BEFORE THE BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

In re: **Appeal of the West End DC Community Association**	**BZA Case No: 21221** **Building Permit No. B2401624**

REPLY IN SUPPORT OF APPELLANT'S EMERGENCY MOTION FOR STAY AND REQUEST FOR EXPEDITED HEARING DATE

Appellant West End DC Community Association ("Appellant" or "WEDCCA"), by counsel, hereby respectfully submits this Reply in support of its Emergency Motion for Stay and Request for Expedited Hearing Date (the "Motion"), in order to respond to the issues raised in the Oppositions filed by the Department of Buildings ("DOB") and the property owner, the District of Columbia, acting through its Department of General Services and Department of Human Services (collectively, the "District"). Although Appellant disputes virtually all of the legal arguments and factual contentions made in the Oppositions, in the interest of brevity, Appellant is limiting this Reply to two issues with particular significance for the Board's consideration of the Motion.[1]

I. The Board Has The Authority To Issue A Stay.

In the Motion, Appellant explained that the Board has the authority to enter a stay in this matter pursuant to D.C. Code § 6-641.07(g)(1) and (4), and cited as support the Board's

[1] Both Oppositions attack Appellant's standing to bring this Appeal. The District has already twice raised the issue of Appellant's standing by motion to dismiss in the related Superior Court action – relying on exactly the same arguments and legal authority cited in the Oppositions here – and the Superior Court has already twice rejected the District's arguments on that issue. *See* Orders dated February 12, 2024 and August 6, 2024 in *West End DC Community Association v. District of Columbia,* et al., 2023 CAB 006666. To the extent that the Board is inclined to consider the standing issue *for a third time*, Appellant respectfully requests the opportunity to brief the issue in greater detail.

decisions in BZA Appeal No. 15129 *of Richard B. Nettler* (1989) and BZA Appeal No. 15136 *of Phil Mendelson on behalf of ANC 3C* (1989). In the *Nettler* and *Mendelson* appeals, the Board determined that, "pursuant to D.C. Code Sec. 5-524(g)(4) (1988) [the predecessor to D.C. Code § 6-641.07(g)(4)], **the Board has authority to stay construction, just as the Zoning Administrator has authority to stop work pursuant to a permit,**" and it entered an Order staying construction pursuant to a contested building permit until the date on which the Board was scheduled to decide the permit appeal. *Id.* at 1 (bold added).

Both Oppositions attack the precedential value of *Nettler* and *Mendelson*, but neither presents any controlling case law from the DC Court of Appeals or any decision of this Board that addresses, much less overturns or even criticizes, its prior determination in those appeals. The District's empty assertions about the decisions being "old" and "exceedingly weak" are nothing more than rhetoric. Regardless of the year they were decided, *Nettler* and *Mendelson* are still very much good law, particularly given that the statutory basis for the Board's power to enter an interim stay in those appeals is still in place and exactly the same today as it was when they were decided. *See* D.C. Code § 6-641.07(g)(4).

D.C. Code § 6-641.07(g)(4) states that, in a building permit appeal, the Board has the power to "reverse or affirm, wholly or partly, or may modify the order, requirement, decision, determination, or refusal appealed from or **may make such order as may be necessary to carry out its decision or authorization, and to that end shall have all the powers of the officer or body from whom the appeal is taken**." (Bold added.) In *Nettler* and *Mendelson*, the Board determined it has the power to enter a stay just as "the officer or body from whom the appeal is taken" – the Zoning Administrator in those appeals – has the authority to issue a stop work order. The DOB criticizes that holding because it is the Code Official, not the Zoning Administrator,

that has the power to issue stop work orders. That criticism is a red-herring. As both Oppositions acknowledge, the Code Official is the Director of the DOB, and it is the Director of the DOB who issues building permits, including the permit at issue in this Appeal (*see* Permit No. B2401624) and the permits in *Nettler* and *Mendelson*. Because the Board has "all the powers of the officer or body from whom the appeal is taken," it has the same powers as the Code Official, which includes, as both Oppositions admit, the power to issue stop work orders.

In its Opposition, the District argues that the phrase, "may make such order as may be necessary to carry out its decision or authorization," is effectively a temporal limitation that precludes the Board from taking any action, including issuing a stay, *before* it renders a final adjudication in an appeal. But that is not what D.C. Code § 6-641.07(g)(4) says. That provision authorizes the Board to make *any* order, irrespective of timing and whether a final decision has been reached or not, that may be necessary to carry out its ultimate decision. The whole point of a stay is to preserve the status quo during the time when an issue is under consideration so that, when the Board ultimately reaches a decision on the merits, its decision has meaning and effect. And, as Appellant explained in its Motion, absent a stay in this Appeal, the District will unquestionably make good on its commitment to move clients into the Aston as soon as possible and effectively moot the Appeal and render meaningless any decision that the Board ultimately reaches. Under the circumstances, it cannot be legitimately disputed that the entry of a stay is an "order as may be necessary to carry out [the Board's ultimate] decision" in this Appeal, which is exactly the relief that D.C. Code § 6-641.07(g)(4) authorizes the Board to make.

