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July 29, 2002

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**VIA HAND DELIVERY**
Geoffrey Griffis, Chairman
Board of Zoning Adjustment
441 4th Street, N.W.
Suite 210
Washington, D.C. 20001

**Re: Board of Zoning Adjustment Application 16836**
**The Washington Home**

Dear Chairman Griffis and Members of the Board:

Enclosed please find Proposed Findings of Fact and Conclusions of Law submitted on behalf of the Citizens Concerned About the Home's Expansion ("CCHE") in the above matter.

Very truly yours,

Jonathan P. Graham

Enclosure

BZA
Case No. 16836
Exhibit No. 70

Board of Zoning Adjustment
District of Columbia
CASE NO.16836
EXHIBIT NO.70

**Application No. 16836** of The Washington Home d/b/a The Washington Home & Hospice of Washington for a special exception under section 219 of the District of Columbia Zoning Regulations, 11 DCMR, to (i) construct an addition to the existing 201-bed facility to add four additional hospice beds and (ii) to enlarge the existing 75 space parking lot to 173 spaces all at 3720 Upton St. N.W., Lot 818 in Square 1825.

## PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED ON BEHALF OF THE CITIZENS CONCERNED ABOUT THE HOME'S EXPANSION

Hearing Dates: April 2, 2002, June 25, 2002, July 9, 2002.

Decision Date: August 6, 2002

## FINDINGS OF FACT

A. Applicant's Lot and Surrounding Neighborhood

1. The Washington Home's ("TWH") lot is located in an R-1-B residential neighborhood surrounded by houses. TWH's lot is bordered by Upton Street to the North, Wisconsin Avenue to the West, the Sidwell Friends School and the Phoebe Hearst Elementary School to the South, and Tilden Street to the East. Thirty-eighth Street intersects Upton St. across from TWH.

2. Tilden and Upton Streets are filled with single family detached residences. Thirty-eighth Street across from the home is filled with single-family and semi-detached residences. The residences on all these streets were built between the 1920s and 1950s. A number of the residents of the area have lived there over 30 years and the attractiveness of the neighborhood has attracted a number of new residents in recent years.

3. TWH has leased a significant parcel of its land on the west or Wisconsin Avenue side of its property to the U.S. Post Office. That property contains a significant building and parking facilities and buffers TWH from Wisconsin Avenue.

4. The applicant's lot is sited within ANC 3F. The property was formerly sited in ANC 3C.

5. In connection with TWH's application to the Board, neighborhood residents formed a group named Citizens Concerned with the Home's Expansion ("CCHE") which has party status in this proceeding.

6. TWH, ANC 3F, and CCHE agree that TWH's grounds and landscaping are currently attractive and suitable for a health care facility operating under a special exception in an R-1-B zoned residential neighborhood.

B. History of Special Exceptions Granted to TWH

7. In 1985, TWH requested a special exception to demolish its then-existing facility and to build a 189-bed facility with a 116 space parking lot in the residential neighborhood.

8. The neighborhood and TWH were able to resolve most concerns about the building and landscaping in 1985, but disagreed about the appropriateness of building such a large parking facility on the lot.

9. This Board granted the applicant the request to build a 189-bed facility but permitted it to build a parking lot for 75 vehicles only.

10. In 1997, TWH applied for a special exception to add 12 beds to the facility.

11. In its formal Statement to the Board in September 1997, TWH stated that: "The current parking arrangement was the product of extensive community input. The

most immediately affected neighbors are opposed to any change in the existing parking plan. Accordingly, the Home will maintain the existing number of parking spaces on the site and there are no changes to the layout associated with the request. The small increase in beds will not generate a demand for any additional parking spaces. There will be only three additional employees per shift and they are likely to travel to The Home via public transportation." Statement of Applicant, BZA Application No. 16263 (Sept. 3, 1997) at 6 (emphasis added).

12. Also in September 1997, the president of TWH, Ms. Sandra Long, provided a Statement to the Board in support of the application for 12 more beds that stated: "We have adequate, appropriately located and screened off-street parking to provide for our needs. The immediate neighbors have requested a retention of the current number of parking spaces in connection with this application. The facility will meet all applicable code and licensing requirements." Statement of Sandra Long at 2 (emphasis added).

