COZEN O'CONNOR

May 3, 2019

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VIA EMAIL AND FIRST-CLASS MAIL

David Brown
Knopf & Brown
401 East Jefferson Street, Ste. 206
Rockville, MD 20850

RE: Ward 1 Short-Term Family Housing – 2500 14th Street NW

Mr. Brown:

On behalf of the District Department of General Services ("DGS"), I write to you concerning the Ward 1 Short-Term Family Housing project (the "Project") proposed at 2500 14th Street NW (Lot 205, Square 2662) (the "Property"). It is our understanding that you were retained by neighbors to review zoning aspects of the Project, and that you subsequently issued a memorandum dated April 18, 2019 concerning your findings (the "Memorandum"). The purpose of this letter is a comprehensive response to the Memorandum and to inform you that the Project complies with all zoning requirements.

DGS has submitted an application with the D.C. Department of Consumer and Regulatory Affairs ("DCRA") for a building permit to construct the Project. As designed, the Project is a by-right structure and use in the MU-5A zone. A copy of the architectural plan set (the "Plans") is attached at **Tab A**. Although the building permit has not been issued, I wanted to provide a response to the issues raised in the Memorandum in an effort to avoid any protracted dispute concerning the Project.

I. Residential Apartment Use

The Project is designed to include 35 apartment-style units for families experiencing homelessness (the "Apartment Units") and 15 units of "permanent supportive housing" for seniors (the "PSH Units"). The Apartment Units and the PSH Units qualify as an "apartment house" use under the Zoning Regulations, and the Project is, therefore, a by-right use in the MU-5A zone. *See* 11 DCMR Subtitle U § 512.1(a).

The Memorandum incorrectly asserts that the Apartment Units are an "emergency shelter" use. This incorrect assumption appears to be based on the designation of other shelters that were authorized under the Homeless Shelter Replacement Act of 2016 ("HSRA") by the Council of the District of Columbia (the "Council"). The HSRA and the Homeless Shelter Replacement

Amendment Act of 2018 (the "HSRA Amendment") draw a clear distinction between the emergency shelter units in other wards and the planned apartment-style units at the Property.[1]

For the facilities in Wards 3–8, the HSRA allocates funds for the construction of "DC General Family Shelter replacement units." As defined under D.C. Code § 4-751.01(11A), such a unit means "a private ***room*** that includes space to store and refrigerate food and is constructed by or at the request of the District for the purpose of sheltering a homeless family." (emphasis added).

Whereas, for the facility in Ward 1, the HSRA and the HSRA Amendment allocates funds for the construction of "apartment-style units." This type of unit is more broadly defined as a "housing unit" that has "separate cooking facilities and other basic necessities to enable families to prepare and consume meals," "separate bathroom facilities," and "separate sleeping quarters for adults and minor children." *See* D.C. Code § 4-751.01(3). The Project proposes to include the Apartment Units in order to meet the requirements of the HSRA and HSRA Amendment.

The zoning definition of an "apartment" is substantially similar to the HSRA's "apartment-style units." Under the Zoning Regulations, an apartment is "one (1) or more habitable rooms with kitchen and bathroom facilities exclusively for the use of and under the control of the occupants of those rooms." *See* 11 DCMR Subtitle B § 100.2. An "apartment house" is "any building or part of a building in which there are three (3) or more apartments, providing accommodation on a monthly or longer basis. *Id.*

In BZA Appeal 18151, the Board considered what constitutes an "apartment house" use. A copy of the order in that case is attached at **Tab B**. The University of the District of Columbia leased 21 units in a larger apartment building for student housing. The owner of the apartment building challenged a building permit claiming that the units would no longer be an "apartment house," but, instead, a "dormitory" or "rooming house" use.

The Board did not agree. The Board distinguished an "apartment house" use from a "dormitory" or "rooming house" because the units had their own kitchen and bathroom and the units were under the exclusive use and control of the occupants. *See* **Tab B**. In regard to the "exclusive use and control" factor, the Board found that "the 21 units remain under the exclusive control of the occupancy of each unit, inasmuch as the occupants control the locks to their individual units, and are thereby able to exclude other residents from the units." *See* **Tab B**. Therefore, the Board concluded that the 21 units were an "apartment house" use that is permitted in that zone.

The same logic and interpretation of the Zoning Regulations applies here. Each Apartment Unit will have its own kitchen and bathroom facilities. *See* **Tab A**. The Apartment Units have living space that is separate and distinct from the sleeping quarters. *See* **Tab A**. The Apartment Units are designed so that only the occupant can access the unit, which is key-controlled. *See* **Tab A**. The occupants will have exclusive control over their own space, and occupants will be able to exclude all other residents from their unit.

In contrast, the facilities in Wards 3–8 do not feature kitchen facilities within the rooms. Most bathrooms are shared, with only a limited number of rooms having private bathrooms. The

[1] The HSRA originally allocated funds for the Ward 1 facility at 2105-2107 10th Street NW. The HSRA Amendment changed the location to the Property, which is owned by the District of Columbia.

rooms are open spaces without separate living and sleeping quarters. The rooms are not under the exclusive control of the occupants, but there are security monitoring desks on each floor. Thus, the design features at the homeless shelters in Wards 3-8 differ considerably from the Ward 1 facility.

In sum, the Apartment Units meet the zoning definition of an "apartment," and the Project qualifies as an "apartment house" use. Therefore, the Project will be a by-right use in the MU-5A zone.

II. Single Building

The Project will be a "single building" for zoning purposes. The Project will be a single building through an internal connection between the Project and the existing Rita Bright Community Center, which meets all the requirements of Subtitle B § 309.1.[2] As referenced in the Memorandum, DCRA's Zoning Administrator confirmed that the internal connection meets the zoning requirements in an email dated March 25, 2019 (the "ZA Email"), a copy of which is attached at **Tab C**.

The internal connection is fully above grade, even though it is located in the parking level. The application of the "grade-plane" method under Subtitle B § 304.5 indicates that the floor area where the internal connection is located is fully above grade. That the internal connection is located on the parking level is not relevant to this determination. As such, the internal connection meets the requirements of Subtitle B § 309.1 and the Project is a "single building" under the Zoning Regulations.

The Zoning Administrator has historically interpreted Subtitle B § 309.1 to require that the common space or passageway that satisfies subsection (d) is located above grade, not the entire connection. The Zoning Administrator may rely on the application of the "grade-plane" method to determine that the internal connection is above grade. In fact, the "grade-plane" method is intended for this very purpose: to determine the portions of a building's floor that are above grade and below grade.

As a single building, the Project is permitted to have more than one use. *See* Subtitle B § 202.1. Whether the use is a "primary" or "principal" use has no import. The Zoning Regulations control for multiple uses on a single lot by requiring that each use be subject to the regulations applicable to that use. *Id.* The uses need not "operate as a single functional unit."

As a single building, the Project also would constitute "one principal structure" on the Property. Your application of Subtitle A § 301.3 in this context is incorrect. This regulation states the general requirement that a building permit may only be issued for a structure that is on a "separate lot of record." In other words, DCRA can only issue a building permit for a principal structure if that structure is located on a record lot. The Property is a record lot and, as such, a building permit can be issued for the Project.

[2] Under Subtitle B § 309.1, a building is considered a "single building" when it 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 building.

III. Rear Yard

In the Memorandum, you confirm that the Project will meet the rear yard requirement in the MU-5A zone even if the Property is not deemed a "through lot."[3] As a "corner lot" abutting three streets, the Project's required rear yard of 15' can be measured from the center line of the street abutting the rear of the structure pursuant to Subtitle B § 318.8. The Project would meet its rear yard requirement whether the rear yard is located on Chapin Street or Clifton Street, which are 65' and 50' in width, respectively.

The Project and the Rita Bright Community Center are a "single building" and, thus, have the same rear yard. If the Project meets its rear yard requirement, then it necessarily follows that the Rita Bright Community Center meets its rear yard requirement. The community center's "historic" frontage has no bearing on the rear yard because DGS may select a front lot line. Accordingly, any assertion that the Rita Bright Community Center has its own, distinct rear yard requirement is misguided.

IV. Parking and Loading

The Memorandum states that the parking requirement should be based on the "emergency shelter" use categorization for the Apartment Units. As outlined above, that categorization is incorrect. The Project is a residential apartment use, and is subject to the "residential, multiple dwelling unit" use category for the purposes of the parking requirement. At 50 units, the Project's parking requirement is 15 spaces. At approximately 15,079 sq. ft., the Rita Bright Community Center has a parking requirement of 8 spaces. As noted in the Memorandum, the Project is entitled to a 50% reduction in its parking requirement due to its proximity within 0.25 miles of the priority bus route on 16th Street NW. *See* Subtitle C § 702.1(c)(3). It follows that the overall parking requirement is 12 spaces. The Project provides 21 parking spaces, which exceeds the minimum required parking.

Similarly, a loading berth is only required when a residential apartment use exceeds 50 dwelling units. *See* Subtitle C § 901.1. The Project has 50 units and, therefore, loading is not required. Likewise, the community center does not have a loading requirement because it is less than 30,000 sq. ft. *See id.*

V. Bicycle Parking

The Project will meet both the long-term and short-term bicycle parking requirement. The Project must provide 17 long-term bicycle spaces and 3 short-term bicycle spaces. The Rita Bright Community Center must provide at least 6 short-term bicycle spaces, but no long-term bicycle spaces. In combination, the bicycle parking requirement is 17 long-term spaces and 9 short-term spaces.

The zoning summary on sheet A0.11 of the Plans indicates that there will be 17 long-term spaces. However, the summary has a typographical error as to the short-term spaces, stating that the Project and community center will only have 3 short-term spaces. As depicted in sheet L1.01, there will be short-term bicycle racks located in public space along Chapin Street NW. The bicycle racks will exceed the minimum requirement of 9 short-term spaces.

[3] DGS maintains that the Property qualifies as a "through lot" under the Zoning Regulations.

VI. Timeliness

Notwithstanding the inaccuracies stated in the Memorandum, it is arguable that any challenge to the Project, whether to the structure or the use, is time-barred. DGS has made numerous public presentations regarding the Project, including at official meetings of ANC 1B. These presentations began in December 2017. The community was on notice that DGS intended to construct the Project as a by-right apartment house use, and that the Zoning Administrator agreed that the Project qualified as an "apartment house."

The Zoning Regulations state that a zoning appeal "shall be filed within sixty (60) days" from the earlier of "the date the person appealing the administrative decision had notice or knowledge of the decision complained of," or "reasonably should have had notice or knowledge of the decision complained of." *See* Subtitle Y § 302.2.

