RICHARDSON PLACE NEIGHBORHOOD ASSOCIATION, Appellant, v. D.C. DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS, And OAKTREE DEVELOPMENT, LLC, d/b/a/ OTD 410-412 RICHARDSON PLACE LLC, Applicant.	Case No.: 19441

APPELLANT'S MEMORANDUM IN SUPPORT OF APPEAL

Appellant Richardson Place Neighborhood Association ("RPNA"), a citizens' association comprising owners of approximately 10 homes on or adjacent to Richardson Place, NW, appeal two nearly-identical (and related) modified building permits. The two permits were issued by the D.C. Department of Consumer and Regulatory Affairs ("DCRA") in the fall of 2016. The first permit appealed is B1611469 (issued for 410 Richardson Place NW and based on original permit No. B1214832). The second permit appealed is B1611470 (issued for 412 Richardson Place NW and based on original permit No. B1002883). The permits were filed by OTD 410-412 RICHARDSON PLACE LLC, which is owned by Oaktree Development, LLC (collectively, "Oaktree").

Briefly stated, Oaktree and its lessee—a new "co-living" start-up called Common Living, Inc., (www.common.com)—are on the cusp of opening a newly-constructed, 24-unit dormitory for young professionals on two adjoining, formerly vacant parcels. Oaktree has proceeded to construct this building "as of right." While this might not be a problem had Oaktree sought a

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variance to for its intended use, it has not done so. Nor would it have been problematic had Oaktree constructed the building in accordance with the zoning regulations applicable to R-4 Zones, which, on account of the rules' concern about density, require **any** use other than "flats" or "rowhomes" to limit lot coverage to 40%. But Oaktree did not do that either. Instead, it constructed a building covering 60% of the lot, representing to its neighbors and the D.C. Department of Consumer and Regulatory Affairs (DCRA) that it was building two adjacent, "2 family flats." See Permit Nos. B1611469 & B1611470.[1] But Oaktree's intended use comes nowhere near the zoning code's definition of "flats." On the contrary, "co-living" is not a use contemplated by the existing rules, which means it cannot be constructed as of right in an R-4 zone. But even if the Office of Zoning were to analogize to existing uses contemplated by the zoning regulations, see 11 D.C.M.R. 199 (2015), the uses closest to what Oaktree intends are either as an apartment house—which is not permitted in an R-4 zone at all—or as a rooming or tenement house, both of which must comply with the 40% lot-coverage requirement.

As Appellant explains below, this is a blatant violation of the city's zoning laws, and represents a breach of trust with the both the city and the development's immediate neighbors. Appellant therefore respectfully requests that the permits be rescinded.

I. Background

A. The Subject Property

The subject property consists of two adjacent lots on the south side of Richardson Place, NW—a small, internal half block bounded by New Jersey Avenue, Rhode Island Avenue, Florida Avenue, 4th Street, and R Street. The addresses of the subject property are (1) 410

[1] See also Attach. A, May 16, 2016 Email from Peter Stuart, Partner, Oaktree Development LLC to J. Justin Wilson ("[T]he way [the building is] permitted is two, two family flats (4 units). We are making a few design tweaks but are not seeking to change the zoning/use."); see also DCRA Building Permit Nos. B1214832 (410 Richardson) & B1002883 (412 Richardson) (each granting developer a "new building permit" to construct, on each parcel, a "54 ft. x 26.5 ft. 3-story flat, row dwelling . . . .").

Richardson Place NW (Square 507, Lot 102) and (2) 412 Richardson Place NW (Square 507, Lot 101). A public alley abuts both structures to the south, and another public alley abuts the parcel at 412 Richardson Place to the West.

Prior to construction of the current, nearly-completed structure whose permits are the subject of this appeal, the subject property had been subdivided into 5 lots (811, 812, 813, 814, and 815) having 4 different addresses (410, 412, 414, and 416 Richardson Place NW). See Attach. C, Board of Zoning Adjustment (BZA), Application of Wilbur Mondie, Case No. 17404, Jan. 26, 2006 Hearing Transcript at 70 (discussing original lots associated with current property).[2] Sometime between 2006 and 2012, the owner subdivided the property into the two current lots at issue here (Lots 101 and 102).

Both permits at issue on appeal—B1611469 and B1611470—represent their purpose as follows:

> Completion of an existing 2 family flat to include minor reconfiguration of space, finish material changes, building system revisions to accommodate reconfiguration. Refer to original permit B1214832 for applicable building codes, building classification, energy code compliance, fire protection, means of egress, accessibility, fire separation, travel distance and ADA compliance.[3]

These modification-and-repair permits relate back to two original building permits that DCRA issued in 2012 to the former owner of the property, Wilbur Mondie, for new construction of the very same pair of two-family flats and/or row dwellings. See DCRA Building Permit Nos. B1214832 (410 Richardson) & B1002883 (412 Richardson) (each granting developer a "new building permit" to construct, on each parcel, a "54 ft. x 26.5 ft. 3-story flat, row dwelling and

[2] Available at app.dcoz.dc.gov/Content/Search/Search.aspx.

