BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPLICATION OF
MED DEVELOPERS, LLC

BZA CASE NO. 19751
HEARING DATE: NOVEMBER 14, 2018

TESTIMONY OF THE MASSACHUSETTS AVENUE HEIGHTS CITIZENS ASSOCIATION
Presented by Anita Crabtree, MAHCA Zoning Coordinator

I. INTRODUCTION / OVERVIEW

I am here to testify on behalf of the Massachusetts Avenue Heights Citizens Association (MAHCA), a party in this case. My name is Anita Crabtree and I am the MAHCA Zoning Coordinator.

The applicant, MED Developers, LLC ("MED," "developer," or "applicant") is asking this Board to grant it a special exception to build a large, four story plus penthouse, institutional, non-conforming memory care facility which is a healthcare facility on two R-1-B lots. Anyone who has ever visited a facility like this, knows all that comes with it – the staff, the visitors, the traffic, moving trucks for move-ins and move-outs, the deliveries, the emergency vehicles, etc.

When we were at the BZA the last time, there were a few decision cases that were heard before we were called and it struck me how many of the commissioners talked about how seriously they take requests by homeowners to bump out their homes, add a porch, or make some other changes, many of them arguably minor. I appreciate that the BZA takes these types of changes so seriously, that the law is enforced and that the homeowners are made to rigorously jump through all the required hoops. I have seen what neighbors have gone through to complete their applications and do things the right way. The experience with this application 19751 and the lack of rigor by the applicant to provide necessary information and engage with the impacted community are in glaring contrast to the rigor with which I have seen private individuals approach this process. I hope and trust that the BZA will review this application with the same rigor with which it reviews applications by homeowners to bump out their homes, because building this proposed large, non-conforming and of character structure in an R-1-B single family home neighborhood, which the DC Comprehensive Plan designates as a Neighborhood Conservation Area, should not be done without ensuring that the applicant has met its burden of proof and that the proposed development strictly adheres to the zoning regulations.

MAHCA opposes this application and hereby respectfully requests that this Board deny the applicants request for two special exceptions:

(1) the applicant has not met his burden of proof;
(2) this special exception application does not meet the six conditions required in order for a continuing care retirement community ("CCRC") special exception to be granted (Subtitle U, Section 203.1(f)(1)-(6)), in particular the proposed facility does not fulfill the parking condition under subsection (4) and the no objectionable conditions standard under subsection (5);

(3) this special exception would not be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps (Subtitle X, Section 901.2(a)); and
(4) this special exception would affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps (Subtitle X, Section 901.2(b)).

II. APPLICANT FAILS TO MEET ITS BURDEN OF PROOF

A. Generally

In this case, the applicant has not met its burden of proof "to prove no undue adverse impact." Applicant has made no real effort to "demonstrate" this "through evidence in the public record" (*See* Subtitle X, § 901.3). Instead of making a good faith effort to meet its burden of proof, applicant has deliberately submitted a vague application in an effort to get this through with providing as little information for the public record as possible, as recognized by ANC 3C and described in its resolution (*See* Exhibit 146). In providing so little information based on which to assess the impact of the proposed facility, the applicant shifted its burden of proof to MAHCA, which is not what the law intends.

Subtitle X, Section 901.3 specifically states that even "if no evidence is presented in opposition to the case," which is certainly not the case here because there is an enormous amount of opposition, "the applicant shall not be relieved of this responsibility."

The applicant has not even attempted to meet its burden of proof. It filed a barebones application without an operator about six months before it was able to find an operator willing to join the project. I know from conversations I had with Nick Finland of MED that long before MED filed its application, MED was unable to find an operator. Mr. Finland stated he was having difficulty finding someone because no operator wanted to operate such a small facility. The application MED filed alone, without an operator, in March 2018 merely states that its proposed facility would have no adverse impact on neighbors because the CCRC use is presumed to be residential. There was no further reasoning or analysis as to why there would be no adverse impact, even though the applicant has the burden of proof.

B. Missing Information

A major challenge for MED and Guest Services, Inc./Guest Services Senior Living, LLC ("GSI"), the operator MED eventually found, is that neither entity has ever built, managed or operated a memory care facility. The companies are looking to enter the market and have no established name in memory care, no experience and no track record. Sunrise, on the other hand, is an established provider in this geographic area and can draw on the experience with its many other facilities, which is precisely what it did in order to provide information such as the number of estimated emergency vehicles that would come to its proposed facility per month, the number of deliveries per week, etc. Even though applicant and GSI have no track record or experience, they should still have made an effort to meet their legal burden by providing this type of information based on comparable market data.

Below is a list of all the information the applicant chose not to include in its application, which it should and could have.

1. Number of deliveries and other commercial vehicles to the facility?

Applicant states that there will be two deliveries to the facility per week. This is nonsense, as anyone with any common sense would realize. Trash and recycling pick-up are each likely to take place one to two times per week, making that between two and four commercial vehicle trips to the facility already. By not disclosing this type of information, it appears as though applicant is either trying to hide something or that applicant is incompetent and simply does not know. In addition to trash and recycling pick-up, there will be mail deliveries, courier deliveries like FedEx and UPS, medication deliveries, food deliveries with enough food to prepare all meals onsite, moving truck to move residents in and out, emergency vehicles, etc.

2. Who makes up the 18 daytime staff?

What is the break-down? That 18 staff includes a receptionist, facility manager, cooks, food servers/feeders, a van/shuttle driver, cleaners, laundry personnel (all laundry will be done onsite), medical director, nurse(s), patient caretaker staff, programming and activity facilitators, etc.

3. How will traffic flow to and from the facility given that the only access for vehicular traffic is via the narrow, approximately 12 foot alley?