In *Woodley Park Community Assoc. v. D.C. Bd. of Zoning Adjustment*, the Court of Appeals found that the appellant knew of the issues being appealed before issuance of a building permit. *See Woodley Park Community Assoc. v. D.C. Bd. of Zoning Adjustment*, 490 A.2d 628, 637 (D.C. 1985). The Court noted that community members had reviewed plans for the proposed project during task force meetings on that development, and "as to the issues of height, setback, and use, the plans presented at these meetings were substantially similar to those objected to" in the appellant's zoning appeal. *See id.* The Court identified letters written by the task force to the property owner and the zoning administrator objecting to the project and its zoning compliance. *See id.* The *Woodley Park* Court concluded that the appellant "had full actual notice of the aspects of the building project relating to height, setback and use," and, as to those issues, the appeal was appropriately dismissed for timeliness. *See id.*

The community had notice that the Project was deemed a by-right use in the MU-5A zone. Any challenge to that determination must be made within sixty days from the date of notice pursuant to Subtitle Y § 302.2. Such a challenge has not been made and, therefore, is time-barred.

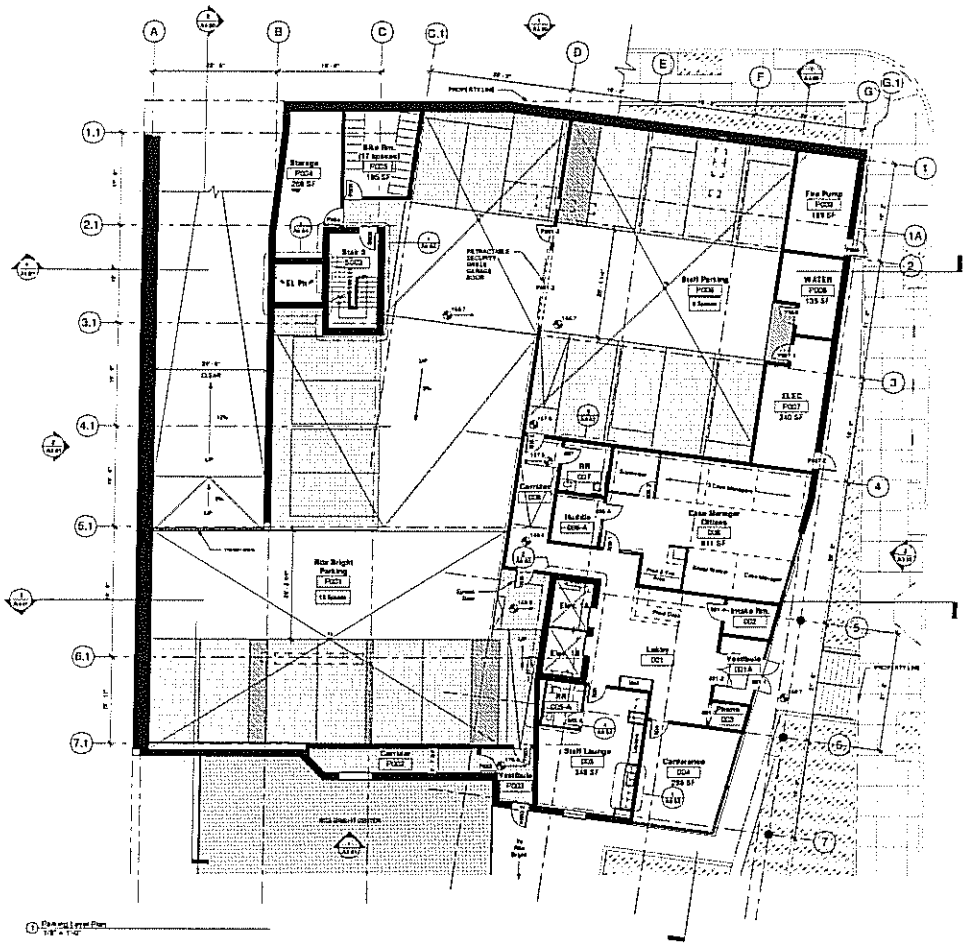
VII. Conclusion

In conclusion, DGS has submitted the Plans to DCRA for a by-right Project, including the proposed apartment house use. To that end, DGS does not agree with your statements in the Memorandum. Nonetheless, DGS remains committed to working with community members throughout the permitting and construction phase of the Project. DGS looks forward to engagement with the Ward 1 Advisory Team, including residents of 1420 Clifton Street NW, as part of the Good Neighbor Agreement process that will begin in July. DGS will continue to listen to community concerns and address them in an expeditious manner. Thank you for your attention to this letter and please do not hesitate to contact me should you have any questions.

Sincerely,
Cozen O'Connor

By: Meridith Moldenhauer

Tab A



1 Basement Level Plan

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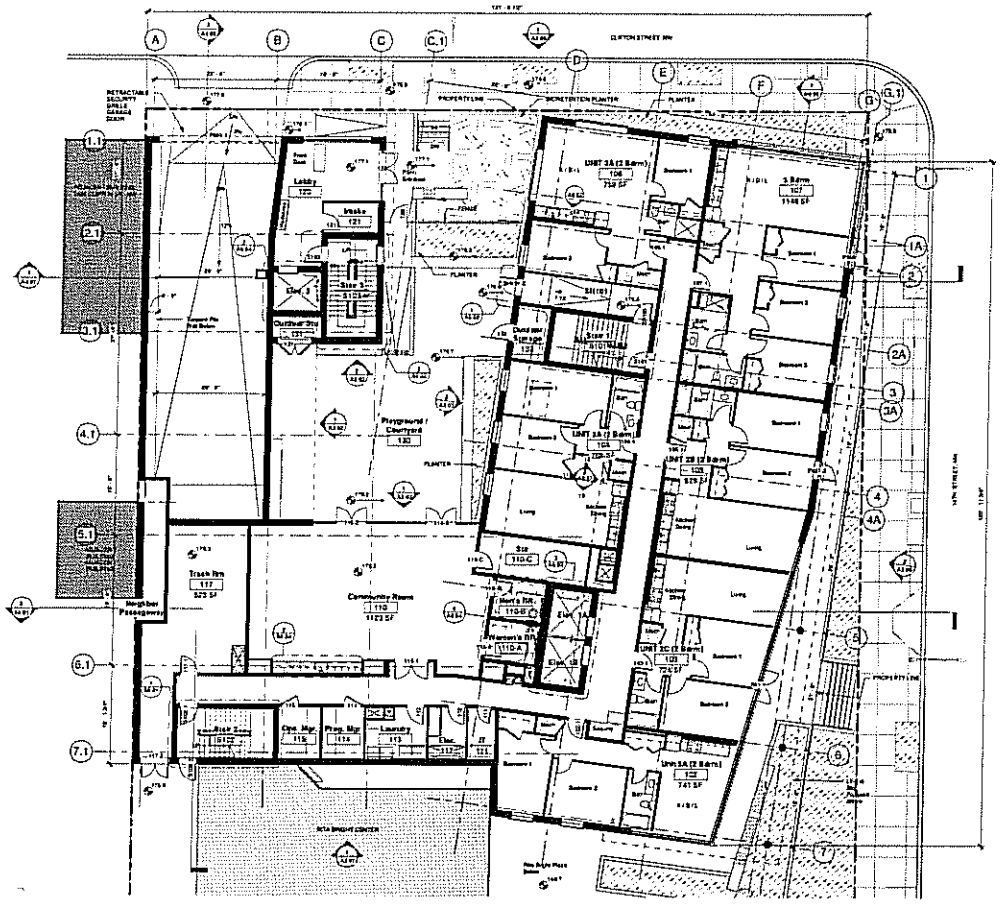
Ward 1 STFH & PSH

P1 Floor Plan

A2.00



GENERAL NOTES

1. SEE UNIT PLAN SHEETS A5.01 SERIES FOR ENLARGED UNIT PLANS

KEY NOTES

1 GARDEN ACCESS TO ROOF HATCH ABOVE

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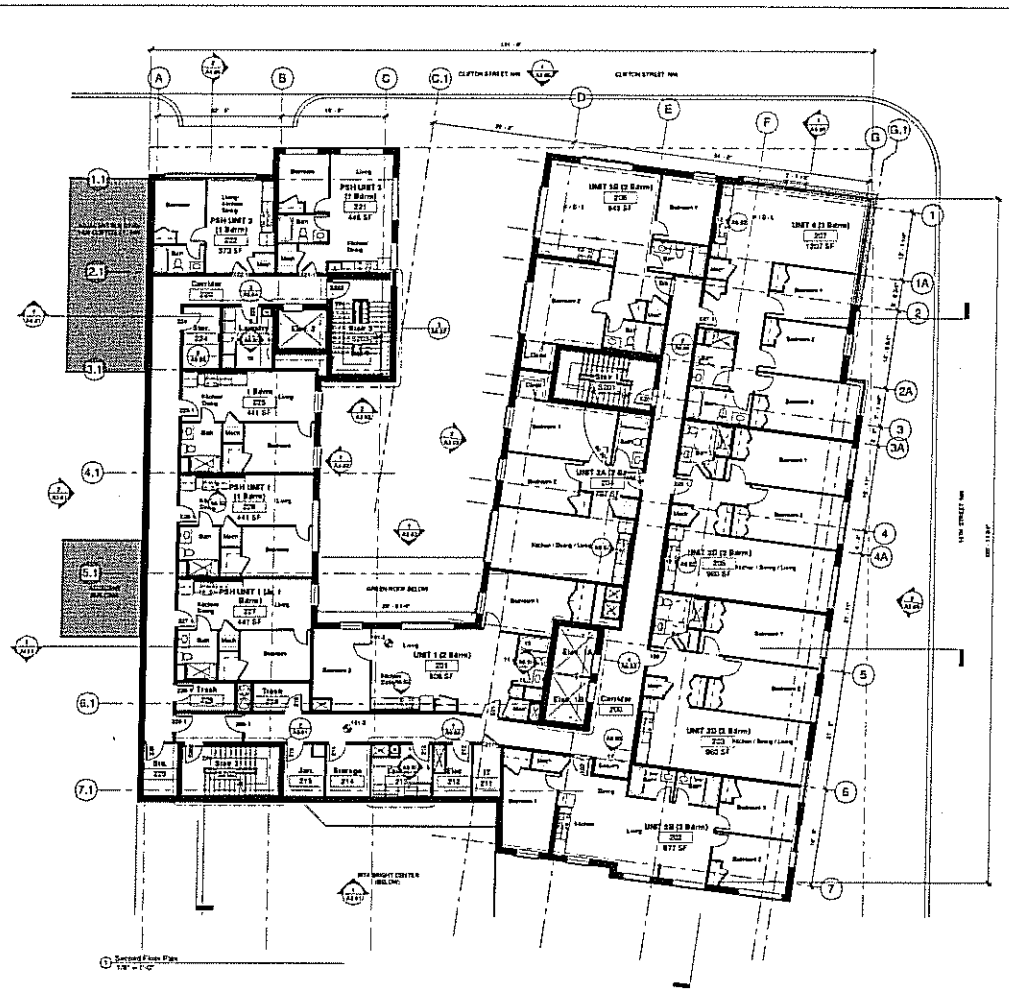
Ground Floor Plan

