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July 5, 2000

Mr. Edgar T. Nunley
Chief, Zoning Review Branch
Department of Consumer
and Regulatory Affairs
941 North Capitol Street NE
Washington, D. C. 20002

Dear Mr. Nunley:

Re: **BZA Application No. 16566**
Georgetown University 2000-2010 Campus Plan –
Acquisition, Use, and Effective Control of Facilities on Georgetown University Campus in R-3 single-family district, by a private hospital management company, without a use variance or a certificate of occupancy

This letter is to follow up on our conversation of last week regarding the question of whether a "nonprofit" hospital management corporation (MedStar Health, Inc.), which is not a college or university, may operate a hospital, clinic, doctors' office building, helipad, and/or other support facilities in an R-3 (row-house, single-family home) district, without either a use variance or (apparently) a certificate of occupancy.

Of course, a private hospital and a clinic are permitted under the Zoning Regulations as a matter of right only in R-4 (row and apartment house conversion) districts and above [11 DCMR § 330.5 (e)]; doctors' offices and the like are permitted as a matter of right only in non-residential districts [11 DCMR §§ 601.1 (g), 701.6 (c)]; and all non-residential uses of land require a certificate of occupancy [11 DCMR § 3203.1].

As we discussed, according to MedStar's Certificate of Need (CON) application[1] to take "effective control" of the Georgetown University Hospital and the University's clinical enterprise, the parent holding company, MedStar Health, Inc., is a nonprofit corporation that also owns both for-profit and not-for-profit subsidiaries. At page 2 of the CON application, MedStar Health, Inc., proposes to create a new nonprofit subsidiary corporation known as MedStar Georgetown Medical Center (MGMC) to purchase, use, control, and operate present and future hospital, clinic, medical office, and other support facilities (also CON page 7).

Those facilities are either located or proposed to be located on the northern part of the Georgetown University campus on Square 1321, fronting on Reservoir Road, N.W. The zoning of the part of the Georgetown campus that MedStar would use is exclusively R-3. (So far as we are aware, MedStar does not propose to use any part of the small C-1 strip located near the southern edge of the campus plan area located on Square 1223 to the south and east.) The pre-existing use of Georgetown's north campus is for Georgetown University's own Medical Center (GUMC), which includes the University's School of Medicine, as well as its Hospital, its Faculty Practice Group, the Lombardi Cancer Center, and the Community Practice Network.

[1] MedStar Health, Inc., Certificate of Need Application for Change in Effective Control of the Georgetown University Center Clinical Enterprise including: The Georgetown University Hospital, the Community Practice Network, and Certain Assets Associated with the Faculty Practice (Operating Units of the Georgetown University Medical Center, An Unincorporated Division of Georgetown University, filed April 3, 2000, with the D. C. State Health Planning and Development Agency (SHPDA).

BZA
Case No. 16566
Exhibit No. 114

114

Board of Zoning Adjustment
District of Columbia
CASE NO.16566
EXHIBIT NO.114

The helipad is also on R-3 land, south of the north campus, in the northwestern part of the main campus.

Although Georgetown University will be entitled to minority representation on MGMC's board of directors as long as its "academic affiliation" agreement with MedStar continues, and MGMC will enjoy certain autonomy, MedStar as MGMC's parent corporation will appoint and remove all of MGMC's directors. Moreover, GU's right to even minority representation on MGMC's board will terminate if GU exercises its right to terminate the academic affiliation agreement, and MedStar, as MGMC's parent corporation will ultimately be in control of MGMC (see summary of MGMC's by-laws in CON application, Tab 4).

While Georgetown University may remain as the nominal landlord and owner of the underlying land, MedStar will either own north campus buildings outright or acquire them under a long-term lease, having an initial term of 98 years, a nearly automatic renewal term of an additional 52 years, and an unlimited number of additional nearly automatic 98-year renewal terms after the expiration of the initial 150 years.

The organization chart accompanying the CON application clearly shows the Georgetown Hospital as part of the MedStar organization, not as a part of Georgetown College or University (CON Tab 1).

Much of the payment for the so-called Hospital Lease, about $80 million, will be payable by MedStar to Georgetown at the inception of this "lease." Additional payment, up to $70 million, could be payable as deferred compensation depending, not upon the duration or nature of MedStar's tenancy, but upon MedStar's "earnings" from its operations in the District of Columbia (whether or not the operations were acquired from Georgetown University). "Lease renewals," however, will be for nominal amounts of "rent," such as $1 for exercising a 52- or 98-year renewal option. Regardless of whether one views this transaction as a "lease," or as a "sale" disguised as a lease, it is clearly not a fee-for-service contracting-out arrangement in which MedStar acts merely as Georgetown's contractor or agent. Under the MedStar-Georgetown arrangements, moreover, the helipad also will be for MedStar's "exclusive" use (CON Tab 6, p. 2, ¶ 8, second sentence).

Although we have not seen the academic affiliation and asset purchase agreements that we understand may have been signed on Friday, MedStar's CON application, which summarizes the agreements, makes it clear that Georgetown retains the option of terminating its "academic affiliation" agreement with MedStar at any time, as well as its discretion to discontinue its Medical School at any time (CON Tab 5, § 3 at PP. 102, and § 20 at p. 9). Thus the arrangements contemplate a transfer of Georgetown's north campus present and future hospital and clinical enterprise facilities to MedStar that could last considerably longer than either Georgetown's medical school, the university's involvement with academic medicine, or any "academic affiliation" between Georgetown and MedStar. Since MedStar is not a college or university, or part of one, a special exception under Section 210 of the Zoning Regulations for use of residential land as a "college or university, including (a) "college or university hospital" does not appear to be sufficient to authorize MedStar's independent use and control of the hospital and other medical buildings and facilities in an R-3 district.

