BOARD OF ZONING ADJUSTMENT

Washington, D.C.

Appeal by: **Case No. 20183**

The Residences of Columbia Heights, a Condominium

Appeal of Building Permit B1908601
2500 14th Street, NW

APPELLANT'S REPLY TO
DCRA PRE-HEARING STATEMENT

Appellant, The Residences of Columbia Heights, a Condominium ("RCH"), through undersigned counsel, submits this Reply to the Pre-Hearing Statement of the Department of Consumer and Regulatory Affairs ("DCRA"), pursuant to Board Rule Y-302.18. This appeal concerns the validity of DCRA's issuance of building permit B1908601 (the "Permit") for a new building to be constructed on the property at 2500 14th Street, N.W. (the "Property"). What the Permit approves is the construction in one building of 35 units of Short Term Family Housing ("STFH") and 15 units of Permanent Supportive Housing ("PSH") (collectively, the "Project"). Further, this new building is proposed to be connected to the existing Rita Bright Community enter on the Property in such a way as to enable the existing and new structures to be regarded as a single building under the Zoning Regulations.

ARGUMENT

In simplified terms, RCH presents three grounds for its appeal of the Permit. First, it should not have issued the Permit unless and until the Board approved a special exception for the 35 units whose use is defined in the Zoning Ordinance as an emergency shelter, an approval the Department

Board of Zoning Adjustment
District of Columbia
CASE NO.20183
EXHIBIT NO.55

of General Services, which controls the Property, has not sought or obtained. Second, the side yard setback requirement for the new building has been violated, having been excused from compliance by DCRA on the erroneous grounds that the existing and new buildings will constitute a single building. Third, the Permit has been issued in violation of the parking and loading requirements for the emergency shelter portion of the Project. DCRA has failed to refute any of these claims, as made clear in RCH's Pre-Hearing Statement and as briefly reiterated below.

I. A SPECIAL EXCEPTION IS REQUIRED FOR THE EMERGENCY SHELTER PORTION OF THE CONSTRUCTION AUTHORIZED BY THE PERMIT

DCRA asserts that RCH's claim that a special exception is required contravenes the Zoning Regulations. DCRA Statement at 4. But RCH made clear that under (a) the HSRA as to Wards 3-8 and (b) the HSRAA as to Ward 1, all the buildings authorized are "facilities to provide temporary shelter for families experiencing homelessness," and that such a use falls squarely within the definition of the "emergency shelter" use in the Zoning Regulations, i.e., B-100.2. This is so regardless of the internal configuration of the units, such as "single room" or "apartment style." Therefore in terms of compliance with the Zoning Regulations, there is no justification for the Board to distinguish the Ward 3-8 emergency shelters from the Ward 1 emergency shelter. Indeed, RCH documented many instances of City officials referring to the STFH units in the Project as an "emergency shelter."

DCRA attempts to bolster its argument by refuting claims RCH did not make. Thus, DCRA asserts that RCH claims "that the STFH Units somehow transform the entire project into an 'emergency shelter,' and that the alleged 'emergency shelter' use is a 'dominant use' requiring a 'special exception,'" and that the Appellant "fails to provide any legal justification for these assertions, and the suggestion by the Appellant that there is a "dominant use" is irrelevant, without

support, and unfounded in the zoning regulations." DCRA Statement at 4-5. RCH has made no such "dominant use" claim or even remotely suggested that the 15 PSH units are to be embraced within the special exception required for the 35 emergency shelter units. Rather, RCH has relied on B-202, Applicability of Multiple Uses, which subjects each use in a multiple use buildings to "the regulations of the applicable use category."

DCRA also misstates RCH's argument regarding the definition of "apartment." Contrary to DCRA's claim, DCRA Statement at 8, RCH has not argued that the concept of "control" in that definition has been "abandoned." RCH's point is that the meaning of that term was clarified in an amendment to the definition following the Board's decision in BZA Case No. 18151. "Control" is not about keys to the unit or the exclusiveness of physical occupancy; it is about legal responsibility for the premises, as evidenced by "rental agreement or ownership." B §101.2.

DCRA argues that the use of the word "may" in reference to the two listed "control" options shows that these are not the exclusive means to demonstrate "control." DCRA Statement at 8. But DCRA offers nothing to demonstrate anything more than the sort of "control" a hotel guest has over his or her room by being supplied a key or coded card. Like a hotel, a use not allowed in this zone, the emergency shelter use is geared to temporary occupancy of the units by those in need of temporary shelter.[1]

[1] Subtitle B contains multiple instances in which the "may/or" language is intended to provide prescriptive guidance, not optional or non-mandatory, open-ended guidance. These examples include: Farmers Market ("The market may operate daily, intermittently throughout the week, or seasonally."); Vegetated Roofs ("Vegetative roofs may be intensive or extensive but are not limited to modular or layered growth systems."); Medical Care ("These facilities may provide medical or surgical care to patients or offer overnight care"). Cases in which the term "may" is used and is intended to be provide more options, provide clear language to that effect, such as "may include, but are not limited to" or "examples include."

