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SOLE PRACTITIONER (2017)

March 4, 2020

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

Re: **Appeal of Building Permit B1908601**
**BZA Case No. 20183 -- 2500 14th Street, N.W.**
***Request to Reopen Record***

Dear Chairperson Hill and Members of the Board:

Appellant, the Residences of Columbia Heights, a Condominium ("RCH"), hereby requests that the Board reopen the record under Y-602.6 so that RCH may (1) contest the non-compliant filing of several individuals from ANC1B (Exhibit 84); (2) submit rebuttal comments on three aspects of the testimony provided by DHS Director Zeilinger that was not entered into the record in advance of the hearing, as required under Y-302.17; and (3) submit comments in lieu of cross-examination opportunity not provided.

## 1. ANC1B Filing Not Compliant with Y-503.2, Y-302.17

RCH requests that the Board recognize that Exhibit 84—a 2/25/20 memo signed by three individual members of ANC1B with an attached 2018 resolution—does not constitute a "great weight" ANC report under Y-503.2. The document:

- fails to comply with the requirements of Y-503.2 (b) through (h) as no public notice, meeting, vote or resolution was undertaken by ANC1B on the appeal, nor did ANC1B assess or hold deliberations on the building plans and permit,
- does not speak to the matters before the Board in Case 20183, and
- was filed in an untimely manner, on the day of the hearing, February 26, and without notice to parties, contrary to Y- 302.17.

**RCH is not requesting that the Board expunge Exhibit 84 from the record but rather to take due account of RCH's objection that it is not the sort of actual ANC report entitled to "great weight" consideration under Y-503.2.**

Board of Zoning Adjustment
District of Columbia
CASE NO.20183
EXHIBIT NO.87A

## 2. DHS Apartment Buildings Serving as Shelters

### a. Unverified DHS Director Testimony

DGS secured a postponement in the January 29, 2020 hearing, seeking more time to prepare responsive materials. At the hearing, DHS Director Zeilinger read from written testimony, but that testimony was not entered into the record before the hearing, in violation of Y- 302.17. The bulk of her testimony was irrelevant to the matters before the Board, in that it constituted a description of DHS standards for housing homeless individuals, which is not the purview of the Board or the Zoning Regulations.

However, Director Zeilinger did reference sites that were allegedly apartment buildings that served as shelters yet did not undergo special exception hearings, and DGS counsel cited Certificates of Occupancy ("CO") for two such buildings. While the Board eventually decided not to allow the COs to be entered into the record, the Board did allow DGS and DHS to make robust arguments utilizing this information. In fact, the Chairman prompted Director Zeilinger to identify the number of DHS apartment sites. On behalf of RCH, Mr. Gambrell raised an objection that the information had not been submitted prior to the hearing, but the Chairman responded that if the Board decided they "wanted to see it," then RCH would "have an opportunity to take a look at it as well."

RCH was not afforded an opportunity to assess this information in the hearing. Accordingly, RCH requests that the Board accept into the record the research it has undertaken post-hearing on the DHS/DGS testimony. As detailed below, the apartments cited do not appear to support the position of DGS and DHS, as none apparently came before the Zoning Administrator in terms of securing building permits that would have triggered decisions regarding whether the sites were emergency shelters requiring special exception hearing. However, it is possible that in one or more instances, the uses, all of which are in the RA-1 zone, are in violation of U-420.1(f) if operating as emergency shelters without appropriate special exception review.

- **2601-2603 Naylor Road SE**. Director Zeilinger referenced "about 8 apartment buildings we use for apartment-style shelter in this way." One site was 2601-2603 Naylor Road SE. RCH has determined that permits were issued 2010, 2016, 2017 and were all for repairs, including a 11/10/16 permit (B1701572) that states: "Work is for two DHS multifamily building 2601." There is no indication that an emergency shelter review was conducted.

- **1701-1711 V Street SE**. Director Zeilinger also referenced 1701-1711 V Street SE. Permits from 2008 to 2019 all involved repairs with no permits relevant to assessment as emergency shelter.

- **107 Wayne Place SE**. DGS counsel asserted that there were several projects that were supportive of the city's assertions that, as is the situation elsewhere in the District, the Ward 1 site "does not comply with the definition of an emergency shelter." She went on to reference 107 Wayne Street [sic, Place] which has a CO issued in 2012 that says apartment building…." Since the hearing RCH has been able to determine that 107 Wayne Place SE did not have a building permit, prior to 2017, and thus would not have come before the Zoning Administrator for a determination as to whether or not it required a special exception hearing. Furthermore, the CO referenced by DGS counsel has a specific notation, under the Conditions/Restrictions section that reads: "THIS BUILDING NOT TO BE USED AS A HOMELESS SHELTER PER MATT LEGRANT."

- **Irving**. DGS counsel referenced another site on "Irving" with a CO, but Appellant was unable to locate information on this site.

### b. The Zoning Regulations Properly Distinguish Apartment Buildings from "Apartment-Style" Emergency Shelters on the Basis of Their Occupants

In defending the Zoning Administrator's decision to characterize the 35 units of "apartment-style" units of "temporary shelter" authorized by the 2005 Act, the 2016 HSRA and the 2018 HSRAA as an "apartment building," Director Zeilinger made the sweeping assertion that it would be a "dangerous precedent" for the Zoning Regulations to regulate uses on the basis of who the user is, rather than the buildings' nature and use. As RCH understands her testimony, if one is a person meeting the statutory definition of "homeless" in the 2005 Act, their occupancy of a DHS-operated "temporary shelter" is regulated as a special exception if the dwelling unit is one room in a building with common areas for dining and personal care, but their occupancy is by-right as a residential apartment building use if the dwelling units themselves contain all these elements.

