BOARD OF ZONING ADJUSTMENT
Appeal by the Residences of Columbia Heights, a Condominium of the Building Permit B1908601 – 2500 14th Street, NW

Appellant's Pre-Hearing Statement

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Board of Zoning Adjustment
District of Columbia
CASE NO.20183
EXHIBIT NO.14

Appellants

This Pre-Hearing Statement is filed by The Residences of Columbia Heights, a Condominium, at 1420 Clifton St., N.W. (Appellant), located directly abutting the proposed Ward 1 Short-Term Family Housing (STFH) authorized to be constructed at 2500 14th Street, N.W. by DCRA-approved building permit B1908601. Appellant's condominium is on lot 203, square 2662. A Google Map aerial photograph shows the "H" shaped condominium and its parking area, north of Peluca Alley and abutting the Rita Bright Community Center. Exhibit 2.

Summary of Case

The appeal is of the Zoning Administrator's approval of permit B1908601 (the "Permit") to construct what is described as follows: "New building with 50 residential apartments for Short Term Family Housing (STFH). 35 will be 2 and 3 bedroom apartments. The remaining units will be 1 bedroom apartments for Permanent Supportive Housing (PSH)." Exhibit 3. The part of the project that Appellant avers is an "emergency shelter" use under the Zoning Regulations is authorized by Section 2 of D.C. Act 22-441, amending the Homeless Shelter Replacement Act of 2016 ("HSRA"), Section 3(a)(l). The HSRA was enacted "to provide temporary shelter to families experiencing homelessness." HSRA Preamble. The issues under appeal include:

1. Failure to file for a special exception from the Board of Zoning Adjustment (BZA) for construction of an emergency shelter, as required by U-513.1(b).
2. Failure to provide the necessary rear yard setback for the new building to be located at 2500 14th Street, N.W., as required by G-405.2. Without that rear yard setback, the proposed shelter will be constructed directly abutting the Appellant's building, effectively sealing off its courtyard.
3. The permit violates the parking and loading requirements for the portion of the permitted construction that constitutes an "emergency shelter" use.

Creation of a Ward-specific shelter system to replace the D.C. General homeless shelter is a City-wide policy priority. Appellant thus sought redress within the framework of advisory bodies and officeholders furthering that policy -- specifically: the Ward 1 Short-Term Family Housing Advisory Team, the DCRA Zoning Administrator, and Ward 1 City Councilmember Brianne Nadeau and her staff. Ultimately, these efforts were unsuccessful in ameliorating Appellant's

§3(a)(1) of the HSRA to designate 2500 14th Street, N.W., as the replacement location for the Ward 1 "temporary shelter for families experiencing homelessness." The HSRTAA increased the number of replacement units from 29 to 35 and added authorization to include 15 units of "permanent supportive housing" ("PSH") for seniors. Appellant does not contest the statutory basis for these changes to the initially approved plan for Ward 1 under the HSRA.

Subsequently, a Ward 1 Advisory Team was formed in March 2018, with representatives from ANC 1B, the Ward 1 Councilmember's office, various city agencies and community groups, and the Appellant. In the Advisory Team meetings, zoning compliance issues were not brought up and discussed. City representatives did not discuss or explain why the Ward 1 shelter would not be undergoing a BZA special exception review or why a rear yard setback to Appellant's building was not being provided. Ward 1 Councilmember Chief of Staff Tania Jackson eventually advised Appellant on April 3, 2019, that zoning matters were on a separate track and not part of the Advisory Team review process.

Appellant brought the lack of a rear yard setback to the City's attention on February 20, 2019. Thereafter, on March 14, 2019, the City's contracted counsel sought from DCRA an interpretation that a rear yard setback to the common lot line with the Appellant's property was not required. Subsequently, DGS provided this interpretation to the Zoning Administrator via its counsel on March 25, 2019. DGS's counsel claimed that the rear yard was located facing Chapin Street, N.W., i.e., the rear yard of the Rita Bright Community Center. Counsel's rationale was that the new building could be deemed part of the existing community shelter building, which did meet its rear yard setback requirement. Exhibit 3.

