GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 16407 of Capitol Hill Group pursuant to 11 D.C.M.R.§ 3108.1 for a special exception under Section 359 for opening an additional 32 beds in an existing nursing facility at 700 Constitution Avenue, N.E. (Square 865, Lot 76).

HEARING DATE: January 6, 1999
DECISION DATE: February 3, 1999

ORDER

STATEMENT OF PROCEEDINGS AND EVIDENCE:

1. The property that is the subject of this application is located at 700 Constitution Avenue, N.E. and fills most of square 865. The lot number is 76. The site is bounded by Constitution Avenue and Massachusetts Avenue on the south, 7th Street on the west, C Street on the north and 8th Street on the east. It immediately abuts St. James Church. The site is zoned R-5-D.

2. The subject application was filed on September 23, 1998, on behalf of Capitol Hill Group d/b/a MedLINK Nursing Center at Capitol Hill ("Applicant" or "MedLINK") for a special exception pursuant to 11 D.C.M.R. § 3108.1. Specifically, Applicant requests approval under Section 359 for opening an additional 32 beds at its existing nursing facility located at the subject premises. On July 24, 1991, the Board of Zoning Adjustment ("Board"or "BZA"), in Application No. 15542, granted a special exception for the operation of 130 beds currently in service.[1] This application seeks a modification of that order, to permit an additional 32 beds.

3. Under Section 359 of the Zoning Regulations (11 D.C.M.R.), the Board may approve a special exception for an additional 32 beds at Applicant's facility provided that Applicant meets the conditions specified at Section 3108 and Sections 358.2 through 358.7.

4. Section 3108 provides that a special exception should be granted if the proposed project is in harmony with the Zone Plan and Zone Maps and is not likely to adversely affect the use of neighboring property.

5. Sections 358.2 through 358.7 provide that a special exception should be granted if (1) no other property in the same square contains a community based residential facility for seven or more persons, (2) no other property within a radius of five hundred feet from any portion of the subject property contains a community based residential facility for seven or more persons, (3) adequate, appropriately located and screened off-street parking is provided to meet the needs of

[1] The previous BZA case listed the facility's address as 708 Massachusetts Avenue.

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occupants, employees and visitors to the facility, (4) Applicant's facility meets all applicable code and licensing requirements and (5) Applicant's facility will not have an adverse impact on the neighborhood due to traffic, noise, operations or the number of similar facilities in the area. Additionally, the Board may approve more than one community based residential facility in a square or within five hundred feet if the Board finds that the cumulative effect of the facilities will not have an adverse impact on the neighborhood because of traffic, noise or operations.

6. A hearing on this matter was held on January 6, 1999. At the hearing, Ms. Linda Grigsby, Applicant's Director of External Affairs, testified that the subject site has long been used as a site for medical facilities, including the Capitol Hill Hospital, which operated with approximately 250 beds. Ms. Grigsby also explained that Applicant provides many community services, including flu shots, health screenings, wellness programs, healthy lifestyle courses and exercise classes. Ms. Grigsby stated that Applicant notifies area residents about the services through the MedLINK Newsletter which is sent to all mailing addresses within zip codes 20001, 20002 and 20003. The newsletter is also inserted into copies of the Washington Post. Ms. Grigsby further explained that Applicant's property is monitored daily to ensure that it is free of litter and Applicant's security personnel patrol the site every hour and a half.

7. Additionally, Ms. Grigsby testified that Applicant permits parishioners from three nearby churches to park in Applicant's parking lots when parishioners attend church services or events. This includes parishioners from neighboring St. James Church with whom Applicant's predecessor entered into an agreement to provide parking in return for the closing of the alley that was located between the two properties. She testified that the hospital had been unaware of any dissatisfaction with the parking arrangement until immediately before a December 14, 1998, meeting of the Advisory Neighborhood Commission, when the pastor of St. James Church had sent a letter to that effect. Ms. Grigsby indicated that, since that time, the Chief Executive Officer of MedLINK had been attempting to set up a meeting to resolve the matter, but despite such efforts, had not been able to contact the pastor. Ms. Grigsby also stated that many of Applicant's employees rely on public transportation rather than drive vehicles to work.

8. Mr. John Lunsford, Applicant's General Counsel, testified that adding 32 beds to Applicant's operations would bring the total up to 162 beds, which is the number permitted by Applicant's Certificate of Need as issued by the State Health Planning and Development Agency ("SHPDA"). Additionally, Mr. Lunsford stated that Applicant currently has a waiting list of patients seeking care from its facility and that many of its patients rely on Medicare and Medicaid to obtain such care.