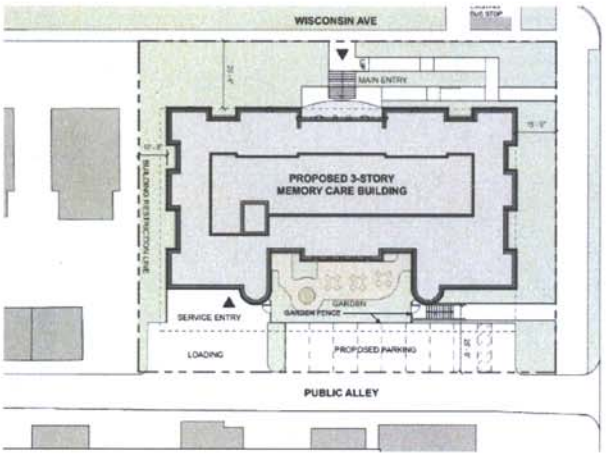
Why was no traffic study or assessment done in order to assess and ensure a smooth traffic flow to the facility? Since the applicant is proposing to have all vehicular traffic to the facility access the facility via a narrow, less than 13 foot, two-way, residential alley which is bordered by two one way streets, traffic flow can easily be halted if even just one car blocks the alley. In order to attempt to mitigate the alley situation, applicant would have at least had to provide a traffic assessment showing how applicant envisions traffic flowing to and from the facility. But, applicant is only interested in getting these special exceptions approved, hook or crook, and does not appear at all interested in figuring out major issues like safe and efficient traffic flow. This is not in line with wanting to serve a vulnerable population such as memory care patients or in line with being a good neighbor.

4. Applicant provided inaccurate renderings

Why did the applicant's architect not provide spot elevations or topography? Why did the applicant's architect not include overall dimensions of the proposed facility, such as building height, and calculate the square footage and include the floor area ratio (FAR)? The applicant just keeps saying that it will comply with all zoning requirements. That is not enough because the burden is on applicant show how it will comply. I consulted an architect about the plan applicant included in the exhibits to its prehearing statement and the architect easily opened the applicant's plan in the program BlueBeam. The architect I consulted was able to provide dimensions of a space on the plan by hovering over it with a mouse. The dimensions clearly exist, so why did applicant make it a point not to include them in its application? This failure to disclose readily available information when the applicant has the burden of proof makes it seem as though applicant is trying to hide something and/or act in bad faith.

(a) How exactly will the loading look? Why is it not included on the renderings?

In the drawings included in the exhibits to applicant's prehearing statement (*See* Exhibit 41A), the loading dock is only shown and referenced in one place, namely on page A001.



Why is the loading dock not depicted on any of the renderings, e.g. on page A203 (*See* Exhibit 41A) at the back left of the proposed facility? The loading will have a critical and adverse impact on neighbors of the facility because commercial vehicles will on a very regular basis have to pull into the narrow alley and then somehow back up into the loading area while not hitting the cars parked at the facility and not hindering residents from getting to and from their garages. It is critical that applicant and its architect clearly depict this area in a drawing and that applicant describe in detail how a truck will get to the loading dock, how many trucks can load at once, etc.

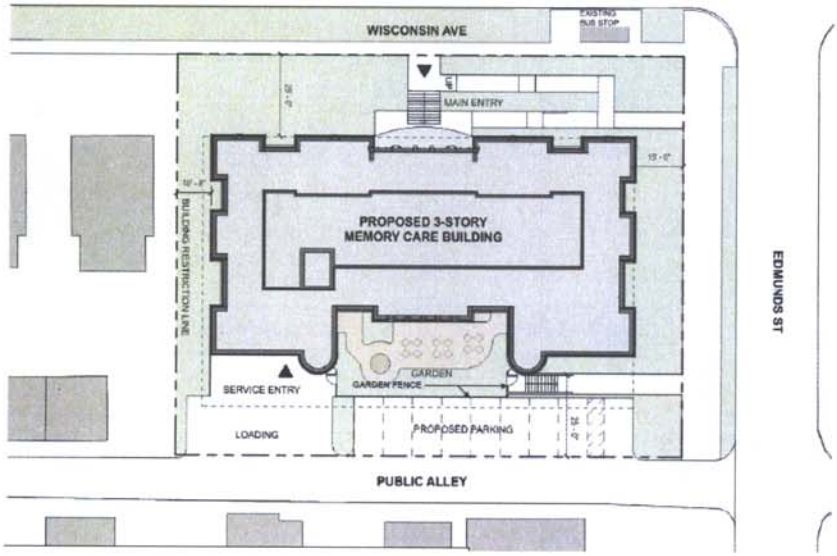
(b) Garbage pick-up area

Why is this not accurately depicted on the renderings such as on page A203 (above) (*See* Exhibit 41A). Based on individuals from MAHCA having visited most, if not all, assisted living facilities in Ward 3, many of them have large, open dumpsters outside with garbage flowing

over, even though they should not. Garbage management is a critical issue and the applicant does not address this issue clearly or sufficiently.

(c) Bus stop on Wisconsin is depicted as far smaller than it is

On a drawing in the attachments to the applicant's prehearing statement on page A001 (*See* Exhibit 41A), applicant inaccurately shows the bus stop on Wisconsin Avenue at the corner of Edmunds Street as being a small area when, in fact, the bus stop takes up significantly more space than indicated. Since applicant has stated that resident patients will be boarded onto and off of the facility shuttle from the alley, which is a crazy and unsafe proposal, especially because of how long it can take to board even one memory care patient into a vehicle, MAHCA's expert witnesses expect that the resident patients would in reality most likely be boarded when the shuttle pulls up to the front of the facility on Wisconsin Avenue, which will be illegal and in violation of traffic regulations, not to mention that it will be unsafe. Even assisted living facilities, memory care facilities, nursing homes and other healthcare facilities in urban areas have circular drives or areas where one can pull up to drop someone off or pick someone up. This is not the case here because DDOT is not willing to create a curb-cut on Wisconsin Avenue, and it is just one more reason why this site is not suited for a large, institutional healthcare facility such as the proposed memory care facility.