A2.01



GENERAL NOTES

1. SEE UNIT PLAN SHEETS A6.10 SERIES FOR GSA ARIGID AREA PLANS

KEY NOTES

1 LEADER ACCESS TO ROOF HATCH ABOVE

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2nd thru 4th Floor Plan

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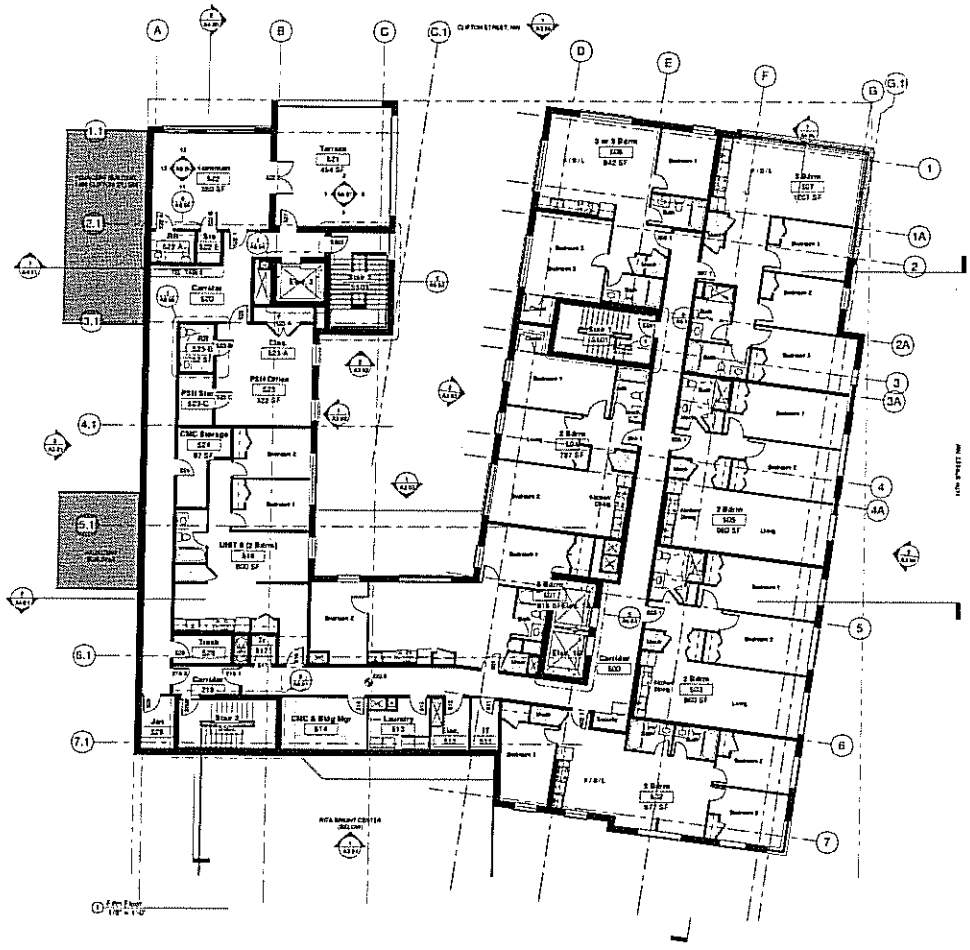
A2.02



GENERAL NOTES

1. SEE LEAF PLAN SHEETS A4.00 SERIES FOR THE WHOLE AREA PLANS

KEY NOTES

1.1 WATER ACCESS TO ROOF MATCH ABOVE

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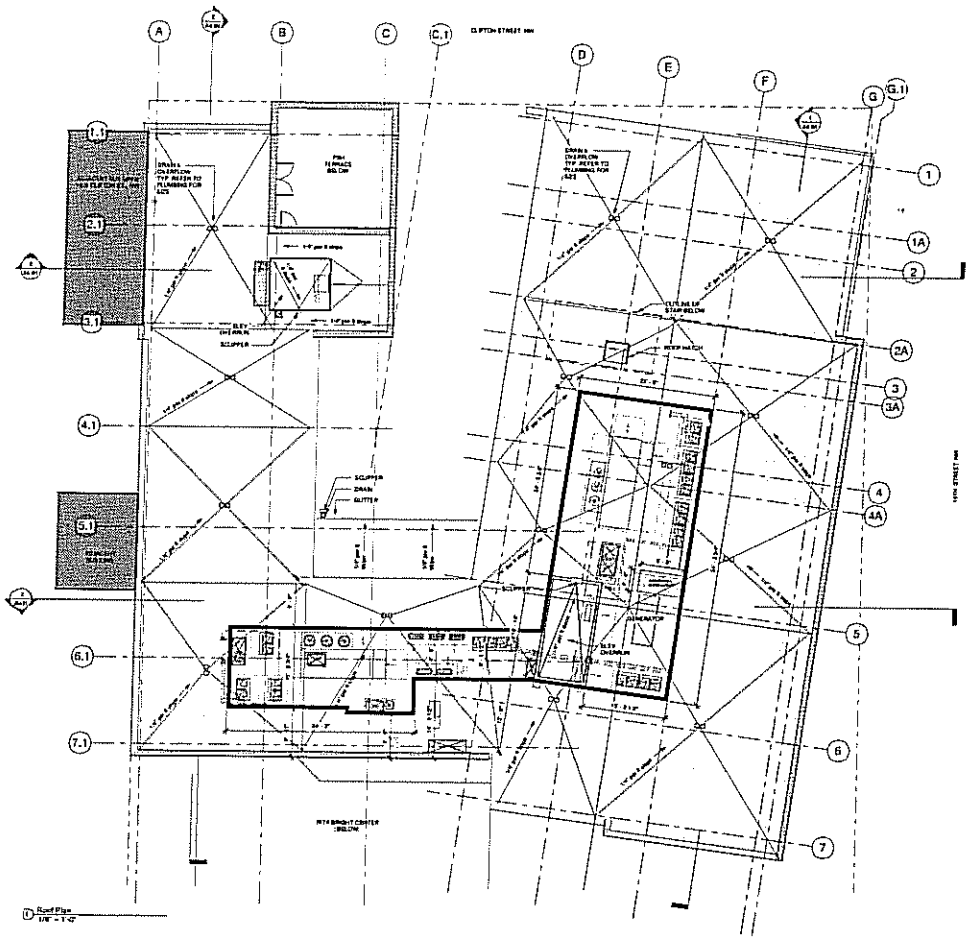
5th Floor Plan

A2.03



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Ward 1 STEH & PSH

Roof Plan

1/8" = 1'-0"

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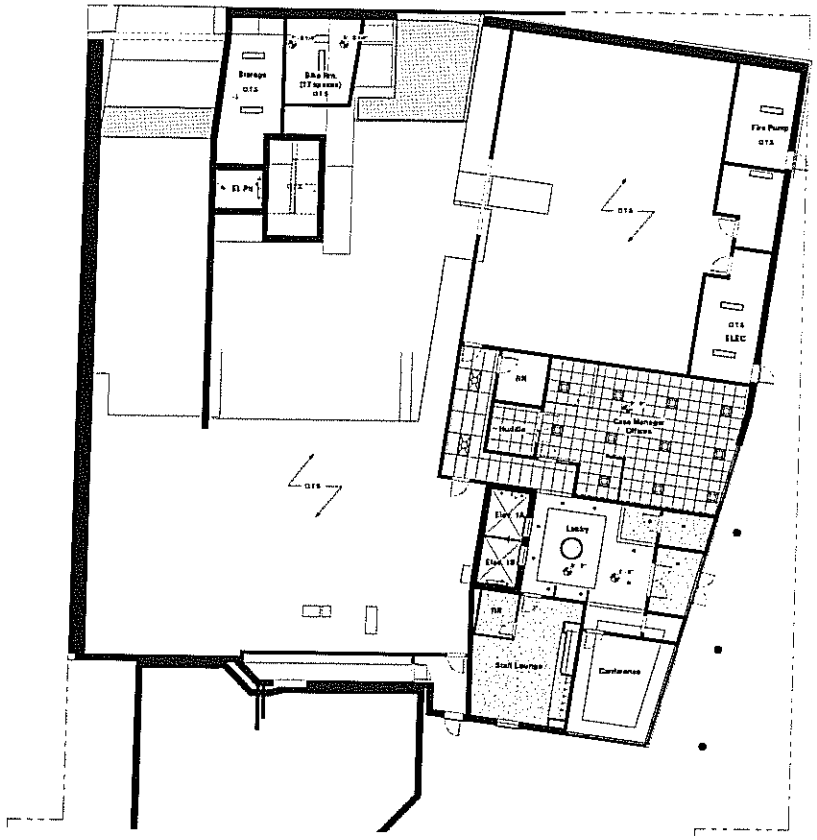
A2.04



GENERAL RCP NOTES:

1. ⌀" HID DOWNLIGHTS ARE SHOWN TO LOCATE A FIXTURE. IT SHALL BE CENTERED IN THE ROOM OR CELING BAY.