[3] Strangely, both permit descriptions refer back to Permit No. B1214832, which issued only for **410** and not 412 Richardson Place. See DCRA Permit No. B1214832. This supports Appellant's view that the property owner has treated its project as a single structure and not as two separate "flats" as the applicant has represented in its submissions to DCRA. See infra Section II.C.

one required 9 ft. X 19 ft. Automobile parking space on the lot. . . . Conversion to two family flat.”). Appellant notes that the original reference to a “conversion” is erroneous, as the property was vacant prior to construction of the project at issue here.

The subject property currently has a near-completed structure in place as pictured in Attachment G (including October 2006 Photos of Construction Site). Before addressing the proposed project as portrayed in the applications before the DCRA, we briefly note the history of the project before the BZA in a prior variance application.

B. History of the Applicant’s Project

The relevant history begins in 2005, when the subject property was purchased by Wilbur Mondie, who sought to construct a project nearly identical to the one currently at issue here. At that time, Mr. Mondie, through his attorney Leonard McCants, applied to the BZA “for a variance from the lot-width and lot-area requirements under [11 D.C.M.R. §] 401.3, to allow the construction of four flats (two-family dwellings) in the R-4 District . . . .” Case Information, BZA App. No. 17404.[4] The BZA heard testimony on the application three times: first in December 13, 2005; second in January 24, 2006; and third in February 7, 2006. See id.; see also Attachments C & D (January and February BZA Hearing Transcripts).

As the Secretary from the D.C. Office of Zoning noted in testimony before the BZA, Mondie’s application specifically proposed “construct[ing] a single building of four single-family dwelling units on a consolidated lot.” See Attach. D, BZA App. No. 17404, Feb. 7, 2006, Hearing Tr. at 60 (Presentation of Clifford Moy, Secretary of D.C. Office of Zoning). The proposed lot coverage was to be 59.4%—just shy of the 60% lot coverage that may be constructed “as of right” for row dwellings and flats. See id. at 68; see also 11 D.C.M.R. § 403.2

[4] Available at app.dcoz.dc.gov/Content/Search/Search.aspx.

(2015).

The members of the BZA and a representative from the D.C. Zoning Commission expressed a number of concerns regarding the project, including primarily: (a) that Mr. Mondie was attempting to circumvent the lot-coverage restrictions applicable to as-of-right structures in an R-4 Zone by building a single structure but representing it to the BZA as a series of adjacent row homes;[5] and (b) that the project's density (including a finished basement and three above-ground levels) was "substantially" greater than nearby structures, and therefore that the project "fail[ed] in terms of maintaining the character" and density of the neighborhood.[6]

During the hearings, the D.C. Office of Planning also expressed its view that the project was not even properly categorized as "row homes" or "flats" at all, but rather was an "apartment," which is not permitted without a variance in an R-4 zone. As staff member Karen Thomas explained:

> We looked to the definition of what exactly is an apartment. One building of various units, more than three units. [Here, y]ou're having four units. The R-4 zone regulation does not account for having apartments in the R-4 district. So if you're erecting a new structure from the ground up, **this is not even a conversion, you are in fact *de facto* erecting an apartment building**. Three units all together, three or four units all together in one building where it looks like a row house[,] it is an apartment building.

Attach. C, BZA App. No. 17404, Jan. 24, 2006, Hearing Tr. at 87 (Comments of Karen Thomas, Office of Planning) (emphasis added).

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[5] See Attach. C, BZA App No. 17404, Jan. 24, 2006, Hearing Tr. at 70 (Comments Carol Mitten, Chair, D.C. Zoning Commission) ("[W]hen you consider this a single structure then it becomes sort of impossible to consider it individual ro[w] dwellings and invoke the lot occupancy limitation for a ro[w] dwelling at . . . 60 percent . . . where as [in] the Office of Planning's view . . . this would come under 'all other structures,' which is at 40 percent, sort of like you can't have it both ways."); id. at 83 (noting that Mondie did not seek a lot-occupancy variance); id. at 83-84 (Comments of BZA Chair Geoffrey Griffis) ("[T]he point is in the R-4 district ro[w] dwellings and [f]lats are allowed at 60 percent lot occupancy. There are other structures . . . [which] would be required to comply with 40 percent lot occupancy. . . . The question then is is this an 'other [structure]' or is this a townhouse flat? And I guess the difficulty . . . is in one sense you're asking us to look at [the project] as a single building and then in the next . . . iteration we look at it individually. How do we reconcile that, in terms of the regulations?").

