear and decide any . . . portion of any appeal where the order, requirement, decision, determination, or refusal was not based on in whole or in part upon any zoning regulation or map." 11-X DCMR § 1100.3.

WEDCCA makes arguments about the sufficiency of DGS's permit application,[28] the reviews performed by disciplines other than the ZA,[29] and the "R-2" Building Code use on the Permit.[30] They all fall under the umbrella of the Construction Codes—not the Zoning Regulations. Appeals concerning the administration and enforcement of the Construction Codes' requirements are heard only by the Office of Administrative Hearings. *See* 12-A DCMR § 112.2 (". . . any person directly affected or aggrieved in a materially adverse manner by a final decision or order of the code official, including but not limited to issuance . . . of a permit . . . is authorized to appeal the final decision or order . . . that is based upon the Construction Codes by filing an appeal with the Office of Administrative Hearings."). The Board consistently dismisses appeals grounded on Construction Codes arguments.[31] These arguments too should be dismissed.

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For all these reasons, WEDCCA cannot show it is likely to succeed on the merits of the zoning appeal.

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[28] BZA Appeal No. 21221 *of West End DC Community Association*, Exhibit #6, p.8.
[29] BZA Appeal No. 21221 *of West End DC Community Association*, Exhibit #6, p.11–13.
[30] BZA Appeal No. 21221 *of West End DC Community Association*, Exhibit #6, p.22.
[31] *See, e.g.*, BZA Appeal No. 18151 *of Van Ness South Tenants' Association* (2011), Decision and Order, p.7 (dismissing for lack of jurisdiction claims concerning defects "in the body of the building permit" and violations of the Building Code); BZA Case No. 19477 *of Kingman Park Civic Association* (2017), Dismissal Order, p.5–6.

B. WEDCCA is not in danger of irreparable harm.

WEDCCA has not made a showing of irreparable harm if the Board denies the stay. It states wrongly that DGS was required to seek a special exception and prove that its use "[w]ill not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Map."[32] But it never points to a single concrete harm that the Property—or its intended residents' use of it—will have on the neighboring properties. It makes only the conclusory statement that if DGS proceeds with its plans before the Board decides the case on the merits, DGS will undermine the "economic and public policy objectives of the Zoning Regulations" and "harm the neighborhood's property owners and occupants that the Zoning Regulations are designed to protect."[33] Yet it has not shown us how the harm will occur—or that it will even occur to WEDCCA or its anonymous members.[34]

To the extent that WEDCCA seems to be alluding to the specter of economic harm, "economic loss does not, in and of itself, constitute irreparable harm." *District of Columbia v. Eastern Trans-Waste of Md., Inc.*, 758 A.2d 1, 15 (D.C. 2000). Such harm will only be found if economic loss "threatens the very existence of the movant's business." *Id.* Here, no such allegations have been made—much less proven.[35]

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[32] BZA Appeal No. 21221 *of West End DC Community Association*, Exhibit #6, p.11.
[33] BZA Appeal No. 21221 *of West End DC Community Association*, Exhibit #8, p.12.
[34] *See supra*, Section II.A.i–ii.
[35] WEDCCA also argues that it will be "denied its full due process rights" and its appeal "will be effectively mooted" if the Board denies a stay. BZA Appeal No. 21221 *of West End DC Community Association*, Exhibit #8, p.10–11. That is an obvious red herring. The appeal would not be moot because if at the public hearing the Board agrees with WEDCCA that DGS's use does not constitute an apartment house, or that DGS must obtain a special exception for an emergency shelter, WEDCCA will have received precisely the relief it was looking for. To the extent WEDCCA suggests that due process *demands* a stay, that is wrong. Due process provides a public hearing on the merits—WEDCCA is already receiving all the process it is due.

C. The remaining factors weigh against imposing a stay.

When the Government is the opposing party, the harm to opposing parties and public interest factors merge. *Niken v. Holder*, 556 U.S. 418, 435 (2009). The equities easily weigh against imposing a stay.

