DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

In Re. **Appeal of the West End DC Community Association**	**BZA Case No.: 21221** **Next Event: Virtual Public Meeting** **November 6, 2024, 9:30 a.m.**

PROPERTY OWNER'S OPPOSITION TO
APPELLANT'S EMERGENCY MOTION FOR STAY

The District of Columbia, acting through its Department of General Services (DGS) and Department of Human Services (DHS) (collectively, the District), as the owner and operator of the property located at 1129 New Hampshire Ave. NW (the Aston), opposes the motion by appellant West End DC Community Association (WEDCA) to stay all construction, use, and occupancy at that location until this Board's ruling on WEDCA's appeal.

First, WEDCA has requested relief this Board is without jurisdiction to grant. Contrary to WEDCA's assertions, the Board lacks statutory or regulatory authority to issue preliminary interim stays in zoning appeals. For that reason alone, the Board should summarily deny WEDCA's motion without proceeding further at this time.

If considered, WEDCA's motion fails all four prongs governing motions to stay under the standard applied in Superior Court. WEDCA's appeal is not likely to prevail on the merits, because WEDCA lacks standing and the Zoning Administrator's decision to approve the permit at issue was not erroneous. The Aston's use properly falls under the "Apartment" category, and the regulations pertaining to George Washington University's Planned Use Development (PUD) are plainly and facially inapplicable to this property. Next, WEDCA has failed to show that interim use of the Aston while this Board decides WEDCA's appeal would cause WEDCA any imminent or irreparable injury. Finally, the balance of the equities and the public interest firmly

rest in favor of the project proceeding at this time. WEDCA's request for a stay would, if granted, result in vulnerable, unhoused community members losing access to shelter during the rapidly-approaching winter season. Against these concrete, and even deadly, risks of harm, WEDCA offers no reason to believe that it or the public would be harmed by allowing the District's planned use of the Aston to proceed. The Board should reject WEDCA's unjust and unjustified motion.

BACKGROUND

I. The District's Redevelopment and Intended Use of the Aston

The property at issue in this lawsuit, known as the Aston, is located at 1129 New Hampshire Ave. NW. The Aston was previously used as student housing by its previous owner, George Washington University (GWU). It is zoned as RA-5, which is "predominantly high-density residential." *See* 11-F DCMR § 101.8. The District purchased the Aston in 2023 with the intention of using the property for non-congregate bridge housing. *See* Ex. A ¶¶ 4–6 (Declaration of Rachel Pierre, Family Servs. Adm'r, D.C. Dep't of Human Servs. (Oct. 25, 2024)). The District intends to operate the Aston for up to 190 individuals, primarily consisting of couples, mix-gendered adult families, and clients in need of medical services, or those who cannot be served by current shelter facilities in the District. *Id.* ¶¶ 20, 22. "Bridge housing" is defined as temporary apartment-style units for clients transitioning into more permanent housing. *Id.* ¶ 6. Each resident will have access to and control of a private unit, including a kitchen and bathroom and the ability to lock their respective units. *Id.* ¶ 21. Clients will remain at the Aston for at least one month with the average projected stay lasting three to five months. *Id.* ¶ 28.

During redevelopment of the Aston, the District formed a Community Advisory Team (CAT), which includes representatives of Advisory Neighborhood Commission (ANC) 2A,

where the property is located. *See* Off. of the Deputy Mayor for Health & Hum. Servs., *Aston Community Advisory Team (CAT)*, available at https://dmhhs.dc.gov/page/aston-community-advisory-team. The CAT is made up of representatives from ANC 2A, the Foggy Bottom Association and West End Citizens Association, Ward 2 Councilmember Brooke Pinto, DGS and DHS, and homeless services stakeholders. *Id*. Its purpose is to allow an avenue for members of the community to provide feedback on concerns related to community members' quality of life during any building repurposing and construction and during the first two years of operation of the Aston; to coordinate opportunities for community feedback and share information with DHS; and to develop Good Neighbor Agreements. *See id*. The CAT continues to meet on a monthly basis. *Id.*

To manage the Aston, the District entered into a contract with The Community Partnership (TCP), a non-profit corporation. *See* Ex. A ¶¶ 13, 14. TCP, in turn, contracted with Friendship Place, a housing service provider, who will oversee day-to-day operations of the Aston. *Id*. ¶¶ 15, 16. Friendship Place has begun moving into the Aston under the conditional Certificate of Occupancy (COO) the District received on October 18, 2024, in order to prepare the Aston to receive clients. *Id.* ¶¶ 11, 18. The current conditional COO does not permit clients to move in; the District intends to apply for a new COO authorizing such use. *Id.* ¶¶ 12, 18, 19.[1] At this time, the District expects to move residents into the Aston in mid-November. *Id.* ¶ 12.