9. Mr. Lunsford further testified that Applicant anticipates hiring only 40 additional employees, spread out over three shifts per day, to accommodate patients assigned to the additional 32 beds. This increase in employees is small compared to the existing staff of 302 employees at the facility, the majority of which are residents of the District of Columbia. Additionally, since many of the employees rely on public transportation, there should not be any adverse impact on traffic.

10. Mr. Lunsford also stated that Applicant planned to open an underground garage that will add 144 parking spaces to the existing 132 spaces for a total of 276, which will be more than enough parking spaces to serve employees, doctors and visitors.[2]

11. Ms. Ellen McCarthy, an expert in land use and urban planning, testified on behalf of Applicant. Ms. McCarthy explained that an increase of 32 beds at Applicant's facility constituted a minor change and would meet an important community need for long-term care services. In fact, Ms. McCarthy pointed out that a change from 130 to 162 beds represented less than a 25% increase in patients and is consistent with Applicant's Certificate of Need. Ms. McCarthy also stated that a large percent of the individuals receiving health care from Applicant depend on Medicare and Medicaid in order to obtain such care.

12. According to Ms. McCarthy, adding 32 beds to Applicant's facility would not adversely impact adjacent property owners. Specifically, there is a long history of hospital use at the subject site. Moreover, Capitol Hill Hospital, the previous hospital at the site, involved a greater intensity of use than that proposed by Applicant, since it had operated with up to 250 beds and was an acute care facility. Ms. McCarthy also testified that adding 32 beds would have no impact on the residential character of the neighborhood since Applicant's proposal required no increase in the physical size of the facility or modification to the exterior of the structure. Moreover, the proposed use is, in fact, a residential use of the property.

13. Additionally, Ms. McCarthy stated that adding 32 beds to the facility would not adversely impact traffic or parking in the neighborhood. According to Ms. McCarthy, skilled nursing care facilities generate low amounts of traffic, and with the increase in staff at only 40 positions spread over three shifts per day there would only be 140 to 150 employees at the site at any given time. Ms. McCarthy concluded that the 276 parking spaces would be more than enough to accommodate the facility's employees and visitors. Ms. McCarthy also explained that the underground parking facility had not been used to date because there had been no requirement for the additional parking spaces. She stated that ample parking had been provided continuously for Applicant's employees and visitors and that area residents had never complained about such employees or visitors parking on the street or using scarce public parking spaces.

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[2] Mr. Lunsford also explained that even though Applicant has not complied with the Board's 1991 order directing Applicant to provide 176 parking spaces, Applicant has continuously provided ample parking to serve the needs of employees, residents, visitors and parishioners. Mr. Lunsford further stated that the underground garage would be open by February 1, 1999. Additionally, in accordance with the Board's request, a certificate of occupancy for the garage was filed with the Office of the Board of Zoning Adjustment on January 15, 1999. Prior to that date, Applicant had no authorization from the District of Columbia Government to utilize the garage.

14. Ms. McCarthy also testified that adding 32 beds to Applicant's facility would not adversely impact the integrity of the Zone Plan. She pointed out that, under the Zoning Regulations, a hospital, sanitarium or clinic is permitted as a matter of right in more restrictive R-4 zones. Ms. McCarthy added that a special exception will not even be required for a community based residential facility if a proposed Zoning Commission rule is approved and adopted. Additionally, there are no other residential uses on Square 865. Ms. McCarthy further testified that the Generalized Land Use Map designates the subject site as moderate density residential and it is immediately adjacent to a mixed-use, moderate density residential / low density commercial area along 8th Street, N.E.

15. Ms. McCarthy also outlined Applicant's efforts to discuss any concerns that area residents may have had regarding Applicant's request for a special exception. For instance, Ms. McCarthy explained that Applicant's representatives addressed three meetings held by Advisory Neighborhood Commission ("ANC") 6A. These meetings were held on November 5, December 3 and December 14, 1998. Ms. McCarthy also described Applicant's efforts to share information regarding the proposal with the Stanton Park community organization and Ward 6 Council member, Ms. Ambrose.

