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 EMERGENCY MOTION FOR STAY AND REQUEST FOR EXPEDITED HEARING DATE

Appellant West End DC Community Association ("Appellant" or "WEDCCA"), by and through undersigned counsel, hereby respectfully submits this emergency motion for (1) a stay of all remaining construction and the use and occupancy of the property located at 1129 New Hampshire Avenue, NW (the "Aston" or "Property") until such time as the Board issues a decision in Appellant's appeal of Building Permit No. B2401624 (the "Appeal"); and (2) an expedited hearing date in the Appeal, stating as follows:

The Permit, which was issued by the Department of Buildings ("DOB") on August 7, 2024, authorizes the owner of the Property, the District of Columbia,[1] to perform extensive interior renovations to the Aston and, in turn, complete the District's redevelopment of the Aston for use as a non-congregate shelter facility for up to 190 homeless persons. 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. Appellant has filed an appeal of the Permit on the grounds that the DOB's decision to issue the Permit was clearly erroneous and inconsistent with the Zoning Regulations in multiple respects, including that it improperly authorizes work and the

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

District's use and occupancy of the Property without the necessary (1) special exception approval from this Board to operate an emergency shelter in the RA-5 zone; and (2) approval from the Zoning Commission to change the use of the Aston pursuant to Planned Unit Development (PUD) No. 06-12 and Campus Plan No. 06-11 (hereinafter, the "GWU PUD").

For these reasons, and as explained in greater detail below, all of the relevant factors weigh in favor of a stay: (1) Appellant is likely to prevail on the merits of its Appeal; (2) Appellant, its members and contributors, and the West End neighborhood as a whole will suffer irreparable injury in the absence of a stay; (3) the District will suffer little or no harm from a brief stay and, in any event, any harm is far outweighed by the harm that Appellant is likely to suffer in the absence of a stay and also can be mitigated by the scheduling of an expedited hearing in the Appeal; and (4) the public interest favors granting a stay. Accordingly, the Board should grant this motion, enter a brief stay as outlined herein, and schedule a hearing in this Appeal as soon as its schedule permits.

ARGUMENT

This Board has the authority pursuant to D.C. Code § 6-641.07(g)(1) and (4) to enter a stay in connection with the appeal of a building permit issued by the DOB. *See generally* BZA Appeal No. 15129 *of Richard B. Nettler* (1989); BZA Appeal No. 15136 *of Phil Mendelson on behalf of ANC 3C* (1989). In evaluating a motion for stay, the Board is "required to consider four factors: [1] whether the movant [is] likely to succeed on the merits, [2] whether denial of the stay would cause irreparable injury, [3] whether granting the stay would harm other parties, and [4] whether the public interest favors granting a stay." *Kuflom v. District of Columbia Bureau of Motor Vehicle Servs.*, 543 A.2d 340, 344 (D.C. 1988) (citations omitted). "When the last three factors strongly favor interim relief, only a 'substantial' showing of likelihood of success, not a

'mathematical probability,' is necessary for the court to grant a stay." *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987).

A. Appellant Is Likely To Prevail On The Merits.

In its Memorandum in support of this Appeal, which is incorporated herein by reference, Appellant describes in detail five reasons why the DOB's decision to issue the Permit was clearly erroneous and inconsistent with the Zoning Regulations:

First, the DOB improperly issued the Permit without first requiring the District to obtain a special exception for its planned use of the Aston. Based on the facts set forth in Appellant's Memorandum (pp. 2-8), which were known and/or readily available to the DOB during its consideration of the District's 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* Mem., 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 [that] 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* Mem. Ex. F at 1, 8. That assertion fails because (1) clients of the District's proposed shelter will not have the exclusive use and control of individual units

necessary for the Aston to qualify as an Apartment House under the Zoning Regulations; and (2) 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." Mem., pp. 15-20.

Second, the DOB failed to conduct any assessment of the District's Permit Application for compliance with the Zoning Regulations. The District's plans for the Property as described in Appellant's Memorandum 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. In fact, 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." Mem. 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. Mem. 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* Mem. 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* Mem., pp. 15-20. Finally, as explained in Appellant's Memorandum (pp. 21-22), 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 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.

Third, 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* Mem. 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 Aston, GWU had used the Property as student housing until June of 2022. *See* Mem. 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 Community Advisory Team ("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* Mem. Ex. B at 3, 6, 7; Mem. Ex. C at 3, 4, 7; Mar. 11, 2024 DHS Presentation at 8, 16.[2] 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

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

be revoked on that basis alone.

Fourth, 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 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* Mem. Ex. K. As explained above, 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* Mem. Ex. B at 3, 6, 7; Mem. 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.

Fifth, the DOB failed to conduct any assessment of the District's Application for compliance with 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* Mem. 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.[3] 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.

In sum, each of the foregoing reasons alone is a sufficient basis for the Board to revoke the Permit and direct the DOB to refrain from considering any renewed permit application and/or

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

application for a certificate of occupancy unless and until the District seeks and obtains the necessary approvals from the Board and the Zoning Commission. Accordingly, Appellant is likely to prevail on the merits of this Appeal.