II. Procedural History

As part of the Aston's redevelopment, DGS filed for a demolition permit on August 18,

[1] After this brief was finalized, undersigned counsel was informed that the District has now been issued a new, 90-day Certificate of Occupancy. The District will supplement this filing with the new COO as early as is practicable next week.

2023 (No. D2400001), which DOB issued on December 15, 2023.[2] On November 21, 2023, DGS filed an application for a building permit (the Permit), No. B2401624. Appellant's Ex. F (Permit Application). As relevant here, the District's application indicated that the "Existing Use(s) of Building" and the "Proposed Use(s) of the Building" would remain the same: "Apartment Houses – R-2." *Id.* DOB reviewed the Permit Application in the summer of 2024 and issued the Permit on August 7, 2024. *See* [2] Building Permit No. B2401624. WEDCA filed this appeal on Friday, October 4, 2024, and filed a motion seeking an emergency stay and expedited hearing date on October 10, 2024. *See* [6] Appellant's Memorandum in Support of Appeal (Appellant's Mem.); [8] Appellant's Emergency Motion for Stay and Request for Expedited Hearing Date (Appellant's Mot.).

LEGAL STANDARD

D.C. Code § 6-641.07(g)(1) authorizes the Board to "hear and decide appeals where it is alleged by the appellant that there is error in any order, . . . decision, [or] determination . . . made by the Director of the Department of Buildings . . . in the carrying out or enforcement of any [Zoning Regulation]." D.C. Code § 6-641.07(g)(4) authorizes the Board to, "in conformity with the provisions of this subchapter, reverse or affirm, wholly or partly, or may modify the order, . . . appealed from or may make such order as may be necessary to carry out its decision or authorization . . . ."

[2] WEDCA appealed the issuance of the demolition permit to the Office of Administrative Hearings on December 29, 2023, but voluntarily dismissed that case on September 12, 2024.

ARGUMENT

I. The Board Lacks Authority To Issue Interim Stays.

"An administrative agency is a creature of statute and may not act in excess of its statutory authority." *D.C. Off. of Tax & Revenue v. Shuman*, 82 A.3d 58, 66 (D.C. 2013) (citations omitted). "The purported exercise of jurisdiction beyond that conferred upon the agency by the legislature is *ultra vires* and a nullity." *Id*. (citations omitted). "Absent express statutory or regulatory authority, a regulatory agency may not impose remedial measures." *Id*. at 69 (citations omitted).

> "[I]n contrast with judicial tribunals . . . administrative law tribunals—created by the legislature to serve dispute resolution and rulemaking-by-order functions within agencies of the executive branch—by definition and design do not have the inherent 'equitable authority' that courts in the judicial branch have derived from common law traditions and powers. Administrative [agencies] only possess narrowly defined statutory and regulatory powers; they do not have the traditional equity power of courts to formulate remedies."

Id. (quoting *Ramos v. D.C. Dep't of Consumer & Regul. Affs.*, 601 A.2d 1069, 1073 (D.C. 1992)). To the extent that the Board has any implicit discretionary power, it is strictly limited to "the regulation of the parties and proceedings before [it]," such as regulating "pleadings, discovery, testimony, and attorney behavior." *Ramos*, 601 A.3d at 1073–74 (citing *Brown v. D.C. Bd. of Zoning Adjustment*, 413 A.2d 1276 (D.C. 1980)).

WEDCA cites D.C. Code §§ 6-641.07(g)(1) & (4), in support of the proposition that "[t]his Board has the authority . . . to enter a stay in connection with the appeal of a building permit." Appellant's Mot. at 2. WEDCA is wrong. Section (g)(1) provides the baseline authority to "hear and decide appeals." Then, Section (g)(4) explains the particular kinds of orders which the Board may issue to carry out this function. They include the power to "reverse or affirm, wholly or partly, or . . . modify" the order or decision which is being appealed. D.C.

Code § 6-641.07(g)(4). Finally, Section (g)(4) authorizes the Board to "make such order as may be necessary to carry out *its decision or authorization*." (emphasis added). This provision, by its plain text, pertains *only* to orders "carry[ing] out" its final decision. Likewise, the ending clause describing how the Board "shall have all the powers of the officer or body from whom the appeal is taken," is explicitly limited by the preceding phrase "to that end," thereby indicating that these "powers" are expressly limited to the task of "carry[ing] out its decision or authorization." D.C. Code § 6-641.07(g)(4).

