BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Statement of Monte Edwards
Representing the
STANTON PARK NEIGHBORHOOD ASSOCIATION

Case No. 17043
November 18, 2003

My name is Monte Edwards. Together with Drury Tallant, who is also here today, I serve as Co-Chair of the Land Use Committee of the Stanton Park Neighborhood Association (SPNA). SPNA is a civic association that works for improvement of the Stanton Park neighborhood by representing the interests of the north Capitol Hill community in the area bounded by East Capitol Street, 10th Street NE, H Street NE, and 2nd Street NE. SPNA appeals the Zoning Administrator's issuance on March 26, 2003 of two Certificates of Occupancy concerning the parking requirements of the hospital and nursing facility, generally referred to as MedLINK, located at 700 Constitution Avenue:

> **CO 51289**, issued to Capitol Hill Healthcare Group as a "Community Based Residential Facility-Health Care Facility that Provides Housing for the Handicapped," with 117 beds and requiring 25 parking spaces.
> **CO 51290**, issued to Capitol Hill Community Hospital as a "Hospital," with 60 beds and requiring 60 parking spaces.

These Certificates should not have been issued because this Board previously issued orders which prescribed the use and parking requirement for this facility:

> **Order No. 15542**, issued July 1991, authorized the operation of a health care facility with 130 beds and 250 employees. The facility was required to provide 176 off-street parking spaces.
> **Order No. 16407**, issued October 1999, authorized an expansion of operations of this same facility to 162 beds and 340 employees. The facility was required to provide 276 off-street parking spaces.

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Board of Zoning Adjustment
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The 2003 Certificates of Occupancy (COs) should not have issued because of the existence of the prior Orders of this Board, the most recent of which requires the facility to provide more than three times as much off-street parking as the combined parking requirement of the two wrongfully issued COs. Further, not only was the Zoning Administrator without authority to disregard the prior Board of Zoning Adjustment (BZA) Orders, the Zoning Administrator did not have authority to set the parking requirements for CO 51289 because the authority to establish the parking requirement for a Community-Based Residential Facility of over 16 persons is delegated specifically and exclusively to the BZA under 11 DCMR 2101.1.

In persuading the Zoning Administrator to issue the Certificate of Occupancy requiring only 25 parking spaces for the 117 bed nursing facility, Capitol Hill Group argued that the *Nebraska Avenue* case, BZA Appeal No. 16716A, issued October 2, 2001, justified such a result. But *Nebraska Avenue* offers no authority for establishing parking requirements under the amended zoning regulations regarding housing for the handicapped. In *Nebraska Avenue,* the Deputy Zoning Administrator determined the number of required parking spaces on March 8, 1999. Zoning Commission Order No. 869, which amended the Zoning Regulations to allow housing for the handicapped as a matter of right in the R-4 Zone, did not become effective until April 30, 1999, almost two months after the parking determination in *Nebraska Avenue.*

The factual situation in *Nebraska Avenue* was different than the factual situation in this case. The Sunrise facility that was the subject of *Nebraska Avenue* was a yet-to-be constructed facility, and it was necessary to employ projections and estimates to establish the parking requirement. The hospital and nursing home that are the subject of this appeal are existing facilities, and this Board has over 12 years of actual experience that it has employed in establishing the parking requirements. The parking requirements for these facilities were properly established by the 1991 and 1999 Orders of this Board.

Outside of any claim of precedent established by *Nebraska Avenue*, the Sunrise facility is materially different from the hospital and nursing facility that comprise MedLINK. Sunrise included the term "Assisted Living" in its name at the time of the *Nebraska Avenue* case, but currently refers to itself as "Sunrise Senior Living" which is consistent with its anticipated nature. It will likely be primarily an independent living facility when it opens in mid-December of this year. The pricing structure supports this, since the basic rental includes apartment rent, meals and apartment cleaning, but if assistance is required, it is provided on an *a la carte* basis at additional cost. Assistance in daily living tasks (such as bathing or dressing) incur additional daily fees and medication administration incur further daily fees. Sunrise is not licensed as a nursing facility and will provide no skilled nursing services. Sunrise offers a very different kind of service, will have significantly lower staffing levels, and will have a substantially lower parking requirements than the Capitol Hill Healthcare facility