In an April 3, 2019 meeting with DGS, its counsel, Councilmember Nadeau and Appellant, the City was unwilling to address Appellant's setback concerns. Appellant subsequently retained counsel who prepared an April 18, 2019 memo (emailed to the Zoning Administrator on April 19, 2019) documenting non-compliance with the rear yard setback requirement as well as additional zoning violations, including the special exception requirement for emergency shelters. Exhibit 4. On May 3, 2019, counsel representing DGS wrote a letter to the Appellant's attorney, disputing all cited concerns. Exhibit 5. On May 8, 2019, the Appellant's attorney wrote a memo to the Zoning Administrator disputing the assertions in the May 3, 2019 letter of DGS counsel, as well as the March 25, 2019 email interpretation by the Zoning Administrator. Exhibit 6. This memo was

discussed in a May 10, 2019 in-person meeting with the Zoning Administrator and DCRA General Counsel, attended by the Appellant, Appellant's attorney, and the Ward 1 Councilmember's Chief of Staff. The Zoning Administrator did not respond to a follow-up Appellant email inquiring about the status of his assessment.

The Permit

The Description of Work in Permit B1908601 states: "DGS New building with 50 residential apartments for Short Term Family Housing (STFH). 35 will be 2 and 3 bedroom apartments. The remaining units will be 1 bedroom apartments for PSH. Staff parking (9-12 spaces) is located on one level, partially below grade in the new building. The building will be one partially below grade parking level and five above grade levels including residential units, parking and building services, community rooms, and administrative space. The site will also include outdoor recreation space, a courtyard playground for use by residents of the STFH program and a terrace for the PSH residents. The building is expected to achieve a LEED for Homes Gold rating with sustainable features such as high efficiency systems and fixtures, green roofs, and a continuous thermal envelope." The Permit was issued on September 30, 2019. Exhibit 7.

Zoning Administrator Errors

Failure to Request Special Exception Under U-513.1(b)

The subject property is located at 2500 14th Street N.W., located in the MU-5A zone. MU-Use Group E. Subtitle U-513.1(b) specifies that an "emergency shelter" is a special exception use in that zone. In turn, the emergency shelter use is defined as follows:

> Emergency Shelter: 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, effective October 22, 2005 (D.C. Law 16-35; D.C. Official Code §§4-751.01 *et seq.*); an emergency shelter use may also provide ancillary services such as counseling, vocational training, or similar social and career assistance. B-100.2.

When challenged on filing its Permit application without first seeking an "emergency shelter" special exception from the BZA, DGS argued that the proposed building is an "apartment house." DGS claimed that a special exception is not necessary as the 35 STFH units and the 15

PSH units qualify as an "apartment house" under Subtitle B 100.2, and thus, constitute a matter-of-right use in the MU-5A zone under U-512.1. Exhibit 5 at 1. DGS notes that the facility will contain three or more "apartments" providing accommodations on a monthly or longer basis. *Id.* at 2. But while it may be correct that the 15 PSH units constitute an "apartment house," that does not make the 35 STFH units part of it, regardless of whether the STFH units are single rooms or apartments.

A careful look at the applicable provisions of the Zoning Regulations makes clear that DGS's argument cannot be squared with its terms. First of all, for the other Wards for which shelters were authorized by the HSRA "to provide temporary shelter for families experiencing homelessness," HSRA §3(a), DGS sought and obtained special exception approval for them from the BZA as emergency shelters, as that use is defined in the Zoning Regulations. The BZA approval orders, all final and in effect at this point, are as follows: Order 19287 (Ward 7); Order 19288 (Ward 8); Order 19289 (Ward 4); Order 19450 (Ward 3); Order 19451 (Ward 6); and Order 19452 (Ward 5).

Despite this consistency of approval in all the other Wards subject to the HSRA, DGS contends that the shelter authorized by the HSRA for Ward 1 is materially different from those authorized for Wards 3-8, in that for Ward 1, the type of unit is "apartment style," rather than the "D.C. General Family Shelter replacement units" authorized for Wards 3-8. Exhibit 5 at 2. While the specific authorizations for the Ward 1 units do differ from the others in terms of the internal configuration of the units, all seven HSRA authorizations are encompassed within the statutory authorization for each to "construct a facility to provide temporary shelter for families experiencing homelessness." This wording is identical for all seven affected Wards: Ward 1 – HSRA §3(a)(1)(B) and HSRTAA §3(a)(1); Ward 3 – HSRA §3(a)((2); Ward 4 – HSRA §3(a)(3)(B); Ward 5 – HSRA §3(a)(4); Ward 6 – HSRA §3(a)(5); Ward 7 – HSRA §3(a)(6); and Ward 8 – HSRA §3(a)(7).

