BEFORE THE BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

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

APPELLANT'S MEMORANDUM IN SUPPORT OF APPEAL

Appellant West End DC Community Association ("Appellant" or "WEDCCA") respectfully submits this memorandum in support of its appeal of Building Permit No. B2401624 (the "Permit"), which was issued by the Department of Buildings ("DOB") on August 7, 2024 for property owned by the District of Columbia[1] at 1129 New Hampshire Avenue, NW (the "Aston" or "Property"). Appellant is an unincorporated civic association whose members and contributors are individual residents and businesses that reside or have a place of business in the West End neighborhood of the District, within very close proximity to the Property.

As explained in detail below, the decision by the DOB to issue the Permit was clearly erroneous and inconsistent with the Zoning Regulations for multiple reasons. Most importantly, the District's plans for the Property would violate the Zoning Regulations in two main respects: (1) the District is prohibited from providing temporary shelter accommodations for the homeless at the Aston without first seeking and obtaining a special exception from the BZA, which it has not done; and (2) the District is prohibited from changing the use of the Aston without first seeking and obtaining Zoning Commission approval pursuant to Planned Unit Development (PUD) No. 06-12 and Campus Plan No. 06-11 (hereinafter, the "GWU PUD"), which it has not done. The DOB knew, or at the very least should have known, that the District's intended use of

[1] The District owns the Property through its Department of General Services ("DGS").

the Aston would violate the Zoning Regulations in these ways. Yet it made no attempt to investigate or require the District's compliance with the Zoning Regulations.

Instead, it blindly relied on the District's inaccurate and incomplete representations regarding its intended use of the Property, and on a non-binding zoning determination letter that the District obtained from the Zoning Administrator nearly two years prior, and which was based on outdated and incomplete information. The DOB's decision to issue the Permit despite these violations of the Zoning Regulations – not to mention without any attempt to assess the District's plans for compliance with the Zoning Regulations – was arbitrary and capricious. For these reasons, and as explained further below, the Board should revoke the Permit and direct the DOB to refrain from considering any renewed permit application and/or application for a certificate of occupancy unless and until the District seeks and obtains the necessary approvals from the Board and the Zoning Commission.

RELEVANT BACKGROUND

I. The District's Purchase Of The Aston

This Appeal arises out of the District's purchase of the 10-story building commonly known the Aston from George Washington University (GWU), and its redevelopment of the Aston for use as a non-congregate shelter facility for up to 190 homeless persons. In July 2022, the District issued a public Request for Space "seeking offers for existing buildings that could serve as non-congregate housing for DC residents who are experiencing or are at risk for homelessness." *See* DGS-RFS-DHS-2022-6 (Non-Congregate Housing) (the "RFS")[2] at 1. The RFS indicated that, while the District would consider options available for lease, its strong preference was to purchase an existing building that would require minimal reconfiguration in

[2] *Available at* https://dgs.dc.gov/event/dgs-rfs-dhs-2022-6-request-space-%E2%80%9Crfs%E2%80%9D-dgs-rfs-dhs-2022-6-non-congregate-housing.

order to fulfill the intended purposes of the planned facility. *Id.* The RFS stated that the relevant property would be put to the following intended use: "Primarily non-congregate housing and emergency hypothermia shelter and any other lawful use." *Id.* at 3. The RFS invited proposals for existing buildings or land that could accommodate, among other attributes, "[u]p to 100 units (single room occupancies or efficiencies / studios or hotel suites / extended stay style units)," "[o]ffice space for 12 to 15 staff," an "[e]xam room," "[m]ultipurpose space for dining and meeting space," and "[o]utdoor space for recreation." *Id.* at 2-3.

Around the same time of the District's RFS, GWU was engaged in its own competitive process to sell the Aston, which had been used by GWU as student housing until June 2022. As part of the District's selection process, an evaluation panel consisting of personnel from DGS and its third-party real estate consultant, Savills, Inc., evaluated fifteen properties submitted in response to the RFS as well as ten additional property options, one of which was the Aston. The District ultimately determined that the Aston was one of several properties that matched its criteria, and, in January 2023, GWU and the District reached an agreement for the District to purchase the Aston for approximately $27.5 million.

On May 19, 2023, the District, through DGS, notified the public for the first time that it intended to purchase the Aston from GWU and redevelop the Aston for use as a non-congregate shelter facility. *See* D.C. Council, CA25-0254, *Council Real Estate Contract Summary* at 2-3.[3] According to the District, purchasing and redeveloping the Aston "is a key strategy to closing the PEP-V [Pandemic Emergency Program for Medically Vulnerable Individuals] hotel sites," which were established and funded by the federal government as part of a pandemic-response program for elderly and medically-vulnerable homeless individuals. *Id.* at 3. Now, however, with the

[3] *Available at* https://lims.dccouncil.gov/Legislation/CA25-0254.

federal government no longer reimbursing the District for the costs of maintaining those sites, the District has been hemorrhaging $2 million per month just to keep the PEP-V sites open. *Id.* Faced with these mounting fiscal concerns, the District acted quickly after publicly announcing its plans for the Aston to officially execute a purchase and sale agreement with GWU on July 11, 2023; and, soon thereafter, on August 23, 2023, the District and GWU closed on their purchase and sale of the Aston. However, in its rush to acquire the Aston and repurpose it as a PEP-V replacement, the District has ignored and/or intentionally circumvented the requirements and procedures of the Zoning Regulations. The District's violations have led to the filing of two lawsuits in the DC Superior Court.