16. ANC 6A submitted a letter to the Board which indicated that its Zoning and Licensing Committee had unanimously agreed to support the application, with three conditions, at its December 14 meeting. Because the ANC had no quorum, it could not officially adopt the committee's recommendation.

17. At the hearing, commissioners from ANC 6A testified that the ANC supported the Application. Its conditions included continued availability of parking spaces for St. James parishioners and assurances that Applicant would continue to empty its exterior trash barrels regularly. Commissioners Daniel Pernell and Gregory Ferrell acknowledged that they were present at a December 14, 1998, meeting held by the ANC 6A Zoning and Licensing Committee and that during the meeting the committee unanimously approved Commissioner Pernell's motion to endorse Applicant's request for a special exception.

18. Ms. Karen Wirt, a neighborhood resident and former Commissioner of ANC 6A, testified in support of Applicant. Ms. Wirt stated that Applicant has been a good neighbor to the area residents, provided many services to the community and maintained its property. She also stated that Applicant provided a vital service by operating a long-term care facility and should be allowed to add 32 beds to its operations.

19. Two neighbors appeared in opposition to the application. Although he did not complain specifically about any litter or unsafe conditions at the subject site, Mr. Ronald Nelson stated that he has never personally witnessed trash pick-up or security patrols. Mr. Nelson also stated that he has never seen any publications regarding the exercise and health programs that Applicant

offers to area residents. Mr. William Silagi was concerned that Applicant had not provided the number of parking spaces required under the 1991 Board order and that Applicant had inadvertently operated for a short period with a few more beds than was permitted under the 1991 order.

PROPOSED FINDINGS OF FACT:

1. Applicant has previously been granted a special exception under Section 359 to establish a health care facility with 130 beds at the subject premises.

2. Applicant must obtain a special exception to add 32 beds to its existing health care facility.

3. Increasing the number of beds will not require any changes to the exterior of the structure or increase the physical size of the facility.

4. No other property in the same square as Applicant's facility contains a community based residential facility of seven or more persons.

5. No known property within a radius of five hundred feet from any portion of Applicant's facility contains a community based residential facility for seven or more persons.

6. Applicant is providing adequate, appropriately located and screened off-street parking for the needs of occupants, employees and visitors to the facility.

7. Applicant's facility meets all applicable code and licensing requirements.

8. Applicant's facility will not have an adverse impact on the neighborhood due to traffic, noise, operations or the number of similar facilities in the area.

9. The addition of 32 beds to Applicant's facility is in harmony with the Zone Plan and Zone Maps and is not likely to adversely affect the use of neighboring property.

CONCLUSIONS OF LAW AND OPINION:

Applicant seeks a special exception in order to add 32 beds to its existing nursing facility at 700 Constitution Avenue, N.E. The Zoning Regulations provide that the Board may grant special exceptions as follows:

Pursuant to authority contained in the Zoning Act of June 20, 1938 (52 Stat. 797), as amended, the Board is authorized to grant special exceptions, as provided in this title where, in the judgement of the Board, those special exceptions will be in harmony with the general

purpose and intent of the Zoning Regulations and Maps and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps, subject in each case to the special conditions specified in title 11 D.C.M.R. § 3108.1

Therefore, the Board's discretion in deciding Applicant's request for a special exception is limited to determining whether Applicant's request complies with the requirements enumerated in the particular regulation pursuant to which the exception is sought. If Applicant has met its burden, the Board ordinarily must grant the application. *First Baptist Church of Washington v. District of Columbia Board of Zoning Adjustment*, 432 A.2d 695, 698 (D.C. 1981); *Stewart v. District of Columbia Board of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973).

MedLINK thus has the burden of demonstrating that its request addresses the issues set forth at sections 359 and 3108.1 of the Zoning Regulations. Generally, MedLINK must show that (1) the use, height, bulk, and design are in harmony with existing uses and structures on neighboring property; (2) ample parking space is provided; and (3) the use will not create dangerous or other objectionable traffic conditions.

Based on the testimony and evidence presented at the hearing, MedLINK has met its burden. Adding 32 beds at its nursing facility will not change the use, height, bulk or design of the structure, which was previously approved by the Board in 1991. Moreover, Applicant's parking facilities provide ample parking spaces for occupants, employees and visitors and the proposal will not create dangerous or other objectionable traffic conditions. The Board has further determined that Applicant's request complies with the requirements enumerated at section 359.