This argument, however, is inconsistent with the express terms of the Zoning Regulations. "Emergency shelter" is a stand-alone use, not a subcategory of a larger use group, including "residential." B-200.2(aa). Subcategory (aa)(1) limits this use to "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." Here, unit occupants are not property owners, nor do they have what the law recognizes as a "tenancy." Instead, they have signed an agreement with DHS to abide by rules and regulations for occupancy of the premises but have neither a fixed term for such occupancy or any obligation to pay rent. They are, at best, "roomers,' not "tenants." *See Young v. District of Columbia*, 752 A.2d 138, 144 ((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."). And while Director Zeilinger testified that in some cases, the occupants of apartment-style units stay there for

months or even years, that does not alter the fundamentals of their legal status. Further confirming the distinction between the residential use group, which clearly includes privately owned and operated apartment houses, the "lodging" use group, B-200.2(t), expressly excludes from its ambit "uses which would more typically fall within **the emergency shelter or residential use categories.**" *Id.,* (t)(3) (emphasis added). This sentence makes no sense if an apartment-style emergency shelter is just an example of the residential use category, not the separate and distinct use it is defined to be.

There is a further reason grounded in the Zoning Regulations why Director Zeilinger is quite mistaken in her belief that the Regulations fail in this instance to distinguish one apartment house from another based on the status of the occupants. The 2016 Zoning Regulations carried forward the pattern of the 1958 regulations that, in most residential or mixed-use zones, an emergency shelter housing no more than four persons was a by-right use, whereas any larger shelter was a special exception use. Invariably, then and now, the special exception was subject to conditions designed to ensure that, in any given area, there was not an overconcentration of such uses. In this case, for example, the MU-5A Zone special exception conditions include a prohibition on more than one emergency shelter of seven or more persons within the same square or 500 feet in any direction, unless their cumulative effect would not have an adverse impact on the neighborhood because of traffic, noise, or operations. U-513.1(b)(1),(5). Perhaps Director Zeilinger, as a zealous advocate for the homeless, would view this provision, which plainly does not apply to conventional apartment buildings, as unduly discriminatory, but unless and until the Zoning Regulation is changed or invalidated, it is to be adhered to.

Thus, as to the question, "Did the Zoning Administrator err in concluding that the part of the project being built to satisfy the statutory requirement in the Homeless Shelter Replacement Amendment Act of 2018 of adding 35 "apartment-style" units of "temporary shelter" was merely part of a larger "apartment building?", the answer is "yes." He should have concluded that those 35 units constituted an "emergency shelter," whose definition is limited to "temporary housing" for the homeless, as that term is understood in the 2005 Act mentioned in the definition. Those 35 units should have been treated as an emergency shelter, which means going through the special exception process required for the MU-5A Zone pursuant to U-513.1(b).

### c. DHS's Programmatic Rules for Emergency Shelter Occupancy Are Irrelevant

Finally, Director Zeilinger made an undocumented assertion that the terms of occupancy that DHS imposes on STFH and PSH residents are the same. If her assertion accurately reflects DHS operations and policy, DHS may be in violation of the 2005 Act because, as RCH has detailed, occupancy of PSH is required to be unrestricted in time, whereas occupancy of STFH is intended to be temporary. But whether or not DHS is running its homeless shelter programs according to the established statutory criteria is

irrelevant to the issue of compliance with the Zoning Regulations. By its express terms, the Zoning Regulations limit the term "emergency shelter" to "temporary housing." That is why RCH does not dispute the characterization of the PSH units as something else, i.e., an apartment building, and why RCH does dispute lumping in the STFH temporary housing ("shelter" = "housing" in this context) into the legitimate apartment house use alongside it without seeking and obtaining a special exception.

### 3. Lack of Cross-Examination Opportunity on Timeliness

In the February 26, 2020 hearing, DGS was allowed to cross-examine RCH about timeliness on the grounds that DGS had not been given the opportunity to cross-examine on this issue previously. The Board did not similarly provide RCH the opportunity to cross-examine the Zoning Administrator on this issue. In lieu of recreating an RCH opportunity to cross-examine, RCH simply wishes to draw Exhibit 59 to the attention of the Board, as well as the following brief supporting statement:

DGS and DCRA assert that the appeal is untimely in relation to issuance of the foundation permit. However, RCH is appealing matters associated with the building permit, as it did not regard issuance of the foundation permit and the triggering event for this appeal. The foundation permit does not require a special exception as it does not authorize construction of the assertedly exempt apartment-style units, nor does it include the meaningful connection, as the Zoning Administrator confirmed in the January 29, 2020 hearing, in response to a question from Member John: (LeGrant: "I do not believe that they would illustrate the connection being below grade, because it's DCRA's position is that the connection is above grade in compliance with the requirements.") Secondly, RCH relied upon the footnote in the 3/25/19 "advisory statement" email from Mr. LeGrant, stating: "This email is NOT a "final writing", as used in Section Y-302.5 of the Zoning Regulations [...] Therefore this email does NOT vest an application for zoning or other DCRA approval process...." The importance of such a footnote as a marker of timeliness was affirmed by the Board in a 4-0 vote in Case 20141 on 12/18/19. Finally, as the Board is aware, RCH filed its appeal 24 days following issuance of building permit, well in advance of the 60 day time frame.

In closing, RCH hopes these clarifications can assist the Board so that members can devote their time to review of core exhibits presented by all parties, including the Appellant (33, 55, 78), DCRA (38), and DGS (63).

Very truly yours,

David W. Brown
Attorney for Appellant

/enclosure (Form 150)
cc: See Certificate of Service