In short, regardless of the internal configuration of its units – single rooms or "apartment style" units -- all the buildings authorized by the HSRA are "facilities to provide temporary shelter for families experiencing homelessness," and all fall within the term "emergency shelter" as that use defined in the Zoning Regulations. That definition in plain language encompasses all facilities

providing temporary shelter to the homeless; it makes no distinction among these facilities according to the internal configuration of units within the facility.

DGS also argues that the entirety of the facility authorized by the Permit is an "apartment house" use because the facility is comprised of both STFH (70% of the units) and PSH (30% of the units), with STFH and PSH units within the same building. Exhibit 5 at 1. But applying the "apartment house" use standards to the whole building, including the other (and actually dominant) use, the argument violates B-202.1, Applicability of Multiple Uses, which states: "When a site contains more than one (1) use and these uses fall within different use categories, each use is subject only to the regulations of the applicable use category." Therefore, in the applicable MU-5A zone, the portion of the building devoted to emergency shelter use is a special exception use subject to U-531.1(b), while the PSH portion is a matter-of-right use. Thus, the fact that the PSH portion of the facility does not require special exception review and approval does not excuse DGS's failure to obtain such approval for the emergency shelter portion of the facility.

Finally, DGS claims that the facility is an "apartment house' given the configuration of the proposed building's units (cooking, bathrooms, sleeping); the alleged "control" that occupants have over their rooms; and the ruling in BZA Appeal 18151 that the Board made a distinction between an "apartment" and "dormitory" or "rooming house." Exhibit 5 at 2-3 and Tab B. These arguments do not withstand scrutiny.

The Zoning Regulations definition of "apartment" was modified, after the above-cited Case 18151 and specifies that apartments are defined as "exclusively for the use of and under the control of the occupants of those rooms" and further defines control as follows: "Control of the apartment may be by rental agreement or ownership." STFH units in the Ward 1 shelter will not be "owned" by their temporary occupants. Nor will they be leased to occupants by rental agreements. Nor are occupants required to pay rent to be eligible for occupancy in this temporary housing. The main eligibility requirements for occupancy in Ward shelters are homelessness and D.C. residency. D.C. Code §4-753.02(a). Furthermore, anyone with ownership or leasehold interest in safe housing is not eligible for occupancy. D.C. Code §4-753.02(a)(a-4).

The 2016 Zoning Regulations thus clarify that for an apartment, the concept of "control" is not about the exclusiveness of physical occupancy, but rather about legal responsibility for the property, as evidenced by either ownership or a leasehold. A leasehold, rather than ownership, is

sufficient under the Zoning Regulations because the District, from the perspective of zoning policy, properly recognizes that apartment lessees should be regarded as indistinguishable from owner occupants of apartments and other residential living units allowed in the residential zones. But plainly the Zoning Regulations have drawn a line between permanent and transient occupancy of living units. This is clearly expressed in the principal distinction drawn in the Regulations between "hotel" and "apartment house." A "hotel" is for "transient guests who rent the rooms or suites," and the definition explicitly states that "[t]he term 'hotel' shall not be interpreted to include an apartment house. . . ." B-100.2. Tellingly, the "hotel" use is not allowed by right or by special exception in the various R zones, including the RA residential apartment zones. The only hotels allowed in the RA zones are those that were in existence on May 16, 1980, and they cannot be expanded. U-401.1 (d)(2). This reflects a clear and strong policy disfavoring transient living units in the residential zones, subject to clearly stated and limited exceptions, one of them being "emergency shelter." DGS cannot properly do an end-run evasion of this policy by giving the transient occupants of the "apartment-style units" keys and locks, but not the traditional rights and responsibilities found in landlord-tenant leases that would make the facility an "apartment house."