II. The District's Plans To Use The Aston As An Emergency Shelter

In the months since the District acquired the Aston, it has publicly disclosed only limited and oftentimes contradictory information regarding its plans for the Aston. However, several aspects of the District's plans are clear and undisputed. First, the District has consistently expressed its desire and intention to begin moving homeless clients into the Aston as soon as possible. While the District has delayed the anticipated move-in date on several occasions, most recently, representatives of its Department of Human Services ("DHS") stated in a presentation to the Aston Community Advisory Team ("CAT") that they expect to begin moving in clients during the week of October 1, 2024. *See* Sept. 5, 2024 DHS Presentation to Aston CAT at 3.[4]

With respect to its planned use of the Aston, the District has stated that "[t]he Aston will be a new, safe, service rich, semi-private shelter … [that] will specifically address populations that cannot be served by [the District's] current shelter system." *See* Ex. A (July 18, 2023 DHS Responses to ANC 2A Questions) at 2. The proposed shelter will serve, among other targeted

[4] *Available at* https://dmhhs.dc.gov/node/1739126.

populations, individuals with severe medical vulnerabilities who "cannot be adequately served in [existing] low barrier shelters," which offer only "clinic services, not daily nursing or professional staff"; and the District will use the Aston facility to support the "[m]edically vulnerable" with "chronic conditions" who are "in need of [a] medical respite bed[,] … meaning short-term, acute, recuperative stays." *See* Mar. 11, 2024 DHS Presentation to the Aston CAT at 15-16[5]; Ex. B (Nov. 15, 2023 DHS Presentation to ANC 2A) at 4-7; and Ex. C (June 21, 2023 DHS presentation to ANC 2A) at 3-7. District representatives also admitted, in response to questions from the public at the June 21, 2023 ANC meeting, that individuals staying at the Aston will receive three meals per day, among other significant support services. In a subsequent submission to the ANC 2A in July 2023, the District stated that Medical Support/CNA Staff at the Aston will "[p]rovide intimate, hands on healthcare to clients in helping them with bathing, dressing, grooming, oral hygiene care, and all other activities of daily living." *See* Ex. A at 5.

The District has also been consistent in describing the services to be provided at the Aston as "transitional" and "temporary." Recently, in a sworn declaration submitted in a related DC Superior Court case, Rachel Pierre, the Administrator for the Family Services Administration within the District's Department of Human Services (DHS), described the shelter services to be offered at the Aston as "temporary apartment-style units for clients transitioning into housing" and "transitional housing for individuals … who are homeless or at risk of homelessness." Ex. D, ¶¶ 5, 6, 19. At the admission stage, "[c]lients [of the Aston] will be issued a bed subject to an admissions criterion such as medical vulnerability, unable to serve in [the District's] current shelters, or matched to housing." *See* Mar. 11, 2024 DHS Presentation at 15; Ex. B at 7; and Ex.

[5] *Available at* https://dmhhs.dc.gov/node/1739126.

C at 6. In terms of bed configuration, clients will be assigned to units in "[p]airs" with "[t]wo [clients] to a room with a bathroom for each individual suite." *Id.* Once admitted, clients will receive "consistent medical services" as needed and will be required to participate in "intensive case management" "as a condition of admission." *Id.*; *see also* Ex. D, ¶ 25. The District expects to have significant "flow" of individuals into and shortly thereafter out of the facility into more permanent solutions, that most clients of the Aston will be in need of "short-term, acute, recuperative stays," and that the minimum length of stay at the Aston will be one month and the average length of stay will be 3-5 months. *See* Mar. 11, 2024 DHS Presentation at 15-16; Ex. B at 3-7; and Ex. C at 3-7.

Consistent with the transitional and temporary nature of the District's anticipated use of the Aston, the District has openly admitted that clients of the Aston will not occupy or control individual units by rental agreement or ownership. When asked in discovery in the related DC Superior Court case to "[s]tate whether clients will occupy or control housing accommodations in the Aston by rental agreement or ownership," the District referred to the "DHS – Emergency Continuum of Care for Homeless Contract" (hereinafter, the "DHS Continuum of Care") issued by the Office of Contracting and Procurement on January 1, 2024 "for a description pertaining to non-congregate shelters generally." *See* Ex. E at 2. The DHS Continuum of Care explicitly defines non-congregate shelter as: "Private units or rooms used as transitional housing to individuals and adult households and **do not require occupants to sign a lease or occupancy agreement**." *See* DHS Continuum of Care § C.5.3.1.2 (emphasis added).[6] Not only is the lack of lease or occupancy agreement a defining feature of the non-congregate shelter model, it is also

[6] *Available at* https://contracts.ocp.dc.gov/contracts/details?id=Q1cxMTIyMTPCpkJhc2UgUGVyaW9k&hash=iaq3drl96yx88yam.

a legal requirement associated with the $18+ million in federal funding that the District received to purchase the Aston. *See* Notice CPD-21-10, *Requirements for the Use of Funds in the HOME-ARP Program* at 55 ("A non-congregate shelter [] is one or more buildings that provide private units or rooms as temporary shelter to individuals and families and does not require occupants to sign a lease or occupancy agreement").[7]

The only contract or agreement that must be signed by clients of non-congregate shelters like the Aston is a copy of the "Program Rules," which are provided and explained to each client upon entering the shelter. *See* DHS Continuum of Care § C.5.10.2.a. The Program Rules are, by definition, one-sided and binding only on the clients of the Aston. *See* DC Code § 4-751.01(29) (The relevant statute defines "Program Rules" as the "set of provider rules, client rights, and complaint and appeal procedures … proposed by a particular provider for the purpose of governing the behavior and treatment of its clients and approved by the Mayor … ."); *see also id.* §§ 4-754.11, .12 (identifying the rights afforded to clients of non-congregate shelters, which do not include any right to exclusively use or control any portion of such a shelter). Neither the District nor its third-party operator will sign the Program Rules or agree to be bound by its terms. *Id.*; *see also* DHS Continuum of Care § C.5.10.2.a.