LEGEND

- 2' x 2' WHITE ACT
- GYP. BRD CEILING BORDER
- GYP. BRD CEILING
- 2' x 2' ACT
- 2' x 4' ACT
- 1' x 4' ACT
- 8" X 8" PERFORATED METAL PLANKS
- 8" WIDE ACOUSTICAL WOOD PLANKS
- O.T.S. = OPEN TO STRUCTURE

KEY:

- 6" RECESSED CAN
- PENDANT LIGHT
- 3" DIAMETER RECESSED LIGHT (LENGTH VARIES)
- 2' x 2' LIGHT
- 2' x 4' LIGHT
- WALL SCONCE
- WALL MOUNTED VANITY LIGHT
- HVAC SUPPLY
- OUTDOOR AIR SUPPLY
- RETURN

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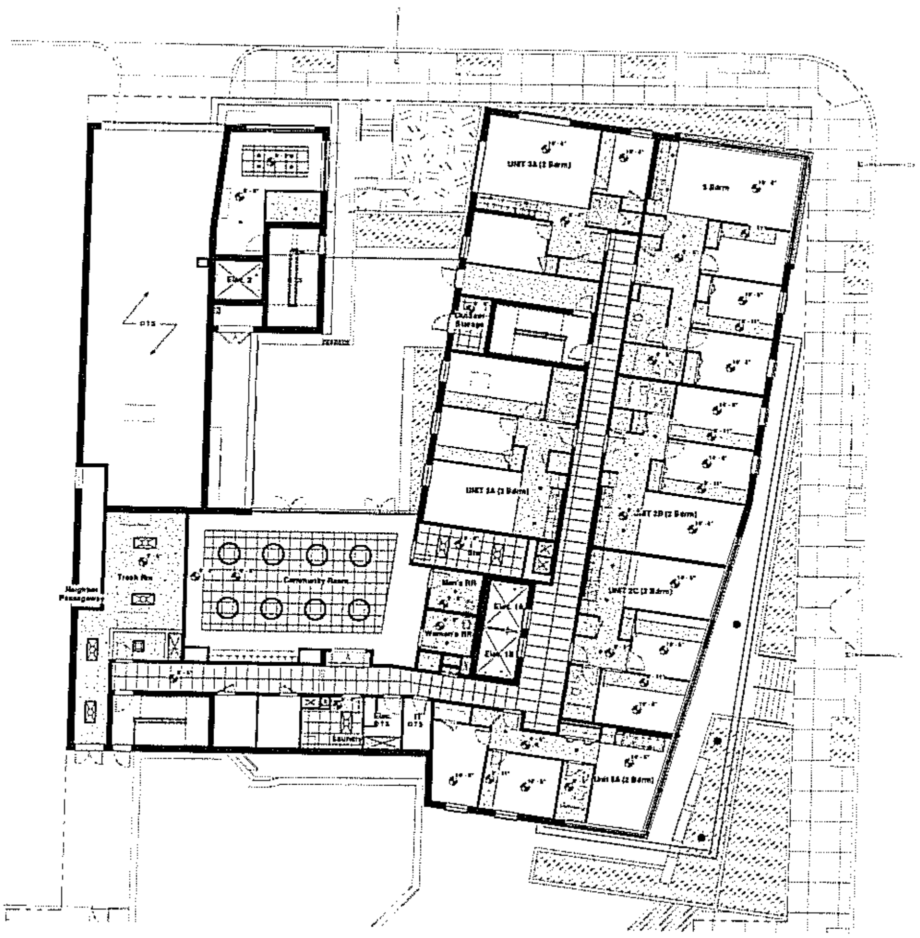
Ward 1 STFH & PSH

Drawing Title

P1 Reflected Ceiling Plan

A2.10

Parking Level Reflected Ceiling Plan



Ground Floor Reflected Ceiling Plan

GENERAL RCP NOTES

LEGEND

O.T.S. = OPEN TO STRUCTURE

KEY

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Washington DC

Drawing Title

Ground Floor Reflected Ceiling Plan

A2.11

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GENERAL RCP NOTES

1. IF NO DIMENSIONS are shown TO LOCATE A FIXTURE IT SHALL BE CENTERED IN THE ROOM OR SPACE AND

LEGEND

- 2' x 2' RECESSED ACT
- GYP. BRD. CEILING BORDER
- GYP. BRD. CEILING
- 2' x 4' ACT
- 2' x 2' ACT
- 2' x 8' ACT
- 8" X 8" PERFORATED METAL PLANKS
- 8" WIDE ACOUSTICAL WOOD PLANKS
- G.T.S. = OPEN TO STRUCTURE

KEY

- 6" RECESSED CAN
- PENDANT LIGHT
- 2" DIAMETER RACEWAY LIGHT (LENGTH VARIES)
- 2' x 2' LIGHT
- 2' x 4' LIGHT
- WALL SCONCE
- WALL MOUNTED VANITY LIGHT
- HVAC SUPPLY
- OUTDOOR AIR SUPPLY
- RETURN

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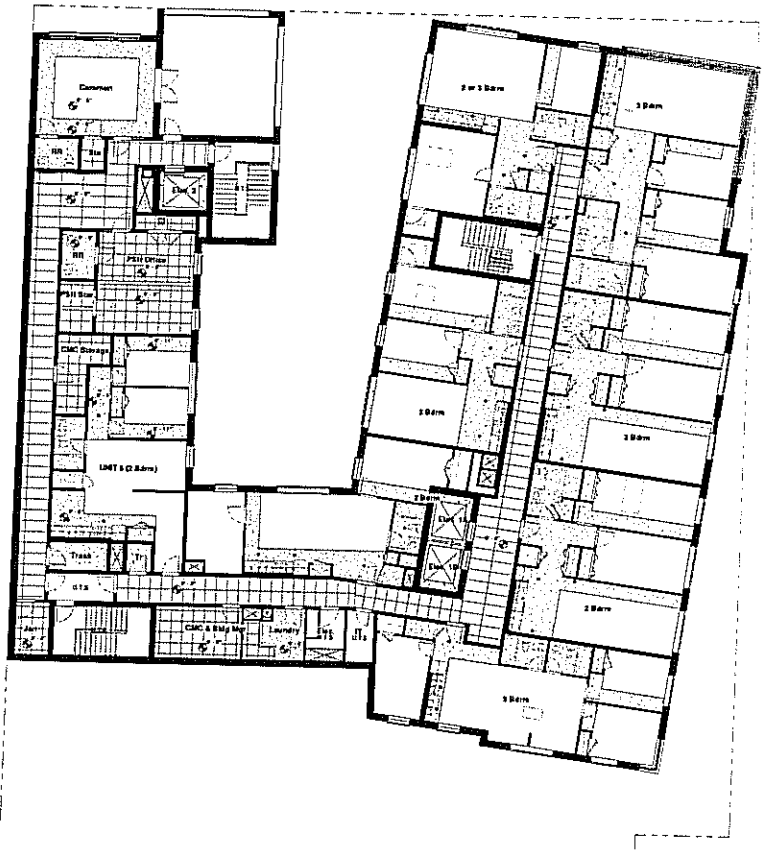
Ward 1 STEH & PSH

2nd thru 4th Floor Reflected Ceiling Plans

A2.12



GENERAL RCP NOTES

1. IF NO DIMENSIONS ARE SHOWN TO LOCATE A FIXTURE IT SHALL BE CENTERED IN THE ROOM OR CEILING GRID

LEGEND

- 2' x 2' ROCKACT
- GYP. BRD CEILING BORDER
- GYP. BRD CEILING
- 2' x 2' ACT
- 1' x 4' ACT
- 2' x 4' ACT
- 2' X 2' PERFORATED METAL PLANES
- 4" WIDE ACOUSTICAL WOOD PLANES

STS = OPEN TO STRUCTURE

KEY

- 6" RECESSED CAN
- PENDANT LIGHT
- 2" DIAMETER RECESSED LIGHT (LENGTH VARIES)
- 2' x 2' LIGHT
- 2' x 4' LIGHT
- WALL SCONCE
- WALL MOUNTED VANITY LIGHT
- HVAC SUPPLY
- OUTDOOR AIR SUPPLY
- RETURN

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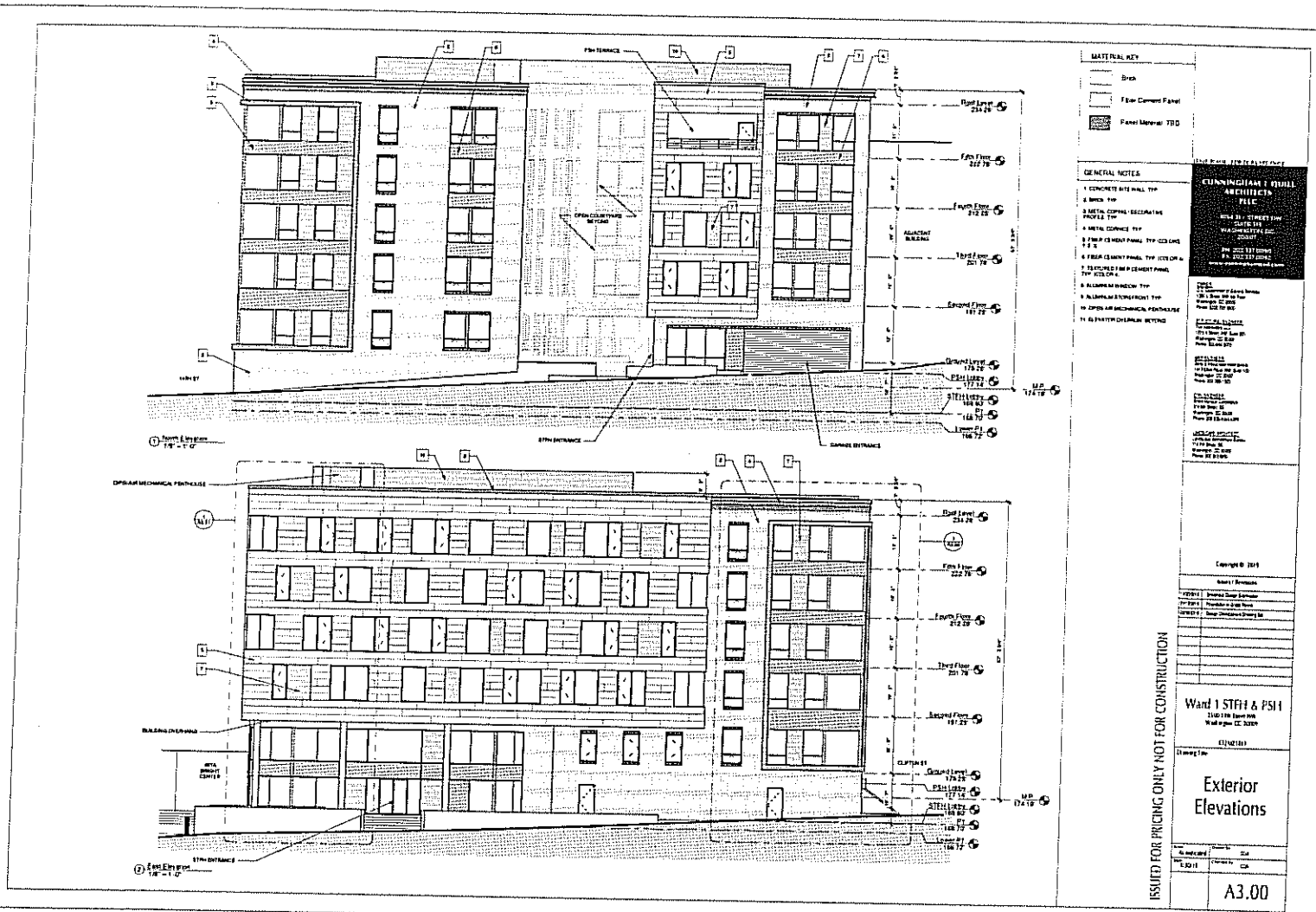
5th Floor Reflected Ceiling Plan