[6] See id. at 77-78 (Chairperson Griffis).

In the last of the three hearings on February 7, 2006, the BZA was on a path to deny the variance that Mondie had sought. Early in that hearing, the BZA's Vice-chair, Ruthanne Miller, had indicated her view that the variance application failed for a number of reasons, including for the fact that it "doesn't meet lot occupancy requirements"; even though "[the project] may be comprised of single row dwellings . . . it becomes something other than that when they're put together. That's why I think it falls in the category of all other structures." Attach. D, BZA App. No 17404, Feb. 7, 2006, Hearing Tr. at 64-65, 68-69. As the discussion was wrapping up, Member John Mann moved to deny Mondie's application for a variance, which was seconded by Chairperson Griffis. See id. at 78. But before Member Miller or Member Curtis Estherly could register their vote, Mondie withdrew his application. He formalized his motion in a hand-written letter, and the BZA formally registered the withdrawal on February 8, 2006. See Attach. E, Feb. 8, 2006 Letter from Jerrily Kress, Office of Zoning, to Wilbur Mondie.

Beginning in 2008, Mondie submitted four applications to DCRA for building permits to construct "new single family dwelling[s]" on the lots at 410 and 412 Richardson Place. See DCRA Application ID Nos. B0801796 & B0801798 (9/9/2008); B0902560 & B0902562 (1/7/2009). All were withdrawn.

In 2010, Mondie finally achieved some success before DCRA. In doing so, he effectively submitted to DCRA plans that, at least as to the BZA's concerns about density and circumventing lot coverage requirements, were nearly identical to those submitted to the BZA for a variance. But Mondie did not indicate to DCRA that he would need a variance. Instead, he did two things that Appellant believes likely would have avoided raising red flags during the zoning review of Mondie's applications.

First, instead of submitting one permit application for a single, connected building spanning both lots, he submitted two different applications for two "different" buildings: one at 410 and the other at 412 Richardson Place. See DCRA Nos. B1002881 (Jan 22, 2010) (for 410 Richardson) and DCRA No. B1002883 (Jan 22, 2010) (for 412 Richardson).

Second, instead of proposing to build four adjacent, single-family row homes—as he had in his variance application—he proposed to build 2, two-family flats—that is, two identical buildings (one at 410 and one at 412) that, taken together, comprise a total of 4 units: two basement units, and two three-story main units. See Attach. B, SITE PLAN & DETAILS, 410 RICHARDSON PL., at 2 (describing project as "a three story [two-family building] with basement" where "one unit shall be a basement only unit."). Appellant notes that DCRA only has copies of the building plans at 410 Richardson Place and could not produce copies of the building plans for 412 Richardson Place to Appellant.

The description of work for 412 Richardson was "BUILD A THREE STORY + CELLAR FLAT." See DCRA No. B1002883 (Jan 22, 2010). The description for 410 was "New 54ft x 26.5ft 3-story SFD [single-family dwelling] row dwelling one required 9ft x 19ft automobile parking space on the lot. (The width of proposed structure shall span [*sic*] the complete 26.5ft lot width)." See DCRA No. B1002881 (Jan 22, 2010).

For whatever reason, Mondie appeared to allow the permit for 410 Richardson Place (B1002881) to lapse, submitting a *new* application in 2012 for only 410. That application was numbered B1214832, and contained a description nearly identical to DCRA No. B1002881. The permit was "revised" in 2014 (No. B1405041), and extended twice in 2015 (Nos. B1511381 and B1602101).

For 412, however, Mondie kept extending the original 2010 permit, DCRA No. B1002883, first in 2012 (No. B1212625), thrice in 2013 (Nos. B1304026, B1304064, and B1309581), and twice again in 2015 and 2016 (Nos. B1511382 and B1606031).

C. Transfer of Ownership to Oaktree

On April 20 2016, Mondie sold the property to Oaktree for $2.2 Million. See Attach. F, Property Sale Record, D.C. Office of Tax and Revenue. Oaktree modified the permits to reflect the change in ownership (See DCRA Permit Nos. B1606608 [for 410] and B1606609 [for 412]).

In August 2016, Oaktree applied for the alteration and repair permits at issue here, seeking in both permits to "Complet[e] . . . an existing 2 family flat to include minor reconfiguration of space, finish material changes, building system revisions to accommodate reconfiguration." DCRA Permit Nos. B1611469 and B1611470. The property current looks as depicted in the photograph represented in Attachment G. To Appellant's knowledge, at no time after 2005 or 2006 has the property owner sought a variance before the BZA.