Based on the foregoing facts, the shelter accommodations that the District intends to provide at the Aston constitute an Emergency Shelter under the Zoning Regulations, which, as set forth more fully below, cannot be operated in the Aston without a special exception from the Board. But the District has not sought or obtained such a special exception from the Board to date. Furthermore, the District's plans to convert the Aston from its most recent approved use as an Apartment House for GWU student housing to a transitional non-congregate shelter would

[7] *Available at* https://www.hud.gov/sites/dfiles/OCHCO/documents/2021-10cpdn.pdf.

clearly be a change in use that requires Zoning Commission approval under the GWU PUD. The District has not sought or obtained such approval from the Zoning Commission.

III. The Permit Application

The permit application at issue in this appeal (No. B2401624) (the "Application") was filed by an agent of DGS on November 21, 2023. The Application and accompanying documents describe the scope of the proposed work as:

> Non-structural modifications to the interior elements of an existing residential facility. Renovation of four existing bathrooms in units 306, 506, 606, and 806 to meet ADA standards. Conversion of existing residential unit (unit 100) into an additional exit to improve accessibility, reducing the total number of dwelling units from 124 to 123. Enhancement of current residential units through the installation of vinyl plank flooring and repainting of the entire facility.

Ex. F at 1; Ex. G (Drawings Cover Sheet). Although the District's anticipated use of the Property differs significantly from the Property's prior use as GWU student housing, the District indicated in its Application that the "Existing Use(s) of Building" and the "Proposed Use(s) of Building" are exactly the same: that is, as "Apartment Houses – R-2."[8] Ex. F at 1,8. With the exception of a handful of answers to "Yes or No" questions, the rest of the District's nine-page Application is blank. *See generally* Ex. F. In the Zoning Data Summary portion of the Application, the District provided only the Property address and the name of the Building Owner, and indicated again that its Proposed Use of the Property is: "Apartment Houses – R-2." *Id.* at 8. The rest of the Zoning Data Summary is blank. *Id.*

Among the other supporting materials provided by the District along with its Application was a Zoning Determination Letter that the District obtained from the Zoning Administrator

[8] The "Residential Group R-2" occupancy category refers to "occupancies containing sleeping units or more than two dwelling units where the occupants are primarily permanent in nature," and generally includes "Apartment houses[,] Boarding houses (nontransient) with more than 16 occupants[,] Congregate living facilities (nontransient) with more than 16 occupants[,] Convents, Dormitories[, and] Fraternities and sororities[.]" 12-A DCMR § 310.4.

more than two years ago, in August 2022 (hereinafter, the "2022 Determination Letter"). At that time, the District was only just considering making an offer on the Property, and DHS sought a non-binding, advisory opinion from the Zoning Administrator. Ex. H. The Zoning Administrator concluded, ***based on the information provided to him by DHS*** in August 2022, that the District's "proposed non-congregate housing" is most appropriately classified as an "Apartment House use" within the meaning of the Zoning Regulations; and that such a use is permitted as a matter-of-right in the applicable zone for the Aston property (RA-5 zone):

> It is my determination that the District's intended use of non-congregate housing is a matter-of-right use within the RA-5 zone and would not require any approval from the Board of Zoning Adjustments, for special exceptions or variances for the Apartment House use at 1129 New Hampshire Avenue, NW.

Ex H at 2.

The 2022 Determination Letter makes clear that the opinions expressed therein were non-binding and purely advisory; were based solely on the information presented by DHS in August 2022; and did not excuse the District from complying with all applicable Zoning Regulations before proceeding with its plans for the Aston. The Letter stated, in relevant part:

> DISCLAIMER: *This letter is issued in reliance upon, and therefore limited to, the questions asked, and the documents submitted in support of the request for a determination. The determinations reached in this letter are made based on the information supplied*, and the laws, regulations, and policy in effect as of the date of this letter. *Changes in the applicable laws, regulations, or policy, or new information or evidence, may result in a different determination*. This letter is NOT a "final writing", as used in Section Y-302.5 of the Zoning Regulations (Title 11 of the District of Columbia Municipal Regulations), nor a final decision of the Zoning Administrator that may be appealed under Section Y-302.1 of the Zoning Regulations, *but instead is an advisory statement of how the Zoning Administrator would rule on an application if reviewed as of the date of this letter based on the information submitted for the Zoning Administrator's review*. Therefore this letter does **NOT** vest an application for zoning or other DCRA approval process (including any vesting provisions established under the Zoning Regulations unless specified otherwise therein), which may only occur as part of the review of an application submitted to DCRA.

Ex. H at 2 (bold and underline in original; italics added).