By definition, no final decision has been made in this case; rather, WEDCA is asking this Board to issue substantive relief *before* a final adjudication has been made. Appellant's Mot. at 1 (requesting a stay "until such time as the Board issues a decision in Appellant's appeal"). The Board lacks authority to do so.

In an attempt to argue that the Board has the authority to issue a stay, WEDCA also cites thirty-five-year-old caselaw, including BZA Appeal No. 15129 of Richard B. Nettler (1989) and BZA Appeal No. 15136 of Phil Mendelson on behalf of ANC 3C (1989). *See* Ex. B (Order Granting Stay). These examples are exceedingly weak and should not be considered authoritative evidence of the Board's jurisdiction. First, they predate *Shuman*, in which the Court of Appeals made expressly clear the limits of an administrative agency's authority, as well as the current incarnation of the Zoning Regulations themselves. And the cases do not explain whatsoever *how* the relevant provisions of the D.C. Code authorized the Board to take such action in either case, they simply compare the Board's authority to that of the Zoning Administrator issuing a stop work order. *See* Ex. B. Put another way, once the Board reaches a final decision, it has the "power" of DOB "to [the] end" of "carry[ing] out [the Board's] decision

or authorization." D.C. Code § 6-641.07(g)(4). Here, no decision on the final merits of this case has yet been made.

Nor does WEDCA's requested relief fit under any permissible implicit discretionary authority of the Board. Simply put, WEDCA is not asking for the Board to regulate "the parties and proceedings before [it]," *Ramos*, 601 A.2d at 1073, but rather for the Board to regulate *use of the Aston itself* before a final decision on the appeal has been reached. As such, issuance of a preliminary stay would be patently outside the Board's jurisdiction, and for this reason alone the motion should be denied.

II. WEDCA's Motion Lacks Merit.

Should the Board proceed to consider the merits of WEDCA's motion, it should summarily be denied. "To prevail on a motion for stay, a movant must show that he or she is likely to succeed on the merits, that irreparable injury will result if the stay is denied, that opposing parties will not be harmed by a stay, and that the public interest favors the granting of a stay." *Salvattera v. Ramirez*, 105 A.3d 1003, 1005 (D.C. 2014) (citing *Barry v. Wash. Post Co.*, 529 A.2d 319, 320–21 (D.C. 1987)).[3] The four-factor standard used for a motion to stay agency action is the same legal standard as that used in a motion for preliminary injunction. *See Hill Dermaceuticals, Inc. v. U.S. Food & Drug Admin*., 524 F. Supp. 2d 5, 8 (D.D.C. 2007). "On a motion for stay, it is the movant's obligation to justify the [] exercise of such an extraordinary remedy." *Cuomo v. U.S. Nuclear Regul. Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985).

[3] In citing this standard governing preliminary injunctive relief, drawn from District and federal court precedent, the District does not concede that the Board has the authority under this standard to issue a stay.

A. WEDCA Is Not Likely To Succeed on the Merits.

1. WEDCA Lacks Standing.

First, WEDCA lacks standing to bring this appeal. Standing is a fundamental prerequisite for zoning appeals, as reflected by the requirement in 11-Y DCMR § 302.12(f)(2) that an appellant provide "[a] statement as to how the appellant has standing to bring the appeal, specifically with regard to the administrative decision being appealed" and "the statement shall explain how the appellant is aggrieved." Here, WEDCA submits that it "is a not-for-profit civic association that is comprised of, controlled by, and represents the interests of individual owners and occupants of properties in the immediate vicinity of the Property at issue in this Appeal." *See* [5] Appellant's Statement Pursuant to 11-Y DCMR § 302.12 ¶ 7 (Appellant's Statement). There are two fatal problems with WEDCA's statement, however. The first is that WEDCA never identifies how it has standing on behalf of itself, as would be required to fulfill organizational standing. Second, WEDCA never explains how it or its members are actually "aggrieved."