Given MedStar's proposed indefinite, independent, and "effective control" of such facilities, concerning which there is only a temporary "academic affiliation" agreement with the college or university that continues to be the "principal use" of Georgetown University's campus in the R-3 district, MedStar's activities do not appear to be a permitted "accessory use," as that term is defined by Section 199 of the Zoning Regulations [11 DCMR § 199.1 - definition of "use, accessory"], where, by definition, an "accessory use" is a use of land "customarily incidental and subordinate" to the "principal use," and "located on the same lot as the principal use."

Georgetown University's present campus plan (for 1990-2000) does not mention or include MedStar or its proposed assumption of "effective control" of Georgetown's north campus medical facilities (other than the medical school) or Georgetown University's helipad. On January 31,

2000, Georgetown University filed a 2000-2010 campus plan application, BZA Application No. 16,566, but the "draft" campus plan accompanying that application, as filed with the Board on January 31, 2000, did not include any mention of MedStar's proposed control of any present or proposed new construction on the north campus [Application No. 16566, Exhibit 6]. That application did not even mention MedStar by name nor did it explicitly mention the proposed transfer of University health care facilities to MedStar's exclusive use and "effective control." Several proposed new facilities were instead presented in the January 2000 filing only as new University construction for "medical/health care use" undifferentiated from pre-existing University-managed and controlled "medical/health care" uses.

As a result, when the BZA referred the proposed campus plan to your office in February 2000 for comment, MedStar, its arrangements with Georgetown, and MedStar's proposed occupancy and "effective control" of present and future campus facilities were neither revealed nor explicitly mentioned. MedStar's CON application, as I mentioned, was not filed until April, 2000, and then (so far as we know) only with the SHPDA, not with your office or the BZA. It was only on May 30, 2000, that Georgetown "amended" its campus plan application, without leave of the Board, to reveal MedStar's planned use of Georgetown's R-3 land, in a "campus plan" filed with the Board as a part of Georgetown's voluminous May 30, 2000 pre-hearing statement [BZA Application No. 16566, Exhibit 46A, p. 6]. Your office does not appear to have been copied or asked by the BZA to comment on the 5/30 "campus plan" in the May 30 pre-hearing statement that does mention MedStar explicitly. The 5/30 filing seeks the Board's special exception approval, under Section 210, of the campus plan as changed to mention MedStar, but it does not seek also to amend the application to include a request for use variance relief to permit a private hospital, a private clinic, private doctors' offices, and a private hospital's "helipad," in an R-3 district.

From the fact that you did not appear to be aware of any pending application for a certificate of occupancy by MedStar or any subsidiary, it would appear that Georgetown University and MedStar may plan that MGMC to take possession and "effective control" of numerous campus facilities, and avoid zoning review by your office, through the expedient of operating those facilities under the certificates of occupancy previously issued for them to the University.

Questions concerning MedStar's use of Georgetown University's R-3 land came up briefly, in cross-examination, at the initial public hearing on the campus plan application on June 13. They will arise again at the second day of hearings on this BZA application, now set for July 18, when government reports and neighborhood testimony are expected to be heard. At the June 13 public hearing, Georgetown University's counsel claimed that MedStar's use of Georgetown University's R-3 land, pursuant only to campus plan approval under Section 210 (11 DCMR § 210), was supported by a BZA decision last year involving special exception approval under Section 210 for the construction of a new hospital on the George Washington University ("GWU") campus for a private for-profit firm's use [June 13 transcript, p. 334].

The GWU Hospital case, however, involved the construction only of a new hospital within the boundaries of an existing campus, only on land zoned R-5.[2] Since that land was already zoned R-5, a private hospital was a matter-of-right use [11 DCMR § §§ 330.5(e), 350.4(a)], a point which the Board's order explicitly noted in its "Conclusions of Law and Opinion," Order, May 19, 1999, at p. 13, second full paragraph. In addition, the Board granted a motion by the applicant to consolidate an application for, among other things, an area variance also needed for the proposed hospital [Application No. 16389, Decision and Order, May 19, 1999, ¶ 1 at p. 1]. Thus, there was no claim in the George Washington University case, such as there is here, that a special exception under Section 210 can eliminate the requirement for any variance that might otherwise be required from otherwise applicable zoning requirements.

Please let me know, at your earliest convenience: (a) whether either MedStar Health, Inc.,

[2] [BZA Application No. 16389, of The George Washington University, pursuant to 11 DCMR § 3108.1 for a special exception under Section 210 for further processing of an approved campus plan to allow the construction and use of a new, replacement university hospital in an R-5-D/R-5-E District at premises 900 23rd Street, N.W. (Square 40, Lot 36)].

MedStar-Georgetown Medical Center (MGMC), or any other MedStar-affiliated entity has applied for a Certificate of Occupancy for use of R-3 land on Georgetown's campus, (b) whether the Zoning Administrator would grant a Certificate of Occupancy to either MedStar corporation or any other MedStar entity for the proposed uses of R-3 land described above without a use variance, and (c) what steps (such as a use variance) would be required in the Zoning Administration's view to allow this non-university corporate operation of health and administrative facilities in an R-3 district.

If you would like clarification of any of the issues this letter has raised, need any further information or assistance concerning what neighborhood residents have found in SHPDA's CON file, or if my questions are in any way unclear, please do not hesitate to let me know. I can be reached at 337-6505.

Sincerely,

Barbara Zartman

Barbara Zartman
Commissioner, ANC 2E04