The Zoning Administrator's review and opinions were also extremely limited in scope. He addressed only the appropriate use classification for "non-congregate housing" *generally*, and whether such a use would be permitted as a matter-of-right in the RA-5 zone applicable to the Aston. The Zoning Administrator did not consider, address, or even mention, among other relevant issues: (1) the "emergency shelter" use classification; (2) whether and to what extent clients of the Aston facility will have the exclusive use and control of individual units necessary for the Property to qualify as an Apartment House; (3) whether clients of the Aston facility will hold leases or ownership rights in individual units in the Aston facility; (4) whether the operation of a medical clinic or provision of medical services is permitted in the RA-5 zone; (5) whether and to what extent the Property is subject to the GWU PUD; (6) whether the use of the Aston as a non-congregate shelter is a change in use that requires Zoning Commission approval pursuant to the GWU PUD; or (7) whether the office portion of the District's planned facility is allowed as a matter of right in the RA-5 zone. It is also clear, as explained below in Section II, that the limited information that the District *did in fact* present to the Zoning Administrator – and which served as the basis for his narrow opinion set forth in the 2022 Determination Letter – differs in several significant ways from what the District is actually proposing for the Aston.

Despite the Zoning Administrator's disclaimer regarding the limited scope of his evaluation – and although it was based on incomplete and stale information – the District has relied on the 2022 Determination Letter in order to circumvent zoning laws that restrict the uses that the District is proposing for the Property. In fact, it is clear from the Permit file that the District submitted the 2022 Determination Letter along with its Application as purported proof of its compliance with the Zoning Regulations, and that the DOB blindly accepted the 2022 Determination Letter without conducting any independent assessment of its own.

IV. The DOB's Review And Issuance Of The Permit

After the Permit Application was filed, DOB reviewers in several disciplines reviewed the Application for compliance with the relevant codes. In their first round of comments to the District, the DOB reviewers performing the fire, plumbing, structural, and zoning reviews all raised issues regarding what appeared to be the District's change in use and occupancy of the Property. In response, the District held out the 2022 Determination Letter as its proof that there is no change in use or occupancy and that its plans for the Aston comply with the Zoning Regulations. The following excerpts reflect the reviewers' comments and the District's responses thereto:

Review No.	Comment	Response	Sheet#
		***	
Fire Review			
	Per Section 1010.1 of 2015 IEBC, for change of occupancy a drinking fountains and service sink will be required due to increase in plumbing fixture demand.	No change of occupancy, building is compliant with RA5 Zone, per determination letter. Accessory use analysis confirms zoning compliance. Drinking fountain and service sink are provided.	P-001, P-101, P-104, P102, P-201 and P-202 Determination Letter in Supporting Documents, Accessory Use Analysis chart in A-007
		***	
Plumbing Review			
1	Per Section 1010.1 of 2015 IEBC, for change of occupancy a drinking fountains and service sink will be required due to increase in plumbing fixture demand.	No change of occupancy, building is compliant with RA5 Zone, per determination letter. Accessory use analysis confirms zoning compliance. Drinking fountain and service sink are provided.	P-001, P-101, P-104, P102, P-201 and P-202 Determination Letter in Supporting Documents, Accessory Use Analysis chart in A-007
		***	

Structural Review			
3	1) CS(Coversheet): Please update the Description of Work on the coversheet to reflect what is proposed on the Drawings – which is a [Change of Use from an R-2 (Apartment Building) to a Mixed Use Building, R-2 Apartment Building with B use (Office Suites) on the Second Floor Level] - [2017 DCBC Sec. 504, Table 508] – be sure to state that the Number of Apartment Units is being reduced from (124) to (110) in the Description.	No change of occupancy, building is compliant with RA5 Zone, per determination letter. Accessory use analysis confirms zoning compliance. Coversheet updated to reflect the final number of apartment units.	Coversheet, Determination Letter in Supporting Documents, Accessory Use Analysis chart in A-007

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5	Please state the 'Required' and 'Provided' number of Plumbing Fixtures on the Coversheet serving the B Use on the Second Floor Level (based on the Total Occupant Load proposed for the Floor) [2017 DCBC Sec. 2902, Table 2902.1]	No change of occupancy, building is compliant with RA5 Zone, per determination letter. Accessory use analysis confirms zoning compliance.	Determination Letter in Supporting Documents, Accessory Use Analysis chart in A-007
6	[2017 DCBC Sec. 106.2.2, Sec.1004] – Use and Occupancy diagrams (depicted on overall floorplans of each level of the building, as well as building sections) shall be provided as part of the Drawing Submittal. These Diagrams shall outline/ identify the Uses for each Area for each Floor Level of the Building [ie. graphically differentiate on the Floorplan Diagrams and Building Sections where the Dwelling Units are located … then show the Areas where the Office Use(s) will be in a different way (hatch pattern, grey tone, etc.) … then show the Areas where the Assembly Spaces are located	No change of occupancy, building is compliant with RA5 Zone, per determination letter. Accessory use analysis confirms zoning compliance. Diagrams indicating accessory use space and dwelling units are indicated in A007, A008.	A-007, A-008, Determination Letter in Supporting Documents, Accessory Use Analysis chart in A-007

	(Multipurpose Room, Conference Rooms, etc.).		

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Zoning Review			
1	The Office use is not allowed as a matter of right in the RA-5 zone, unless approved by the Board of Zoning Adjustment as a Use Variance.	No change of use, building is compliant with RA5 Zone, per determination letter. Accessory use analysis confirms zoning compliance Coversheet was updated to reflect the final number of apartment units, reduction from 124 to 110.	Determination Letter in Supporting Documents, Accessory Use Analysis chart in A-007, Number of Dwelling units in chart A-008

Ex. I at 1-5; *see also* Ex. J (Sheet A007 reflecting referenced "accessory use analysis chart").