(d) Why are neighboring homes amorphous gray blobs?

The applicant's renderings are deliberately misleading. The renderings on page A203 (as well as on pages A201 and A202) (*See* Exhibit 41A) show impacted, neighboring homes as gray, amorphous blobs with no rooflines. The home at 2615 Wisconsin Avenue is shown as further away from the facility and from the purported loading dock than it actually will be. On page A203, the foliage drawn in is completely inaccurate and appears to have been included to cover up the loading dock area. It is one thing to have preliminary drawings, but another thing to have inaccurate drawings. The only thing this drawing seems to depict accurately is that the proposed facility will be four stories tall plus a penthouse and it will *tower* over neighboring homes and be

completely out of character with the largely red brick homes in this R-1-B conservation neighborhood area.

(e) Parking

On page A203 (above), it does not appear as though the proposed nine (9) parking spaces would fit in the designated parking area, let alone the number actually required by the application zoning regulations.

III. APPLICATION FAILS TO MEET SIX CCRC CONDITIONS (Subtitle X, Section 901.2(c))

A. Parking

If the residential parking standard of one space per two units, which was historically applied to CCRC facilities, were good enough and provided for enough parking, the parking condition would not have had to be added to the CCRC special exception (*See* Subtitle U, § 203.1(f)(4)). The parking condition was added deliberately and there are only five of the seventeen special exceptions provided under Subtitle U, § 203.1 which include a parking standard (*(f) CCRC, (h) emergency shelter, (i) health care facility, (j) parking, (l) private schools and residences for teachers and staff*). The parking condition was not added to the CCRC special exception criteria in order to reduce the number of spaces provided based on the residential standard. If the residential standard applies to a special exception, there is already a mechanism in the regulations to reduce the number of parking spaces required by the residential standard - Section 703, which does not apply in this case because the parking standard here is a condition to which the entire special exception is subject. That condition cannot be undone by another special exception (*See* Exhibit 145, Councilmember Mary Cheh's Letter to DDOT).

The parking condition was most likely added to the CCRC special exception because the residential standard was too low, i.e. for every two CCRC units, there will be more than one

employee, resident and/or visitor who requires parking at the facility, especially in the case of a memory care facility where having family and friends visit patient residents frequently and for substantial periods of time per visit is an integral part of the treatment for dementia. If the residential parking standard has any use anymore in the context of CCRCs, it should be to function as a minimum of required parking spaces. While there can be debate about what constitutes sufficient, sufficient means enough and enough off-street parking in this case for employees (at least 18 + vendors), residents, and visitors (all visitors for 36 patients plus personal aides) is more than 17 spaces, even if 10% were not to drive to the proposed facility. Based on due diligence MAHCA has conducted, MAHCA learned that a majority of the staff at the proposed facility would likely commute from far away, e.g. Hyattsville, Gaithersburg, Wards 7 and 8 and would have journeys, according to our careful calculations, of longer than 95 to 120 minutes if they were to take public transportation, so it is highly likely that they will drive instead, requiring daily parking (an especially heavy load at shift changes). While DDOT may force the applicant and operator to offer incentives to employees not to drive, the operator cannot afford to have employees showing up late for shifts. We have spoken to individuals at other similarly located facilities, i.e. on bus routes, but not on the metro, and virtually no employees take public transit. There is nothing to change that trend here. The applicant saying that employees will be incentivized to take public transit will not make it so. Where is the evidence? And, if the applicant discriminates against potential employees because they would drive to work, that is commuter discrimination.

Why should the applicant simply be able to ignore that condition and apply the residential standard, which is already a low standard, to the proposed very commercial and institutional facility? The applicant should provide enough off-street parking for all staff (which the applicant estimates will be 18 staff during the day, for all vendors/contractors who will on a regular basis come to work at the facility (physical therapists, beauticians, personal aids, reading companions, physicians, facilitators for all the resident activities described by the applicant, etc.), and for reasonably expected visitors.

If the applicant feels it can only provide nine parking spaces on the proposed site, the applicant should only build a facility that requires nine parking spaces. The applicant does not have the right to foist the burden of its proposed overdevelopment of an R-1-B lot on the R-1-B neighbors.

B. Objectionable Conditions

Though neither MED's application nor the pre-hearing statement acknowledges *any* issues, adverse impacts or objectionable conditions for the impacted neighbors or the wider impacted community, the proposed facility would create many objectionable conditions.

1. Noise, Traffic, Pollution, Safety, Loss of Privacy, Light and Air

(a) No Accurate Estimate of Traffic to the Facility

Unlike Sunrise, in connection with its proposed development of an assisted living facility in Tenleytown, the applicant has not provided answers to frequently asked questions, including about traffic to the facility and deliveries to the facility, e.g. average number of visits per

week/month by ambulances, fire trucks, UPS, FedEx, uniform service, etc. This may well not be possible for the operator to provide since it has no experience operating a memory care facility and no experience operating any independent living or assisted living facilities in Washington, DC. Sunrise, while perhaps not the ideal operator, has a track record and is always intimately involved in its projects from the start, as are most operators. It is highly unusual for an operator not to have a say in the application or in the design and to join a project at the eleventh hour. This is and should be viewed as a red flag.

(b) Overuse of the Alley

The applicant proposes that ALL traffic to and from the facility use the narrow roughly twelve foot wide alley to access the facility, thereby effectively co-opting the alley for use as its private road. There would be a loading dock right next to a home and directly across the narrow residential alley from other homes. There would also be a parking lot with an insufficient number of parking spaces, which will cause staff and visitors seeking parking to pull into the alley and into the small parking lot to look for a parking space and if they do not find one, to turn around in the small parking lot, to the extent that will be possible, and then to drive through the alley back onto one of the one-way streets which border the alley on each side. The proposed use of the alley for all traffic to and from the facility and for all loading and waste pick-up would be undue overuse of the alley, would substantially and unduly interfere with neighbors' use of the alley to access their garages and to come and go from their homes on foot via their back gates, and is a major safety hazard. Even though DDOT supports use of alleys, without doing site visits and by opining based on looking at Google maps, this is not about DDOT's misguided philosophy. This is about safety. The increase of traffic and thereby noise and pollution and the impact on safety are highly objectionable conditions for MAHCA which the applicant has not acknowledged or proposed any mitigation for.