A2.13


MATERIAL KEY
Brick
Fiber Cement Panel
Panel Material TBD
GENERAL NOTES
1. CONCRETE SITE WALL TYP.
2. BRICK TYP.
3. METAL COPING / DECORATIVE PROFILE TYP.
4. METAL CORNICE TYP.
5. FIBER CEMENT PANEL TYP. (COLOR 3 & 5)
6. FIBER CEMENT PANEL TYP. (COLOR 4)
7. TEXTURED FIBER CEMENT PANEL TYP. (COLOR 6)
8. ALUMINUM WINDOW TYP.
9. ALUMINUM STOREFRONT TYP.
10. OPEN AIR MECHANICAL PENTHOUSE
11. ELEVATOR OVERRUN BEYOND
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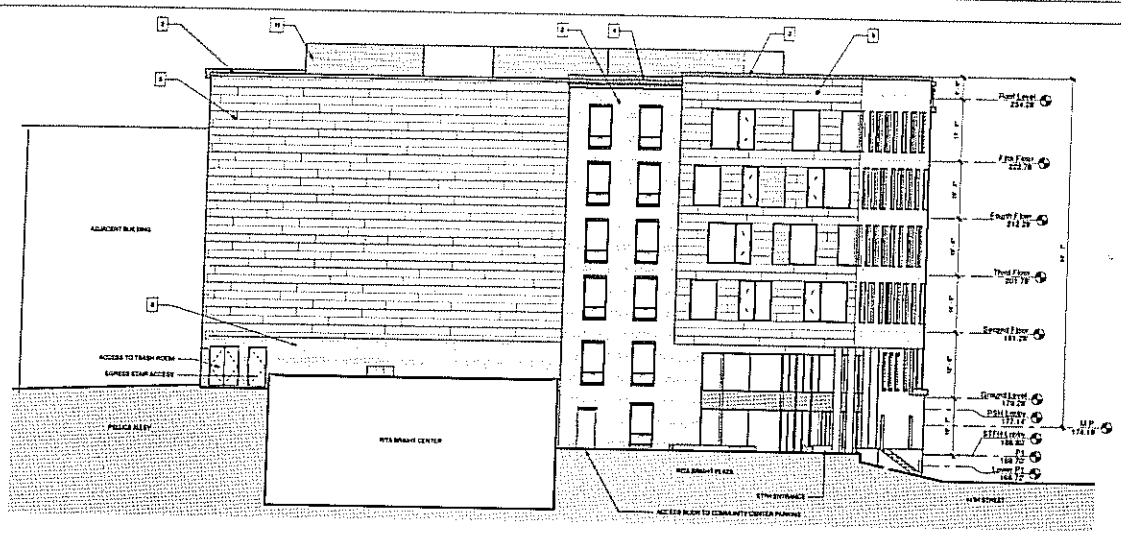
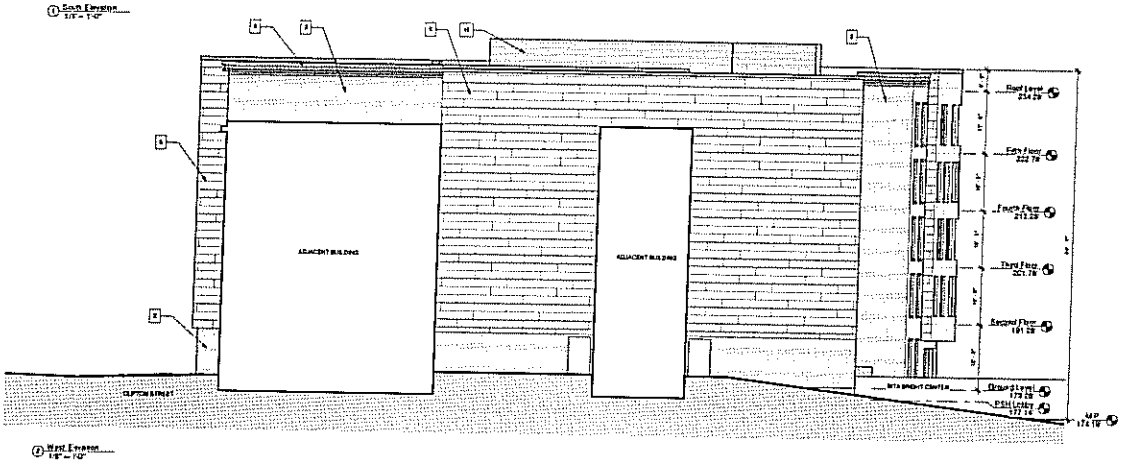
Ward 1 STEH & PSH
Exterior Elevations
A3.00



① South Elevation
3/16" = 1'-0"



② West Elevation
1/8" = 1'-0"

MATERIAL KEY

- Brick
- Fiber Cement Panel
- Panel Material TBD

GENERAL NOTES

1. CONCRETE EPS WALL TYP
2. BRICK TYP
3. METAL COPING / DECORATIVE PACKS TYP
4. METAL CORNICE TYP
5. FIBER CEMENT PANEL TYP (COLOR 1, 2, 3)
6. FIBER CEMENT PANEL TYP (COLOR 4, TYP (COLOR 5)
7. TEXTURED FIBER CEMENT PANEL TYP (COLOR 6)
8. ALUMINUM WINDOW TYP
9. ALUMINUM STOREFRONT TYP
10. OPEN AIR MECHANICAL PENTHOUSE
11. ELEVATOR OVERRUN BEYOND

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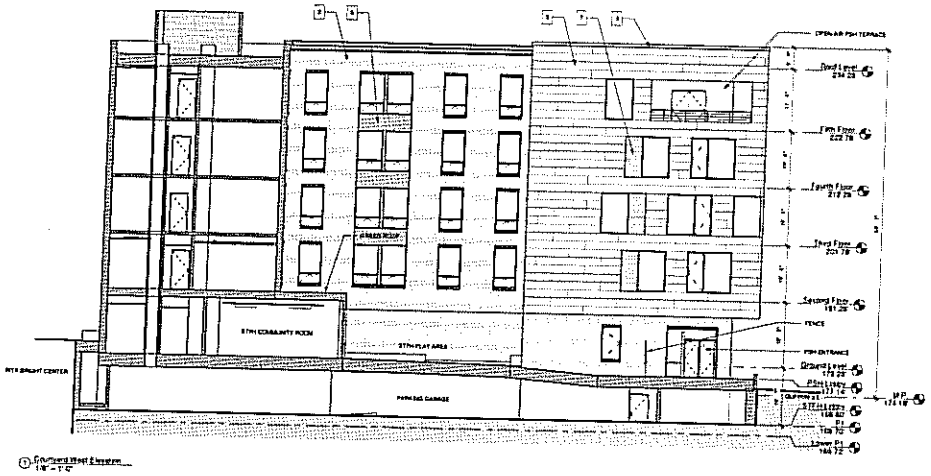
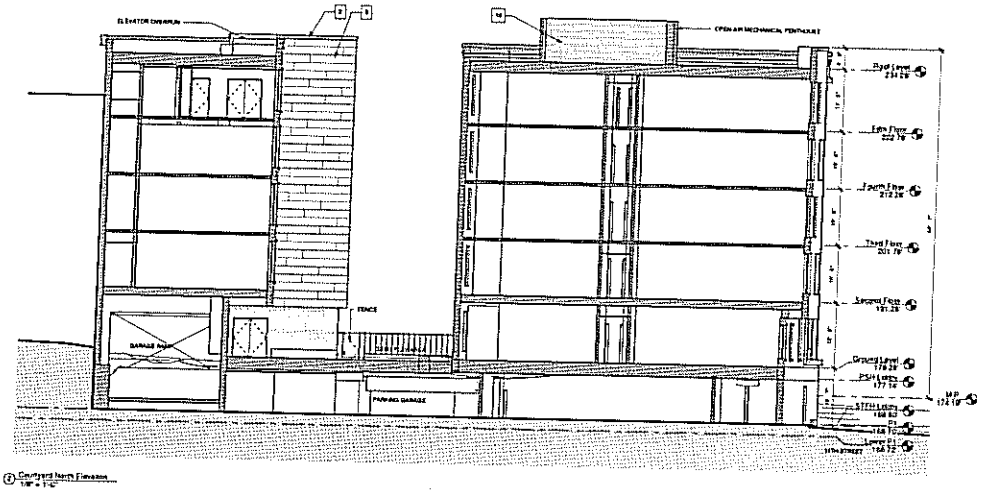
Exterior Elevations

A3.01



1 Courtyard West Elevation
1/8" = 1'-0"



2 Courtyard North Elevation
1/8" = 1'-0"

MATERIAL KEY

- Brick
- Fiber Cement Panel
- Panel Material TBD

GENERAL NOTES

1. CONCRETE SITE WALL TYP.
2. SPACE TYP.
3. METAL COPING / DECORATIVE PICKETS TYP.
4. METAL CORNICE TYP.
5. FIBER CEMENT PANEL TYP / COLOR 1 & 2
6. FIBER CEMENT PANEL TYP / COLOR 4
7. TEXTURED FIBER CEMENT PANEL TYP / COLOR 5
8. ALUMINUM WINDOW TYP.
9. ALUMINUM STOREFRONT TYP.
10. OPEN AIR MECHANICAL PENTHOUSE
11. ELEVATOR OVERRUN BEYOND