C. The Ward 3 Plan

13. The Ward 3 Plan found at D.C.M.R. Title 10, Chapter 14, states that a major theme for Ward 3 is "[p]rotecting the Ward's residential neighborhoods" and notes that Ward 3's "most outstanding characteristic is its low density, stable residential neighborhoods." § 1400.2. Accordingly, "controlling redevelopment" is another major theme of the Ward 3 plan in order to preserve the strong residential character of the neighborhood and the quality of life therein to make the District more attractive to potential residents. § 1400.2(b).

14. One policy goal advanced in the Ward 3 plan is to "[d]iscourage encroachment of nonresidential uses into residential areas." § 1402.4(g).

15. Another policy goal of the Ward 3 plan is to improve air quality and thus to "[e]ncourage institutional and large corporate residents to promote public transit usage and discourage employee reliance on single-occupant vehicles; this should be a condition when possible in connection with discretionary governmental approvals." § 1403.5(a)(3).

16. Institutions that wish to expand in Ward 3 and act cooperatively with the neighborhoods in which they exist must keep the Ward 3 plan in mind.

D. TWH's Current Application, the ANC Resolutions, and the Hearings To Date

17. TWH has applied for a special exception to construct an addition to the existing 201-bed health care facility to accommodate an additional four beds and to enlarge its parking lot from 75 spaces to 173 spaces.

18. In September 2000, TWH asked ANC 3F to approve an addition of four beds but did not request it to act on any request for parking. Apr. 2 Tr. 78-79 (testimony of TWH president Lynn O'Connor). In July 2001, ANC 3F voted to approve the certificate of need alone; no specific proposal for construction of an addition or parking was before it. July 9 Tr. 292-94 (testimony of ANC Commissioner Kogan).

19. TWH presented its construction/addition and parking lot plans to ANC 3F on March 18, 2002 and June 17, 2002.

20. On June 17, 2002, ANC 3F unanimously voted, 7-0-0, to oppose the application.

21. On June 24, 2002 ANC 3C also voted, 6-0-1, to oppose the application.

22. At the June 25, 2002 hearing the applicant reached nearly the end of its case in chief; no city agency, ANC, or CCHE had yet presented testimony or its case. Concerned with the period of time this matter has taken (occasioned in part by scheduling conflicts both of counsel to TWH and of CCHE's representative), the Board solicited comments from the parties about when to reschedule. TWH's counsel represented that TWH had obtained a Certificate of Need issued by the District of Columbia State Health Planning and Development Agency ("SHPDA") that required it to obtain an special exception from the BZA before the Certificate of Need expired on September 21, 2002. June 25 Tr. 214-15. As the transcript of that hearing indicates, the Board accepted this representation and, as an accommodation to TWH, decided to split the hearing by topic – a hearing would be held on July 9, 2002 that considered only the issue of the applicant's desire to construct an addition and a hearing would be held on September 10, 2002 that would consider the issues raised by the request to enlarge the parking lot.

23. The CCHE and the ANCs objected to splitting the hearings and decisions on the application for a special exception.

24. An additional hearing was held on July 9, 2002, limited to the request to construct a four-bed addition to TWH.

E. TWH's Compliance with Board Orders and Attitude Toward Neighborhood Concerns

25. Applicant obtained a special exception in 1987 that limited it to 189 beds and 75 parking spaces. In 1997 it obtained a special exception to add 12 beds and represented that it needed no additional parking and that the additional employees it would hire would likely use public transportation to commute to work.

26. Between 1985 and 2002, TWH increased the number of nurses it employed from 166 to 203 and its total number of employees to 298. TWH asserts that it wishes to hire additional nurses.

27. Without applying for a special exception or notifying the neighborhood or any city authorities, TWH has re-striped its parking lot to create at least 89 spaces, 14 more than permitted by the Board's 1985 Order.

28. Without applying for a special exception or notifying the neighborhood or any city authorities, TWH contends that it allows more than 130 cars to park in its 75-space permitted lot on a routine basis.

29. TWH has no program to encourage public transportation use by its employees. Apr. 2 Tr. 71-73 (testimony of TWH president Lynn O'Connor).

30. TWH provides free parking to its employees and visitors.

31. TWH allows cars to park in violation of the fire codes. Apr. 2 Tr. 89 (testimony of TWH president Lynn O'Connor).

32. TWH operates its parking lot in violation of this Board's prior Order. TWH understands that it is operating in violation of this Board's 1985 Order. Apr. 2 Tr. 111 (testimony of TWH president Lynn O'Connor).