By seeking a stay of construction, WEDCCA is effectively asking the Board to keep people on the streets as winter approaches. WEDCCA's claimed harm is purely speculative; the physical harm to those without shelter is immediate, severe, and all too real.

While it is difficult—and perhaps insensitive—to assign a dollar value to the basic need for shelter and warmth, the fines imposed by the District on landlords who fail to heat their rental units provide a meaningful indicator of how serious this need is regarded. The District's Property Maintenance Code requires dwellings to be provided with heating facilities capable of maintaining a room temperature of 68°F during the winter.[36] 12-G DCMR § 602.2. When heat is not provided or is not working, a $1,218 per day per apartment penalty is authorized. 16 DCMR §§ 3201.1(b)(1), 3201.8(b); 12-G DCMR § 106.1.1. The Aston will have 123 apartments.

If the law recognizes such a steep penalty for denying heated accommodations, the value of housing that protects persons who would otherwise be experiencing homelessness against the cold speaks for itself.

III. WEDCCA Has Not Shown Good Cause To Justify Expediting The Zoning Appeal's Public Hearing.

Under the Board's rules, "[a]ppeals and applications shall be heard in the order in which they are filed with the Board and appear on the calendar. The hearing date may be advanced or postponed by order of the Board for good cause shown." 11-Y DCMR § 500.5. Despite captioning

[36] Last year, the District's average winter temperature was just 44°F. *See* National Weather Service, https://www.weather.gov/media/lwx/climate/dcatemps.pdf (last accessed Oct. 25, 2024).

its motion "Appellant's Emergency Motion for Stay and Request for Expedited Hearing Date," WEDCCA did not address its purported request for an expedited hearing date. This is likely for a reason: WEDCCA has not shown, and cannot show, *any* cause, much less good cause, as to why the hearing date should be advanced.

CONCLUSION

The Board lacks the authority to impose an interim stay of the ZA's decision to issue the Permit. Not only does the Board lack that authority, but WEDCCA has not shown a stay would be warranted because: WEDCCA is unlikely to succeed on the merits of the zoning appeal; it has not shown danger of irreparable harm if the stay is denied; and the harm to the District and the public interest caused by a stay is simply too great. Nor has WEDCCA shown any cause, much less the legally-required good cause, as to why the zoning appeal's public hearing should be expedited.

In sum, the Board should (1) hold it is not authorized to impose an interim stay; (2) deny WEDCCA's motion for an interim stay; and (3) deny WEDCCA's request to expedite the zoning appeal's hearing. If the Board decides it can impose an interim stay, it should deny the stay because WEDCCA has not shown that such an extraordinary remedy is warranted in this case.

Respectfully submitted,

ESTHER YONG MCGRAW
GENERAL COUNSEL

ERIK COX
DEPUTY GENERAL COUNSEL

/s/ *Brian W. Lampert*
Brian W. Lampert (DC Bar No. 90008702)
Assistant General Counsel
Department of Buildings
Office of the General Counsel
1100 4th Street, SW, 5th Floor

Washington, DC 20024
202.701.4767 (mobile)
brian.lampert1@dc.gov

CERTIFICATE OF SERVICE

I certify that on October 25, 2024 a copy of the foregoing was sent via electronic mail to:

West End DC Community Association

S. Scott Morrison, Esq.
Nicholas E. McGuire, Esq.
scott.morrison@katten.com
nicholas.mcguire@katten.com
Counsel for Appellant WEDCCA

Office of the Attorney General

Brendan Heath, Esq.
David R. Wasserstein, Esq.
brendan.heath@dc.gov
david.wasserstein@dc.gov
Counsel for Appellee DGS

ANC 2A

Trupti Patel
Chairperson
2A@anc.dc.gov
2A03@anc.dc.gov

SMD 2A06

Joel Causey
Single Member District Commissioner
2A06@anc.dc.gov

/s/ Brian W. Lampert
Brian W. Lampert