(c) Air Pollution and Light Pollution

Given how many more trucks and cars would be traveling up the narrow, residential alley on which the back gates of homes are, MAHCA is very concerned that pollution from the vehicles will be trapped in the narrow alley and will impact the air quality in neighbors' backyards and homes. These are not large lots where the backyards are an acre large and the pollution may diffuse. These backyards are fairly small and the houses are right there, so the alley is practically in neighbors' backyards. While applicant's counsel is fond of stating that the alley will be a buffer between the homes and the proposed facility, the alley would far more play a key role in subjecting neighbors to objectionable conditions.

The laundry facility on-site will be a commercial laundry facility since the laundry for all thirty-six (36) resident patients, the on-site catering facility, and the rest of the proposed facility would be processed there. There has been no information provided on how the venting of that laundry facility will be handled and whether any vents will face the residential home next to the facility. There is concern about the exhaust from the commercial laundry facility onsite and that there will be noise, fume, vent issues.

Since the facility and its perimeter will have to be well-lit at night, MAHCA is concerned about light pollution.

(d) Loss of Privacy

The proposed facility would tower over neighboring buildings, something which the applicant's architect has failed to accurately depict on drawings, as described above. The need to provide natural light to all thirty-six (36) memory care patients of the proposed facility is in direct conflict with the preservation of the privacy of the nearby homes. Since the proposed facility will be so tall and will be a continuous wall of windows from one end of the lot to the other, there will be direct lines of sight into neighboring homes, including bedrooms and bathrooms.

(e) Loss of Light and Air; Noise

There is an enormous difference to having three single family homes built on that lot, which would each have sixteen (16) feet between them, and having the proposed facility built there, which will be a barricade spanning virtually the entire width and depth of the lot, especially because of the screened penthouse on top of the tall facility. The applicant has not provided any information on how the proposed design will mitigate loss of light for neighboring properties and how air and noise pollution (e.g. sirens, facility alarm whether for emergencies or routine testing, back-up generator testing which must occur once per month and is very loud, etc.) will be mitigated given the significant increase in mechanical equipment on the lot and in traffic, including commercial traffic, on the lot and in the narrow, residential alley which the applicant effectively proposes to co-opt as its private road for the proposed facility.

The applicant proposes housing all mechanical units, HVAC, back-up generator, back-up water supply, etc. on the roof of the proposed facility and covering up the equipment with a screen to create a tall penthouse. There has been no information provided on how much noise all the equipment will generate and how much of that noise will be heard by impacted neighbors. Neighbors are concerned that the noise from the mechanical penthouse will exceed permitted noise levels in an R-1-B zone.

2. Inviability

(a) Is the Proposed Facility Inviable?

The applicant has not provided any evidence that the proposed facility would be financially viable with only 34 units and that the neighborhood will not be stuck with an empty non-conforming structure once the memory care use fails. It is especially important that the applicant address the risk of inviability because the applicant and the operator have no experience or track record with memory care. How are they going to attract resident patients to the facility? Do they have a market study? Occupancy projections? What will the approximate costs be per month? The applicant claims that this will be a high-end facility and the architect has repeatedly talked about making the facility look expensive. That will require high-paying individuals and they have a lot of facility options to choose from in this area. How will this proposed facility be competitive?

Viability and size of the facility have been a major issue in the Sunrise case at Tenleytown (*See* Sunrise's Prehearing Statement, BZA Case # 19823, Exhibit 69). It is far more likely that Sunrise knows what it is talking about since it has been in the senior living, assisted living, memory care business since the 1970s.

(b) Proposed Facility is Poorly Designed

When I sought feedback from professionals in the memory care space, I was told that the design is an unimaginative one, especially from Perkins Eastman, that the facility is not well through through, and that the facility is not resident driven, e.g. most such facilities have circular drives at the front so that patients can be driven up to the door or readily escorted there and do not have to be dropped off at the back in the alley or at the loading dock or in the front on busy, six-lane Wisconsin Avenue, which would be against the law and dangerous. Dana LePere will testify further to the less than subpar design of the facility. Given the importance design, amenities, and green space have on the decision to choose a memory care facility, it is not likely this facility would be viable.

(c) MED and GSI have NO Experience Building or Operating Memory Care Facilities

Applicant has no experience building or managing independent living facilities or assisted living facilities, let alone memory care facilities, so there is no track record to look to.

The operator, GSI, who was not at all involved in preparing the initial application, also has no experience building or operating memory care facilities. GSI blatantly misrepresented its experience both at the "community meeting" on August 29, 2018 and at the P&Z Committee meeting on September 4, 2018.

At both meetings, GSI stated it currently operates two assisted living facilities and suggested that it operates memory care facilities. However, one of those two facilities, The Pineapple House at Sapphire Lakes in Naples, Florida, is at best in construction, so is not yet in operation (https://www.guestservices.com/news/2018/07/17/pineapple-house-sapphire-lakes-press-release/). As the website states, "set for fall 2019 grand opening." The community corrected the operator at the community meeting and the operator quickly qualified his statement, but then made the same false statement about currently operating two assisted living facilities to the P&Z Committee on September 4, 2018.

The other facility cited by GSI is the The Cove at the Marbella, which appears to be a 14-bed assisted living facility within a high-rise independent living retirement community, but which is not a memory care facility (http://www.marbellapelicanbay.com/). GSI has not shown that it has any experience building or operating a memory care facility, so, like the applicant, has not track record. Guest Services Senior Living, LLC is a Delaware LLC which was set up less than two years ago and John Gonzalez, the President of Guest Services Senior Living, LLC was hired at about the same time.