Standing for an organization to bring actions on its own behalf "turns on whether the organization's activities in pursuit of its mission have been affected in a sufficiently specific manner as to warrant judicial intervention." *Fraternal Order of Police Metro. Police Dep't Labor Comm. v. District of Columbia*, 290 A.3d 29, 37 (D.C. 2023). "[A]n organization's mere interest in a problem or its opposition to an unlawful practice is not sufficient . . . , nor is a simple setback to an organization's abstract social interests." *Id*. Instead, organizational standing "requires a showing that the defendant's allegedly unlawful actions have caused a concrete and demonstrable injury to the organization's activities." *Id*. Here, WEDCA does not proffer that it in fact has any "activities" or "mission" whatsoever besides "the filing of lawsuits

or administrative actions." Appellant's Statement ¶ 7. By definition, then, it has not suffered any "concrete and demonstrable injury to the organization's activities" due to the District's redevelopment and intended use of the Aston, *see Fraternal Order of Police*, 290 A.3d at 37, and therefore it lacks organizational standing.

As for associational standing, "an association must plausibly allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Id*. at 38. WEDCA indicates that it will present a witness who can testify as to "the detrimental impact that the District's intended use of the Property will have on the surrounding neighborhood as a whole and specifically on the properties in the immediate vicinity of the Property, many of which are owned and/or occupied by Appellant's members and contributors." Appellant's Statement ¶ 10. This is insufficient. Board regulations require an appellant, "*at the time of filing the appeal*" to "explain how the appellant is aggrieved," "specifically with regard to the administrative decision being appealed." 11-Y DCMR § 302.12(f)(2) (emphasis added).[4] WEDCA's statement that its members' property will suffer a "detrimental impact" could not be more vague and conclusory. "[C]lose proximity to [a] property alone does not make every use, or change in use, of the subject property injurious to [a neighborhood organization's] members." *York Apartments Tenants Ass'n v. D.C. Zoning Comm'n*, 856 A.2d 1079, 1085 (D.C. 2004). Rather, *specific* allegations of harm are necessary. *See, e.g.*, *Youngblood v. D.C. Bd. of Zoning Adjustment*, 262 A.3d 228, 235 (D.C. 2021) (alleging increased noise, congestion, traffic, and

[4] Analogously, a proposed intervenor must "clearly demonstrate[]" that he or she "has a specific right or interest that will be affected," and which would be "more significantly, distinctively, or uniquely affected by the proposed zoning relief than those of other persons in the general public." 11-Y DCMR § 502.13.

loss of parking); *Economides v. D.C. Bd. of Zoning Adjustment*, 954 A.2d 427, 434 (D.C. 2008) (citing obstructed views, air, and light); *see also Goto v. D.C. Bd. of Zoning Adjustment*, 423 A.2d 917, 932 (D.C. 1980) (Kelly, J., concurring in part and dissenting in part) ("I would not confer automatic standing upon an adjoining property owner without some allegation of injury to that specific property. Courts have frequently denied standing to adjoining property owners who failed to make a sufficient showing of special or pecuniary damages.") (collecting cases).

WEDCA's error is compounded in that it does not even identify with particularity *which* members may be affected by the unspecified "detrimental impact[s]." The Supreme Court has definitively rejected such "self-descriptions of [] membership" without "identify[ing] members who have suffered the requisite harm" as insufficient for organizations to assert the standing of their members. *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009).

Summing up, WEDCA fails to show that, as an organization, it has anything more than a "mere interest in a problem," *Fraternal Order of Police*, 290 A.3d at 37, nor has it explained how any of its members will be specifically aggrieved by the decision at issue, 11-Y DCMR § 302.12(f)(2). As such, it lacks standing to bring this appeal altogether and therefore has not demonstrated a likelihood of success. *See Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015) ("A party who fails to show a substantial likelihood of standing is not entitled to a preliminary injunction.").

2. The Zoning Administrator Correctly Found the Aston's Application Consistent With Apartment Use.

WEDCA insists that the "District's planned use of the Aston is the textbook example of an Emergency Shelter under the Zoning Regulations." Appellant's Mot. at 3. Making matters worse, according to WEDCA, "[t]he Zoning Administrator did not consider or even mention the 'emergency shelter' classification." Appellant's Mot. at 6. And further, WEDCA claims, in