The 2022 Determination Letter was evidently sufficient for the DOB zoning reviewer, because, on July 9 and again on August 5, the zoning review was approved without additional comment or objection. The remaining discipline reviews were approved shortly thereafter, on July 26 and 29. The Permit was then issued on August 7, 2024. *See* Permit No. B2401624.

ANALYSIS

The Board is authorized by Section 8 of the Zoning Act 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 the Director of the Department of Buildings[.]" DC Code § 6-641.07(g)(1); 11-X DCMR § 1100.2. Appeals to the Board "may be taken by any person aggrieved, or organization authorized to represent such person, … by any decision of the Director of the Department of Buildings granting … a building permit … or any other administrative decision based in whole or in part upon any zoning regulation or map adopted under this subchapter." DC Code § 6-641.07(f); 11-Y DCMR § 302.1. Here, the decision by the DOB to grant the Permit was clearly erroneous and inconsistent with the Zoning Regulations for

multiple reasons:

I. The DOB Improperly Issued The Permit Without First Requiring The District To Obtain A Special Exception For Its Planned Use Of The Property.

Based on the facts set forth above, which were known and/or readily available to the DOB during its consideration of the Permit Application, the shelter accommodations that the District intends to provide at the Aston constitute an Emergency Shelter under 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"). According to the District's own public statements, the Aston will serve as a facility providing temporary housing for individuals and families who are otherwise homeless as well as ancillary support services by a third-party operator under contract with the District. *See supra*, pp. 4-8. In other words, the District's planned use of the Aston is the textbook example of an Emergency Shelter under the Zoning Regulations.

Accordingly, the District cannot proceed with its proposed plans for the Aston without first seeking and obtaining a special exception from the Board for an Emergency Shelter. *See* 11-U DCMR § 420.1(f) ("Emergency shelter[s]" are one of the uses that are permitted only as a special exception in the RA-5 zone). In addition to the general showing required of any applicant for a special exception – "to prove no undue adverse impact" from its proposed use (11-X DCMR § 901.3) – the District, as an applicant specifically seeking to operate an

Emergency Shelter in an RA zone, would be required to make a heightened showing in order to obtain a special exception. Specifically, the District must demonstrate to this Board, among other requirements, that **"[t]he facility shall not have an adverse impact on the neighborhood because of traffic, noise, operations, or the number of similar facilities in the area**"; and, because the District's proposal contemplates serving far more than the allowable 25 persons at the Property, that "**the program goals and objectives of the District of Columbia cannot be achieved by a facility of a smaller size at the subject location and if there is no other reasonable alternative to meet the program needs of that area of the District**[.]" 11-U DCMR § 420.1(f) (emphasis added). To date, the District has not applied to the Board for a special exception to operate an Emergency Shelter in the RA-5 zone, much less made the heightened showing in this forum required by the Zoning Regulations.

Instead, the District has attempted to circumvent that requirement and the special exception process by arguing that its anticipated use of the Property constitutes an Apartment House under the Zoning Regulations, which is permitted as a matter of right in the RA-5 zone. Indeed, the District represented in its Permit Application that its proposed use of the Property is: "Apartment Houses – R-2." *See* Ex. F at 1, 8. That assertion fails for multiple reasons.

A. The District's Proposed Shelter Facility Does Not Meet The Definition Of An Apartment House Under The Zoning Regulations.

The Zoning Regulations define Apartment House as "[a]ny building or part of a building in which there are three (3) or more apartments, providing accommodation on a monthly or longer basis"; and the term "Apartment" refers to "[o]ne [] 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). Here, clients of the District's facility will not have the

exclusive use and control of individual units necessary for the Aston to qualify as an Apartment House.

The District admits that clients of the Aston will not occupy or control units in the Aston by rental agreement or ownership. *See* DHS Continuum of Care § C.5.3.1.2 (By definition, non-congregate shelters provide "[p]rivate units or rooms [for] transitional housing to individuals and adult households **and do not require occupants to sign a lease or occupancy agreement**") (emphasis added). The only contract or agreement that clients of the Aston will sign in connection with their use of the Aston is a copy of the "Program Rules," which clients will be required to complete upon arriving at the Aston. *See id.* § C.5.10.2.a; Ex. E at 2-3; *see also* DC Code § 4-751.01(29). Without a rental agreement or legal title to the units, clients of the Aston will not possess the requisite legal interest to exclusively use and control the units. By definition, rental agreements and ownership confer the requisite degree of control. *See Odumn v. United States*, 227 A.3d 1099, 1104-06 (D.C. 2020) ("[P]roperty law regards a lease as equivalent to a sale of the premises for the term of the lease, making the tenant both owner and occupier during the lease"; "[T]enancy grants a tenant **exclusive** possessory rights to the leased property for the term of a lease") (emphasis added; citations omitted). On that basis alone, the District's planned use of the Aston does not – and cannot – qualify as an Apartment House.

Even putting aside the lack of rental agreement or ownership, there is nothing to suggest that clients of the District's shelter facility will have the necessary degree of control over individual units to bring the facility within the definition of an Apartment House. It is commonly understood that an "exclusive" right to use or control something means that the right is limited to only one person or group *to the exclusion of all others*. *See* 11-B DCMR § 100.1(g) ("Words not defined in this section shall have the meanings given in Webster's Unabridged

Dictionary"); MERRIAM-WEBSTER.COM DICTIONARY (exclusive. "1a: excluding or having power to exclude[;] b: limiting or limited to possession, control, or use by a single individual or group. 2a: excluding others from participation").[9] Rental agreements and ownership inherently confer exclusive rights to use and control real property, which is why the Zoning Regulation's definition of Apartment explicitly states that the requisite control may be shown "by rental agreement or ownership." 11-B DCMR § 100.2.