B. Appellant Will Suffer Irreparable Harm In The Absence Of A Stay.

Appellant, its members and contributors, and the West End neighborhood as a whole will suffer irreparable harm in the absence of a stay.

Since first announcing its plans to purchase and redevelop the Aston in May 2023, 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 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] According to announcements made at the Aston CAT meeting on September 23, 2024, the District has once again delayed its anticipated move-in date, this time because the Property failed a recent inspection due to insufficient fire exits and "door closers" at the entrances to each unit.[5] Nevertheless, the District has publicly committed to addressing the issues identified in the failed inspection and reaffirmed its plans to move clients into the Aston as soon as possible. Given the District's stated intentions and the limited work that remains in order to address the failed inspection and prepare the Property for client move in, the District will almost certainly begin operating the Aston as a non-congregate shelter before the Board has the opportunity to hear the

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

[5] *See* Ella Mitchel, *DC indefinitely delays opening of Aston unhoused shelter following failed building inspection*, The GW Hatchet, Sept. 26, 2024, *available at* https://gwhatchet.com/2024/09/26/dc-indefinitely-delays-opening-of-aston-unhoused-shelter-following-failed-building-inspection/.

merits of this Appeal on a standard schedule. And, once that happens, Appellant's Appeal will have been effectively mooted, and Appellant will be denied its full due process rights.

As the Board is aware, the Zoning Regulations are intended to promote and maintain the character of the various neighborhood zones, and to encourage the stability of the zones and the value of the properties contained in them. 11-F DCMR §§ 101.1, 101.2, 101.3. To those ends, the Zoning Regulations identify certain types of property uses that are permitted only as a special exception within the RA-5 zone, including, under certain circumstances, "[e]mergency shelter[s]." 11-U DCMR § 420.1(f). And, the special exception approval process is designed to ensure that any non-residential uses and development in the RA-5 zone are strictly compatible with the adjoining residential uses that are permitted as a matter of right in and which predominate the neighborhood.

Indeed, in general, the Board is authorized to grant a special exception where, in its judgment, the special exception "(a) [w]ill be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps; (b) [w]ill not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps; and (c) [w]ill meet such special conditions as may be specified in this title." 11-X DCMR § 901.2; *see also id.* § 901.3 ("The applicant for a special exception shall have the full burden to prove no undue adverse impact and shall demonstrate such through evidence in the public record"). In addition to this general showing required of any applicant for a special exception, 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 [that] there is no other reasonable alternative to meet the program needs of that area of the District[.]" 11-U DCMR § 420.1(f).

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. If the District is nonetheless allowed to complete its redevelopment of the Aston and proceed with its plans to operate the Aston as a non-congregate shelter, it will not only undermine the economic and public policy objectives of the Zoning Regulations, but also harm the neighborhood's property owners and occupants that the Zoning Regulations are designed to protect. On the other hand, a brief stay will simply maintain the status quo and preserve this Board's authority to safeguard the purpose and character of the various neighborhood zones through the special exception approval process.

C. <u>The District Will Suffer Little Or No Harm From A Brief Stay.</u>

In contrast to the significant harm that Appellant and the West End neighborhood would suffer in the absence of a stay, the District will suffer little or no harm from a brief stay until the Board issues a decision in this Appeal. The District's planned use of the Aston is not a for-profit endeavor, and it has no financial interest in the Aston's operation or the outcome of this Appeal. Nor would a brief stay cause any practical harm to the District. The District has retained a third-party provider to operate the Aston on its behalf, so the District has not dedicated any of its own resources or personnel to the operation of the Aston. Furthermore, any stay in this Appeal would pale in its duration to the District's own self-imposed delays since it acquired the Aston. The

District reached an agreement to purchase the Aston in January 2023, and it closed on its purchase on August 23, 2023. Despite supposedly selecting the Aston for its immediate readiness to be operated as a non-congregate shelter, the District has spent the last year planning and preparing its operations, delaying the Aston's opening on at least five separate occasions. Under the circumstances, the District cannot credibly claim any meaningful harm from the imposition of a stay in this Appeal.

Moreover, any perceived harm that the District might allege as a result of a stay is entirely of its own making. The District has known about the zoning implications of its proposed use of the Aston for years. That is why it sought a zoning determination letter from the Zoning Administrator (albeit based upon incomplete, stale, and inaccurate information) more than two years ago, in August 2022. While the Zoning Administrator provided the District with the opinion that it wanted – based on the self-serving information that the District curated for him – he made it clear to the District that his opinions 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 Aston:

> 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.