3. Applicant Made No Effort to Make the Building Green

It does not appear as though the applicant is making any effort to make the building green, e.g. no green roof, etc. By contrast, Sunrise has stated on its website about its proposed facility in Tenleytown (https://www.sunriseseniorliving.com/tenleytowndevelopment.aspx) that it would build that facility to LEED standards.

IV. Proposed Facility Is Not in Harmony with the Zoning Regulations and Zoning Maps (Subtitle X, Section 901.2(a))

The proposed facility is not in line with the DC Comprehensive Plan, as other witnesses will elaborate upon, in particular, Mr. Robert McDiarmid and as outlined in the ANC 3C resolution (*See* Exhibit 146).

The proposed facility would significantly and likely irreversibly change the character of the neighborhood, which is a Neighborhood Conservation Area under the DC Comprehensive Plan. It is not the intention of the DC Comprehensive plan that the character of the neighborhood be altered so significantly with in-fill development. The applicant, instead of making the proposed facility blend in with the largely red brick neighborhood, is having the building designed to look like the apartment buildings across Wisconsin Avenue, which is another zone entirely.

The proposed facility will change the proposed site from a low-density site to a high density site. On a lot zoned for two to three single family homes, there will be 36 residents, 18 day-time staff, vendors, and visitors. That can easily be as many as 60 plus people at any one given time, which is a far cry from the the range of three to 15 people who would likely inhabit three houses on the proposed site.

V. Proposed Facility Would Affect Adversely the use of Neighboring Properties (Subtitle X, Section 901.2(b))

1. Adverse impact

The proposed facility will adversely impact the use of neighboring properties and, in many instances, rob neighbors of the quiet enjoyment of their homes and backyards.

VI. Reports from DC Agencies

A. OP Report

The OP report includes numerous errors and inaccuracies and incorrect analysis and application of the zoning regulations. In many places the OP report is a verbatim regurgitation of the applicant's application and in other instances the OP report includes information that is not in the public record and that OP likely learned and included in its report because of conversations it had with applicant's legal counsel or other representatives. For the reasons set forth below, MAHCA requests that this Board disregard OP's report (*See* Exhibit 50).

1. The OP Report is Riddled with Mistakes

(a) Report States Incorrect Number of Memory Care Units and Parking Spaces

The report appears to have been hastily and sloppily written and contains inaccuracies which significantly undermine the credibility of the report. According to the applicant's initial application, the proposed facility was to have 38 units (*See* Exhibit 15, page 4). The number of units was changed to 34 units for 36 resident patients in the Applicant's Prehearing Statement (*See* Exhibit 41, page 6). Yet, the OP report states on pages 2 and 4 that there will be 32 units (*See* Exhibit 50).

Applicant argues that the residential parking standard of two units to one parking space still applies to CCRC facilities. Even if that were accurate, the OP report does not include the correct number of parking spaces based on the residential standard. The residential standard would require that there be 17 parking spaces for a 34 unit facility. Yet, OP states throughout its report that the proposed facility requires 19 parking spaces for 32 units (*See* Exhibit 50, pages 1, 3, 4, and 5). A 32 unit facility would require 16, not 19, parking spaces, so OP's mistakes are not even consistent with one another.

(b) The OP Report Ignores the CCRC Special Exception Parking Condition

At the end of 2016, OP initiated the inclusion of the six conditions which were added as conditions for the granting of a CCRC special exception in July 2017 (*See* legislative history including (i) Proposed Text from OP and (ii) Notice of Final Rulemaking attached hereto as Exhibit 1). OP acknowledges the conditions as being valid and in effect in the Sunrise OP report (*See* the Sunrise OP Report, BZA Case # 19823, Exhibit 90, page 3), but in its report for this case, OP mentions the parking condition but provides no analysis of the information in the applicant's application vis-à-vis the parking condition (*See* Exhibit 50, page 4):

> *(4) The use and related facilities shall provide sufficient off-street parking spaces for employees, residents, and visitors;*
>
> A total of nine parking spaces would be provided on site, where 19 spaces are required. Special exception relief to partially reduce the number of required parking spaces has been requested as part of this application, and separate analysis has been provided below.

The reasoning is wholly lacking. There is no discussion of how many employees, residents and visitors there would be at the proposed facility and what would be sufficient parking for them. By contrast, this is the analysis OP included for the same parking condition in the Sunrise OP report (*See* the Sunrise OP Report, BZA Case # 19823, Exhibit 90, page 5):

(4) The use and related facilities shall provide sufficient off-street parking spaces for employees, residents, and visitors;

The facility would provide the required 66 parking spaces (25 for the church and 41 for the continuing care retirement community) – no relief from parking is requested or required. The parking spaces would be provided in a below grade, two-level parking garage and would primarily serve employees and visitors as most residents would not be expected to drive. The applicant states that the greatest parking demand for the church would be on Sunday mornings, and it is envisioned that the demand for both the church and the continuing care retirement community would be 48 spaces, which would be accommodated in the garage. During the week, the church parking demand would be much less. A van to transport residents on daily trips would have a parking space in the garage. The proposal would provide 30, long-term bicycle spaces in the garage and 12, short-term space placed along Alton Place and Yuma Street near the entrances.

The applicant states that based on parking demand at comparable Sunrise locations in the area and the church parking demands, the parking proposed would be in excess of the demand and envisions that there would be an excess of 20 spaces on weekdays and 18 spaces on Sunday mornings (Exhibit 52A, page 13, Table 2: Shared Parking Demand).

DDOT supports the number of parking and bicycle spaces as adequately serving the residents, employees and visitors to the site, and notes in their comments (Exhibit 53) that the facility would not negatively impact movement of traffic or parking on the adjacent streets.

