BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Rebuttal Statement of Monte Edwards
Representing the
STANTON PARK NEIGHBORHOOD ASSOCIATION
Case No. 17043
November 25, 2003

The Department of Consumer and Regulatory Affairs (DCRA) has argued that Zoning Commission Order No. 869, which amended Section 350.5 of the Zoning Regulations, effective April 30, 1999, amounted to an "upzoning" by making housing for the handicapped a matter-of-right use in certain residential zones. If so, it amounted to "upzoning by stealth." This case is the first time that "upzoning" is sought to be applied to a Health Care facility. Order 869 did not address such a possibility, and such a possibility was not contemplated by the parties to that proceeding, community organizations, or even the Capitol Hill Group, the facility that is the subject of this appeal. For more than a year and a half after the issuance of Order No. 869, Capitol Hill Group came to this Board for zoning regulation (Order No. 16407, issued October 1999, Order No. 16407-A, issued September, 2000). The concept of housing for the handicapped was first applied to an independent/assisted living facility in BZA Appeal No. 16716A, issued October 2, 2001. But the facility in that appeal, Sunrise, is very different, with much lower staffing and parking requirements, from the skilled nursing facility that is the subject of this appeal. Further, a fundamental issue in this appeal involves parking, which under 11 DCMR 2101.1 is to be determined by this Board. That provision was not at issue in the Sunrise case.

DCRA Has Not Made a Reasonable Determination of Parking

DCRA has determined that only 25 parking spaces are required for the nursing facility, known as the Capitol Hill Healthcare Group. When asked about the basis for that decision, Ms. Faye Ogunney, Chief of the Zoning Review Branch, testified that information provided by the MEDLink nursing facility, consisting of its application to the DC Department of Health for a Health Care Facility License as well an affidavit provided by Mr. Henry Vaughn, MEDLink's chief financial officer were relied upon to determine the number of employees . But the affidavit does not quantify the number of employees and the application only specifies the number of professional employees, and does not specify the number of foodservice, housekeeping or other employees. Further, to the extent that those documents were taken into account, it could not have been a considered evaluation, since they were provided on the very day that the Certificates of

BZA
Case No. 17043
Exhibit No. 104

Board of Zoning Adjustment
District of Columbia
CASE NO. 17043
EXHIBIT NO. 104

Occupancy issued - March 26, 2003. The only reliable evidence of the current number of employees is the information MEDLink provided to the Health Department on October 2, 2003 (attached to SPNA's statement at the November 18 Hearing in the Appeal), which specifies a total number of 532 employees for the hospital and nursing home. That information was provided on October 2, 2003, and thus could not have been taken into account in the Certificates of Occupancy that were issued six months earlier, on March 26.2003. Ms. Ogunney further testified that the Zoning Administrator was restricted to a consideration of residential uses, specifically a rooming or boarding house, in determining the parking requirement for the nursing home. But nowhere is there any requirement to support this restricted view. Further, what kind of a residential facility would have a support staff of 532 employees for a resident population of 177? For these reasons, the most competent method of specifying the parking requirement is the directive of section 2101.1 of the Zoning Regulation that the parking should be determined by this Board. If, for some reason this Board determines that the case should be sent back to the Zoning Administrator for a determination on parking, the Board should direct the Zoning Administrator to take into account the number of employees, impact on the community, and other relevant data that this Board has taken into account in its prior orders concerning this facility.

There is Neither Factual Nor Legal Support for the Result Advocated by DCRA

DCRA argues that a skilled nursing facility should be treated as housing for the handicapped and that the parking requirement of 11 DCMR 2101.1 should be ignored. The case law that DCRA has provided seems to support the proposition that a nursing home provides housing for persons that are impaired or limited in performing one or more life activities, and therefore constitute housing for the handicapped. But there are significant distinctions between those cases and the issues in this appeal. Those cases involve the application of federal statutes having to do with disabilities or limitations. *Wagner v. Fair Acres Geriatric Center,* 49 F.3d 1002 (3rd Cir. 1995) explained at page 1010, note 8 that:

> Federal law defines a nursing home as an institution which ... is primarily engaged in providing to residents (A) Skilled nursing care and related services for residents who require medical or nursing care, (B) Rehabilitation services for the rehabilitation of injured, disabled or sick persons, or (C) On a regular basis, health and related care and services to individuals who because of their mental or physical condition require care or services (above the level of room and board) which can be made available to them only through institutional facilities.

