COZEN O'CONNOR

March 6, 2020

Meridith H. Moldenhauer
Direct Phone 202-747-0763
Direct Fax 202-683-9389
mmoldenhauer@cozen.com

Frederick L. Hill, Chairperson
Board of Zoning Adjustment
441 4th Street, NW, Suite 200S
Washington, DC 20010

RE: BZA Appeal No. 20183
DGS' Response In Opposition to Appellant's Motion to Reopen the Record

Chairperson Hill and Honorable Members of the Board:

Pursuant to Subtitle Y § 407.4, Intervenor DC Department of General Services ("DGS") hereby files its response in opposition to March 4, 2020 motion seeking to reopen the record (the "Motion") filed by Appellant, Residences of Columbia Heights, a Condominium (the "Condominium").[1]

At the end of the 4-hour and 47-minute hearing on the Appeal, the Board closed the record. This was memorialized in BZA Exhibit No. 86, a February 27, 2020 "Memo to File" filed by the BZA Secretary, which expressly states, "At the public hearing of February 26, 2020, the Board of Zoning Adjustment completed its hearing procedures, closed the record and scheduled the case for decision on March 25, 2020." The Memo to File then quotes the language of Subtitle Y § 602.6 which governs the BZA's review of motions to reopen the record, such as the one filed by the Condominium.

The Condominium failed to address the zoning standard; so accordingly, the Appellant's Motion must be denied. The narrative included in the Motion's justification does not address any of the standards for reopening a BZA case record, as set forth in Subtitle Y § 602.6 of the Zoning Regulations. Specifically, Subtitle Y § 602.6 states the following:

> Any supplemental material received by the Board after the close of the record that bears upon the substance of the application or appeal shall be returned by the Director and not accepted into the files of the Board. However, if the materials are accompanied by a separate request to reopen the record, the request shall be accepted and presented to the Board for consideration. ***The request must demonstrate good cause and the lack of prejudice to any party***. Such requests may be granted by the presiding officer and, if granted, the supplemental materials shall be entered into the record. (emphasis added)

[1] DGS' Opposition is filed two days after DGS was served with the Condominium's motion on March 4, 2020.

The Condominium failed to demonstrate sufficient evidence to satisfy both prongs of this test.

The Condominium did not submit any evidence demonstrating "good cause" to justify reopening the record. Instead, the Condominium provided new information to supplement the record after the record was closed. The Condominium is not entitled to a second bite at the apple after the Board conducted a thorough hearing and formally closed the record.

We wish to now note a few points in that regard. First, the Condominium does not even argue "good cause" when trying to belatedly assert claims of error in the ANC 1B filing. Factually, the ANC's filing was emailed to the BZA on February 25, 2020, and it was in the BZA record for the February 26, 2020 Hearing. Accordingly, the Condominium could have raised these issues during the hearing, but either failed or chose not to do so. Finally, the Board is well-versed on what ANC communication is entitled to Great Weight and what is not. Therefore, the Condominium's belated statements on that particular matter are not necessary or relevant.

Second, the Condominium does not demonstrate "good cause" when arguing that it wants to provide additional rebuttal testimony, despite the fact that the Condominium provided rebuttal testimony consistent with Subtitle Y § 507.1(f) during the February 26, 2020 Hearing. Without asserting any good cause whatsoever, the Condominium now seeks to insert new information into the record regarding other buildings used by DHS. This is directly contrary to the Board's well-reasoned decision to exclude copies of the Certificates of Occupancy proffered by DGS. Moreover, the Condominium uses this Motion to attempt to repackage many of the same arguments they asserted at the hearing. Such action does not comply with Subtitle Y § 602.6 and must be rejected

Finally, the Condominium does not demonstrate "good cause" through its attempt to incorporate an asserted procedural error regarding DGS's preliminary motion on timeliness. Rather, the Condominium was provided ample and proper opportunity to provide its evidence on that matter during the January 29, 2020 discussion of that preliminary motion.

Plainly, the Condominium fails to demonstrate that reopening the record could not lead to "prejudice to any party" as it is required to show in Subtitle Y § 602.6. Rather, it is clear that reopening the record would prejudice DGS by allowing the filing of additional materials in the record after the record has been closed. As one example, it would prejudice DGS if the Board accepted the Condominium's one-sided and incomplete review of different buildings, without giving DGS the opportunity to file the Certificates of Occupancy for those buildings.[2]

Accordingly, DGS would ask the Board to evaluate the Condominium's Motion on the record at the March 11, 2020 Board Meeting date. If the Board decides to grant the Motion, then DGS would appreciate the opportunity to respond in writing by March 17, 2020, or a later date that the Board may set.

For the reasons set forth above, DGS urges the Board to deny the Condominium's Motion to Reopen the Record. The Condominium has failed its burden under Subtitle Y § 602.6 because

[2] If the record is reopened, then DGS requests that the Board permit these Certificates of Occupancy in the record.

it has not shown good cause to grant the motion to reopen the Record, and it does not demonstrate how reopening the record would not prejudice DGS. Thank you for your attention to this matter.

Sincerely,

Cozen O'Connor

By: Meridith H. Moldenhauer

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March 2020 a copy of the foregoing Reply in Opposition to the Appellant's Motion Seeking to Reopen the Record was served, via electronic mail, on the following:

District of Columbia Department of Consumer and Regulatory Affairs
c/o Hugh Green
1100 4th Street SW, Ste. 5266
Washington, DC 20024
Hugh.green@dc.gov
Attorney for DCRA

David W. Brown, Jr. Esq.
Knopf & Brown
401 E. Jefferson Street, Suite 206
Rockville, MD 20850
brown@knopf-brown.com
Attorney for Appellant

Advisory Neighborhood Commission 1B
2000 14th Street NW, Suite 100
Washington, DD 20009
1B@anc.dc.gov

Jennifer Bristol, SMD Commissioner
ANC 1B06
1B06@anc.dc.gov

Meridith H. Moldenhauer