The applicant in this case merely states that it will have 18 employees onsite during the day and 36 residents. The applicant does not at all mention visitors or vendors/service providers who will regularly come to the facility to provide all those services applicant touts. If OP did not receive enough information from the applicant in this case to properly assess whether the CCRC special exception conditions are met, then OP should have asked the applicant to submit additional information to the public record. No such request was made and no additional information was submitted to the public record by applicant about whether it is providing sufficient off-street parking for employees, residents and visitors. As set forth above in Section II. B. above on all the information that is missing from applicant's application, applicant submitted a deliberately vague application. Yet, OP is still perfectly willing to overlook the lack of information and support applicant's application. That is stunning and ridiculous. It is no wonder the applicant did not feel the need to submit an honest application in which it provides accurate staffing and visitor information when OP is willing to evaluate the proposed project favorably without any of that information.

(c) OP Report Mistakenly Allows for Special Exception Relief

It appears as though OP did not educate its staff about how to apply the six CCRC conditions it added to the CCRC special exception and what it means for a special exception to be "subject to" a condition. In Subtitle X, Section 901.2(c), the Special Exception Review Standards specifically provide that special exceptions must "meet such special conditions as may be specified in this title." A condition to which a special exception is subject cannot be undone with additional special exception relief.

2. The OP Report Repeats MED's Application Verbatim without Reasoning or Analysis and Includes Information Not in the Public Record

In a phone conversation I had with Joel Lawson of OP, I asked him whether OP ever questions the accuracy or sufficiency of information an applicant includes in an application. He initially tried to claim that OP does, but when I noted that the applicant in this case deliberately provided a bare-bones application with as little information as possible, Mr. Lawson stated that OP does not presume an applicant is lying or withholding information, that OP takes the application at face value and bases its report solely on what is in the public record. In a case where an applicant is deliberately withholding information and providing as little information as possible for the public record, that renders OP's report useless since the OP report is merely a regurgitation of the applicant's application.

(a) Repeats MED's Application Verbatim

Many sections of the OP report simply repeat and/or restate the applicant's application with no reasoning or analysis, which should not be the case, as noted by the DC Court of Appeals.

(b) Includes Information Not in the Public Record

MAHCA has asked the applicant whether he would consider providing underground parking during conversations with the applicant, but he always refused to engage on this topic though he initially agreed to consider the idea. Nowhere in the documents applicant submitted is there mention of below-grade parking. Since none of the applicant's submissions to the public record address below-grade parking or any related financial hardship, why does the OP report include the following statement, "[t]he provision of below-grade parking would create a financial hardship for the proposed use, and result in unnecessary additional impacts on the neighborhood"? How does OP know that providing below-grade parking would create a financial hardship? There is no evidence in the public record to this effect. How does OP know that below-grade parking would result in unnecessary additional impacts on the neighborhood? There is no evidence in the public record to this effect. OP did not express any concern about the below-grade parking that would be provided for the proposed Sunrise facility in Tenleytown (*See* the Sunrise OP Report, BZA Case # 19823, Exhibit 90, pages 3, 5, 8).

The inclusion of this topic in the OP report could only have come from a conversation OP had with applicant's counsel or another of applicant's representatives. Yet, Joel Lawson specifically told me that OP is not permitted to include in its report any information not in the public record. I followed up to ask whether information from a conversation with applicant could be included and he said no. Why is OP taking it upon itself to advocate for applicant? Or, did OP do this at applicant's request? If that is the case, then OP is not operating above board.

B. <u>DDOT Report</u>

DDOT's report is inaccurate and, therefore, fundamentally flawed, for the reasons set forth below. For this reason, MAHCA requests that this Board disregard DDOT's report.

1. DDOT Applied Incorrect Legal Standard in Assessing Required Parking

In its report for this case (See Exhibit 5), DDOT did not follow the current legal standard for CCRC special exceptions. DDOT simply ignored the parking condition to which granting of the CCRC special exception is subject (Subtitle U, Section 203.1(f)(4)).

2. Councilmember Mary Cheh Asked DDOT to Apply the Law Correctly and Update Its Report; DDOT Refused

There is no chance this was an oversight or mistake because when Councilmember Mary Cheh, who oversees DDOT, wrote a letter to DDOT explaining that it applied the law incorrectly in its report and requesting that DDOT apply the correct legal standard and update its report accordingly (*See* Exhibit 145), but DDOT refused to do so. Not only does Councilmember Cheh oversee DDOT, but she is a tenured law professor and experienced attorney who knows her way around statutes and regulations. The individuals at DDOT who reviewed this case and drafted the report are not attorneys. Their ineptitude at understanding and applying the law is glaring and would have earned them nothing less than an F on a law school exam.

3. Councilmember Mary Cheh Requests this Board Deny the Application

Since DDOT refused to apply the law correctly and update its report, Councilmember Cheh wrote a letter to this Board requesting that the Board deny applicant's request for two special exceptions (*See* Exhibit 260).

VII. Conclusion

The proposed non-conforming facility would be built across two to three R-1-B lots, thereby shifting the building middle point uphill and allowing a taller building than could be built on the lowest of the single lots. The building will be four stories tall and have a penthouse. It will be a monolithic structure completely out of keeping with the character of the neighborhood, which the DC Comprehensive Plan designates a Neighborhood Conservation Area. The proposed facility would tower over all of the R-1-B single family homes in its vicinity. This proposed institutional, medical, healthcare facility and its operation would adversely impact the use of neighboring property as contemplated by the zoning regulations and by the DC Comprehensive Plan. A myriad of objectionable conditions would result from the proposed facility, including traffic, noise, air and light pollution, loss of safety and privacy, inviability which will lead to the neighborhood being stuck with a huge, non-conforming structure that has to be repurposed, such repurposing could force an even more burdensome use on the R-1-B neighborhood. The applicant has not only not met its burden of proof to demonstrate that there will be no objectionable conditions or adverse impact, but the applicant deliberately provided as little information as possible information about the proposed facility, its operations and the impact it would have on the neighborhood. MAHCA has invested countless hours conducting the research on memory care facilities, how they are operated and speaking with experts in all the relevant areas. By not providing any detail about the staffing or operation of the facility, the traffic flow,

including commercial deliveries in the narrow, residential alley, the applicant shifted its burden of proof to MAHCA, which is not the intention of the law. The zoning regulations, including the DC Comprehensive Plan, are there to safeguard property rights and MAHCA asks that this Board accurately apply the current legal standard and deny the applicant's application for two special exceptions.