33. TWH's parking lot expert prepared a report in connection with this proceeding. That report states that the proposed addition of 4 beds to the facility will "account for 6 additional car trips over the day with 4 new employees and approximately 2 additional visitors per day." Gorove/Slade Parking Analysis (Jan. 15, 2002) at 9. The report also states that the increase in amount of services required for the additional 4 beds "will be linearly proportional to the increase in beds." *Id.*

34. Notwithstanding its expert's report, TWH through counsel asserted to the Board at the July 9, 2002 hearing that the four additional beds will not generate more employment although TWH conceded that additional visitors including medical professionals and family members would be attracted to the facility. July 9 Tr. 270-71.

F. TWH's Plan for Construction of a Four-Bed Addition

35. TWH has not yet set forth its construction plans in detail. TWH's construction manager, John Armentrout, was unable to provide the Board with details about how construction would proceed that would minimize disruption to the neighborhood. Mr. Armentrout testified that TWH does not have any completed or finished plans and does not have any contractor input into the project. June 25 Tr. 179, 188-89. Nor has any preliminary pricing been done on the project. June 25 Tr. 182. Mr. Armentrout was unclear about how many trucks and truck loads would be necessary, had not yet located a contractor with "small tandem trucks," and had not yet thought about the quantities of gravel and asphalt that would need to be removed. June 25 Tr. 184-85. He did testify that truck traffic would be the heaviest during the "demolition phases and paving phases." June 25 Tr. 181. As Chairman Griffis noted, Mr. Armentrout's "speculation on the number of [truck] trips" was basically useless to" the Board. June 25 Tr. 185. Although TWH has pledged to put $100,000 toward landscaping, TWH has no clear plan of how that money will be spent or what it will buy other than " a lot of material." June 25 Tr. 183. TWH also acknowledged that it is adjacent to two schools, Sidwell Friends and Phoebe Hearst, that create enormous amounts of traffic in the morning and afternoons, June 25 Tr. 192-92, but has presented no plan about

how it would deal with the safety and traffic problems presented by that school traffic.

## CONCLUSIONS OF LAW AND OPINION

36. In determining whether the Board should grant a special exception to TWH to construct an addition to the existing 201 bed facility, the Board must consider whether TWH has met both the procedural requirements and substantive burden of demonstrating that it is entitled to the relief requested at this time. The ANC and CCHE do not have the burden of proving that TWH is not entitled to the exception it seeks.

37. Before granting a special exception for construction of a 4-bed addition, the Board must consider whether TWH is able to meet the associated requirement that there be "adequate, appropriately located, and screened off-street parking to provide for the needs of occupants, employees, and visitors to the facility." DCMR 219.3

38. The Board credits the opinion of TWH's parking expert to the extent that he asserts that additional parking spaces will be required by the addition of 4 beds to the facility.

39. Because TWH itself asserts that it does not have adequate parking for its existing number of beds, and because TWH's expert asserts that more spaces will be required for four additional beds, the Board cannot at this time find that TWH meets the requirement that it provide "adequate, appropriately located, and screened off-street parking to provide for the needs of occupants, employees, and visitors to the facility."

40. Because the issues involving increased traffic and increased parking are intertwined with the question of the degree of much impact the addition of four beds will cause on

the traffic and parking demands, the BZA finds that it should consider these issues collectively once the record is complete on the request for parking.

41. The Board is also unwilling to grant a special exception for construction of an addition without evidence that TWH has put together a detailed, well-thought-out, construction plan that minimizes disruption to the neighborhood. That evidence does not currently exist.

42. This Board must also consider the Ward 3 Plan and its concern with institutional encroachment upon residential areas. Because the addition of additional beds, the associated construction, the congested traffic in the area (which is proximate to two schools), will undoubtedly encroach on the residential character of the area, the Board cannot at this time approve the construction of an addition.

43. This board must also give "great weight" to the views of ANC 3F and ANC 3C. Both are unanimously opposed to the construction of the addition. Accordingly, it is not appropriate to approve the construction of the addition at this time.

44. Furthermore, because TWH has not obeyed the previous Order of this Board with regard to limitations on the number of parking spaces, the Board is unwilling to "split" the decision on the application to separately consider the issues of construction of an addition and the requested additional parking without fully reviewing TWH's past conduct in light of this Board's previous Orders.