issuing the construction permit, DOB "blindly relied on the 2022 Determination Letter," *id.* at 5, and "fail[ed] to conduct a meaningful assessment of the District's plans for zoning compliance." *Id.* at 6. WEDCA's arguments are baseless. WEDCA speculates that both the Zoning Administrator and the DOB zoning reviewer did not consider other classifications in assessing the zoning compliance of the Aston. The only support WEDCA offers for this speculation is that the Zoning Administrator did not mention "emergency shelter" in the 2022 Determination Letter and that the only comment the DOB zoning reviewer left on the building permit application related to possible office use. *Id.* at 5-6. This evidence of absence, however, does not reflect that DOB failed to conduct a meaningful assessment. Hardly. WEDCA offers no support in the regulations or elsewhere for the proposition that DOB must affirmatively disclaim the applicability of other zoning categories in its comments on an application. In fact, issuance of the building permit itself "reflects a zoning decision about whether a proposed structure, and its intended use as described in the permit application, conform to the zoning regulations." *Basken v. D.C. Bd. of Zoning Adjustment*, 946 A.2d 356, 364 (D.C. 2008). Thus, it is implicit in issuing the permit that DOB determined that the proposed use is permissible under the specific classification in the Zoning Regulations. DOB need not go further.[5]

Regardless, as it stands DOB's determination was proper, and the BZA should affirm its reasoning. *See Ward 5 Improvement Ass'n v. D.C. Bd. of Zoning Adjustment*, 98 A.3d 147, 155 (D.C. 2014) ("The BZA may consider the [Zoning Administrator's] views in arriving at its own

[5] Even if a proposed use fits within multiple potential definitions, the prevailing question is simply whether the use comports with the applicable Zoning Regulations, or, more simply, whether the DOB erred. *See Kalorama Citizens Ass'n v. D.C. Bd. of Zoning Adjustment*, 640 A.2d 179, 180 (D.C. 1994) (noting with approval that "[t]he Board further concluded, and the regulations confirm, that intervenor's bed and breakfast establishment conformed to the definition of a 'rooming house' in 1982, even if it more closely fit the definition of an 'inn'").

de novo interpretation [of the Zoning Regulations] . . . ."). Under the Zoning Regulations, an apartment is defined as, "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." 11-B DCMR § 100.2 (emphasis added). In turn, an apartment house is defined as "any building or part of a building in which there are three (3) or more apartments, providing accommodation on a monthly or longer basis." *Id.* WEDCA argues that residents of the Aston will not have control of their rooms because they will not sign a lease nor own the units. Appellant's Mot. at 6. Neither is necessary under the Zoning Regulations, however, to establish use and control of the units. 11-B DCMR § 100.2. Moreover, the District's plan for the Aston includes private units with kitchens and bathrooms over which each resident will have exclusive control, *i.e.*, the ability to lock their respective units. *See* Ex. A ¶ 21. And, WEDCA concedes that "the minimum length of stay at the Aston will be one month," Appellant's Mot. at 7, plainly falling within the Zoning Regulation's definition of apartment house, requiring "accommodation on a monthly or longer basis," 11-B DCMR § 100.2.

Two BZA cases are instructive. Indeed, the Board has previously rejected the precise arguments WEDCA makes here. In BZA Case No. 20183, a condominium association, Residences of Columbia Heights (RCH), challenged a proposed short-term family shelter by arguing that DCRA issued a building permit in error. *See* Ex. C (DCRA Statement of the Case) at 1-2. The proposed new facility was comprised of units that each had a private bedroom, kitchen, and bathroom, with each resident having a key to control entry into their respective units. *Id.* at 5. Just as WEDCA does here, RCH specifically argued that the use of the intended facility was more appropriately defined as an "emergency shelter," and that, because the District

had not sought a special exception, DCRA had issued the permit in error. *Id.* The Board rejected RCH's argument, finding that the Zoning Administrator "correctly identified this as an apartment house because the apartment was one or more habitable rooms with kitchen/bathroom facility exclusively for the use of, and under the control of, the occupants of those rooms." Ex. D (Excerpt of Transcript of May 6, 2020 BZA Public Meeting) at 39. The Board also noted that residents would have a right to occupy their units for over "30 consecutive days ... Therefore ...it qualified under the lodging definition."). *Id.* at 40. The parallels could not be clearer. The composition of each unit at the Aston (including a bedroom, kitchen, and bathroom), each resident's right of control via a key, and intended stays lasting beyond thirty days, render this matter virtually indistinguishable from the proposed use of the facility in Case No. 20183. WEDCA's argument must fail.