EXHIBIT 1

LEGISLATIVE HISTORY REGARDING ADDITION OF SIX CONDITIONS TO CCRC SPECIAL EXCEPTION AT SUBTITLE U, SECTION 203.1(F)(1)-(6)

i. Proposed Text from Jennifer Steingasser at the Office of Planning (December 30, 2016)
ii. Notice of Final Rulemaking – Zoning Commission (July 10, 2017)

District of Columbia
Office of Planning

MEMORANDUM

TO: Zoning Commission

FROM: JLS
Jennifer Steingasser, Deputy Director, Historic Preservation and Development Review

DATE: December 30, 2016

SUBJECT: ZC Case No. 17-
Proposed Text Amendment for Continuing Care Retirement Community

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There were many comments submitted to the record in case ZC No. 08-06 G regarding the proposed technical correction to the definition of Continuing Care Retirement Community in Subtitle B § 100.2. The proposed correction would have only added the word "and" and the word "also" as underlined below:

> Continuing Care Retirement Community: A building or group of buildings providing a continuity of residential occupancy and health care for elderly persons. This facility includes dwelling units for independent living, **and** assisted living facilities, plus a skilled nursing care facility of a suitable size to provide treatment or care of the residents; it may **also** include ancillary facilities for the further enjoyment, service or care of the residents. The facility is restricted to persons sixty (60) years of age or older or couples where either the husband or wife is sixty (60) years of age or older.

Continuing Care Retirement Community ("CCRC") was defined and adopted as part of the 2016 regulations after being duly advertised in the Notice of Proposed Rulemaking (May 28, 2015) and adopted by final action January 14, 2016. The Commission excluded the proposed amendment to the definition from final action in case ZC No. 08-06G and asked OP to include the definition in a broader case with the special exception.

Use by Special Exception

The comments focused on whether the use would still be eligible as a special exception under the corrected 2016 definition if the use only had "dwelling units for independent living." Subtitle U §203.1 (f) identifies CCRC use as eligible by special exception in the R-Use Groups A, B and C which includes all the single family household zones.

The Zoning Commission asked the Office of Planning to return with clarifying text regarding the definition for CCRC and provisions for the use as a special exception in R, Residential House, the RF, Residential Flat, and the RA, Residential Apartment zones. The Office of Planning proposes a text amendment that would permit a CCSC, to include independent living, assisted living and skilled nursing care, or any combination thereof, with review criteria to avoid objectionable conditions.

A CCRC facility that is *only independent living* is essentially an apartment building for residents over 60 years of age. To avoid creating multi-family apartment buildings in the single family R zones, OP proposes a limit of eight (8) residents for a CCRC that is solely an independent living facility (i.e. it does not include assisted or nursing facilities). OP recommends eight because it is the limit used for other specialized residential uses such as a health care facility in the R zones as a special exception (U§ 202.1 (j)) and for a boarding house in the RF zones (U § 301.1 (h)) as a matter of right.

OP recommends the Commission set down the following text amendments for public hearing:

I. Amend the definition of Continuing Care Retirement Community in Subtitle B §100.2, as follows:

Continuing Care Retirement Community: A building or group of buildings providing a continuity of residential occupancy and health care for elderly persons. This facility includes dwelling units for independent living~~,~~ **and** assisted living facilities, plus a skilled nursing care facility of a suitable size to provide treatment or care of the residents; it may **also** include ancillary facilities for the further enjoyment, service or care of the residents. The facility is restricted to persons sixty (60) years of age or older or couples where either the husband or wife is sixty (60) years of age or older.

II. Amend Subtitle U § 203.1 (f) as follows:

203 SPECIAL EXCEPTION USES – R-USE GROUPS A, B, AND C

203.1 The following uses shall be permitted as a special exception in R-Use Groups A, B, and C, if approved by the Board of Zoning Adjustment under Subtitle X, Chapter 9 subject to applicable conditions of each section:

(a) ...

(f) Continuing care retirement community**, subject to the provisions of this section.**

(1) The use shall be for persons sixty (60) years of age or older or married or domestic partner couples where either spouse or domestic partner is sixty (60) years of age or older;

(2) The use shall include one or more of the following services:

(A) **Dwelling units for independent living,**

(B) **Assisted living facilities, or**

(C) **A licensed skilled nursing care facility;**

(3) If the use does not include assisted living or skilled nursing facilities, the number of residents shall not exceed eight (8);

(4) The use may include ancillary uses for the further enjoyment, service or care of the residents;

(5) The use and related facilities shall provide sufficient off-street parking spaces for employees, residents and visitors;

(6) The use, including any outdoor space provided, shall be located and designed so that it is not likely to become objectionable to neighboring properties because of noise, traffic, or other objectionable conditions; and

(7) The Board may require special treatment in the way of design, screening of buildings, planting and parking areas, signs, or other requirements as it deems necessary to protect adjacent and nearby properties.

III. Amend Subtitle U § 420.1 by adding a new section 420.1 (i) to allow a CCRC as a special exception in the RA-1 and RA-6 zones as follows:

420 SPECIAL EXCEPTION USES (RA)

420.1 The following uses shall be permitted as a special exception if approved by the Board of Zoning Adjustment under Subtitle X, Chapter 9, subject to any applicable provisions of each section:

(a)...