45. Finally, because the request to split the application mid-course into a hearing on construction of an addition portion and a separate hearing on the request for an enlarged parking lot was made at the end of a hearing on June 25, 2002 based on a representation by TWH that its Certificate of Need issued by the District of Columbia

State Health Planning and Development Agency ("SHPDA") required it to obtain a special exception from this Board before the Certificate of Need expired, we examine whether that decision was well considered. See June 25, 2002 Hearing Tr. At 214; see generally id. at 208-223; see remarks of Chairman Griffis July 9, 2002 Hrg Tr. 259-60 (citing the "fairly stringent time requirement on the applicant for that addition").

46. Review of the relevant statutes and subsequent statements by TWH's representative makes clear that TWH will have to request an extension of its Certificate of Need from the District's SHPDA whether or not the Board ultimately grants the application to construct an addition. Under D.C. law, TWH requires a Certificate of Need from the SHPDA before it may construct an addition. TWH's Certificate of Need was issued for a one year period and expires on September 21, 2002. The D.C. Code makes clear that "A certificate of need shall be effective for the period that the applicant states is necessary to complete the project for which the certificate of need is granted." D.C. Code § 44-411(a) (emphasis added). It is unlawful for TWH to "begin[] or continu[e] construction or initiat[e] a new or expanded service after expiration of a certificate of need." D.C. Code § 44-416(c).[1] Given that TWH has not even finalized its construction plans, and given that it has projected it will take six months to complete construction, it is apparent that TWH's Certificate of Need will

[1] This is an excerpt from a statute that makes it a criminal act for: Any person, including the principal officers or agents of a corporation or association, who violates this chapter, or the rules issued pursuant to this chapter, by the willful failure to obtain a certificate of need, deviates from the provisions of a certificate of need, or beginning or continuing construction or initiating a new or expanded service after expiration of a certificate of need shall, upon conviction, be subject to a fine of not less than $500 and not more that $2,500. Each day of a continuing violation shall constitute a separate offense.

expire well before it can complete construction of the addition (and it does not appear it will even be able to initiate construction) before the Certificate of Need expires. Thus, the timing of the Board's decision on the request for an exception to construct an addition to the property will have no effect on TWH's ability to conform to its existing Certificate of Need. As the D.C. Code makes clear, whether the Board acts now or in a few months, TWH will have to apply for an extension of the certificate of need. The Board notes that, according to the statute, if TWH "is making good faith efforts to meet the schedule, the SHPDA shall extend the certificate of need for an additional period or periods as necessary for the applicant to complete the project." D.C. Code § 44-411(a). Since TWH has not asserted that it is not making good faith efforts to proceed, the ability of TWH to apply for an extension of the Certificate of Need is not affected by the timing of this Board's decision. In fact, at the July 9, 2002 Hearing, TWH backed off its representation made on June 25, 2002 Hearing and conceded that TWH would need to obtain an extension of the Certificate of Need from SHPDA no matter when the Board made its decision. Tr. 263-64. Therefore, this Board declines at this time to render a decision on the fragmented question of whether to approve the construction of an addition.

47. Even if the Board were ultimately to grant permission to construct an addition to the facility, it would not do so until TWH, the ANC, and CCHE had agreed upon conditions under which that construction would take place. At a minimum, those conditions would include the following:

    a. The construction site plans will conform to those presented to the Board in this course of this proceeding.

b. TWH will not permit construction to begin before 7:00 a.m. and construction will not continue after 5:00 p.m. Construction shall not take place on Saturdays, Sundays, or holidays.

c. TWH will ensure that the contractor will prevent access or egress by construction equipment from the site from 7:45 a.m. until 9:15 a.m. and from 2:30 p.m. until 3:30 p.m. in order to help ensure the safety of the children attending nearby schools.

d. TWH will require the contractor to post flagmen on Upton and 37th Street to guide traffic whenever construction trucks are entering or exiting the premises.

e. TWH will provide on-site temporary parking for construction workers and equipment.

f. At the end of each workday, the construction site will be clear of litter, construction materials, machinery and other unsightly objects. Under no condition will construction vehicles (including trailers) be parked on the street overnight.

g. The Home will appoint an individual to work with the ANC and CCHE to alleviate any concerns that may arise during the course of the construction and will act in good faith to alleviate those concerns and compel the construction contractor to act to alleviate those concerns.

Accordingly, it is hereby ORDERED that TWH's application for a special exception to construct a 4-bed addition to its facility is DENIED without prejudice to further consideration in connection with its request for an enlarged parking lot.

## CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July 2002, a true and correct copy of the foregoing CCHE's Proposed Findings of Fact and Conclusions of Law was served by first-class mail, postage prepaid, on:

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