Here, however, clients of the Aston cannot possibly have exclusive control of individual units because that would mean that the clients possess the right and ability to exclude others, including representatives of the District and/or its third-party operator, from entering and/or interfering with their units. But it would be untenable for the District to relinquish all control over individual units to the clients of the Aston and still carry out its intended program. As noted above, the District has made clear that the services to be provided at the Aston will be "transitional" and "temporary"; and the District expects to have significant "flow" of individuals into and out of the facility in as little as one month, with the average length of stay being 3-5 months. *See* Ex. Mar. 11, 2024 DHS Presentation at 15-16; Ex. B at 3-7; and Ex. C at 3-7. The District has also made clear that, once admitted, clients will be required to participate in "intensive case management" "**as a condition of** admission and **in order to continually reside**

[9] It is also well-recognized under DC law that having exclusive control of real property necessarily means the right and ability to exclude others from entering and/or interfering with that property. *See United States v. Leake*, No. 19-cr-194 (KBJ), 2020 U.S. Dist. LEXIS 112934, *17 (D.D.C. June 26, 2020) (A claim for common law trespass to land requires the claimant to demonstrate "**exclusive control of the land," which in turn requires "possession of the property in question and the ability to exclude others from entrance onto or interference with that property**") (emphasis added; citations omitted); *see also Gaulmon v. United States*, 465 A.2d 847, 853 (D.C. 1983) (appellant did not fit within "dwelling house exception" to crime of carrying a pistol without a license because the day-to-day control exercised by hotel management over rooms, which included retaining keys to all rooms, requiring guests to present identification, and routing telephone calls through a centralized switchboard, demonstrated that appellant lacked "exclusive possession and control" of the premises).

at the Aston." *Id.* (emphasis added). If the District were to relinquish control of individual units, it would be powerless to ensure compliance with the Program Rules and to remove clients that, for example, fail to participate in "intensive case management" or overstay the program duration. Granting clients exclusive control of the units would also mean that the clients could lawfully deny access to any other client assigned to a particular unit, which would undermine the District's plan to assign units in "[p]airs" with "[t]wo [clients] to a room with a bathroom for each individual suite." *See* Mar. 11, 2024 DHS Presentation at 15; Ex. B at 7; and Ex. C at 6.

B. The District's Interpretation Of The Zoning Regulations Ignores The Parameters Of The Residential Use Category.

The District's argument that its planned use of the Property constitutes an Apartment House is inconsistent with the limited scope of the "residential use category." The RA zones are "designed to provide for residential areas suitable for multiple dwelling unit development and supporting uses." 11-F DCMR § 101.1. Section 11-B200 of the Zoning Regulations specifically limits the "residential" use category to "use[s] offering habitation on a continuous basis of at least thirty (30) days. **The continuous basis is established by tenancy with a minimum term of one (1) month or property ownership**." 11-B DCMR § 200.2(aa)(1) (emphasis added). That Section provides a number of examples of "residential uses" – "single dwelling unit, multiple dwelling units, community residence facilities, retirement homes, rooming units, substance abusers' home, youth residential care home, assisted living facility, floating homes, dormitories, or other residential uses" – but the common characteristic of each of these examples is that it provides "habitation on a continuous basis of at least thirty (30) days … **established by tenancy** … **or property ownership**." *Id.* §§ 200.2(aa)(1), (3).

Here, as noted above, clients of the Property will not be property owners, nor will they possess what the law recognizes as a "tenancy." *See* DC Code §§ 42-3501.03(36), (33)

("Tenant" under the Rental Housing Act "includes a tenant, subtenant, lessee, sublessee, or other person entitled to the possession, occupancy, or the benefits of any rental unit owned by another person"; and "[r]ental unit" is a housing accommodation, "which is rented or offered for rent …"); *Robbins v. Reagan*, 616 F. Supp. 1259, 1270-71 (D.D.C. 1985), *aff'd*, 780 F.2d 37 (D.C. Cir. 1985) (homeless shelter residents were not "tenants" entitled to notice to quit under DC law because the government never sought or received any rent for use of the shelter) (citing *Smith v. Town Center Mgmt. Corp.*, 329 A.2d 779, 780 (D.C. 1974) (individual allowed to live in an apartment rent-free was not a "tenant" entitled to notice to quit but, rather, "a permissive user or licensee who, upon being asked to leave, became a trespasser")). Instead, according to the District, clients of the Aston will have only a unilateral agreement to abide by the Program Rules. *See* DHS Continuum of Care § C.5.10.2.a. Under the circumstances, clients of the District's shelter facility will be, at best, "roomers," not "tenants." *See Young v. District of Columbia*, 752 A.2d 138, 144 (D.C. 2000) ("The critical distinction between a tenant and a roomer is that **a tenant is a purchaser of an estate, entitled to exclusive legal possession, but a roomer has merely a right to use the premises**") (emphasis added).