Thus the DCRA cited federal cases do not make the important distinction that the DC Zoning Code makes between assisted living facilities and licensed nursing facilities. In the cases offered by DCRA, the facts indicate they are primarily assisted living facilities, such as Sunrise, rather than the skilled nursing facility that is MEDLink, even though the language in those cases refers to the facilities as nursing homes (which encompasses both facilities for federal purposes). *United States v. Commonwealth of Puerto Rico*, 764 F. Supp. 220 (1991) involved the determination of the zoning administrator to close down a two-story, 8 bedroom residence that was operated as housing for 13 elderly individuals, substantially different from the nursing home/hospital facility with 177 patients and 532 employees that is the subject of our appeal.

Hovsons v. Township of Brick, 89 F.3d 1096 (3rd Cir. 1996), involved the efforts of a developer to obtain zoning approval to construct housing for handicapped elderly people who would reside there "very often for the rest of their lives" (89 F.3d at1102), again, different from the average patient stay of 11 month for the nursing home that is the subject of this appeal. In ruling that the Township should allow the development as a "reasonable accommodation" under the Fair Housing Act, the Court cautioned that (*id.* at 1106):

> It is uncontroverted that the township of Brick has a substantial interest in enforcing its zoning code and that, under appropriate circumstances, local zoning codes are entitled to a considerable amount of deference (citations omitted). We are also mindful of the fact that "[i]n requiring reasonable accommodation, ... Congress surely did not mandate a blanket waiver of all facially neutral zoning policies and rules, regardless of the facts." *Oxford House, Inc. v. City of Virginia Beach,* 825 F.Supp 1251,1261 (E.D. Va. 1993).

DCRA cites *Lapid-Laurel, LLC v. Zoning Board of Adjustment,* 284 F.3d 442 (3d Cir. 2002) for the proposition that nursing homes provide housing for the handicapped. In *Lapid-Laurel*, a developer was unable to obtain zoning approval to construct a facility for the elderly. The process for seeking that approval was similar to our Special Exception process, and was referred to as a variance for an "inherently beneficial purpose," since it involved a group home for the handicapped, and therefore is held to a reduced standard compared of other variance proceedings (284 F.3d 442 at 453). The developer argued that the Board's denial of Lapid's application for variances and site plan approval violated the Fair Housing Amendments Act (FHAA) requirement that municipalities "make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford handicapped persons an equal opportunity to use and enjoy housing". (*id.* at 448) The Court rejected the developer's arguments based on a weighing of the objective of assisting the handicapped versus the need to impose reasonable boundaries in accomplishing this purpose. Those reasonable

boundaries involve the application of the above quoted admonition to provide deference to local codes (*id.* at 462). The problems that the application presented under local codes involved parking, in terms of ingress and egress, the design of the parking lot in terms of deliveries, traffic safely, and access for emergency vehicles. The Court concluded that these problems would cause an "undue Hardship" on the Township, but had not been appropriately addressed in the developer's presentation before the Board (*id.* at 466).

Bryant Woods Inn v. Howard County, Md., 124 F.3d 597 (4th Cir. 1997) also involved local zoning requirements which were weighed against the objective of providing housing for the handicapped. The owner of an 11-bedoom house in Columbia, Md. sought to expand its operation from 8 to 15 elderly residents, some of which suffered from Alzheimer's and other forms of dementia. The Owner was unable to satisfy Howard County's traffic and parking requirements and therefore sought a waiver of the requirements on the ground that its residents would not need additional parking (124 F. 3d 597, at 600). Howard County denied the request. Bryant Woods Inn appealed, contending that Howard County's refusal to change its zoning to accommodate expansion from 8 to 15 residents violates the Fair Housing Act by failing to make "reasonable accommodations" when it refused the owner's application to expand his operations. In evaluating this claim the Court recognized "the tension between Howard County's right to control land uses through neutral regulation and its duty to make reasonable accommodations for the handicapped under the FHA" (*id.* at 603). In resolving this tension, the Court concluded the FHA does not require abandoning the deference that courts have traditionally shown to local zoning codes, nor does the FHA provide a waiver of zoning policies and rules which would give the disabled the ability to determine where and how they would live regardless of zoning ordinances to the contrary. The FHA requires only that local government make "reasonable accommodation" to afford persons with handicaps "equal opportunity to use and enjoy" housing in those communities (*id.*). The Court concluded that "to require a zoning variance to allow Bryant Woods Inn to expand its group home from 8 to 15 residents without providing adequate parking and not to require the county to grant a similar waiver for group homes not involving handicapped persons would advantage Bryant Woods Inn" (*id.* at 605). This would be wrong because "the FHA only requires an 'equal opportunity,' not a superior advantage" (*id.*).

The consistent theme in all of these cases is that there is no impediment to this Board continuing to regulate the nursing facility as a Health Care Facility and exercising its authority to determine the parking requirements for the MEDLink facilities.