Similarly, in BZA Case No. 18151, the Van Ness South Tenants' Association (the Association) challenged DCRA's issuance of a building permit which allowed the University of the District of Columbia (UDC) to erect partition walls in 21 units within an existing 625-unit apartment house. Ex. E (BZA Decision and Order, Apr. 5, 2011) at 1. The Association argued that the building permit impermissibly authorized a "dormitory" or "rooming house" within an apartment house because residents did not have "exclusive use and control of their units." *Id.* The Board noted that the issue of control was not at issue in the permitting process and, as such, DCRA "was not obligated to investigate whether that element was met." *Id.* at 6. Even so, the Board considered the issue on appeal and found that "[t]he 21 units remain under the exclusive control of the occupants of each unit, inasmuch as the occupants control the locks to their individual units, and are thereby able to exclude other residents from the units." *Id.* The Board held that the UDC Occupancy Agreement, which granted UDC, among other things, the

prerogative to force students to leave during breaks and to limit access to overnight guests, did not meaningfully "affect[] the long term control of the occupant so long as they are allowed to remain on the premises." *Id.* Similarly, here, all Aston residents will receive keys to their units, and will sign Program Rules allowing for periodic inspections; the Aston's Program Rules are not meaningfully different from the UDC Occupancy Agreement in this respect. *See* Aston Program Rules.[6] Because residents at the Aston "retain the rights to exclude all others," except Friendship Place, residents have the necessary control of their units to constitute apartment use.

Given this clear precedent, WEDCA's argument that the "Residential Group R-2" designation on the Permit is inapt also fails. *See* Appellant's Mot. at 6-7. Because residents will stay for at least a month, if not significantly longer, and have exclusive control of their units, the use classification of apartment house is proper. As such, "Residential Group R-2" is in fact appropriate. *See* 12-A DCMR § 310.4 (defining "Residential Group R-2 as "occupancies containing sleeping units or more than two dwelling units where the occupants are primarily permanent in nature," and which generally include "Apartment houses."); 11-B DCMR § 100.2 (defining apartment house as "any building or part of a building in which there are three (3) or more apartments, providing accommodation on a monthly or longer basis."). By the text of the Zoning Regulations, and clear BZA precedent, the District's intended use of the Aston reflects apartment use. Thus, DOB's issuance of the building permit was not in error and the Board should reject WEDCA's arguments. 11-Y DCMR § 100.4 ("The Board ... shall also hear and decide zoning appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal made by any administrative officer or body, including the Mayor, in the administration or enforcement of the Zoning Regulations.").

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[6] DOB included a copy of the Program Rules in its filing. *See* [10A] DOB Ex. A.

3. The George Washington University PUD Is Inapplicable to the Aston.

The Zoning Regulations "prohibit[ ] any construction on [a] PUD site that is not authorized in the order approving the PUD, including development under matter-or-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. WEDCA argues that the Aston is located on a lot that falls under GWU's Campus Plan No. 06-11 and PUD No. 06-12, first approved by the Zoning Commission in March 2007 and effective until October 2027. Appellant's Mem. at 24. In addition, WEDCA asserts that a temporary amendment to the GWU PUD, PUD #06-12Q, applies. Appellant's Mot. at 9. According to WEDCA, because a PUD applies to the property, DOB's issuance of the Permit was in error. Appellant's Mot. at 9. Not so.

The problem for WEDCA is that neither GWU's Campus Plan or the temporary PUD applies to the Aston. For starters, the Aston is located at Square 72, Lot 7,[7] a lot not contained within the original GWU PUD. *See* Z.C. Order No. 06-11/06-12, at 5-6 (listing the precise Lot numbers that are included in the GWU PUD, and omitting the Aston's). Moreover, PUD #06-12Q, which operated for the express and temporary purpose of rearranging the housing assignments for some of GWU's student population while one of GWU's other dormitory buildings underwent renovations, expired in 2022. *See* Z.C. Order No. 06-11Q/06-12Q, at 10 (indicating that "[t]he Limited Period [of PUD #06-12Q] shall end on the date when the last undergraduate student moves out of the above-referenced property" and further "the Temporary

[7] The Aston's lot and square number, a matter of public record, can be found on the Official Zoning Map of the District of Columbia, at https://maps.dcoz.dc.gov/zr16/#l=20&x=-8576913.1414&y=4707986.845899999&mms=lots!square!zoneDistrict!pendingZones!puds!pendingPuds!campusPlans.

Housing Plan use for The Aston ... will last no more than 24 consecutive months."); *see also* Letter from Matthew Le Grant, Zoning Adm'r, to Anthony Hood, Chairperson, D.C. Zoning Comm'n (Aug. 8, 2022) (confirming that GWU ended its temporary housing at the Aston pursuant to PUD 06-12Q).[8] Because no PUD applies, WEDCA's argument necessarily fails.