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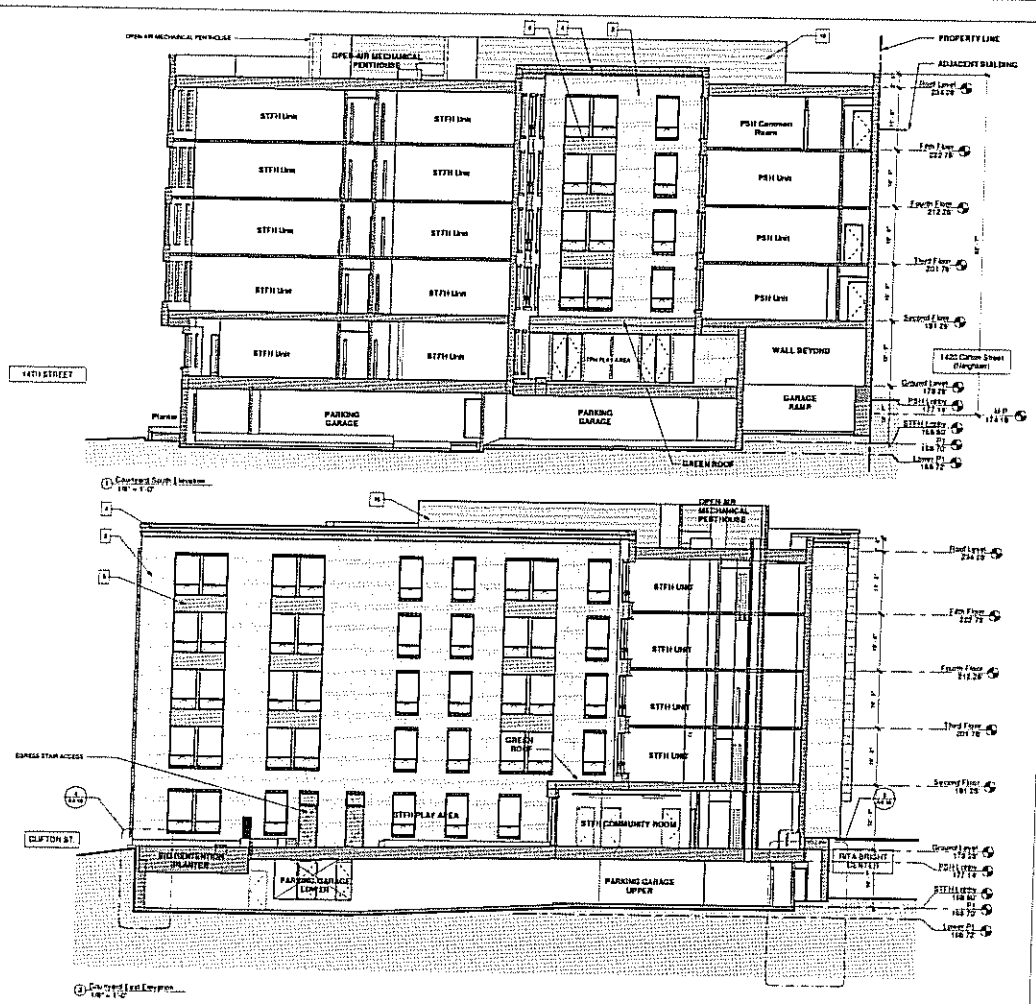
Ward 1 STFH & PSH

Courtyard Elevations & Sections

A3.02



MATERIAL KEY

- Brick
- Fiber Cement Panel
- Panel Material TBD

GENERAL NOTES

1. CONCRETE SITE WALL TYP.
2. BRICK TYP.
3. METAL COPING / DECORATIVE PROFILE TYP.
4. METAL COPINGS TYP.
5. FIBER CEMENT PANEL TYP. (COLOR 1, 2, 3)
6. FIBER CEMENT PANEL TYP. (COLOR 4)
7. TEXTURED FIBER CEMENT PANEL TYP. (COLOR 5)
8. ALUMINUM RAILING TYP.
9. ALUMINUM STOREFRONT TYP.
10. OPEN AIR MECHANICAL PENTHOUSE
11. ELEVATOR OVERRUN BEYOND

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Ward 1 STFH & PSH

Courtyard Elevations & Sections

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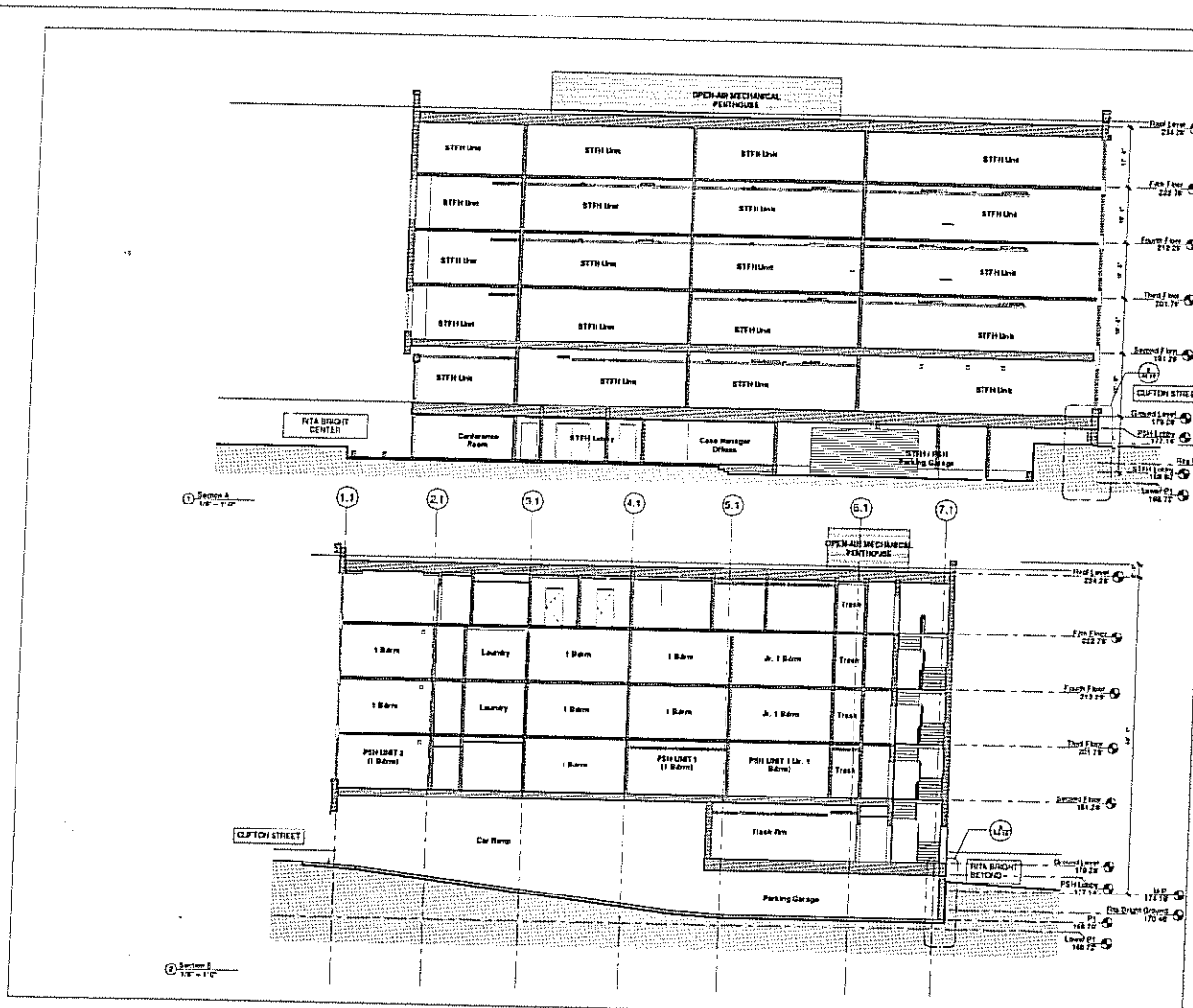
A3.03



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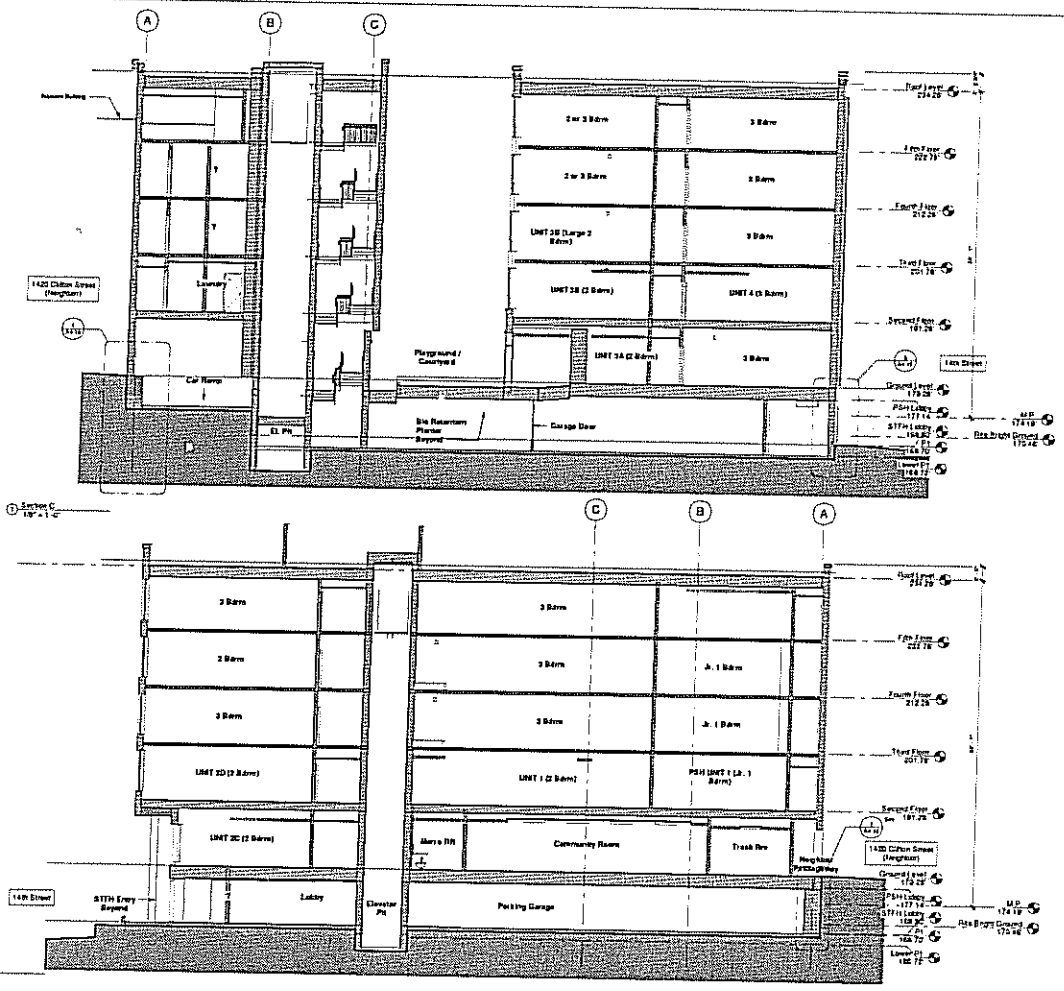
Ward 1 STFH & PSH

