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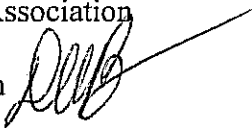
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DAVID W. BROWN

**MEMORANDUM**

**TO:** Board of Directors, Residents of Columbia Heights  
Condominium Association

**FROM:** David W. Brown 

**SUBJECT:** Zoning Compliance Analysis, Ward 1 Emergency Shelter

**DATE:** April 18, 2019

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You have asked me to review the plans submitted by the Department of General Services (DGS) for permitting of the Ward 1 Short Term Family Housing Facility (the "Plans). This is essentially a review of the ZONING SUMMARY table ("Table") set out on Plan Sheet No. A0.11. A copy of the Table is attached for your reference. As detailed below, notwithstanding the Table's purported compliance with the Zoning Regulations, I find a number of significant deficiencies in the conclusions expressed in the Table. The Plans should not be approved in their present form, and are subject to challenge if they are approved.

Use. Many of the Plan's problems flow from a fundamental mischaracterization of the use proposed for the subject property, Lot 205, Square 2662 (the "Property"). My focus is not on the existing community center use already in place on the Property; the mischaracterization concerns the new building proposed to be added to the Property, albeit not as a stand-alone structure. The Table characterizes the addition as an "apartment building" and, hence, a residential use that is a matter-of-right use under U-512.1. In support of this, the Project Narrative on Sheet A0.11 states that "[t]he new building will be comprised of 50 residential apartments." This simplistic analysis ignores the rest of the Narrative, which details that what is involved are two quite distinct use categories: "Of [the 50 units], 35 will be 2- and 3-bedroom apartments for families in need of short term emergency housing (STFH). The remaining residential units will be 1-bedroom apartments for individuals in need of Permanent Supportive Housing (PSH)."

The Property is in the MU-5A zone, which, for purposes of use permission analysis, is part of MU Use Group E, for which U-512, 513 & 514 prescribe permitted, special exception and prohibited uses, respectively. The Narrative appears to be correct as to the PSH use, i.e., as a matter-of-right residential use. In any case, I will assume it is correct. But the Narrative is incorrect in describing the STFH as lumped into that same category. U-513.1(b) expressly defines "emergency shelter" as a special exception use, and that use has development standards that in many respects differ from those for residential uses. I note that the other shelters that are a product

of the Homeless Shelter Replacement Act of 2016 (“HSRA”) were all reviewed and approved by the BZA under the “emergency shelter” development standards in the Zoning Regulations.<sup>1</sup>

The Zoning Regulations prescribe how to apply the development standards when more than one use is implicated in a particular project or location. The controlling provision is B-202, which states that “[w]hen 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.” B-202.1.<sup>2</sup> Accordingly, the portion of the new building devoted to emergency shelter use is subject to the development standards for an emergency shelter as a special exception under U-513.1(b), and the PSH residences are reviewed under the matter-of-right development standards of the MU-5A zone. I looked through the Board of Zoning Appeals (BZA) records for a proceeding leading to review of a special exception request for the emergency shelter on the Property and found none. Upon inquiring about this, I was advised by counsel for DGS that BZA did not issue a special exception; none was sought based on the claim that what is being built is a “residential building,” not a “homeless shelter.” Email, Beth-Sherri Akyereko, DGS Interim General Counsel, to me (April 10, 2019). This is plainly contrary to the approach required under B-202.1, a conclusion which I would expect the Zoning Administrator to readily confirm if asked to do so. Further, without special exception approval, the project as a whole should not be allowed to move forward, in that the two uses are inseparably intertwined. For example, while the ground floor and fifth floor plans, Plan Sheets A2.01 & A2.03 depict 6 and 7 emergency shelter units respectively, Sheet A.2.02 depicts 5 residential and 7 shelter units, respectively on each of floors 2 – 4.

**Height.** The Table shows compliance with the 65’ height limit for buildings not employing inclusionary zoning in the MU-5A zone, as set forth in G-403.1. I see no compliance issue here, regardless of the multiple uses.