B. <u>WEDCA Faces No Imminent and Irreparable Injury From the Aston.</u>

"While it is fundamental to the granting of an injunction that the court make specific findings on all prerequisites for such relief, the most important inquiry is that concerning irreparable injury." *Wieck v. Sterenbuch*, 350 A.2d 384, 387 (D.C. 1976). "[A stay] should not be issued unless the threat of injury is imminent and well-founded, and unless the injury itself would be incapable of being redressed after a final hearing on the merits." *Id*. at 388; *see also Zirkle v. District of Columbia*, 830 A.2d 1250, 1257 (D.C. 2003) (noting that the possibility of later compensatory or corrective relief mitigates against a finding of irreparable harm). To qualify as "irreparable," the alleged injury must be "certain and great," "actual and not theoretical," and "beyond remediation." *CFGC v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006); *see also Comm. of 100 on the Fed. City v. Foxx*, 87 F. Supp. 3d 191, 203 (D.D.C. 2015) (distinguishing between "nuisances" and "annoyances" that would not constitute irreparable harm from "severe disruptions and environmental hazards" that might).

Here, WEDCA states that "the District has consistently expressed its desire and intention to begin moving homeless clients into the Aston as soon as possible." Appellant's Mot. at 10. This is true, insofar as the District intends to begin using the Aston for its intended purpose once it obtains all necessary approvals. But WEDCA then spins this simple fact much too far, claiming that, "the District will almost certainly begin operating the Aston . . . before the Board

[8] A copy of this letter has been filed by DOB in its brief. See [10A] DOB Ex. B.

has the opportunity to hear the merits of this Appeal" and that as a result, "Appellant's Appeal will have been effectively mooted, and Appellant will be denied its full due process rights." *Id*. at 10–11. This is a distortion of the normal administrative process and entirely unavailing as a legal argument.

In fact, later in its brief WEDCA recognizes that, in the normal course, development which is subject to a zoning appeal *does* proceed, at the risk that the property owner may eventually be compelled to modify the property to comply with the final order. *See* Appellant's Mot. at 14 (citing *Draude v. D.C. Bd. of Zoning Adjustment*, 582 A.2d 949, 951 (D.C. 1990) and *Interdonato v. D.C. Bd. of Zoning Adjustment*, 429 A.2d 1000, 1004 (D.C. 1981)); *see also Baskin*, 946 A.2d 356, 371 n.32 (D.C. 2008) (noting that developers of a challenged property knew "that they were proceeding at some risk of having to undo their work."). Given this background principle, WEDCA has no "due process rights" in having the use of the Aston immediately stayed, when their appeal may proceed regardless of whether the Aston opens and WEDCA may yet win its requested relief should the Board accept its arguments. *See Burton v. Off. of Emp. Appeals*, 30 A.3d 789, 798 (D.C. 2011) ("Property interests [for due process purposes] . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.") (citations omitted)).

In other words, WEDCA would not suffer any procedural due process violation from the development proceeding at this time, and its underlying claim that the Aston was improperly zoned would be remediated by "a final hearing on the merits." *Wieck,* 350 A.2d at 388; *see also Kakaes v. Geo. Wash. Univ.*, 790 A.2d 581, 583 (D.C. 2002) (internal quotation marks omitted) ("It is axiomatic that equitable relief will not be granted where the plaintiff has a complete and adequate remedy at law."). WEDCA has not presented *any* injury, not even a "nuisance [or]

annoyance," *Comm. of 100,* 87 F. Supp. 3d at 203, that it would suffer in the interim. For that reason, and regardless of any of the other stay factors, its motion should be denied. *See CFGC*, 454 F.3d at 297.

C. The Balance of the Equities and the Public Interest Weigh Overwhelmingly Against a Stay of the Building Permit.

The last two factors to consider in evaluating a motion to stay are the balance of the equities and the public interest, which merge when the government is the party opposing preliminary relief. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). If these factors tip in favor of the government, they can justify denial of a motion even if a movant has demonstrated irreparable injury. *See Winter v. Nat. Res. Def. Council*, *Inc*., 555 U.S. 7, 23 (2008). WEDCA claims that delaying the opening of the Aston would cause the District "little or no harm." Appellant's Mot. at 12. And, as to the public interest, WEDCA dryly recites that "[t]he public has significant interest in the enforcement of the Zoning Regulations." *Id*. at 15. Of course, on an abstract level, the District agrees that the Zoning Regulations are important, but, as outlined above, the proper and normal course is for a project to proceed at its own risk while a zoning appeal is considered and decided by the Board. *See, e.g.*, *Draude*, 582 A.2d at 951 n.1.