D. Oaktree's Intended Use for 410/412 Richardson Place

In mid-October, 2016, several news outlets began publishing online stories announcing that a new "co-living" startup named Common Living, Inc., would be opening a first-of-its kind, 24-unit, high-density, commercially operated co-living rooming house in the "Shaw" neighborhood of D.C. See, e.g., Attach. J, Tajha Chappellet-Lanier, *Common is bringing a second coliving option to DC [area]*, TECHNICAL.LY (Oct. 12, 2016); Attach. K, Michelle Goldchain, *New co-living space coming to Shaw by December*, DC.Curbed.com (Oct. 7, 2016). None of the articles indicated precisely where the project was going to be located, noting that it was "coming to a secret location." See, e.g., Attach. L, Marisa M. Kashino, *New Co-Living Community Coming to a **Secret** Location in Shaw*, Washingtonian (Oct. 13, 2016) ("This is

not a photo of the Shaw building, because the location has not been disclosed."). But all of the articles indicated that the location would be in Shaw, not Truxton Circle (which is where the subject property is located). Id.

At that time, given a preliminary conversation between Oaktree's Mr. Stuart and the neighbors in May 2016, in which Peter stated he was exploring the possibility of using the space for a "co-living" facility, members of the Richardson Place Neighborhood Association suspected that the articles might have been referring to the subject property but had no confirmation of whether that was so. To obtain confirmation, RPNA President James Wilson emailed Mr. Stuart to set up a meeting between him, his husband (Steven Seigel), and Mr. Stuart, which the three held at Mr. Wilson's and Mr. Seigel's home on October 31, 2016.

At that meeting, Mr. Stuart confirmed the following facts about the intended use of the subject property:

1. Oaktree intended Common Living, Inc. to be its tenant;
2. Common would have a master lease on the entire property;
3. Common was intending to operate the building as a total of 24 distinct living units, each with an *en-suite* bathroom and closet, and 4 separate common areas;
4. Each of the 24 units would be leased individually;
5. An employee of Common would live on premises in one of the 24 units at all times, acting as a sort of superintendent of the entire property.

See Attach. M, Wilson Decl. ¶ 16.

Mr. Wilson also inquired about the status of Oaktree's outstanding modified permit applications, asking when Mr. Stuart expected they would issue. Mr. Stuart informed Mr. Wilson that the permits had already issued. Mr. Wilson expressed surprise at that fact, since he had been checking the status of the permits online for some time. See id. ¶ 18.

This appeal followed.

II. Analysis

The use that Oaktree has indicated on its permit application does not match its intended use of the property. And the intended use of the property cannot be constructed as of right in an R-4 Zone.

Oaktree sought permits to construct two "two-family flats." In reality, however, Oaktree is seeking to use the property as a commercially operated dormitory for professionals, with individual leases signed for 24 private bedrooms and bathrooms, all of which exist under one roof in a single building. This is not a use that may be constructed "as of right" in an R-4 zone, which provides only that "flats" and "rowhouses" may be built as of right to 60% of the lot's coverage. But the zoning code's definition of a "flat" cannot bear the meaning that Oaktree proposes, and indeed the zoning code already provides more appropriate definitions capturing the use that Oaktree intends: an apartment house, a rooming house, or a tenement house, none of which may be constructed as Oaktree has done—*i.e.*, with 60% lot coverage—in an R-4 Zone.

A. Permissible As of Right Structures in R-4 Zones

The D.C. Council intended R-4 Zones to include those areas now developed primarily with row dwellings, but within which there have been a substantial number of conversions of existing single-family dwellings into two-family units. See 11 D.C.M.R. § 330.1 (2015). The R-4 Zone's "primary purpose" is the stabilization of remaining one-family dwellings, id. § 330.2, and is not intended to become an apartment house district, see id. § 330.3. That means that neither apartment house nor tenement houses may be built ***at all*** in an R-4 zone without a variance. See id. § 330.

At the same time, a property owner may, in an R-4 Zone, construct a number of other structures as of right—relevant here, a "flat" and, subject to certain conditions, a "rooming

house." See id. §§ 330.5(f), 330.6. While flats and row homes may be constructed as of right at 60% lot occupancy in an R-4 Zone, any other structure is limited to 40% lot coverage for as-of-right construction. See id. § 403.2 (2015).

B. The "Use" of a Property Under the Zoning Regulations

The "use" of a property under D.C. zoning regulations is the "purpose or activity for which a lot or building is occupied," and "shall be considered as though followed by the words 'or intended, arranged, or designed to be used or occupied, offered for occupancy.'" 11-B D.C.M.R. § 100.1(f); see also 11 D.C.M.R. § 199.2(f) (2015) (same). This has two important points relevant here.

First, how a building is "offered for occupancy"—exemplified here by Common Living, Inc.'s online advertising, see Attachments H & I—may reveal how an owner intends that building to be used.

