July 28, 2002

Board of Zoning Adjustment
for the District of Columbia
441 4th Street NW
Suite 210-S
Washington, DC 20001

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Re: Board of Zoning Adjustment Application No. 16836, The Washington Home

Dear Members of the Board:

ANC 3F joins in the Findings of Fact and Conclusions of Law submitted to the Board by Citizens Concerned about the Home's Expansion (CCHE).

In addition, ANC 3F respectfully requests that the Board defer any decision on a special exception for the four bed addition to the Washington Home until such time as the Board renders a decision on the entire application. On December 21, 2001, the applicant filed a single application requesting that the Board grant a special exception that would authorize construction of an addition to house four new hospice beds and enlargement of an existing parking lot. At the conclusion of a June 25, 2002, hearing at the applicant's urging the Board "bifurcated" the referenced application so that the four bed addition could be decided as a matter separate and apart from the parking lot expansion. As parties to the case, CCHE and ANC 3F opposed this bifurcation. On July 9, 2002, the Board rejected a motion by CCHE opposing the bifurcation.

We believe the Board erred in its decision to bifurcate the case. This error can be corrected by deferring a decision on the four bed addition until such time as the Board is prepared to render a decision on the entire application. Section 3117.3 of the Zoning Regulations establishes the authority of the presiding officer including the authority to "dispose of procedural requests or similar matters." Bifurcation is a procedural matter within the meaning of 3117.3. However, Section 3101.6 of the Zoning Regulation restricts the Board from making any procedural decision that will prejudice the rights of any party. The Board's decision to bifurcate is clearly prejudicial to parties in opposition to the application. The parties were given no notice of the Board's intent to bifurcate until the decision was made at the conclusion of the June 25 hearing and no opportunity was provided for a formal response to this decision. The Board simply announced that it had decided to bifurcate and acted upon its decision while allowing only brief oral comments from CCHE and ANC 3F.

This was prejudicial since the parties had prepared their case on the basis that they would be responding to the application as it had been filed and not to an application divided into two distinct components. Further, the need for the four beds is directly tied to the parking lot

BZA
Case No. 16836
Exhibit No. 71

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Board of Zoning Adjustment
District of Columbia
CASE NO.16836
EXHIBIT NO.71

expansion since four additional parking spaces in the expanded parking lot are requested to meet the parking demand generated by the four beds. While Members of the Board suggested that the impact of the four beds on the total parking requirement was minimal, members of the community see things much differently. Neighbors have high concerns about any increment of additional parking that could contribute to the justification for an expanded parking facility in this R-1-B zone. From the perspective of the community, the decision to bifurcate the case changed the rules of the game in mid-stream and placed the parties in opposition at a serious disadvantage. As CCHE contended in its motion which the Board rejected, the Board's decision constitutes unfair surprise and a lack of appropriate process since the Board changed the rules for the proceeding in mid-course. Such an approach is at odds with the due process requirements of the Administrative Procedures Act.

The Board's decision to bifurcate also diminishes the opportunities for the parties to reach a compromise settlement on the parking lot which is the most contentious issue in this case. In agreeing with the applicant that a special exception for the four bed addition can be considered separately from the parking lot expansion, the Board takes a step in the direction of removing one of the principal motivators for the applicant to seek a compromise on the parking lot. With the knowledge that the four bed addition is no longer linked to the parking lot expansion, the applicant likely will feel less pressured to compromise on the size of the parking lot. This would be highly prejudicial to the opponents' case. Also prejudicial is the fact that Jon Graham, the CCHE's lead member in organizing and presenting the opposition case to the BZA, was not available for the scheduled July 9 hearing because of a pre-existing scheduling conflict. Without Mr. Graham's ability to contribute, CCHE was placed at a distinct disadvantage.

The decision to bifurcate was also prejudicial to the Board's ability to render an informed and fair decision since the applicant presented its case based on the entire application as filed. The applicant's testimony did not address the impacts of the four bed addition as a separate and distinct component of the application and did not distinguish the impacts of the four bed addition from the impacts of the total project. In this regard the Board has placed itself in the position of having received no direct testimony in support of the four bed addition as a separate and distinct project and of having heard no cross-examination of such testimony. On this basis, the Board is not in a position to render a fair, impartial, and informed decision on the four bed addition as a separate and distinct project. Consideration of the four bed addition should be deferred until such time as the Board can render a decision on the application as a whole.

At the June 25 hearing the Board stated that a principal reason for bifurcating the case was the fact that a Certificate of Need (CON) issued by the D.C. Department of Health (DOH) expires on September 20, 2002, and that BZA approval of the four bed addition is needed prior to this date. The Board relied on advice from the applicant in reaching this conclusion. In fact, construction of an addition would have to be completed by September 20 and the services requested in the CON would have to begin prior to that date in order for the applicant to meet the terms of the CON. With a BZA decision on the four beds scheduled for August 6, 2002, it will not be possible for the applicant to meet the terms of the CON by September 20. This means that the applicant will have to seek an extension of the CON or request that a new CON be issued

regardless of any action the Board might take on the special exception request. This demonstrates that the Board acted to bifurcate the application, an act which was prejudicial to the opposing parties, without the benefit of accurate and complete information about the CON procedures.

For the reasons stated above we strongly recommend that the Board defer any decision on the four bed addition until such time as the Board is prepared to render a decision on Application 16836 in its entirety as it was filed.

Sincerely,

Phil Kogan
Commissioner

CERTIFICATE OF SERVICE

A copy of this letter has been provided to the parties or their representatives:

George Keys, Jordan Jessamy and Keys
Jon Graham, Citizens Concerned about the Home's Expansion
Ken Laden, District Department of Transportation
Karen Thomas, Office of Planning