D.C. Off. of Tax & Revenue v. Shuman, is inapposite. 82 A.3d 58 (D.C. 2013). In that case, an administrative law judge of the Office of Administrative Hearings ("OAH") granted "extensive monetary and equitable relief, including the equivalent of a[] [*permanent*] injunction,

the imposition of conditional monthly fines potentially adding up to many tens of thousands of dollars, and the unconditional transfer of a large amount of money from one District agency (OTR) to another (OAH)." *Id.* at 61-62. The Court of Appeals reversed the ALJ's decision, finding that the sweeping relief she entered was unprecedented *for any adjudicative body*; "might well … [have made] administrative law history"; and, if anything, would typically be "associated with contempt proceedings before judicial rather than administrative bodies." *Id.* at 62. The extraordinary relief at issue in *Shuman* stands in stark contrast to the common and accepted relief Appellant seeks here, which is merely an order that maintains the status quo pending the Board's consideration of the Appeal. To the extent that *Shuman* has any relevance here, it is for the general principle that an administrative agency may only act in ways that are consistent with its statutory authority (*id.* at 69-70); and, as explained above, the entry of a brief stay pending the Board's consideration of this Appeal falls squarely within the Board's authorized powers under D.C. Code § 6-641.07(g)(4).

II. The Oppositions Misconstrue The Law Regarding The Critical Distinction Between An Emergency Shelter And An Apartment House.

Both Oppositions attack the merits of Appellant's Appeal on the ground that the Board has already considered the critical appeal issue raised by Appellant – whether the District's planned use of the Aston constitutes an "emergency shelter or an "apartment house" under the Zoning Regulations – and ruled against Appellant's position. Specifically, both Oppositions contend that, in BZA Appeal No. 20183 *of The Residences of Columbia Heights, a Condominium*, the appellant made the same arguments as to why a similar facility in the Columbia Heights neighborhood constituted an emergency shelter, and "[t]he Board ultimately voted unanimously to reject those same arguments." DOB Opposition at 13. Tucked away in a footnote, however, the DOB admits that "[n]o final order and decision has yet been published" in

the *Columbia Heights* appeal. Despite the DOB's contentions, the Board's "vote" in *Columbia Heights* has no legal precedential value on the issues in this Appeal. *See Ward 5 Improvement Ass'n v. D.C. Bd. of Zoning Adjustment*, 98 A.3d 147, 152 (D.C. 2014) ("In contested cases such as this one, factual findings on 'each contested issue of fact' and legal conclusions must be in writing and supported by 'reliable, probative, and substantial evidence'") (quoting D.C. Code § 2-509(e)).

What is also clear from a careful review of the Oppositions is that, in describing the precedential value of the *Columbia Heights* appeal, the District and DOB rely on the "raft of persuasive" arguments that ***they themselves made to the Board*** in that appeal. DOB Opp. at 12. In other words, in arguing that the Aston facility constitutes an apartment house and not an emergency shelter, the District and DOB rely on their own briefings to the Board in *Columbia Heights*, not on any final decision made by the Board itself. Moreover, in *Columbia Heights*, the Board did not discuss or consider two of the critical and determinative issues raised by Appellant in this Appeal: (1) that the Apartment definition states, "[c]ontrol of the apartment may be by rental agreement or ownership"; and (2) that the Zoning Regulations limit the residential use category as a whole to "use[s] offering habitation on a continuous basis … **established by tenancy with a minimum term of one (1) month or property ownership**." 11-B DCMR § 200.2(aa)(1). In fact, in discussing the basis for its vote in *Columbia Heights*, the Board mentioned the term "emergency shelter" only once – in an off-hand remark regarding the Mayor's use of "similar terminology" when discussing shelter facilities in other wards (May 5, 2020 Tr. at 40:18-24).

Finally, both Oppositions fundamentally misconstrue the "emergency shelter" definition in the Zoning Regulations. Emergency shelter is defined as "[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," which "may also provide ancillary services such as counseling, vocational training, or similar social and career assistance." 11-B DCMR § 100.2; *see also* DC Code § 4-751.01(40)(B) (defining "[t]emporary shelter" as "[a] 24-hour apartment-style housing accommodation for individuals or families who are homeless …, provided directly by, or through contract with or grant from, the District, for the purpose of providing shelter and supportive services"). Both Oppositions acknowledge that the phrase, "temporary housing," is not defined in the Zoning Regulation, but they argue that the phrase is used in the definition of "lodging" and that its usage in that context should guide the Board's interpretation of the "emergency shelter" definition. However, their argument on this point makes no sense whatsoever.

"Lodging" is defined, in pertinent part, as "[a] use providing customers with *temporary housing* for an agreed upon term of less than *thirty (30) consecutive days*[.]" 11-B DCMR § 200.2(s) (emphasis added). The District and DOB conclude, therefore, that, "under the Zoning Regulations, 'temporary housing' generally means a term of less than 30 days" (DOB Opp. at 14); and, because clients of the proposed Aston facility will stay for *more than* 30 days, the District's use of the Aston cannot possibly qualify as an emergency shelter. However, if the phrase "temporary housing" means housing provided for "a term of less than 30 days," it is redundant, totally unnecessary, and non-sensical for the definition of "lodging" to include the clarifying clause, "for an agreed upon term of less than *thirty (30) consecutive days*[.]" 11-B DCMR § 200.2(s) (emphasis added). In other words, under the District and DOB's interpretation, the definition of "lodging" is actually "[a] use providing customers with [housing for a term of less than 30 days] for an agreed upon term of less than thirty (30) consecutive

days[.]" That interpretation obviously makes no sense. The only interpretation that *does* make any sense is that "temporary housing" is not specifically limited to a finite amount of time, except in the context of "lodging," where the Zoning Regulations explicitly confine it to a term of "less than thirty (30) consecutive days." In that regard, the use of "temporary housing" in the "lodging" definition actually supports ***Appellant's*** position, not the District and DOB's, because it shows that the emergency shelter definition encompasses *all* temporary housing uses regardless of whether the applicable term is less or more than 30 days.

CONCLUSION

For all of the above reasons, and the reasons set forth in Appellant's Motion, the Board should grant the Motion, enter a brief stay, and schedule a hearing in this Appeal as soon as practicable.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of November 2024, a true and correct copy of the foregoing was served by email on the following:

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