Failure to Provide Required Rear-Yard Setback

Considered apart from the existing Rita Bright Community Center on the Property, which is to remain as an active use following construction of the facility authorized by the Permit for the same lot,[1] the facility confronts both 14th Street, N.W. and Clifton Street, N.W. As such, the rear of the new building could be either the side facing Appellant's building or that facing the Rita Bright Community Center. The rear yard requirement for a corner lot in the MU-5A zone is 15 feet. G-405.2.[2] But the new building has been sited next to the Appellant's building, leaving only a small space between the building and the common property line with Appellant. Exhibit 8. In

[1] The MU-5A zone is not one of the residential zones (R, RF, and RA) where erecting more than one primary building on the lot is prohibited. C-302.2. Rather, more than one primary building can be erected on a single recorded lot in the MU-5A zone, provided that "each building and the buildings as a group, shall meet all of the development standards of the zone." C-302.4.

[2] The lot is a corner lot, not an interior lot, as those terms are defined in B-100.2. While "through lots" do not require a rear yard, through lots are "interior lots," not "corner lots." B-100.2. This is further confirmed by the fact that on the same lot, the Rita Bright Community Center has a zoning compliant rear yard facing Chapin Street, N.W.

fact, the Permit authorizes construction of the new building with no rear yard facing Appellant's building, to the significant detriment of the light and air enjoyed by owners in Appellant's building. The building completely encloses Appellant's courtyard but for a narrow passageway that was provided only after Appellant's owners raised concerns with DGS in April 2019. See Exhibits 2, 8, 9.

To obviate compliance with the rear yard requirement, DGS counsel developed an interpretation that the new building be deemed combined with the existing Rita Bright Community Center to comprise a single building for zoning purposes with the rear yard requirement already satisfied along Chapin Street, N.W. In furtherance of this plan, on March 14, 2019, DGS counsel met with the Zoning Administrator, who subsequently provided DGS counsel a responsive email that essentially repeats the single-building language proffered by DGS counsel. Exhibit 3. This initiative took place approximately a year and a half after the site had been selected, nearly nine months after the first plans had been developed and initial permits had been applied for by DGS, and one month after residents pointed out the lack of rear setback compliance to DGS and the Ward 1 Advisory Team.

DGS's late-blooming single-building rationale fails on multiple counts as detailed below. Preliminarily it must be noted that DGS did not have to try to contort the new construction into merely an addition to the existing building with the connection artifice (described below), as would be necessary in the residential zones. As detailed above, the Property is in a mixed-use zone, i.e., MU-5A, where more than one principal building is allowed on a single record lot. DGS's problem, however, was that, as detailed above, each separate building, as well as the two buildings considered as a group, had to satisfy the rear yard setback requirement. C-302.4. Thus, the belated effort to deem the buildings combined was, purely and simply, an effort to evade the rear yard setback requirement for the new building.

Under B-309.l, two buildings can be considered a "single building" when their connection is: (a) fully above grade; (b) enclosed; (c) heated and artificially lit; and (d) either common space shared by users or space that is designed and used to provide free and unrestricted passage between separate portions of the combined buildings. As noted, DGS obtained an "advisory statement" from the Zoning Administrator that the reconfiguration was in compliance with B-309.1, after representing to him in plan modifications that the connection between the two buildings would be

above grade, enclosed, artificially lit and heated, and allow free and unrestricted passage between the community center and the parking area for the new structure. Exhibit 3.

However, B-309.l (a) requires the connection between the two buildings to be "fully above grade." "Fully" is synonymous with "entirely." It does not mean "partially." Yet, in seeking the Zoning Administrator's advice, DGS counsel claimed "entirely" compliance by noting that the floor area of the connection would count as part of the gross floor area of the building under the grade-plane method set forth in B-304.5. Exhibit 5 at 3. That provision requires portions of the floor area of the building at or crossing the ground level to be counted or not for FAR purposes, depending on how far below grade the area's floor is. In other words, it provides a rule of measurement for floors that are neither fully above nor fully below grade. Reliance on B-304.5 in this context, however, effectively rewrites B-309.l(a), changing it from "fully above grade" to "floor area that is counted as gross floor area for FAR purposes." That is not a permissible reading of the Zoning Regulations.

Furthermore, DGS has argued that the "internal connection" is fully above grade, even if the common space or passageway that satisfies subsection (d), is not fully above grade. *Id.* This is an erroneous reading of B-309.1. All of the subsections - (a) through (d) -- are modifiers of the "connection" that joins the two buildings together. For subsection (d), one of two alternatives must be met. In this case, the intention is to meet (d)(2), i.e., that the "connection" be "[s]pace that is designed and used to provide free and unrestricted passage between separate portions of the building....". But (a) - (d) are in the conjunctive, which means that the "space" referred to in (d) must also meet (a) -(c), to include being "fully above grade." In short, all of the two buildings' connective tissue must be "fully above grade." There is no ambiguity in "fully."