Because non-congregate shelters like the one that the District proposes at the Property do not, by design, "require occupants to sign a lease or occupancy agreement" (DHS Continuum of Care § C.5.10.2.a), they are inherently incompatible with the residential use category applicable to the RA-5 zone. Unlike a property owner or tenant, a client of the Aston will hold no possessory interest or legally protected right to exclusively control and/or use a unit in the Aston; will not pay rent in order to occupy the unit; has no right to exclude the District, its third-party operator, another client of the Property, or any other third party from his or her assigned unit; and can be removed from the unit without being afforded any of the standard procedures granted

to tenants under the law. And, yet, despite these glaring differences, the District has taken the position that its use of the Property as a non-congregate shelter is no different than a traditional residential apartment house. Not only is that position illogical, it is contrary to the express terms of the Zoning Regulations as set forth above.

II. The DOB Failed To Conduct Any Assessment Of The District's Application For Compliance With The Zoning Regulations.

The District's plans for the Property as described above are public information and also readily apparent from the Permit Application materials submitted to the DOB. Instead of conducting a meaningful assessment of those plans and their compliance with the Zoning Regulations, the DOB blindly relied on the 2022 Determination Letter that the District obtained from the Zoning Administrator more than two years ago. Indeed, the only relevant comment offered by the DOB's zoning reviewer on the District's Permit Application was that the District's proposed "[o]ffice use is not allowed as a matter of right in the RA-5 zone, unless approved by the Board of Zoning Adjustment as a Use Variance." Ex. I at 5. And even that comment was evidently abandoned in light of the District's response: "No change of use, building is compliant with RA-5 Zone, per determination letter." *Id.* There is no indication that the DOB zoning reviewer considered, for example, whether the District's proposed use is more appropriately classified as an "emergency shelter"; or whether clients of the Aston facility will hold leases or ownership rights or otherwise exercise the exclusive use and control of individual units necessary for the District's use to qualify as an Apartment House.

Furthermore, the 2022 Determination Letter clearly states that the opinions expressed therein were non-binding and purely advisory; were based solely on the information presented by the District in August 2022; and did not excuse the District from complying with all applicable Zoning Regulations before proceeding with its plans for the Property. Ex. H at 2. But, even

without that express disclaimer, it should have been evident to the DOB that it could not simply rely on the 2022 Determination Letter in evaluating the zoning compliance of the District's current plans for the Property. The 2022 Determination Letter was provided more than two years ago, before the District had even made an offer to purchase the Property, and the Zoning Administrator's review and opinion at that time were extremely limited in scope. He addressed only the appropriate use classification for "non-congregate housing" *generally*, and whether such a use would be permitted as a matter-of-right in the RA-5 zone applicable to the Property. *See* Ex. H at 1. The Zoning Administrator did not consider or even mention the "emergency shelter" classification. Nor did he address or mention the fact that clients of the Property will not hold leases or ownership rights in their units, **even though those are necessary elements of the Apartment definition in the Zoning Regulations**. *See supra*, pp. 15-20.

The limited information that the District *did in fact* present to the Zoning Administrator – and which served as the basis for his narrow opinion set forth in the 2022 Determination Letter – also differs in several significant ways from what the District is actually proposing for the Property. For example, in August 2022, the District represented to the Zoning Administrator that it intended to provide minimal or no support services to clients at the Property. *See* Ex. H at 2 ("[T]he support services … to be provided at this non-congregate housing location do not rise to the level of a community based residential use, as there will not be a level of care administered that is needed to assist residents in their daily living activities. Instead, the residents will live independently consistent with a residential dwelling unit use").

In June 2023, however, the District revealed that it intended to provide significant support services to individuals staying at the Property. In its presentations to the ANC 2A and Aston CAT in 2023 and 2024, District representatives disclosed that the proposed shelter will

serve individuals with severe medical vulnerabilities who "cannot be adequately served in [existing] low barrier shelters," which offer only "clinic services, not daily nursing or professional staff"; and the District will use the shelter facility to support the "[m]edically vulnerable" with "chronic conditions" who are "in need of [a] medical respite bed[,] …meaning short-term, acute, recuperative stays." *See* Mar. 11, 2024 DHS Presentation at 15-16; Ex. B at 4-7; and Ex. C at 3-7. To that end, the District plans to provide individuals with "consistent medical services" and "intensive case management" "as a condition of admission and in order to continually reside at the Aston." *Id.* District representatives also admitted, in response to questions from the public at the June 21, 2023 ANC meeting, that individuals staying at the Aston will receive three meals per day and other significant support services. In a subsequent submission to the ANC 2A in July 2023, the District stated that Medical Support/CNA Staff at the Aston will "[p]rovide intimate, hands on healthcare to clients in helping them with bathing, dressing, grooming, oral hygiene care, and all other activities of daily living." *See* Ex. A at 5. None of this information regarding the significant, daily support services to be provided at the Property was presented to the Zoning Administrator in August 2022.

For these reasons, the DOB's failure to conduct a meaningful assessment of the District's plans for zoning compliance – and its blind reliance on a two-year-old Determination Letter that was based on incomplete, stale, and inaccurate information – was arbitrary and capricious.

III. The Permit Is Defective Because It Misstates The Proposed Use Of The Property.

The District indicated in its Permit Application – and the DOB repeated in the Permit – that the "Existing Use(s) of Building or Property" and the "Proposed Use(s) of Building or Property" are exactly the same: that is, as "Apartment Houses – R-2." *See* Ex. F at 1, 8; Permit No. B2401624. The inclusion of "R-2" presumably refers to the occupancy category,

"Residential Group R-2," as defined in the Construction Codes. Under 12-A DCMR § 310.4, "Residential Group R-2" refers to "occupancies containing sleeping units or more than two dwelling units **where the occupants are primarily permanent in nature**," which generally includes "Apartment houses[,] Boarding houses (nontransient) with more than 16 occupants[,] Congregate living facilities (nontransient) with more than 16 occupants[,] Convents, Dormitories[, and] Fraternities and sororities[.]" (Emphasis added.) Prior to the District's purchase of the Property, GWU had used the Property as student housing until June of 2022. *See* Ex. K (Certificate of Occupancy dated June 13, 2002). Such a use, which was effectively a dormitory, clearly fell under the Residential Group R-2 category.