Second, the use that most closely matches the intended use is the use that must govern for purposes of the zoning regulations. See 11-B D.C.M.R. § 202 ("If a use is determined to fall into more than one (1) use category, the use is subject to the regulations for all applicable use categories. If this results in conflicting conditions or criteria, the most stringent conditions shall be met."); Chagnon v. Bd. of Zoning Adjustment, 844 A.2d 345, 348–49 (D.C. 2004) ("Although the BZA and the Zoning Administrator contend that, in the interests of efficient administration, they may interpret defined uses in the Zoning Regulations to encompass other uses that are functionally comparable even if they are outside the definition, they cite no authority for that position and we cannot agree with it."); L.R. Willson & Sons, Inc. v. Donovan, 685 F.2d 664, 675 (D.C. Cir. 1982) ("[R]egulations cannot be construed to mean what an agency intended but did not adequately express.") (internal quotation marks and citation omitted).

In its applications to DCRA, Oaktree has represented that it is intending to construct and sell or lease two identical flats—that is, two "dwelling[s] used exclusively as a residence for two (2) families living independently of each other." See 11 D.C.M.R. § 199 (defining as synonymous "flat" and "dwelling, two-family"). But Oaktree intends a use different from the one listed on its permit applications—which is of a single, 24-unit complex: a use that is not permitted "as of right" in an R-4 Zone with 60% lot coverage.

C. Subject Property is Not a Flat Because it is Operated as a Single Structure, Rendering it an Apartment House

Oaktree's first problem is that it intends to operate the building as a single structure. Although Oaktree has represented to DCRA that it intends for 410 and 412 to be used separately as "flats," its tenant, Common, advertises the subject property as a single facility: "Make yourself at home. Our newest DC residence has 24 bedrooms, each with a private en-suite bath." See Attach. I, Common.com "Richardson" webpage, *also available at* www.common.com/richardson.

In other words, Oaktree and its lessee intend the two structures to be operated as a single, functioning residence. But the zoning code's definition of a "structure" does not permit the use intended by Oaktree and Common. The Zoning Code defines a structure to encompass multiple buildings, providing that "[a]ny combination of commercial occupancies separated in their entirety, erected, or maintained in a single ownership shall be considered as one (1) structure." 11 D.C.M.R. § 199.1 (defining "structure"). Given Oaktree's and Common's intent to operate the subject property as a single commercial residence, the separately permitted structures at 410 and 412 Richardson must be treated as a single building under the zoning code—a single building which consists of 24 bedrooms and four common areas.

When the building is properly considered as a single structure, it becomes clear that Oaktree does not operate "flats"—two-family dwellings—but rather an "apartment house"—that 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. (defining "apartment house"). As permitted, the subject property contains a total of 4 apartment units (each with 6 bedrooms, a kitchen, and common facilities). And because 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," the structure is thus more properly conceived an apartment house. Id. (defining "apartment"). As a staff member for the D.C. Office of planning noted in her review of the prior iteration of plans for this same project, the building is "*de facto* . . . an apartment building." BZA App. No. 17404, Jan. 24, 2006, Hearing Tr. at 87 (Comments of Karen Thomas, Office of Planning).

The conclusion that the building spanning 410 and 412 Richardson Place NW should be treated as a single structure is also buttressed by federal anti-discrimination laws, which treat buildings like Oaktree's as a single structure, thereby triggering the protections of statutes like the Fair Housing Act. See, e.g., Attach. N, Charge of Discrimination, Housing and Urban Development v. Riexinger, FHEO No. 10-15-0136-8, at 3 (noting that a commercially-leased building spanning 3 different addresses, and consisting of "three, identical, nine-unit, non-elevator buildings," in which "each unit consists of a large private room with a locking kepayd entry…desk…closet, and full bathroom," and where "tenants share a common use kitchen, living room, and laundry room," is a "covered dwelling" under the FHA); see also 14 D.C.M.R. § 199.2 (defining "dwelling" by reference to the Fair Housing Act).

D. *Subject Property is Not a Flat Because its Units Will Not be Used for Single Families Living Independently of Each Other*

The use proposed by the applicant also fails to conform with zoning code because the project's intended use is not as single-family residences, where each family "liv[es] independently of each other." See 11 D.C.M.R. § 199 (defining "flat" and "dwelling, two-family").

As defined by the zoning code, a flat comprises two single-family units, each of which, by definition, houses only one family. See id. (defining "dwelling, two-family"). A family, in turn, is defined as either "one (1) or more persons related by blood, marriage, or adoption, or not more than six (6) persons who are not so related, including foster children, living together as a single house-keeping unit," id. (defining "family").