Building Sections

A4.00



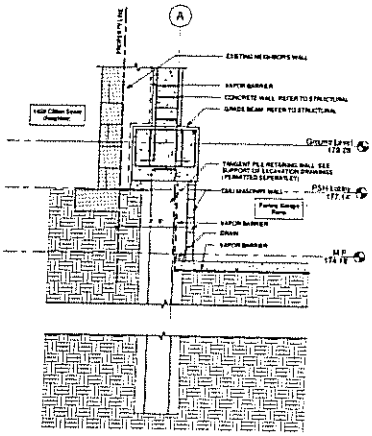
CUNNINGHAM | QUILL ARCHITECTS PLLC

ISSUED FOR PRICING ONLY NOT FOR CONSTRUCTION

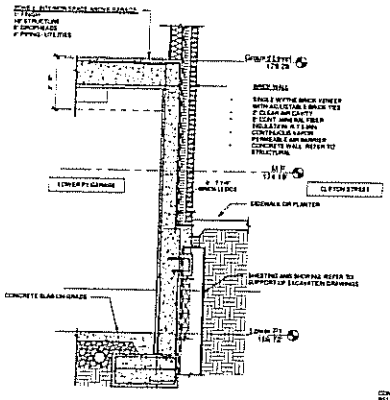
Ward 1 STFH & PSH

Building Sections

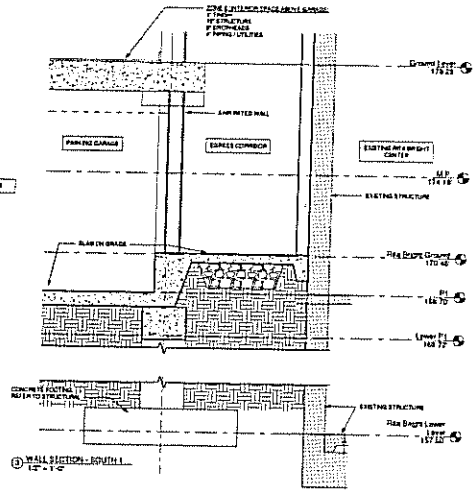
A4.01



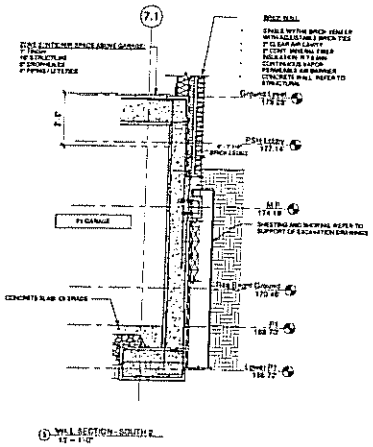
1 WALL SECTION - WEST
1/2" = 1'-0"



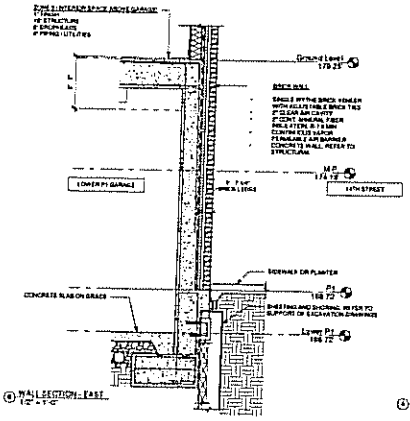
2 WALL SECTION - NORTH 1
1/2" = 1'-0"



3 WALL SECTION - SOUTH 1
1/2" = 1'-0"



4 WALL SECTION - SOUTH 2
1/2" = 1'-0"



5 WALL SECTION - EAST
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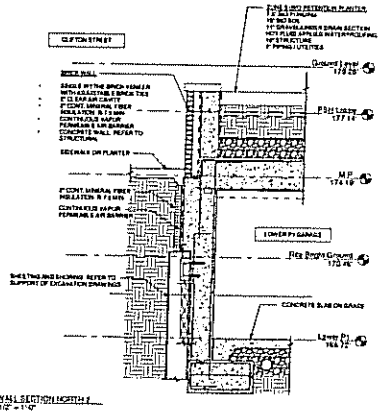

6 WALL SECTION - NORTH 2
1/2" = 1'-0"

CUNNINGHAM | QUILL ARCHITECTS PLLC

ISSUED FOR PRICING ONLY NOT FOR CONSTRUCTION

Ward 1 STEH & PSH

Wall Sections and Details @ Grade

A4.10

Tab B

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 18151 of Van Ness South Tenants' Association pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Department of Consumer and Regulatory Affairs ("DCRA") in the issuance of Building Permit No. B1009105, allowing the construction of walls within 21 apartment units in an existing apartment house[1] located at 3003 Van Ness Street, N.W., in the R-5-D District (Square 2049, Lot 0806).

HEARING DATES: January 4, 2011, February 1, 2011, and March 15, 2011
DECISION DATE: April 5, 2011

DECISION AND ORDER

This appeal was filed on October 12, 2010, with the Board of Zoning Adjustment (the "Board") by the Van Ness South Tenants' Association. The appeal challenged DCRA's decision to issue a building permit that authorized the property owner (the "Owner") to erect partition walls in 21 units within an existing 625-unit apartment house. The Owner leased these 21 units to the University of the District of Columbia ("UDC"), so that the units could be occupied by UDC students. The Appellant claims that the permit was unlawful for several reasons, the primary ones being that the permit improperly authorized either a "dormitory" use or a "rooming house" use within a residential apartment house. After allowing the parties an opportunity to be heard, the Board found that the permit had been properly issued and that the appeal should be denied. A full discussion of the facts and law supporting this conclusion follows.

PRELIMINARY MATTERS

Notice of Public Hearing

The Office of Zoning scheduled a hearing on January 4, 2011. In accordance with 11 DCMR §§ 3112.13 and 3112.14, the Office of Zoning mailed notice of the hearing to the Appellant, Advisory Neighborhood Commission ("ANC") 3F (the ANC in which the subject property is located), the property owner, and DCRA.

[1] The caption originally referred to an apartment building, but the actual term used in § 199.1 of the Zoning Regulations is "apartment house."

Parties

The Appellant in this case is the Van Ness South Tenants' Association (hereafter "the Appellant" or the "Association"). Under its Articles of Incorporation, the Association is a non-profit corporation which is organized, in part, to organize tenants at the 3003 Van Ness apartment house (the "apartment house"), and is also authorized to bring legal actions. (Exhibit 2.) The Association was represented during the proceedings by Brian Lederer, Karen Perry, and David Wilson.[2]

As the owner of the subject property, Smith Property Holdings Van Ness, L.P. (referred to hereafter as "Archstone"[3] or the "Owner"), requested intervenor status in opposition to the appeal. However, the request was unnecessary because Archstone is automatically a party under 11 DCMR § 3199.1(a)(3). Archstone was represented during the proceedings by the law firm of Greenstein DeLorme & Luchs, PC, by John Patrick Brown, Jr., Esq. and Kate Olson, Esq. UDC, which rents 21 units from Archstone, is the lessee of the property involved, and is also an automatic party to the appeal. (11 DCMR § 3199.1(a)(3).) UDC was represented by the law firm of Goulston & Storrs, Allison Prince, Esq. and David Avitabile, Esq. UDC and Archstone participated in all aspects of the public hearing and will be collectively referred to as the "Parties in Opposition."

DCRA appeared during the proceedings and was represented by Assistant Attorney General Jay Surabian, Esq.

Continuances and Pre-Hearing Statement

As noted, the public hearing was first set for January 4, 2011. However, the Board granted the Appellant's continuance request over the opposition of the Parties in Opposition, and the matter was continued until February 1, 2011. The Appellant had not filed a pre-hearing statement by the deadline of 14 days prior to the hearing and the Parties in Opposition expressed their concern that the Appellant might do so at any time prior to the continuance date. In response the Board gave the Appellant until January 14th to file a pre-hearing statement together with a request to waive the deadline. On February 1, the Appellant sought a second continuance of the hearing and an extension to file its pre-hearing statement. Because the Board did not have a quorum on that date, the public hearing was continued to March 15, 2011. On the March 15th date, the Board accepted the Appellant's Pre-Hearing Statement and Parties in Opposition opposition thereto, and conducted the public hearing.

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[2] Although Mr. Lederer is an attorney, he did not act as counsel for the Association. He, Ms. Perry, and Mr. Wilson each also testified as witnesses during the public hearing.

[3] Archstone Communities, LLC is the property manager of the apartment house.

FINDINGS OF FACT

The Property

1. The subject property is improved with an 11-story, 625-unit apartment house located at 3003 Van Ness Street, N.W. in the R-5-D Zone District.

2. The property is operated under a certificate of occupancy that was issued by DCRA to the Owner in 1996 for a 625-unit rental apartment house.

Events Leading Up to the Issuance of the Permit

3. During August, 2010, residents at the building complained to DCRA regarding possible illegal construction at the property.

4. DCRA inspectors investigated the complaints and found that UDC had constructed partition walls inside of 21 apartment units in the building. The apartment units are not contiguous and are located throughout the building and on different floors.

5. The non-load bearing partition walls were added to create an additional bedroom inside of each unit. The addition of the walls did not change the size of the units, create new units, or change the footprint of the building.

6. On August 11, 2010, DCRA issued a Stop Work Order and a Notice of Infraction for working without building permits.[4]

7. David Naples, DCRA's Deputy Chief Building Official, also inspected the property to determine whether there were any fire and safety issues and whether the construction complied with the Building Code. Finding no violations, the only remaining compliance issue was the requirement to obtain a building permit.

The Building Permit

8. On August 13, 2010, Archstone and UDC applied for a building permit to add "21 walls to 21 apartment units". In the application field titled "proposed use," the applicant wrote that the building would remain an "apartment building".

9. Because Archstone/UDC sought only to do interior renovation work at the building, and no change in use was proposed, DCRA did not refer the permit application for zoning review by the Zoning Administrator (the "ZA").

[4] Construction work is not allowed without a building permit under 12A DCMR § 105A.

10. Because of the limited non-structural nature of the work, and because Deputy Chief Naples determined that plans were not required,[5] DCRA was able to issue the building permit on the same day that it was applied for.

The Appeal

11. The Appellant filed this appeal on October 12, 2010, challenging DCRA's decision to issue the building permit. The appeal alleges that DCRA erred because: (a) the construction converted the building into a "dormitory"; (b) the building permit, itself, is defective because it contains errors and is incomplete; and (c) the permit may be in violation of the building code. In later submissions, the Appellant alleged alternatively, that the construction created an unlawful "rooming house." (Exhibit 29, Pre-Hearing Statement.)