**Multiple Buildings.** The Table cites C-302.4 to justify more than one primary building on the Property, claiming that each of the two buildings, and the two considered together will independently satisfy development standards for the zone. Nevertheless this three-way

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<sup>1</sup> The Ward 1 emergency shelter designated in the HSRA was to be on parcels on 10<sup>th</sup> Street, N.W. and V Street, N.W., but when negotiations for acquisition of this land faltered, the Mayor sought and obtained from the Council an HSRA amendment to use the Property instead, and provide “35 2-and 3-bedroom apartment style units” on the Property, which site “may also be used to locate 15 units of permanent supportive housing for seniors and the Rita Bright Recreation Center.” Section 2, D.C. Act 22-441, amending HSRA section 3(a)(1). All of the shelters approved under the HSRA, including Ward 1 initially and as amended, were for same thing: “temporary shelter for families experiencing homelessness.”

<sup>2</sup> There is no ambiguity here; unequivocally, two different use categories are involved—residential apartment or “multiple dwelling” and “emergency shelter”, as those terms are defined in B-100.2. If there were just one use, and there was ambiguity regarding which use category was appropriate, the Zoning Administrator would have to decide which category to apply, using the criteria set forth in B-201. If that provision were applicable, the likely result would be use of the “emergency shelter” use category, in that 70% of the units are shelter units and 30% are residential units, and it is all but certain that the staffing for the facility, as well as day-to-day activity at the new building will be even more heavily weighted toward the shelter use.

compliance (each building and the two combined) is not demonstrated in the Table. If this omission could readily be cured with brief supplemental analysis, it presumably would have been done.<sup>3</sup> Instead, DGS went to the considerable trouble of reconfiguring the project after submission of the Plans. The reconfiguration connects the two structures in such a manner that sought to qualify the interconnected structures as a single building. DGS obtained an “advisory statement” from the Zoning Administrator to that effect pursuant to 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. See email, Matt LeGrant to Cary Kadlecek (March 25, 2019).

The Zoning Administrator’s “advisory statement, under the standards of B-309.1, which merely parrots back to Kadlecek the words he used in requesting the advice, is, in my view legally erroneous. B-309.1(a) requires the connection between the two buildings to be “fully above grade.” “Fully” is synonymous with “entirely,” but it does not mean “partially.” Yet in seeking the ZA’s advice,<sup>4</sup> Mr. Kadlecek 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. 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-309.1(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. More generally, there is no clear demonstration in the Plans that this and the other standards in B-309.1 have been met. Indeed, it appears from the Plans that the main connection between the Community Center and the new building is in the P1 floor level, which is below grade. See Sheet A2.00 and also Sheets A2.01, A3.01, A3.03, A6.02 and the subsequent submittal (3/22/19) of “Level P1 GFA,” prepared by the project architects.

Even if this manifest deficiency could be explained away, there would remain a fundamental problem with use of B-309.1 here. It would conflict with the general rule set forth in A-301.3 prohibiting more than one principal structure on one lot of record. There is no doubt that the structure to be added to the Property is a distinctly different principal use than the pre-existing community center use. “Principal use” is defined as “[t]he building in which the primary use of the lot is conducted.” B-100.2. Here, the primary use for decades has been a community center, which use will continue. But a second primary use is being added; indeed, by any measure the new use is at least as significant as the original primary use. Nor, for the same reasons, can the

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<sup>3</sup> As detailed below in the Setback discussion, this cure was likely avoided as an end-run around setback requirements.

<sup>4</sup> The response from the Zoning Administrator makes clear that “this email is NOT a “final writing”, as used in Section Y-302.5 of the Zoning 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.” (emphasis added)

new structure be characterized as an “addition” to the existing use. Tellingly, A-301.3 spells out seven exceptions to this general prohibition, none of which would apply here. More particularly, A-301.3 does not provide that two differing principal uses are allowed on one record lot if they can be connected by a walkway thread that meets the requirements of B-309.1 and the combined building meets development standards. While those two provisions are in tension, they are not conflicting if one understands that the plain intent of B-309.1 is to allow two buildings on the same lot only when they are going to operate as a single functional unit. The Zoning Administrator’s determination in this instance fails to deal with this issue, and, in effect, strips A-301.3 of any enforceable constraint, so long as some connection, devoid of any architectural coherence or beneficial increase in functionality as between the buildings, can be devised.