Nursing Homes Are Properly Classified as Health Care Facilities

SPNA takes no position as to whether the Sunrise Senior Living facility should have been classified as a Community Based Residential Facility (CBRF) that provides housing for the handicapped under the zoning regulation; however, to claim that nursing homes should also be so classified is unreasonable. The Zoning Administrator seeks to achieve this erroneous result under the rationale that since the Sunrise facility provides housing for persons that are impaired or limited in performing one or more major life activities, then a nursing home, which provides care for individuals with a greater degree of impairment in performing major life activities, should also be classified as CBRFs that provide housing for the handicapped. To extend that argument would mean that there would no longer be any need for the zoning classifications of Health Care Facility or even Hospital, since people that go to hospitals must be handicapped because they go there to have physical impairments corrected, and further, for the time that they are under anesthetic or other medication, they are completely impaired. The consequence of such a classification, for zoning purposes, would be to make all such facilities "matter-of-right," and according to the Zoning Administrator, exempt such facilities from the parking requirements of the zoning regulations. If the concept that "matter-of-right" means that zoning requirements for parking can be waived, then the Zoning Administrator may seek to waive other zoning requirements in the interest of "matter-of-right." The result would be that any facility that can convince the Zoning Administrator that it serves a population with some degree of physical impairment or limitation would be largely exempt from zoning regulations or oversight by this Board. If this Board accepts the action of the Zoning Administrator in this case it will be an invitation for all of the nursing homes in the City to turn their parking lots into apartments or other forms of development.

Parking Requirements for CBRFs Must Be Determined on a Facility-Specific Basis

CBRFs encompass Youth Rehabilitation Homes and Emergency Shelters as well as Health care facilities, a total of seven very different classes of facilities. In determining parking requirements, each of the different classes of CBRFs will likely have different criteria, which may consist of number of residents, number of visitors or number of employees. Thus, unlike other portions of the table in Section 2101.1 of the Zoning Regulations which prescribe parking in terms of ratios, the parking requirement for a CBRF is to be determined by the BZA on a case-specific basis, in order to properly evaluate the nature of the facility, the need to provide off-street parking and the impact of any action on the surrounding community. Requiring a ruling by the BZA on parking does not detract from a facility's matter-of-right status. Proceedings before the BZA provide an opportunity to determine the most appropriate criteria,

receive comments from the community and evaluate the impact the requested action will have on affected neighbors. That opportunity is not available if the decision is made by the Zoning Administrator. Even within the specified classes of CBRFs there can be very different parking requirements. For example, an independent living facility has a different staffing requirement than an assisted living facility or a facility that provides skilled nursing care.

These considerations were taken into account in the two BZA Orders pertaining to the Capitol Hill Group (referred to as the "Capitol Hill Hospital" in 1991). In both Orders, the BZA specifically considered the number of beds and the number of employees in establishing the parking requirements. In 1991, with 130 beds and 250 employees, 176 off-street parking spaces were required. In 1999, with an expansion to 162 beds and 340 employees the parking requirement was increased to 276 off-street spaces. Now, with 177 operating beds and 532 employees, the facility has obtained the Certificates of Occupancy that are the subject of this proceeding that would reduce the parking requirement to 85 off-street spaces. Employees have increased by over 50% since 1999, but the erroneously issued Certificates of Occupancy reduced the required parking to less than a third of the 1999 level.

Ongoing Parking Problems

The 176 parking spaces specified in the 1991 BZA Order were the number of spaces associated with the underground garage owned by the Capitol Hill Group (roughly 32 of the parking spaces are on the surface, above the underground garage, and the balance of 144 spaces are actually underground). But from 1991 through 1999, the Capitol Hill Group had "not complied with the Board's 1991 Order directing Applicant to provide 176 parking spaces." (BZA Order No. 16407 at 3 n.2). The lower level of the garage was subject to flooding and the upper levels were being used for storage of hospital equipment, which was noted in a September 15, 2000 inspection by the Zoning Administrator's representative.