Oaktree cannot reasonably maintain that its 24-bedroom residence will be used by 24 persons "related by blood, marriage, or adoption," and so we must presume that it is intending its use to fall under the second definition of a family—that is, "six (6) [unrelated] persons . . . living together as a single house-keeping unit." Id. While the zoning code does not define this latter phrase with any more specificity, it is abundantly clear that the phrase cannot encompass the use intended by Oaktree and Common—that is, 24 unrelated persons living together in private rooms with en-suite bathrooms. See Attach. I, "Richardson" Page, at www.common.com/richardson. Nor can Oaktree plausibly argue that, were the BZA to view its use as an assemblage of 4 single-family units (i.*e.*, two adjacent flats), each housing six people, that such a use could be construed as four distinct families "living *together* as [] single house-keeping unit[s]." 11 D.C.M.R. § 199.1. This is particularly so because (a) Common represents on the website that each tenant has a private bedroom and bathroom (meaning at least *other tenants* may not enter), and (b) Common takes care of the chores and duties that might otherwise suggest a collective group of

unrelated people are "living together as a single house-keeping unit." See Attach. H at 3-4 (Common Webpage).

Precedent from other jurisdictions supports this position. In In re Miller, 511 Pa. 631 (1986), for instance, the Supreme Court of Pennsylvania helpful surveyed the historical use of the term "single housekeeping unit," recognizing that it has:

> evolved as a term limiting the use to a unit that *functions in the manner of a family residence*. It did not require that any particular relationship between the members of the unit be demonstrated as long as a family residential setting was apparent. This term has been found to *exclude arrangements that were primarily established for profit*, or for therapeutic or corrective purposes, since these settings are not *compatible with traditional family settings*.

Id. at 638 (citations omitted) (emphases added). Under this conception of the term, Common and Oaktree's use does not count as four "single family units" because (a) the arrangement is primarily established for profit, and (b) the units do not function in the manner of a family residence.

Similarly, in Armstrong v. Mayor & City Council of Baltimore, 410 Md. 426 (2009), the Maryland Court of Appeals recently held that four persons living together in a single unit, each with individual leases signed with the landlord, *did* count as a single housekeeping unit, because *all* tenants had "the exclusive right to th[e] entire four bedroom unit" and because each tenant was "equally responsible for the care and maintenance of the apartment unit." Id. at 453 (quotation marks omitted). In reaching its conclusion based on a survey of precedent, it noted that "shared access to the premises and joint responsibility for the care thereof are significant considerations." Id.

As Appellant understands Oaktree and Common's intended use, however—as demonstrated from Common's advertising on its website—the tenants neither enjoy the

"exclusive right to th[e] entire [24] bedroom unit," id., nor are obliged to take "joint responsibility for the care" of the facility, id. On the contrary, Common advertises that its tenants will be entitled to a fully-furnished "Private Bedroom, [a] space to call your own. Choose a room designed for singles or couples," see Attach. H at 3, Screenshot of Common.com Homepage, and will not be responsible for cleaning any of the building's communal spaces, see id. at 4 ("Weekly Cleaning. We're all about good, clean fun. Shared spaces are spruced weekly to keep the place feeling (and smelling) like home."). In addition, as part of the monthly fee, residents will be supplied with (a) kitchen supplies, (b) cleaning supplies, (c) laundry detergent, and (d) "commercial grade WiFi." Id. at 3-4. Common also advertises that its residences will include social gatherings organized by Common, representing the events as a shared experience across the entire building (not just within each arbitrarily-defined 6-room assemblage). Id. at 4 ("We plan weekly and monthly gatherings like potluck dinners, movie nights, yoga, book clubs and all the fun things."). In other words, Oaktree and its tenant Common intend the property to operate not like a flat, with four distinct families each living separately from each other, but rather like a private dormitory, with all furniture and amenities furnished by Common, and in which all of the residents living in the 24 separately-leased units participate in a shared experience.

Finally, the use cannot be considered a "flat" because the proposed use is not one where each family is "living independently of each other." 11 D.C.M.R. § 199 (defining "flat"). As noted, Common advertises that it organizes "community events" for its tenants, which in this case includes at least 24 individual tenants—not 4 distinct families. See Attach. H at 4. Similarly, Oaktree's partner, Peter Stuart, represented that there would be a single superintendant, employed by Common, who would oversee the remaining 23 units in the building, see Attach. M, Wilson Decl. ¶ 16—suggesting that Common and Oaktree view the

property as a single residential property, not two sets of "dwelling[s] used exclusively as a residence for two (2) families living independently of each other." 11 D.C.M.R. § 199.

Whether considered as a single 24-unit residence or four distinct units, each with 6 bedrooms, what Oaktree is intending to operate comes nowhere near the zoning code's definition of "six (6) [unrelated] persons . . . living together as a single house-keeping unit." 11 D.C.M.R. § 199.1.

E. Subject Property is Not a Flat Because it is a Rooming House

Not only does the project fail to count as a "flat" under the zoning code, its use most closely resembles that of a rooming house. In contrast to a flat's focus on single-family housing, a rooming house provides sleeping accommodations for multiple people, each of whom individually rents a rooming unit. The definition of "rooming house" in the zoning code has the following definition, in relevant part:

> 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.