**FAR.** The FAR for the Property, at 41,099 sq. ft., is  $3.5 \times 41,099 = 143,846$  sq. ft., without inclusionary zoning. G-402.1. The Table reports the combined building gross floor area as 82,709 sq. ft., of which 67,630 will be the new addition, i.e., over 80%. I have not investigated whether the claimed deductions from gross floor area are justified, in that the reported gross floor area is nowhere near the allowed limit for the MU-5A zone.

**Setbacks.** The Table reports that no front, rear or side yard setbacks will be provided. There is no front yard setback requirement in the MU-5A zone. Under G-406.1, there is no side yard setback requirement. But this provision states that if a side yard is provided, it should be at least 10.83 feet in width (2” for each foot of the building’s 65’ height). As for the rear yard, purportedly facing Chapin Street, N.W., the Table states that none is required because the Property is a “through lot,” citing B-317.3. This is incorrect. The Property is not a “through lot,” because the Property is a “corner lot” under the lot definitions in the Zoning Regulations. B-100.2. The Property is also a corner lot that abuts three streets. Ignoring for the moment the improper single-building determination, the required rear yard—in this case 15 feet, G-405.2—is to be measured from the center line of Chapin Street, N.W. to the wall of the community center building. This measurement is not provided in the Table, but other plans reveal that the setback requirement is met. See Plan Sheet CIV0105.

By contrast, the Rita Bright Community Center, whose front has always been facing 14<sup>th</sup> Street, N.W. has its rear yard abutting Peluca Alley, not Chapin Street, N.W., and its width is at least the required 15’. See Plan Sheet A0.40. If the new building were independently required to meet setback requirements, and were built in alignment with the Community Center facing 14<sup>th</sup> Street, it, too, would need a 15’ rear yard aligned with the existing Community Center rear yard, and abutting the Condominium property, whereas the Plans show no setback at all for the new building from the common property line with the Condominium.<sup>5</sup> Of course, DGS could seek variances from setback requirements in the course of a BZA emergency shelter special exception proceeding, but to this point DGS has tried to avoid BZA approval of any aspect of the Plans. You

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<sup>5</sup> If instead the new building were built facing Clifton Street, N.W., it would have to have a rear yard of 15’ separating it from the Community Center. These limited setback options make clear that DGS employed the single-building artifice as a device to avoid compliance with otherwise applicable setback requirements. It is also one that, if accepted as lawful, will deprive the Condominium of most of the light and air that would have come from setback compliance along your common property line.

would have substantial arguments to present in opposition to any requested setback variance impacting the Condominium, the discussion of which is beyond the scope of this Memorandum.

**Open Court Width and Green Area Ratio.** The Table claims compliance with the standards for open court width and green area ratio. Compliance with these standards requires more information than is shown in the Plans, so I cannot provide reliable advice on these issues.

**Parking.** The Table erroneously claims parking compliance by ignoring the fact that parking requirements are different for the two uses being added to the Property. For the residential apartments, the Table reports the requirement to be one space for every dwelling unit in excess of four. C-701.5. With 15 units, the excess is 11 units, which translates to 3.6 spaces, which is rounded up to 4. C-709.3. For the emergency shelter, the requirement is not noted in the Table, but it is .5 spaces for each 1000 sq. ft. of the shelter. *Id.* 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  $.5 \times 47.3 = 23.67$  spaces, rounded up to 24. Thus, the total parking requirement for the two uses, if one rounds numbers after adding, would be  $3.6 + 23.67 = 27.27$  spaces, which would be rounded down to 27 spaces, if not 28 by rounding earlier.<sup>6</sup> The Table also claims that the parking requirement is halved under C-702.1.c.3., in that the Property is within a quarter mile of the 16<sup>th</sup> Street bus corridor. If that is correct,<sup>7</sup> then the parking requirement would be 14 spaces, whereas the Table states that only 8 spaces are provided. That is also the number of spaces depicted on Sheet A2.00, the P1 Floor Plan. The Narrative inconsistently states that 9-12 spaces will be provided, but that none of them will be for shelter residents. In either case, there is a parking shortfall.