The proposed expansion of the facility is also consistent with the Zoning Regulations and the Zoning Map. Hospitals are permitted as a matter of right, not only in R-5-D districts, but in more restrictive R-4 districts as well. It is only because the nursing facility in this matter is considered a community-based residential facility that a special exception is required. More importantly, however, Applicant's proposed use is a residential use and it is consistent with the site's zoning. Additionally, the increase in the number of nursing facility beds meets an important need in the District as it provides long-term care to those who require it. The facility is also accessible to those who must depend financially on either Medicare or Medicaid, and as there is a waiting list at the facility, the expansion will enable Applicant to serve those who are waiting for such care.

The Applicant has also demonstrated that the increase in beds will not adversely affect the neighborhood. Special exceptions are expressly provided for in the Zoning Regulations, *see Stewart, supra,* 305 A.2d at 518, and the Board's function in this instance is simply to determine whether a reasonable accommodation has been made between Applicant and the neighbors, which does not interfere with the legitimate interests of the latter. *Glenbrook Road v. District of Columbia Board of Zoning Adjustment*, 605 A.2d 22, 32 (D.C. 1992), *citing Cornell University v. Bagnardi,* 68 N.Y.2d 583, 589, 503 N.E.2d 509, 511, 510 N.Y.S.2d 861, 866 (1986).

The Zoning Regulations require only that Applicant demonstrate that it is not *likely* that the proposed expansion of service will make the facility objectionable to neighboring properties. Further, the Board may grant a special exception for health care facilities in residential and special purpose districts "where in the judgment of the Board, those special exceptions will be in harmony with the general purpose and intent of the zoning regulations and maps and will not tend to affect adversely the use of neighboring property...." *Levy v. Board of Zoning Adjustment,* 570 A.2d 739, 742 (D.C. 1990) (quoting 11 D.C.M.R. § 3108.1). *See Rose Lees Hardy Home and School Association v. District of Columbia Board of Zoning Adjustment,* 324 A.2d 701, 706 (D.C. 1974). "[T]he applicant is not charged with considering every option that any party in opposition might conceptualize...." *Don't Tear It Down, Inc. v. District of Columbia Dept. of Housing and Community Dev.,* 428 A.2d 369, 379 (D.C. 1981).

The proposal by MedLINK accommodates the reasonable concerns of the residents and otherwise meets the requirements for a special exception. Many or most of those who own property neighboring the facility agree with MedLINK.

The only areas which might have the potential to provide an adverse impact are parking and traffic disruption. No increase in the physical size of the facility and no modification to the exterior of the structure will occur. As to the issue of traffic, since all of the increased beds are nursing facility beds the patients are not expected to be driving motor vehicles. Moreover, the addition of 40 full-time employees will generate only a nominal increase in traffic, especially since a large number of employees use public transportation.

With regard to parking, MedLINK's parking facilities, providing a total of 276 parking spaces, is more than adequate to serve the needs of the facility's occupants, employees and visitors.

Based upon the record before the Board, the Board finds that Applicant has met the burden of proof, pursuant to 11 D.C.M.R. 3108, and that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map. The Board further finds that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Map. It is therefore **ORDERED** that the application be **GRANTED, SUBJECT** to the following **CONDITIONS:**

1. Approval shall be for a period of ten years from the final date of this order.

2. The Applicant must provide 162 beds.

3. The number of employees shall not exceed 340.

4. The Applicant must provide 276 off-street parking spaces.

5. The Applicant must meet four (4) times per year with ANC 6A and other concerned neighbors.

6. The Applicant must keep the subject site and surrounding property clear of trash as needed.

VOTE: **3-0** (Betty King, Sheila Cross Reid and Jerry Gilreath to grant).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director

Final Date of Order: OCT 21 1999

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

UNDER 11 DCMR SUBSECTION 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT.

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF TWO YEARS AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO.: 16407

As Director of the Office of Zoning, I certify and attest that on OCT 21 1999 a copy of the order entered on that date in this matter was mailed first class, postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

Richard B. Nettler, Esquire
1801 K Street, NW, Suite 1200
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Daniel M. Pernell, III, Chairperson
Advisory Neighborhood Commission 6A
St. James Parish Church
1132 4th Street, NE
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Linda M. Grigsby, Director of External Affairs
MedLINK Nursing Center at Capitol Hill
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Washington, D.C. 20002

Attested by: _____
JERRILY R. KRESS, FAIA
Director

Date: OCT 21 1999

Attest/O-16407 /POH