The 1999 BZA Order required the Capitol Hill Group to use the 100 parking spaces in its surface parking lot located on the west side of 7th Street as well as the 176 spaces associated with its underground garage. But in 2001, Capitol Hill Group sold the surface parking lot, thereby reducing its off-street parking by 100 spaces and thus violating the parking requirements of the 1999 BZA Order. This violation was brought to the attention of the Zoning Administrator, but the Administrator took the position that it would not enforce the parking requirement in view of the Capitol Hill Group's announced plan to terminate its operation at this location and sell its building complex. Again, on November 20, 2002, a Notice of Infraction was issued against Capitol Hill Group for not providing the number of parking spaces required under BZA Order No. 16407. At present, the former site of the surface parking lot is occupied by newly constructed townhouses and Capitol Hill Group has renounced its contract to sell its building

complex. Capitol Hill Group continues to own its buildings, operating one of the buildings as its hospital and nursing facility. The result of these actions has been to significantly reduce the number of off-street parking spaces provided by the Capitol Hill Group and to greatly increase the utilization of on-street parking spaces by the employees of Capitol Hill Group. The Residential Parking Restrictions at best offer only partial relief from this situation. Capitol Hill Group operates on a 24 hour, 7 day week schedule. The Residential Parking Restrictions do not apply to overnight and weekend times, with the result that during evenings and weekends the hospital and nursing facility employees park on the street with impunity but local residents find it almost impossible to find on-street parking near their homes. This creates not only a hardship but also a personal safety concern for residents who are forced to walk long distances from their cars to their homes late at night.

The Facility Will Likely Have Greater Parking Needs in the Future

Capitol Hill Group is now in bankruptcy and as a part of the plan of reorganization to emerge from bankruptcy, the new hospital and new nursing center will acquire the operational assets (but not the real estate assets) of the Capitol Hill Group. The "new" hospital (to be known as MedLINK Hospital of Washington) and the "new" nursing facility (to be known as MedLINK Nursing Center of Washington) have applied to the DC Department of Health for Certificates of Need (CON) to operate the facility. On October 2, 2003, they provided responses to inquiries concerning their CON Application, extracts of which are attached to this statement. The response to Question 58 confirms that here are now a total of 177 operational beds at the facility; however, the response also indicates 287 "licensed beds." While SPNA does not understand the significance of the "licensed" designation, it appears to indicate that there is a potential for 100 additional beds (with the associated required employee staffing and resultant parking needs).

The two MedLINK operations will lease only the north tower building on 7th Street NE, representing about a quarter of the total building complex owned by the Capitol Hill Group. The new MedLINK entities will also lease an unspecified portion of the 176 space underground parking facility that has been utilized by the hospital and nursing facility. Thus the remaining Capitol Hill Group property on 7th Street, Constitution Avenue and 8th Street will be available for other uses. In today's real estate environment, it is highly unlikely that property will remain vacant, and Capitol Hill Group will likely be able to find someone to occupy that property. If Capitol Hill Group could offer the potential tenants parking in the underground garage, the property would be more valuable. When the employees, patients and visitors of the facilities to be located in the now vacant buildings on 7th Street, Constitution Avenue and 8th Street exceed the amount of available off-street parking or for other reason choose to park on the street, they

will join the employees and visitors of the hospital and nursing facility in competing with residents for on-street parking spaces.

Apparently Capitol Hill Group has already begun that process by leasing six of its operating suites to the Ambulatory Surgical Group. It is highly likely that persons undergoing out-patient surgery will be accompanied by friends or relatives that will expect parking while they wait for the patient. In addition to the parking concerns, 11 DCMR 358 of the Zoning regulations does not permit multiple healthcare facilities or other Community Based Residential Facilities to be located in the same square as a matter-of-right.

Resolving the Situation

At a minimum, this Board should rescind the Certificate of Occupancy issued to the nursing facility (CO 51289, issued to the Capitol Hill Healthcare Group), because the Zoning Administrator had no legal authority to determine the parking requirements for such a facility. Further, the Board should require that all of the off-street parking spaces associated with the underground parking facility be utilized by the nursing facility and the hospital. This would be consistent with the statement of Mr. Henry Vaughn, MedLINK's Chief financial Officer, at the October 31, 2003 Department of Health Hearing that he expects all of the underground parking facility spaces would be committed to the new hospital and nursing home.