However, the District's intended use of the Property does not fall under the R-2 occupancy category. The District has at all times been consistent in describing the services to be provided at the Aston as "transitional." For example, in its PowerPoint presentations to the ANC 2A in June and November 2023 and to the Aston CAT on March 11, 2024, the District indicated that it expects to have significant "flow" of individuals into and shortly thereafter out of the facility into more permanent solutions; that most clients of the Aston will be in need of "short-term, acute, recuperative stays"; and that the minimum length of stay at the Aston will be one month and the average length of stay will be 3-5 months. *See* Ex. B at 3, 6, 7; Ex. C at 3, 4, 7; Mar. 11, 2024 DHS Presentation at 8, 16. Given that the District expects clients of the Aston to reside for only short-term, transitional stays, it cannot credibly be said that occupants of the Property will be "primarily permanent in nature" as the Residential Group R-2 use/occupancy category contemplates. And, because the Permit reflects the wrong occupancy category for the Property, it is fundamentally defective and should be revoked on that basis alone.

IV. The DOB Improperly Issued The Permit Without First Requiring The District To Obtain Zoning Commission Approval To Change The Use Of The Property Pursuant To The GWU PUD.

The Property is subject to and constrained by the GWU PUD, which governs the development and use of University-owned properties and was first approved by the Zoning Commission in March 2007. *See* Z.C. Order No. 06-11/06-12 (Mar. 12, 2007). The Zoning Regulations explicitly "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." *See* 11-X DCMR § 310.2. Here, the GWU PUD is still in effect and will remain in effect until October 2027. Z.C. Order No. 06-11/06-12 at 38.

Among other restrictions, the GWU PUD requires Zoning Commission approval, obtained through a second-stage PUD application, for any development project, other than minor renovation projects, that results in a change in the use of any GWU property. Here, prior to the District's purchase of the Property, GWU had used the Property as student housing until June of 2022. *See* Ex. K. Such a use unquestionably fell under the Residential Group R-2 category as an "occupanc[y] containing sleeping units or more than two dwelling units where the occupants are primarily permanent in nature." 12-A DCMR § 310.4. In contrast, the District's intended use of the Property to provide "transitional" and "temporary" shelter and services does not fall under the R-2 occupancy category. *See* Ex. B at 3, 6, 7; Ex. C at 3, 4, 7; Mar. 11, 2024 DHS Presentation at 8, 16. Under the circumstances, to convert the Property from its most recent approved use as student housing (Residential Group R-2) to a non-congregate homeless shelter with ancillary office and medical uses as the District intends is a change in use that requires Zoning Commission approval under the GWU PUD. The District has not sought or obtained the

required Zoning Commission approval to date. And, it was clearly erroneous and an abuse of its discretion for the DOB to issue the Permit without first requiring the District to seek and obtain Zoning Commission approval under the GWU PUD.

V. The DOB Failed To Conduct Any Assessment Of The District's Application For Compliance With The GWU PUD.

There is no legitimate justification for the DOB's failure to consider the requirements and restrictions of the GWU PUD and whether the District's plans comply with the terms of the GWU PUD. Both the District and the DOB are aware that the Property is part of GWU's Foggy Bottom campus and subject to the GWU PUD. Prior to the District's closing on its purchase of the Property, the title company conducting the closing on behalf of the District and GWU, requested a Zoning Compliance Letter from the Office of Zoning Administration. When the Zoning Administrator issued a Zoning Compliance Letter on August 16, 2023, he indicated, among other things, that "**[t]he property located at 1129 New Hampshire Avenue, NW is subject to PUD #06-12Q**." *See* Ex. L (emphasis added). Similarly, the DC Official Zoning Map, which is expressly incorporated in and made part of the Zoning Regulations (*see* 11-A DCMR § 205.3), indicates that the Property is subject to the GWU PUD. The District's contract to acquire the Property from GWU also explicitly acknowledged that "the Property is part of Seller's Foggy Bottom campus." *See* Proposed Contract CA25-254, at Ex. I. Despite the District's and the DOB's knowledge of the GWU PUD and the restrictions it places on the development and use of the Property, the District omitted any mention of the GWU PUD in its Permit Application; and the DOB ignored the GWU PUD in its evaluation and subsequent issuance of the Permit. These failures are an independent basis to revoke the Permit.

CONCLUSION

Appellant and its members of individual residents and businesses in close proximity to

the Property have the right to ensure that properties within their neighborhood are developed and used in accordance with applicable laws, including the Zoning Regulations. For this reason and all of the reasons set forth above, Appellant is directly and adversely affected and aggrieved in a materially adverse manner by the issuance of the Permit for the Property. If the Permit is allowed to remain in effect, Appellant and its membership roll of West End property owners and occupants will have been deprived of the protections afforded to them by the Zoning Regulations. Accordingly, Appellant respectfully requests that the Board enter an order directing the DOB to revoke the Permit and require the District to comply with all applicable requirements of the Zoning Regulations before any new permit may be issued for the Property.

Executed on: October 4, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 4th day of October 2024, a true and correct copy of the foregoing was served by first-class mail and email on the following:

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