What WEDCA completely omits is any mention of the profound public benefit that will be served by the Aston's opening. The Aston will be used as "bridge housing" for individuals who are currently unhoused, and its function as non-congregate housing is especially vital for serving clients who may otherwise be unable or unwilling to utilize other housing options in the District, such as congregate housing. *See* Ex. A ¶ 22 (citing the Aston's importance for housing couples, mixed gendered adult families, and clients in need of medical services); Ella Mitchell & Fiona Bork, *The Aston Is 'Precedent' in Combating DC's Unhoused Crisis: Local Advocates*, The GW Hatchet (Oct. 7, 2024), https://gwhatchet.com/2024/10/07/the-aston-is-precedent-in-

combating-dcs-unhoused-crisis-local-advocates; *see also District of Columbia v. Reid*, 104 A.3d 859, 877 (D.C. 2014) (remarking on "the demonstrated harms that occur when families are housed in congregate shelters").

WEDCA also notes that the District has already been forced to delay the Aston's opening. *E.g.*, Appellant's Mot. at 10, 12. But this only heightens the public interest in opening the Aston on time, without any unnecessary delay. Community members, including members of the Community Advisory Team and representatives of the Aston's provider Friendship Place, have publicly voiced their concerns that potential Aston clients will face literally life-threatening risks from the upcoming winter season, if they are not able to move into the Aston soon:

- "We don't want people to perish waiting to get services, when they could be in the Aston." Wesley Thomas, a member of the Aston's Community Advisory Team.[9]
- "By the start of hypothermia season, that's when you really start getting to the point where people's lives will be at risk if they can't get into this shelter." Courtney Cooperman, a member of the Aston's Community Advisory Team.[10]
- "The cold is coming, and there are people who, because of this decision and the delay, will be on the street longer in winter." Jean-Michel Giraud, President and CEO of Friendship Place.[11]

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[9] Alex Koma, *A New West End Homeless Shelter Remains in Limbo, As Legal Challenges and Construction Errors Pile Up*, Wash. City Paper (Oct. 17, 2024), https://washingtoncitypaper.com/article/752057/a-new-west-end-homeless-shelter-remains-in-limbo-as-legal-challenges-and-construction-errors-pile-up.

[10] *Id*.

[11] Ella Mitchell, *Community Group Voices Concern Over the Aston's Pending Opening Date as Hypothermia Season Nears*, Ella Mitchell, The GW Hatchet (Oct. 10, 2024), https://gwhatchet.com/2024/10/10/community-group-voices-concern-over-astons-pending-opening-date-as-hypothermia-season-nears.

- "[A]ny unnecessary delay in opening the Aston is unacceptable and would cause grave harm to the Aston's potential clients . . . particularly [] given the upcoming hypothermia season." Trupti Patel, Chairperson of ANC 2A.[12]

Finally, WEDCA makes an offhand reference to "members of the West End community" who "object to [the District's] redevelopment of the Aston." Appellant's Mot. at 14. In fact, the local community has demonstrated sustained and passionate support for the Aston's operation, as the local ANC has already adopted resolutions expressing support for its operation. *See* Ex. F ¶ 7. ANC 2A Chairperson Patel has indicated that, in line with this continued interest, this appeal will be placed before the ANC for its consideration. *Id.* ¶ 14. While WEDCA's anonymous members may object to the District's intended use of the Aston, the rest of the local community, indeed the relevant local governing body, has yet to weigh in on this zoning appeal. *See* 11-Y DCMR § 503 (providing that an ANC within which the property that is the subject of an appeal is located may submit a recommendation as to the appeal at issue). The Board should stay its hand, deny WEDCA's unmeritorious motion, and allow the Aston's future clients the life-preserving housing it will provide.

CONCLUSION

For the foregoing reasons, the Boad should deny WEDCA's motion to stay Permit No. B2401624 pending resolution of this appeal.

Date: October 25, 2024

Respectfully submitted,

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[12] Ex. F ¶¶ 11–12 (Declaration of Trupti Patel, Chairperson, Advisory Neighborhood Comm'n 2A (Oct. 25, 2024)).

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CERTIFICATE OF SERVICE

Pursuant to 11-Y DCMR § 205, undersigned counsel certifies that on October 25, 2024, copies of this filing were served by email on:

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