As a more comprehensive resolution, the Board should reaffirm the parking requirement determinations of its prior Orders. In the past, the hospital and nursing home operations at this location have been treated as an integrated operation, and in the hearing before the Department of Health on October 31, 2003, Mr. Vaughn stressed that integration and co-location as a unique attribute, shared by only one other healthcare facility in the City. That integrated regulation for zoning purposes should continue. Further, since it appears that the operations addressed by those Orders have expanded, and will likely expand even more in the near future, the Board should require that the hospital and nursing facility, as well as any other operation(s) at this location, file an updated application with this Board proposing how to provide the appropriate amount of off-street parking to satisfy the increased intensity of use of the Capitol Hill Group properties.

USES	NUMBER OF PARKING SPACES REQUIRED
Arena, armory, assembly hall, auditorium, community center, concert hall, convention hall, dance hall, funeral parlor, ice or roller skating rink, public hall, stadium, or theater:	
C-4, C-5 (PAD)	No requirement
All other districts	1 for each 10 seats of occupancy capacity for the first 10,000 seats, plus 1 for each 20 seats above the first 10,000; provided, that where such seats are not fixed, each seven square feet 7 ft.^{2} usable for seating shall be considered 1 seat
Boat club or marina:	
All districts	1 for each 4 berths or slips
Churches:	
C-3-C, C-4, C-5 (PAD)	No requirement
All other districts	1 for each 10 seats of occupancy capacity in the main sanctuary; provided, that where the seats are not fixed, each 7 ft.^{2} usable for seating or each 18 in. of bench if benches are provided shall be considered 1 seat
Recreational building or use:	
All districts	1 for each 2,000 ft.^{2} devoted to the building or use
RESIDENTIAL USES	
Apartment house or multiple dwelling:	
R-5-A, C-1	1 for each dwelling unit
R-5-B, C-2-A, C-3-A	1 for each 2 dwelling units
R-4, R-5-C, R-5-D, C-2-B, W, CR	1 for each 3 dwelling units
R-5-E, SP, C-2-C, C-3-B, C-3-C, C-4, C-5 (PAD)	1 for each 4 dwelling units
Community-based residential facility:	
All districts other than C-3, C-4, C-5 (PAD):	
1 to 8 persons housed	1
9 to 15 persons housed	2
16 or more persons housed	As determined by the BZA

USES	NUMBER OF PARKING SPACES REQUIRED
C-3, C-4, C-5 Districts	1 for each 10 persons housed
Dormitory, sorority, or fraternity house not approved as part of a campus plan:	
All districts	1 for each 5 beds
Flat:	
R-5-A	1 for each dwelling unit
All other districts	1 for each 2 dwelling units
One-family dwelling:	
All districts	1 for each dwelling unit
Publicly assisted housing, reserved for the elderly and/or handicapped:	
All districts	1 for each 6 dwelling units
Rooming or boarding house:	
All districts	1 plus 1 for each 5 rooming units
SCHOOLS	
Child/Elderly Development Center:	
All districts	1 for each 4 teachers and other employees
College or other institution of higher learning, business trade, or other school and accessory uses located on the campus:	
C-4, C-5 (PAD)	No requirement
All other districts	For each building: 2 for each 3 teachers; plus either 1 for each 10 classroom seats or 1 for each 12 stadium seats or 1 for each 10 auditorium seats, whichever is greater, except as provided in § 2106
Elementary and Junior High School:	
All districts	2 for each 3 teachers and other employees
High school and accessory uses:	
All districts	2 for each 3 teachers and other employees, plus either 1 for each 20 classroom seats or 1 for each 10 seats in the largest auditorium, gymnasium or area usable for public assembly, whichever is greater
WAREHOUSE	
Warehouse:	

ORIGINAL

October 2, 2003

BY HAND DELIVERY

Mr. Carl W. Wilson
Government of the District of Columbia
Department of Health
825 North Capitol Street, N.E., 3rd Floor
Washington, D.C. 20002

Re: **CON Applications for New Hospital and New Nursing Center**

Dear Mr. Wilson:

This is in response to your letter of September 25, 2003.