**Loading.** The Table claims that no loading space is required and that none is provided, citing C-901.1. 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. But the loading requirement for an emergency shelter is one when, as here, the size of the shelter is between 30,000 and 100,000 sq. ft. of gross floor area. This is another case where, as with parking, DGS has failed to draw the proper use-based distinction in complying with the development standards.

**Bicycle Parking.** The Table claims that 17 long-term and 3 short-term bicycle parking spaces will be provided for all three uses: community center, residential units and shelter units.

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<sup>6</sup> As for the Community Center, the Narrative states that its existing 13 spaces will be relocated to a below-grade location and dedicated to the Center. This is consistent with what is depicted on the P1 Floor Plan, Sheet A2.00. I have assumed that the relocation of the Community Center spaces, without numerical change, does not present a parking compliance issue, and it is not considered in the above analysis.

<sup>7</sup> It is not clear from the Plans that this is correct. The straight-line distance from the Property to 16<sup>th</sup> Street, N.W. is under a quarter mile, but it is likely that any practical walking distance would be greater than a quarter mile, such as the route to the bus stop at the north end of Meridian Hill Park, which may be the closest one on 16<sup>th</sup> Street, N.W. If the latter criterion is the correct one, there is no showing of entitlement to the reduction, and the parking shortfall is likely greater.

The applicable provision is C-802. Under C-802.10, the number of spaces must at least equal the total required for all uses. For the residential use, the requirement is 1 long-term space for each 3 units, and 1 short-term space for each 20 units. At 15 units, that would be 5 long-term spaces and 1 short-term space. For the shelter, the requirement is 1 space for every 10,000 sq. ft., for each type of space. Using the above 47,341 estimate of the gross floor area, this translates to 4.73 spaces of each type, rounded up to 5. For the Community Center, there is no long-term space requirement, but a minimum of 6 short-term spaces. Hence the total number of long-term spaces required is  $5 + 5 = 10$  spaces; the total number of short-term spaces required is  $1 + 5 + 6 = 12$ . The Table thus claims compliance as to the long-term requirement (17 provided/10 required), and non-compliance as to the short-term requirement (3 provided/12 required). Again, failure to distinguish one use from another infects the demonstration of compliance, but whatever the allocation of space between the two uses in the new building proves to be, there will be a shortfall in bicycle parking.

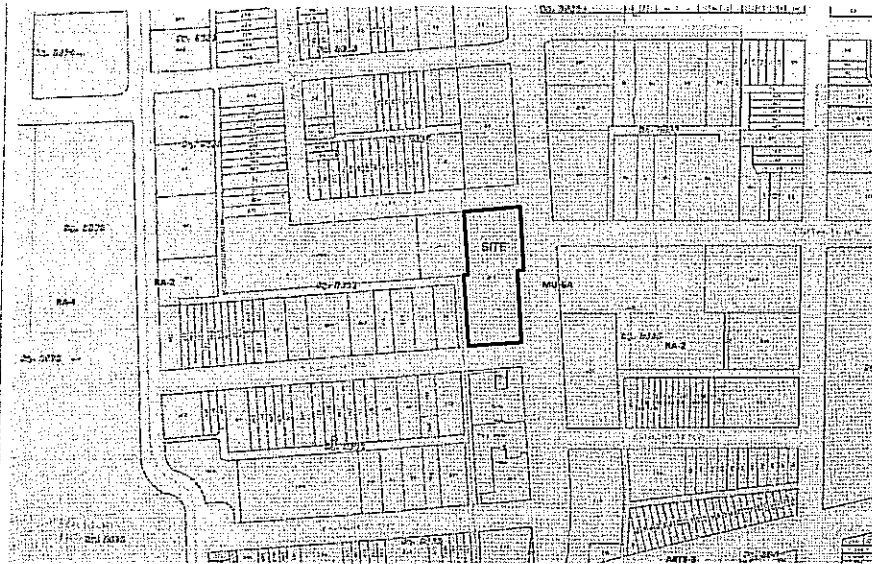
### CONCLUSION

The Zoning Administrator's preliminary advisory statement that the last-minute reconfigurations justify viewing the existing Rita Bright Community Center and the new building as a "single building" determination appears to be legally unsound. It should be re-evaluated in a final decision that could be appealed to the BZA. Beyond that problem, I conclude that this project cannot lawfully move forward (a) without a special exception approved by the BZA for the emergency shelter part of the new addition to the Property, and (b) without either reconfiguration of the new building to comply with setback requirements or variance relief that you would have ample justification to oppose. It is also legally deficient in meeting the applicable parking and loading requirements, which likewise could be addressed in the course of the BZA proceeding essential for the emergency shelter special exception.

