

**Board of Zoning Adjustment
Case No. 19751**

**MOTION TO DISMISS OR,
IN THE ALTERNATIVE,
TO POSTPONE**

MED Developers, LLC (“Applicant”) is attempting to combine and develop two R-1-B lots, which are zoned for single family homes and are part of a neighborhood designated by the DC Comprehensive Plan Generalized Policy Map as a Neighborhood Conservation Area, into one contiguous memory care facility which would have thirty-four (34) units and be three to four stories tall plus a penthouse for a total height of fifty-two (52) feet. The lots are located at 2619-2623 Wisconsin Avenue, NW; lots 0044 and 0812 in square 1935. The Massachusetts Avenue Heights Citizens’ Association (“MAHCA”), which filed a Party Status Request in this case and upon being granted party status in this case, hereby moves the Board of Zoning Adjustment (“BZA”) to dismiss Case No. 19751 for the reasons set forth in (1) and (2) below:

- (1) **Application is deficient on its face:** Applicant’s application is deficient on its face because Applicant failed to furnish two (2) paper copies of “[t]he name and addresses of the owners of all property located within two hundred feet (200 ft.) of the subject property and two (2) copies of the self-stick labels with their names and addresses,” at the time of filing the application, as required by Subtitle Y §300.8(g). Applicant only included the names and addresses of the owners of property located within two hundred (200) feet of lot 0044 in square 1935, which constitutes roughly one-third of the subject property. Applicant failed to include the names and addresses of the owners of all property located within two hundred (200) feet of lot 0812 in square 1935 (*See* Applicant’s Exhibit 8 in IZIS “List of Names and Mailing Addresses of Property Owners within 200 Feet” attached hereto as Attachment 1). Therefore, Applicant’s application does not meet the requirements of Subtitle Y §300 and should not have been “accepted by the Office of Zoning for processing,” as provided in Subtitle Y §300.1, and Applicant’s application should not have been processed “until the application is complete,” per Subtitle Y §300.2.
- (2) **The BZA did not provide legally required notice to all property owners within two hundred (200) feet of the subject property:** The BZA failed to comply with Subtitle Y §402.1(d) because it did not provide “a copy of the notice of public hearing to the owners of all property within two hundred feet (200 ft.) of the subject property.” The BZA did not have an accurate list of the owners of all property within two hundred (200) feet of the subject property because Applicant failed to comply with Subtitle Y §300.8(g) and submitted an incomplete application in violation of Subtitle X §902.1, as set forth in Section (1) above. Applicant’s application only defined the subject property as lot 0044 and the BZA did not know to give notice to the property owners within two hundred (200) feet of lot 0812 which was left out of the subject property description. It would be a dangerous precedent for the BZA to set to agree to waive the requirement that an application be complete and accurate, as required by law.

Accordingly, MAHCA respectfully requests the BZA dismiss Case No. 19751. In the event the BZA does not agree to dismiss this case, MAHCA respectfully requests the BZA postpone Case No. 19751 for the reasons set forth in (1) and (2) above, as well as for the reasons set forth in (3) and (4) below:

- (3) **Applicant recently made material changes to its application:** Applicant only recently provided new, critically material information about its application such that MAHCA has not had a commercially reasonable amount of time to prepare its case or secure expert witnesses. Experts

have provided proposals with lead times of approximately six (6) weeks to review the case, conduct research and do analysis, prepare a written report and prepare for a BZA hearing. MAHCA was able to retain counsel on September 12, 2018, but counsel cannot attend the September 26, 2018 hearing, and even if counsel had been able to, she would not have had enough time to be prepared on September 26, 2018.

a. **On AUGUST 29, 2018: 18 Business Days before Scheduled BZA Hearing:**

An operator of the proposed facility was first identified by Applicant; Applicant and operator held an unproductive and one-sided “community” meeting:

- Even though Applicant filed its application on March 26, 2018, Applicant did so without having an operator. Applicant did not identify an operator for its proposed facility until five (5) months after it filed its application at a hastily scheduled and poorly publicized “community” meeting on August 29, 2018, which was not webcast as Applicant said it would be.
- At ANC 3C’s May 2018 Planning and Zoning Committee meeting, Applicant presented its application, but was unable to answer most questions about its proposed facility because Applicant stated those questions could only be answered by an operator who was yet to be secured and identified. The operator, how it will operate the facility, its experience and track record are critical to assessing the adverse impact on affected neighbors of the proposed development. Therefore, MAHCA requires time to look into the operator, its purported track record, etc. This is particularly important because operator has provided misleading information about its experience regarding its management or operation of assisted living facilities and Applicant and operator have not offered affected neighbors any opportunities to engage with the operator in a meaningful or productive way.

Use of proposed facility stated in March 2018 application was changed:

- On August 29, 2018, MAHCA learned that the use for the proposed facility changed, namely that the proposed facility would be exclusively a memory care facility. MAHCA has spoken with several experts in the field of geriatric psychiatry and is working to secure an expert to provide testimony on behalf of MAHCA.

Building plans were changed, yet are still incomplete:

- On August 29, 2018, MAHCA learned that the building plans submitted with the application in March 2018, when there was not yet an operator, changed and that further changes would still have to be made to the plans. However, MAHCA only saw the building plans projected onto a screen and did not receive any documents regarding the changed use or the changed building plans.

b. **On SEPTEMBER 6, 2018: 13 Business Days before Scheduled BZA Hearing:**

First time the new memory care use is mentioned formally and that the updated, but still incomplete, building plans are provided: Applicant’s Pre-hearing Statement and the Exhibits thereto, dated September 5, 2018, were made available on IZIS (*See Exhibits 41 and 41A* in IZIS), which MAHCA’s experts will have to review and opine on.

c. **On SEPTEMBER 17, 2018: Six (6) Business Days before Scheduled BZA Hearing**

Applicant updated its parking study: On September 17, 2018, Applicant submitted a "Supplemental Memorandum on Parking" (See Exhibit 107 in IZIS) which MAHCA's parking expert will have to review.

- (4) **The BZA hearing has been postponed twice at Applicant's request:** Applicant has requested and received two postponements of the BZA hearing (See Exhibits 35-38 in IZIS). MAHCA has not yet requested or received a postponement. Given the issues set forth in Sections (1) and (2) above, it is required that the BZA hearing at least be postponed in order to prevent the violation of law and due process. Given the issues set forth in Section (3) and in this Section (4), it is reasonable and fair for the BZA to grant MAHCA a postponement.

MAHCA respectfully requests the BZA dismiss Case No. 19751 on the grounds set forth in (1) and (2) above. If the BZA does not dismiss Case No. 19751, MAHCA respectfully requests the BZA postpone Case No. 19751 until Applicant resubmits a correct application, the BZA provides the requisite forty (40) day notice, as legally required by Subtitle Y §402.1, to all property owners within two hundred (200) feet of ALL lots included in the subject property, and MAHCA has a commercially reasonable period of time of at least six (6) weeks to prepare its case.

Dated September 24, 2018



Paul Cunningham
President of MAHCA

BZA Case No. 19751 (MED Developers, LLC)

AFFIDAVIT OF SERVICE

I hereby certify that on September 24, 2018 a copy of the foregoing Motion to Dismiss or, in the Alternative, to Postpone was served via e-mail to the following:

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