Evidence Adduced at the Hearing

12. Sometime in August, 2010, Archstone leased 21 apartment units to UDC. The leases each run from August 15, 2010 through August 14, 2011.

13. Each unit is occupied by up to four UDC students, who stay in the unit for a period greater than one month.

14. The 21 units retained their own kitchen and bathroom facilities for the use of the occupants of that unit only. The occupants of each unit can lock the door to the hallway, thereby excluding other residents from using their bathrooms and kitchen.

15. UDC allowed students to occupy the 21 units pursuant to an "Occupancy Agreement For Off-Campus Student Housing" (the "Occupancy Agreement"), which is part of the record. (Exhibit 29, Tab 3.) Under the Occupancy Agreement, the students agree to various conditions of occupancy, some of which were alleged by the Appellant to be pertinent to its claims. For instance, the Occupancy Agreement provides that UDC will close the off-campus housing during the winter break. It provides that UDC may deny room or roommate changes and may require a student to move from one unit to another during the year, as necessary. It also provides that overnight guests must complete UDC registration forms and that UDC has the right to enter the units for various purposes.

CONCLUSIONS OF LAW

The Board is authorized by § 8 of the Zoning Act of 1938, D.C. Official Code § 6-641.07(g)(2) (2008 Repl.), to hear and decide appeals where it is alleged that there is error in any decision made by any administrative officer in the administration of the Zoning Regulations. The Board's review of such decisions is not limited to the documents presented to the

[5] DCRA's code official may accept permit applications without plans when the work involved is of a "sufficiently limited scope". (12A DCMR § 106.1.)

administrative decision-maker. Rather, as it did in this appeal, the Board conducts a full evidentiary hearing. Parties were permitted to present and cross examine witnesses and introduce evidence, and the Board has carefully considered the testimony and evidence that was presented. However, error may only be found based upon what the District official knew or reasonably should have known at the time he or she made the decision complained of.

The threshold question is to identify the administrative decision that is challenged and the alleged zoning error. The appeal in this case relates to the issuance of the building permit. The alleged zoning error was DCRA's determination that the construction of partition walls within the 21 units did not convert the apartment house use within those units to a different use. The Appellant disagrees and maintains that the permit authorized a "dormitory" or, in the alternative, a "rooming house" use within those units. However, as will be explained below, the Board concludes that the construction of partition walls within the 21 units did not convert the apartment use into either a dormitory use or a rooming house use.

The Proposed Construction of Partition Walls Did Not Authorize a Change in Use

The R-5-D District allows for several types of multiple unit buildings, including apartment houses, rooming houses, and dormitories. What differentiates one from the other are generally speaking the nature of the occupancy, as the following definitions show:

Apartment

Section 199 of the Zoning Regulations defines an "apartment" as "one (1) or more habitable rooms with kitchen and bathroom facilities exclusively for the use of and the control of the occupants of those rooms."

Dormitory

The term "dormitory" is not defined in the Zoning Regulations. Therefore, the Board is directed to the meaning given in *Webster's Unabridged Dictionary*. (*See*, 11 DCMR § 199.2(g).) According to *Webster's 3rd New International Dictionary*, a "dormitory" is "a residence hall providing separate rooms or suites for individuals or for groups of two, three, or four with common toilet and bathroom facilities but usually without housekeeping facilities."

Rooming house

Section 199 of the Zoning Regulations defines a "rooming house" as:

> a building or part thereof that provides sleeping accommodations for three (3) or more persons who are not members of the immediate family of the resident operator or manager, and in which accommodations are not under the exclusive control of the occupants. A rooming house provides accommodations on a monthly or longer basis. The term "rooming house" shall not be

> interpreted to include an establishment known as, or defined in this title as, a hotel, motel, inn, bed and breakfast, private club, tourist home, guest house, or other transient accommodation.

Pursuant to §§ 330.6(d) and 350.4(a) of the Zoning Regulations, a rooming house is allowed as a matter-of-right in the R-5-D Zone District, so long as cooking facilities are not provided in any individual unit.

From looking at the permit application before it, DCRA had no reason to believe that the construction of the partition walls would result in a conversion from an apartment house to one of these other uses. The applicant stated that the units would remain apartments and there was absolutely nothing in the application to suggest otherwise. According to the definition for "apartment" in the Zoning Regulations, two elements are key: (1) the unit must provide kitchen and bathroom facilities, and (2) the unit must be under the exclusive use and control of the occupants. The permit application stated that the only work proposed was the addition of partition walls to add a second bedroom to the 21 units. Thus, DCRA had a reasonable basis for concluding that the units would retain their kitchen and bathroom facilities and would, therefore, continue to satisfy the first element of the definition. Whether or not the units would be in the exclusive control of the occupants was not something that would be revealed in the application process, and DCRA was not obligated to investigate whether that element was met. This was not a situation in which DCRA knew or should have known of circumstances that would suggest that an applicant was being less than honest. In the absence of any indication on the application that a different use was intended, DCRA correctly issued the building permit.

The Additional Evidence Provided by the Appellant Did Not Prove a Change in Use.

The issue of control was not before DCRA when it issued the building permit. The Board nevertheless permitted the Appellants to argue the issue, but concludes that this element of the definition of apartment house was satisfied as well. The 21 units remain under the exclusive control of the occupants of each unit, inasmuch as the occupants control the locks to their individual units, and are thereby able to exclude other residents from the units. The Appellant asserts that the occupants do not have "exclusive use and control" of their units, citing the restrictions contained in the UDC Occupancy Agreement. The Board believes that the Appellant's reading of the "control" language is overly broad. While UDC does retain certain rights and privileges under the Occupancy Agreement, the Board finds none of the restrictions affects the long term control of the occupant so long as they are allowed to remain on the premises. The fact that an occupant may need to vacate the unit during school breaks, not have the roommate of their choice, not have unfettered rights to an overnight guest, or be required to move to another unit has nothing to do with their rights to control the premises while he or she is lawfully there. The occupants retain the rights to exclude all others, except UDC, and the circumstances under which UDC may enter the unit are defined.

Since the Board has concluded that the 21 units would be "exclusively for the use of and control of the occupants", it must reject the Appellant's claim that these were to become rooming units, which by definition provide accommodations that are "not under the control of the occupants". Nor are these units intended to be merely sleeping accommodations, which leads to the Appellant's claim that a dormitory was to be established.

It is clearly stated in the *Webster's* definition that a dormitory is "usually without housekeeping facilities." As mentioned above, the 21 units have retained their housekeeping facilities. Therefore, the units would not be consistent with this element of the "dormitory" definition. In addition, these units are not contiguous, and so it cannot be said that they collectively constitute a "residence hall".

It is worth noting that even if the Board found that a dormitory use was to be established, the use would have been lawful. As UDC correctly points out, the D.C. Court of Appeals confirmed that dormitories are permitted as a matter-of-right in the R-4 and R-5 zones, so long as they are not located within the boundaries of an approved campus plan. *Watergate West, Inc. v. D.C. Bd. of Zoning Adjustment*, 815 A.2d 762 (D.C. 2003). Here, the apartment house is located in the R-5-D Zone and is not within the boundaries of any campus plan for UDC. Accordingly, even if the construction converted the use to a dormitory use, it would be permitted as a matter of right. If that had been the case, the Board would simply have required DCRA to amend the face of the building permit to indicate a dormitory use, but the use would not be disallowed.

Appellant's Other Claims

The Appellant has alleged several defects in the body of the building permit and has also alleged violations of the Building Code, found in Title 12 of the DCMR. However, these claims are outside the scope of the Board's jurisdiction because they do not derive from alleged zoning errors. The Zoning Act clearly limits the Board's jurisdiction to actions taken by District officials in carrying out and enforcing the Zoning Regulations. *See, Appeal No. 17329 of Georgetown Residence Alliance*, 53 DCR 5932 (2006). Therefore, these portions of the appeal must be dismissed.

ANC

The Board is required under § 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21; D.C. Official Code § 1-9.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC's recommendations, which in this case is ANC 3F. However, ANC 3F did not submit a report with any recommendations or participate in the public hearing of this appeal.

For reasons discussed above, it is hereby **ORDERED** that the appeal is **DENIED**.

Vote taken on April 5, 2011.

VOTE: **4-0-1** (Meridith H. Moldenhauer, Nicole C. Sorg, Jeffrey L. Hinkle, and Gregory M. Selfridge voting to Deny; No other Board member (vacant) participating)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

ATTESTED BY: _____
RICHARD S. NERO, JR.
Acting Director, Office of Zoning

FINAL DATE OF ORDER: SEP 06 2011

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

Tab C

From: LeGrant, Matt (DCRA) <matthew.legrant@dc.gov>
Sent: Monday, March 25, 2019 2:55 PM
To: Kadlecek, Cary <CKadlecek@goulstonstorrs.com>
Cc: Ana Baker <abaker@cunninghamquill.com>
Subject: FW: meeting confirmation - 2500 14th Street NW

Cary Kadlecek:

By means of this email I confirm that I am in agreement with the analysis and the conclusions stated in the below email, and as shown on the attachment, and specifically that:

- This determination is in response to our meeting on March 14, 2019 concerning the proposed Ward 1 Short Term Housing Facility (STHF) at the above-referenced property, which is zoned MU-5A.

- The property is a corner lot with frontage on three streets: Clifton Street on the north, 14th Street on the east, and Chapin Street on the south.

- The STHF will be constructed on the same record lot as the Rita Bright Community Center already located on the site. As shown on the attached drawings, the STHF will be constructed on the north side of the site (north is to the right on the drawing) adjacent to the Rita Bright Center.

- Both of the structures will be connected so that they are all one building for zoning purposes.

- The Rita Bright Community Center and the STFH portions of the single building will be connected via the ground floor connection shown circled in red on the attached drawings, and the connection satisfies the criteria under section B-309.1 to be a single building for zoning purposes:

1. First, the connection is entirely above grade, as shown by the section drawing that illustrates that the area of the connection is included in GFA using the grade-plane method in section B-304.5, which applies to this building.

2. Second, the connection is enclosed since it is entirely inside of the building, as shown on the attached section drawing.

3. Third, it is heated and artificially lit.

4. Finally, the connection allows free and unrestricted passage (other than Building Code required doors) between the parking area within the STHF and the Rita Bright Center, as per applicable Section B-309.1(d)(2); indeed, all of the parking for the Rita Bright Center will be within the STHF.

- Because both buildings will be connected and considered a single building for zoning purposes, under section B-318.8, the depth of the rear yard may be measured from the center line of the street abutting the lot at the rear of the building. Thus, the required 15-foot rear yard for the proposed building may be measured to the center line of Chapin Street.

Please let me know if you have any further questions.