Id. § 199.1 (defining "rooming house"); see also D.C. Code § 6–701.12 (defining rooming house as "a building in which rooms are rented and sleeping quarters provided to accommodate 10 or more persons, not including the family of the owner or lessee").

As explained above, Common is holding out the property as a single, 24-unit facility—a position that contradicts any attempt by applicants to maintain that the property will, in fact, constitute four distinct families, with four sets of six people each "living together as a single house-keeping unit." 11 D.C.M.R. § 199.1.

In addition, other definitions in the Zoning Code suggest that what Common intends *is* encompassed by the definition of "rooming house" and "rooming units." As to the latter, a "rooming unit" is defined as "one (1) or more habitable rooms forming a single, habitable unit used or intended to be used for living or sleeping purposes; but not for the preparation or eating of meals." Id. And a rooming house is, of course, a place 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." Id.

Oaktree cannot argue that its accommodations are under the exclusive control of its occupants. On the contrary, Oaktree has represented that it has a master lease that will be signed over to Common, who will then issue individual subleases (or potentially memberships) to each of its subtenants. In addition, each room is "fully furnished" for each tenant, meaning Common owns the "mattress, bedding, hangers, couches, spoons and everything in between." Attach. H, at 3. The "accommodations," therefore, "are not under the exclusive control of the occupants," in which the tenants live together, albeit not as a "single house-keeping unit." 11 D.C.M.R. § 199.1.

In addition, Oaktree's and Common's intent to operate the residence for profit belies any assertion that it intends to operate anything other than a rooming house. While the zoning code does not discuss commercial operation as a clue to whether a use constitutes a "rooming house" or some other use, other provisions of the D.C. Code and its regulatory structure for commercial operation of housing do. For instance, the District already has in place a well-established regime for licensing housing-related businesses, which is how Oaktree and Common intend to use the subject property. Indeed, "[n]o person shall operate a housing business in any premises in the District of Columbia without first receiving a basic business license for the premises by the

Department of Consumer and Regulatory Affairs (Department)." 14 D.C.M.R. § 200.4. Significantly (and quite rationally), the D.C. Code does not contemplate the issuance of commercial housing licenses for single-family residences for "six (6) persons who are not . . . related . . . living together as a single house-keeping unit." 11 D.C.M.R. § 199.1. But it does allow the city to require licenses for owners who operate "rooming houses." D.C. Code § 47-2828(b).

Finally, the proper classification of a building as a rooming house is essential to maintaining the District's health and safety laws. Under D.C. law, certain property owners must "provide and cause to be erected and fixed to every such building 1 or more suitable fire escapes, connecting with each floor above the 1st floor by easily accessible and unobstructed openings, in such location and numbers and of such material, type, and construction as the Council of the District of Columbia may determine." D.C. Code § 6–701.01. This applies to "rooming houses," and particularly "any building 3 or more stories in height, or over 30 feet in height, other than a private dwelling, in which sleeping quarters for the accommodation of 10 or more persons are provided above the 1st floor." Id. The subject property does not currently have plans for fire escapes, and yet the D.C. Code suggests that it must.

In short, Oaktree is "intend[ing], arrang[ing], or design[ing] [its project] to be used or occupied, offered for occupancy" as a rooming house. 11 D.C.M.R. § 199.2. And while rooming houses may be constructed as of right in an R-4 Zone, the building may only cover 40% of the lot, see id. § 403.2 (2015)—which is far in excess of the 60% lot coverage for the buildings erected at 410 and 412 Richardson Place NW.

F. Subject Property is not a Flat Because it is a Tenement House

In the alternative, if the use is not as an apartment house or rooming house, it is as a tenement house. The zoning regulations define a tenement as "One (1) or more habitable rooms in an apartment house, under the exclusive control of the occupant of the apartment house," and a tenement house as "a building or part of a building containing three (3) or more tenements, or any building or part of a building containing any combination of three (3) or more tenements and apartments." 11 D.C.M.R. § 199.1 (defining "tenement" and "tenement house"). The subject property, as intended to be used by Oaktree or Common, fits the definition by individually leasing out 24 bedrooms in an apartment house which is broken into 4 distinct 6-bedroom units. A tenement house may not be built as of right with 60% lot occupancy in an R-4 zone. See 11 D.C.M.R. § 403.2 (2015).

G. Subject Property is, at a Mnimum, Neither a Flat nor a Row Dwelling, and Therefore Cannot be Built as of Right in an R-4 Zone

Even if the property is not as an apartment house, rooming house, or tenement house, it is still not a flat, because it is instead a "Co-living, co-eating, co-playing, co-creating" space, see Attach. H, at 3—a use for which the Zoning Commission has yet to provide a regulation. If that is so, then what Oaktree intends fails to satisfy D.C.'s permissible as-of-right uses for buildings with 60% lot coverage in R-4 zones. Only flats and rowhomes may be built as of right. "All other structures" must occupy only 40%. 11 D.C.M.R. § 403.2 (2015). Oaktree must face a choice: operate its structure properly as a flat, or not at all.