II. THE PROJECT VIOLATES THE REAR YARD SETBACK REQUIRED FROM THE RCH PROPERTY BECAUSE THE EXISTING AND NEW STRUCTURES CANNOT PROPERLY BE DEEMED A SINGLE BUILDING

DCRA does not dispute that the new building must be set back 15 feet from the RCH building (instead of zero feet as allowed by the Permit) if it cannot be considered part of the pre-existing single building on the Property, i.e., the Rita Bright Community Center. But, DCRA argues, the setback requirement is obviated by the connection between the two buildings, which satisfies the "meaningful connection" requirement of B§309.1. DCRA Statement at 8.

DCRA claims that the "meaningful connection" is fully above grade, as required by B-309.1(a). But DCRA relies on DCRA Exhibit 38F, "Connection Level P1 GFA." RCH used this very same exhibit to document that the connection is located in a partially below-grade parking level (i.e., P1) and is therefore not "fully above grade."

In addition, while the "meaningful connection" is very likely "enclosed" in compliance with B-309.1(b), the "meaningful connection" is most certainly not "heated," as required by B-309.1(c). It is, frankly, hard to comprehend how a passageway that is located in a parking garage, within a building that is designed to achieve LEED Gold energy efficiency certification, would be heated.

Thus, the Project fails two of the four B-309.1 tests: (a) fully above grade and (c) heated. Further analysis of compliance with other B-309.1 provisions is thus unnecessary. However, RCH feels compelled to point out the lack of support for compliance with the B-309.1(d) test. First, it is hard to fathom how compliance with the B-309.1(d) requirement for "free and unrestricted passage" can be achieved via a parking garage "meaningful connection" point that is also open to use by Rita Bright visitors and staff, as these non-STFH staff and residents would most certainly not be allowed to enter the STFH/PSH premises without going through a security checkpoint. The

requirements for such security are referenced in the Safety and Security section of the Good Neighbor Protocol ("Provides contracted security on-site 24 hours a day, 7 days a week....") and further detailed in the Security Services requirements for contractors assigned to fulfill responsibilities under the Human Care Agreement for Short Term Family Housing (STFH), 2018:

https://dhs.dc.gov/sites/default/files/dc/sites/dhs/page_content/attachments/ShortTerm%20Family%20Housing%20Solicitation%20.pdf

accessed 1/23/20), which specifies detailed requirements for security guards, intake and screening procedures, recordkeeping, and other requirements. The approved building plans provide no evidence of an intent to staff and operate a secure access point at the garage access point, meaning that residents will either be put at risk by the presence of an insecure site or access will, in reality, be highly restricted, contrary to B-309.1(d).

Finally, a space that is clearly not a point of access can hardly be understood to serve as "common space shared by users of all portions of the building," the second part of the B-309.1(d) test; there would be no point to enter this space as it would simply not serve as common space.[2]

[2] DCRA also refers to BZA Appeal 19950 [sic, 19550], claiming that the Board affirmed the Zoning Administrator's interpretation of a 'meaningful connection' under subtitle B § 309.1 in an analogous building project. DCRA Statement 9-10. But there is no final order for BZA No. 19550. Apart from its lack of finality, definiteness and certainty, it is difficult to determine how this case is applicable here. However, in a review of the case materials and transcripts from that case, the "common hallway" is not analogous to the Rita Bright/Ward 1 space, as the "meaningful connection" was apparently deemed compliant with all four of the provisions of B-309.1 and that the point of difficulty was with B-309.1(d), which presents an "either" option (common space or free access). In this case, as explained above, RCH has provided evidence that the Project's "meaningful connection" with the Rita Breight Community Center fails two B-309.1 provisions, in that it is not fully above grade (B-309.1(a)), and is not "heated." (B-309.1(d)).

Respectfully submitted,

David W. Brown
Knopf & Brown
401 E. Jefferson Street
Suite 206
Rockville, Maryland 20850
(301) 545-6100
(301) 545-6103 – fax
Email: brown@knopf-brown.com

CERTIFICATE OF SERVICE

IT IS CERTIFIED that this 24th day of January 2020 (or as soon thereafter as the BZA approves the filing), two paper copies of the Appellant's Reply to DCRA Pre-Hearing Statement was mailed, first class, postage prepaid to the Office of Zoning, and one copy was mailed, first class, postage prepaid or sent via email, to the applicant and owner of the building permit, Department of General Services, 1250 "O" Street, NW, Washington, DC 20009 dgs@dc.gov; and Advisory Neighborhood Commission 1B, Suite #100 B, 2000 14th Street NW, Washington, DC 20009, 1b09@anc.dc.gov; Advisory Neighborhood Commission 1B Chairperson 1B06, 1B06@anc.dc.gov; Commissioner Jen Bristol, who represents the Single Member District, 1B06@anc.dc.gov; and Hugh J. Green, Esq. 1100 4th Street, SW, 5th Floor, Washington, DC 20024 hugh.green@dc.gov.

David W. Brown, attorney for appellant