Mem. Ex. H at 2 (bold and underline in original; italics added). The District chose to ignore the Zoning Administrator's disclaimer and forego the process of seeking a special exception from this Board and approvals from the Zoning Commission. It did so at its own peril. *See Draude v. District of Columbia Bd. of Zoning Adjustment*, 582 A.2d 949, 951 (D.C. 1990) (noting that a property owner who proceeds with construction while a zoning appeal is "making its way through the administrative and judicial process" does so at its own risk, because the Court "would not hesitate to order appropriate relief," which might include requiring the owner to "tear down" any improper construction); *Interdonato v. District of Columbia Bd. of Zoning Adjustment*, 429 A.2d 1000, 1004 (D.C. 1981) (Property owners who decided to proceed with development while zoning appeal was pending did so "solely at their risk. They were not entitled to rely upon their own assumptions that this court's decision would be favorable to them").

The District has also known for more than a year that members of the West End community object to its redevelopment of the Aston and its failure to obtain necessary zoning approvals. The District's plans and legal failures in this regard have been the subject of at least two Superior Court cases, the first of which was filed in July 2023, and the second of which was filed by the Appellant in October 2023 and alleges many of the zoning issues raised in this Appeal. Indeed, Appellant's counsel first raised the zoning issues at issue in this Appeal in July 2023. The District chose to ignore these issues and the persistent objections from members of the community and to proceed with its acquisition and redevelopment of the Aston in spite of them. Had the District opted to seek a special exception from this Board and/or approval from the Zoning Commission when Appellant first raised those issues with the District in July 2023, it would not be in this situation. The District would either have obtained the necessary approvals

from the Board and the Zoning Commission or not; but, either way, the District would have had clarity on whether its redevelopment could proceed many months ago, well before it expended any time and resources in preparing to operate the Aston as a non-congregate shelter facility. Under the circumstances, the District only has itself to blame for any harm that it believes it will suffer now from a brief stay.

D. <u>The Public Interest Favors Granting A Stay.</u>

The public has a significant interest in the enforcement of the Zoning Regulations. As noted above, the Zoning Regulations are designed to promote and maintain the character of the various neighborhood zones, and to encourage the stability of the zones and the value of the properties contained in them. 11-F DCMR §§ 101.1, 101.2. The residential apartment (RA) zones in particular are "designed to provide for residential areas suitable for multiple dwelling unit development and supporting uses." 11-F DCMR § 101.1. One of the primary ways that the Zoning Regulations seek to accomplish these policy objectives for the RA zones is by limiting the types of *non*-residential uses that may be conducted to those that are "compatible with adjoining residential uses" and by requiring that such uses be approved by the Board through the special exception process. And the special exception process itself ensures that any non-residential uses are in harmony with the purpose and intent of the Zoning Regulations and do not adversely affect the neighborhood and nearby properties. 11-X DCMR §§ 901.2, 901.3.

Moreover, by explicitly requiring that a heightened showing be made for a special exception to operate an Emergency Shelter for more than 25 persons in an RA zone, the Zoning Regulations recognize the unique impacts that such a use may have on the surrounding neighborhood and its residents and businesses. For that reason, the Zoning Regulations explicitly carve out additional safeguards where the proposed special exception use is an

Emergency Shelter. An applicant proposing such a use must demonstrate – beyond what is required for any other special exception use in an RA zone – that the proposed 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 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 [that] 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).

The District is not exempt from complying with the Zoning Regulations, and it has no right to unilaterally redevelop and operate the Aston in a manner that violates well-established use restrictions and approval procedures for the applicable zone. *See, e.g.*, *Speyer v. Barry*, 588 A.2d 1147, 1153 (D.C. 1991) ("[W]e must hold that although the District government was previously exempt from zoning laws applicable to private parties, it is exempt no longer"). Like any other property owner intending to put its property to a use that requires a special exception or approval from the Zoning Commission, the District must submit to the administrative authority of the Board and Zoning Commission and abide by the applicable procedures set forth in the Zoning Regulations as summarized above. To allow the District to proceed with its use of the Aston without the necessary approvals from this Board and the Zoning Commission would render the Zoning Regulations and the policy objectives that they serve meaningless. On the other hand, granting this Appeal and requiring the District to adhere to the procedures set forth above would promote the policy objectives of the Zoning Regulations and protect and enhance the West End neighborhood and its individual residents and businesses. Imposing a brief stay in this Appeal will preserve the status quo while the Board considers this Appeal and prevent the District from circumventing the authority of the Board and Zoning Commission to determine

whether particular non-residential uses are compatible with the Zoning Regulations and the purpose and character of the RA-5 zone.

CONCLUSION

For all of the above reasons, the Board should grant this motion, enter a brief stay as outlined herein, and schedule a hearing in this Appeal as soon as practicable.

Executed on: October 10, 2024

Respectfully submitted,

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CERTIFICATION REGARDING REQUEST FOR CONSENT

By email on the morning of October 10, 2024, undersigned counsel sought consent to the relief requested in this Motion from the other parties to this Appeal. Counsel for the Department of Buildings and for the property owner, the Department of General Services, both respectfully declined to consent. ANC 2A Chairperson, Trupti J. Patel, also responded and declined to consent on behalf of ANC 2A.

/s/ Nicholas E. McGuire
Nicholas E. McGuire

CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of October 2024, a true and correct copy of the foregoing was served by email on the following:

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