H. The DCRA's Failure to Consider the Subject Property's Prior History of Seeking Zoning Relief was Arbitrary and Capricious

In granting zoning approval to Oaktree for the relevant building permits, the DCRA also improperly failed to consider the project's prior history before the BZA. See Section I.B supra. Had it done so, it would have realized several important historical facts that bear on the current

project, none of which DCRA appears to have considered in granting approval to Oaktree for the subject permits.

First, had DCRA reviewed BZA Case Number 17404, Application of Wilbur Mondie, it would have realized that the original developer believed—correctly—that he needed variance relief to construct a building with the size, lot-occupancy, height, and density that he wanted to construct in an R-4 zone, whose "primary purpose" is the stabilization of remaining one-family dwellings. 11 D.C.M.R. § 330.2. As then-BZA Chairperson Griffis noted in summing up the BZA members' objections to the project, its "density . . . is substantially increased in comparison to the [neighborhood] and the number of levels . . . seem to be totally out of the context of what is surrounding [it]." Attach. D, BZA App. No. 17404, Feb. 7, 2006, Hearing Tr. at 78 (Chairperson Griffis). What Mr. Mondie subsequently submitted to the BZA for as-of-right development did nothing to mitigate those concerns, but merely switched the geometry of the project from four, vertically adjacent row dwellings to two adjacent 2-family flats. See id. at 60 (Presentation of Clifford Moy, Secretary of D.C. Office of Zoning).

Second, had DCRA reviewed the BZA case file, it would have recognized that the proper way to conceive of the project is as a single building. See id. (Chairperson Griffis); see also 11 D.C.M.R. § 199.1 (defining "structure" as "[a]ny combination of commercial occupancies separated in their entirety, erected, or maintained in a single ownership shall be considered as one (1) structure").

I. Likely Occupancy in Excess of 24 Persons Will Violate Zoning Regulations

Finally, if Oaktree's intended use is permitted to proceed as "flats," neither DCRA nor the affected neighbors will have any guarantee that the property will not consistently exceed its lawful occupancy, which by law limits the number of unrelated persons who may live in a single-family dwelling to "six." Without guarantees from Common and Oaktree that its

individually-signed leases will limit each of the 24 units' occupancy to a single person—meaning no partners, significant others, spouses, children, friends, or others may stay as guests—the project is liable to consistently exceed the occupancy limitation on single family dwellings. See Attach. H, at 3, Common.com website (advertising that private bedrooms may be offered for "singles or couples"). None of Common's advertised literature reflects that its intended sublessees will be required to limit occupancy, and without a city-mandated tracking, monitoring, or compliance regime in place, the neighbors may well face a building whose density far surpasses the 24 units constructed by Oaktree—perhaps permitting as many as 30 to 40 individuals residing in a space designed for a handful of single families. Without enforceable guarantees from the developer, this use will be likely to consistently violate the zoning code's understanding of "single family" dwellings. See 11 D.C.M.R. § 199.1.

* * *

Although the DCRA cannot be faulted for having been presented with a use on an application—*i.e.* "flats"—that does not match the use intended by the developer—*i.e.* a "co-living" apartment, rooming, or tenement house—it now has an opportunity to ensure that the use matches what may be permissibly constructed as of right in an R-4 Zone. If Oaktree wishes to operate a structure that, at 60% lot occupancy, cannot be constructed as of right, it must proceed by seeking relief from the zoning code in the form of a variance, which will allow neighboring residents to provide input and commentary, and receive guarantees from Oaktree on how it will ensure its use remains conformance with the character of the surrounding neighborhood.

Allowing Oaktree to proceed on its existing permits would merely reward the practice of regulatory loop holing, encouraging other developers to represent one use to DCRA while intending something entirely different. Allowing this project to proceed would effectively

sanction such a practice, signaling to future developers that the zoning code is merely a suggestion, not a binding regulatory regime governing the orderly development of land use in the District of Columbia.

III. Conclusion

For the foregoing reasons, Appellant RPNA hereby requests that permits B1611469 and B1611470 be rescinded and/or denied.

DATED: December 19, 2016

Respectfully submitted,

/s/ James J. Wilson
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CERTIFICATE OF SERVICE

Pursuant to 11-Y D.C.M.R. §§ 205, 300.11, and 302.15, I hereby certify that on this 19th day of December 2016, I have served Appellant's Memorandum in Support of its appeal, along with attached supporting documents, upon the following by electronic mail and/or the Board of Zoning Adjustment's online Interactive Zoning Information System (IZIS).

***

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