More generally, there is no clear demonstration in the Permit-approved plans that this and the other standards in B-309.1 have been met. Indeed, it appears from the Permit-approved plans that the main connection between the Rita Bright Community Center and the new building is in the Pl floor level, which is below grade. Exhibit 10; Exhibit 5, Tab A (sheets A2.00, A3.01, A3.02, A3.03, A4.00, A4.01).

Parking and Loading

DGS claims parking compliance for the combined old and new buildings—13 spaces for the Rita Bright Community Center and 8 spaces for the new building. Exhibit 5 at 4. But DGS has ignored the fact that parking requirements are different for the two uses being added to the Property. The presence of multiple uses is a pivotal factor, regardless of whether the BZA were to determine that the end result is two buildings or one. If two buildings on the same lot, the applicable provisions are (1) C-302.4 which provides that each building, and the buildings as a group "shall meet all of the development standards of the zone;" and (2) B-202.1, which provides that "each use is subject to the regulations of the applicable use category." If one building, due to a qualified connection under B-309.1, then B-202.1 still applies to the single building with multiple uses, and requires each use to meet the requirements for that use.

Assuming that the 13 spaces for the community center is correct, the question is whether 8 spaces is sufficient for the apartment house and emergency shelter uses, also assuming DGS is correct in claiming a 50% parking reduction entitlement for being within a quarter mile of a priority bus route on 16th Street, N.W. For the residential apartments, DGS reports the parking requirement to be one space for every dwelling unit in excess of four, referencing C-701.5. Exhibit 11. With 15 units, the over-4 number is 11 units, which translates to 3.6 spaces, which is rounded up to 4. C-709.3. Halved, the minimum amount would be 2 spaces. For the emergency shelter, the requirement is not noted in the submitted plans, but it is .5 spaces for each 1000 sq. ft. of the shelter. C-701.5. In this case, there is no overall allocation of space as between the two uses, but a reasonable estimate of the amount can be derived from the ratio of shelter units to all units, or 35:50 = 70%. Multiplying that ratio times the overall gross floor area of 67,630 sq. ft. = 47,341 sq. ft., which translates to .5 x 47.3 = 23.67 spaces, rounded up to 24. Thus, the parking requirement for the shelter, halved due to transit proximity, is 12 spaces. But since only 8 spaces are provided for both new uses, and 2 are necessary for the apartment use, this leaves only 6 spaces for the emergency shelter. Plainly, the DCRA-approved Permit improperly authorizes a 50% parking space shortfall for the emergency shelter (6 spaces instead of 12).

Turning to the loading requirement, DGS claims that no loading space is required and that none is provided. Exhibit 5 at 4. This is correct as to the community center, which is under 30,000 sq. ft., and as to the residential units, which at 15, are under the 50-unit exemption for residential

buildings. C-901.1. But the loading requirement for an emergency shelter is one whereas here, the size of the shelter is between 30,000 and 100,000 sq. ft. of gross floor area. Under C-901.1, such an emergency shelter requires a minimum of one loading berth and one delivery space. They are not being provided under the Permit-approved plans. This is another case where, as with parking, DGS has failed to draw the proper use-based distinction in complying with the development standards, and the DCRA-approved Permit has improperly authorized a parking space shortfall.

Timeliness

In full compliance with Y-302.2, which provides a minimum of 60 days to file an appeal with the BZA, this appeal was filed within 20 days of issuance of the Permit, i.e., the "administrative decision" being contested. By its express terms, the Zoning Administrator's March 25, 2019 email to DGS, Exhibit 3, makes clear its issuance was not an appealable event:

> This email 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 email based on the information submitted for the Zoning Administrator's review. Therefore this email 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.

Despite the timeliness of the Permit appeal, DGS counsel made arguments in their May 3, 2019 letter to the undersigned that any appeal was untimely even before the Permit issued. See Exhibit 5 at 5. While undersigned counsel responded to DGS's extraordinary claims, Exhibit 6 at 5, DGS's arguments are simply too frivolous to warrant discussion here.

Conclusion

For the foregoing reasons, the Board should declare Permit B1908601 invalid.

Respectfully submitted,

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