I have not yet addressed the several substantial requirements set forth in U-513.1(b) for special exception approval. They are beyond the intended scope of this Memorandum, but they are anything but nontrivial requirements, especially if the matter is contested at the BZA. Nor have I yet had a chance to address your property rights under adverse possession law with respect to land within the wrought-iron fence bordering the Condominium parking lot or the property within the retaining wall that runs along the east side of the Condominium. In both instances, this property, which appears to have been long held under claim of right by the Condominium and its predecessors in title, is seriously threatened with infringement under the Plans. See Plan Sheets CIV0101, 0102 & 0105.

/Attachment

ZONING MAP



AERIAL MAP



ZONING SUMMARY

	Allowed	Proposed	Comments
Uses U-512	Recreational uses; Residential uses;	Existing Public Recreation & Community Center, Proposed Apartment Building	
Height G-403	65'-0" (70'-0" with IZ)	85'-0" max. to highest parapet.	
Site Area	41,099 SF		Per Subtitle C §302.4, multiple buildings may be constructed on the same lot provided they collectively and separately meet zoning requirements.
FAR G-402	Total Permitted: 3.5 (4.2 with IZ); Non-residential: 1.5 max.	Residential Building: 1.65; Community Center: 0.37; Total for site: 2.0.	
Gross Floor Area (FAR)	143,846 SF (3.5); or 172,615.8 SF (4.2)	Residential building area: 67,630 GSF; Community Center area: 15,079 GSF; Total for site: 82,709 GSF.	
Penthouse C-1500	FAR: 0.4 (not included in building FAR); Height: 12'-0" max. (18'-8" for mechanical space).	Open-air mechanical penthouse @ 8'-0"; Separate elevator overrun @ 4'-7".	Penthouse will not include habitable space, and will only include elevator overruns and mechanical spaces.
Lot Occupancy G-404	80%	13,330 SF + 15,079 SF = 28,409 SF. Lot occupancy: 69.1%	
Front Setback	None required.	Varies across the site.	There are no imposed limits on provided setbacks.
Side Setback G-406	None required; if provided it shall be 2" per 1'-0" of height and 5'-0" minimum.	None.	
Rear Yard Setback B-317	None required for a through lot, per Subtitle B §317.3	None.	
Open Court Width G-202	4 inches per 1 foot of height of court, 10'-0" minimum. STFH Play Area: 19'-10" required; Rita Bright Plaza & access: 15'-0" required.	STFH Play Area: 32'-4" provided; Rita Bright Plaza & access: 23'-0" provided.	For irregularly shaped courts, width is measured by the diameter of the largest circle that can be inscribed in it, per Subtitle B §322.4. STFH Play Area height: 59'-6"; Rita Bright Plaza & access height: 13'-6";
GAR G-407	0.30	0.312 proposed.	
Parking C-701	Residential, multiple: 1 per 3 dwelling units in excess of 4 units (16/2=8 required); Parks & recreation: 0.5/1000 SF (8/2=4 required) Total: 12 spaces required	Residential: 8 spaces provided; Community center: 13 spaces provided; Total: 21 spaces.	Per Subtitle C §702.1.c.3, because this site is within ¼ mile of the 16th Street bus corridor, parking requirements are halved.
Loading C-901	None required.	None provided.	Per Subtitle C §901.1, loading is only required for more than 50 residential units, or more than 20,000 SF in the community center
Bicycle Parking C-802	Parks & recreation: 1/10,000 SF short-term, but no less than 6 (=6 required); Residential: 1/three dwelling units long term, 1/20 dwelling units short-term (=17 long-term required, 3 short-term required).	Long-term: 17 provided; Short term: 3 provided	