Thank you for the prompt attention given to the Notification that we submitted to you on September 15, 2003 to obtain a CON for New Hospital (defined below) and a CON for New Nursing Center (defined below).

We have carefully reviewed your September 25th letter and hereby submit this expedited response. Please note that to expedite your review of this response, we have restated each of your questions (in italicized, bold typeface) and immediately follow with our response (in unbolded, unitalicized typeface).

Please be aware that the bankruptcy orders in effect will require that the closing on the sale of the operations close on or before December 15, 2003. Accordingly, we appreciate your vigilance in assisting us in this process.

In addition, please note that the documents pertaining to that certain loan made by Healthcare Business Credit Corporation to Washington Healthcare Group have not been executed, as one of the conditions to closing on such loan is obtaining the CONs.

If you have any questions regarding our responses, please let us know as soon as possible.

12. ***Please provide a copy of BHS, Inc.'s current management agreement with the MedLINK facilities (Hospital and Nursing Center) and any new management agreement under which the buyer plans to operate after the transfer of ownership.***

Response

- For a copy of the BHS management agreement, see Exhibit Q-12 submitted herewith.

- BHS currently has 53 employees. Applicants intend to move all but approximately 10 of such employees to the payrolls of either New Hospital or New Nursing Center. The remaining 10 employees will be moved to WHG, with whom the New Hospital and New Nursing Center will enter a new agreement on terms no worse to New Hospital and New Nursing Center that the terms reflected in Exhibit Q-12.

14. ***If BHS Management is currently providing management services to MedLINK Hospital and MedLINK Nursing Center, please describe these services. Please discuss whether BHS Management, Inc. will continue to provide any services to the Hospital and the Nursing Center after the transfer of ownership. Please discuss how the services currently provided by BHS Management are to be provided after the transfer of the Hospital and Nursing Center to the buyer.***

Response

- Primarily, BHS (a) provides staffing for services that are common to both the Existing Hospital and the Existing Nursing Center and (b) contracts with third parties for goods and services that are common to both the Existing Hospital and the Existing Nursing Center. In this way, BHS serves as a vehicle for properly allocating common costs and expenses between the Existing Hospital and Existing Nursing Center.

- BHS will not continue to provide any services to the Existing Hospital and Existing Nursing Center after the transfer of ownership.

- Most of the services currently provided by BHS will be performed by the New Hospital and New Nursing Center, respectively. See Response to Question 12 above. Some of the BHS services may, however, be provided by WHG.

29. ***Please discuss the general state of employee relations at the MedLINK Hospital and MedLINK Nursing Center, respectively. Please provide the current number of employees at the Hospital and Nursing Center, respectively.***

Response

- The general state of employee relations at Existing Hospital and Existing Nursing Center is excellent.
- Existing Hospital: 223 employees.
- Existing Nursing Center: 256 employees.

30. ***Please discuss whether BHS Management has any employees. Is it anticipated that the BHS Management employees and/or officers are to become employees and/or officers of the buyer and/or the Hospital and/or the Nursing Center? Is it anticipated that the buyer, the Hospital and/or the Nursing Center will need to replace the functions currently performed by BHS Management's personnel?***

Response

- BHS: 53 employees.
- For the answers regarding the disposition of BHS employees and replacement of BHS, please see response to Question 12.

58. ***How many patient care beds is each facility (the hospital and the nursing center) licensed for and how many beds are operational at each facility?***

Response

- Existing Hospital
  - Number of licensed beds: 125
  - Number of bed operational: 60
- Existing Nursing Center
  - Number of licensed beds: 162
  - Number of bed operational: 117

65. ***Please identify any changes in service, if any, that are proposed or anticipated to take place after the proposed transfer of ownership of the facilities to the buyer.***

Response

- New Hospital. There will be no changes in service after the proposed transfer of ownership.
- New Nursing Center. There will be no changes in service after the proposed transfer of ownership