(i) In the RA-1 and RA-6 zones, a continuing care retirement community subject to the conditions of Subtitle U § 203.1(f).

OP requests the flexibility to work with the Office of Attorney General on the language to be included in the public hearing notice.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
AND
Z.C. ORDER NO. 17-01
Z.C. Case No. 17-01
(Text Amendment – 11 DCMR)
(Continuing Care Retirement Community)
July 10, 2017

The Zoning Commission for the District of Columbia (Commission), pursuant to its authority under § 1 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797), as amended; D.C. Official Code § 6-641.01 (2012 Rep1.)), hereby gives notice of the adoption of amendments to Subtitles B (Definitions, Rules of Measurement, and Use Categories) and U (Use Permissions) of Title 11 (Zoning Regulations of 2016) of the District of Columbia Municipal Regulations (DCMR).

The text amendments revise the definition of a Continuing Care Retirement Community (CCRC) to allow a CCRC to include independent living, assisted living, and skilled nursing care, or any combination thereof, and to add specific review criteria when special exception approval is required. The amendments also clarify that the inclusion of skilled nursing care is permissible but not required in a CCRC. Finally, new text is added to Subtitle U to expressly make the use a matter of right in the Residential Apartment (RA) zones (Subtitle F), except for RA-1 and RA-6 zones where special exception approval is required. This matter of right designation will carry through to the Mixed Use (Subtitle G) and the Special Purpose (Subtitle K) zones.

A Notice of Proposed Rulemaking was published in the June 9, 2017 edition of the *D.C. Register* at 64 DCR 5444. No comments were received. However, the Office of Planning submitted a supplemental report suggesting the deletion of proposed § 203.1(f)(1) to Subtitle U. Paragraph (f) permits a CCRC as a special exception in the R, RF, RA-1, and RA-6 zones. As proposed, the subparagraph contains the same age limitation as stated in the definition of the use. The proposed matter-of-right provision being added to § 401 of Subtitle U does not restate the age limitation. The Commission agreed that eliminating the redundant statement of the age limitation would remove any potential ambiguity from the adopted text.

The amendments shall become effective upon publication of this notice in the *D.C. Register*.

Title 11-B DCMR, DEFINITIONS, RULES OF MEASUREMENT, AND USE CATEGORIES, is amended as follows:

Chapter 1, DEFINITIONS, is amended as follows:

The definition of "Continuing Care Retirement Community" in § 100.2 of § 100, DEFINITIONS, is amended to read as follows:

Continuing Care Retirement Community: A building or group of buildings providing a continuity of residential occupancy and health care for elderly persons. This facility includes dwelling units for independent living, assisted living facilities, or a skilled nursing care facility of a suitable size to provide treatment or care of the residents; it may also include ancillary facilities for the further enjoyment, service, or care of the residents. The facility is restricted to persons sixty (60) years of age or older or married couples or domestic partners where either the spouse or domestic partner is sixty (60) years of age or older.

Title 11-U DCMR, USE PERMISSIONS, is amended as follows:

Chapter 2, USE PERMISSIONS RESIDENTIAL HOUSE (R) ZONES, is amended as follows:

Paragraph (f) of § 203.1 of § 203, SPECIAL EXCEPTION USES – R-USE GROUPS A, B, AND C, is amended to read as follows:

203.1 The following uses shall be permitted as a special exception in R-Use Groups A, B, and C, if approved by the Board of Zoning Adjustment under Subtitle X, Chapter 9 subject to applicable conditions of each paragraph:

...[1]

(f) Continuing care retirement community, subject to the provisions of this paragraph:

(1) The use shall include one or more of the following services:

(A) Dwelling units for independent living;

(B) Assisted living facilities; or

(C) A licensed skilled nursing care facility;

(2) If the use does not include assisted living or skilled nursing facilities, the number of residents shall not exceed eight (8);

[1] The uses of this and other ellipses indicate that other provisions exist in the subsection being amended and that the omission of the provisions does not signify an intent to repeal.

(3) The use may include ancillary uses for the further enjoyment, service, or care of the residents;

(4) The use and related facilities shall provide sufficient off-street parking spaces for employees, residents, and visitors;

(5) The use, including any outdoor spaces provided, shall be located and designed so that it is not likely to become objectionable to neighboring properties because of noise, traffic, or other objectionable conditions; and

(6) The Board of Zoning Adjustment may require special treatment in the way of design, screening of buildings, planting and parking areas, signs, or other requirements as it deems necessary to protect adjacent and nearby properties.

Chapter 4, USE PERMISSIONS RESIDENTIAL APARTMENT (RA ZONES), is amended as follows:

A new subparagraph (3) is added to paragraph (d) of § 401.1 of § 401, MATTER-OF-RIGHT USES (RA), to read as follows:

401.1 The following uses shall be permitted as a matter of right subject to any applicable conditions:

(a) ...

(d) Except for the RA-1 and RA-6 zones:

(1) Multiple dwellings provided that in an apartment house, accommodations may be provided only to residents who stay at the premises a minimum of one (1) month;

(2) Hotel in existence as of May 16, 1980, with a valid certificate of occupancy or a valid application for a building permit; provided, that the gross floor area of the hotel may not be increased and the total area within the hotel devoted to function rooms, exhibit space, and commercial adjuncts may not be increased. An existing hotel may be repaired, renovated, remodeled, or structurally altered; and

(3) A continuing care retirement community; and

(e) ...

Subsection 420.1 of § 420, SPECIAL EXCEPTION USES (RA), is amended as follows:

Subparagraph (7) of paragraph (g) is amended to read as follows:

(g) Nonresidential adjunct uses as an accessory use within an apartment house, consisting of the sale of foods, drugs, and sundries and personal services designed to serve the tenants' daily living needs subject to the following conditions:

...

(7) In considering an application under this paragraph the Board of Zoning Adjustment shall give consideration to the following:

(A) The proximity of MU and NC zones;

(B) The adequacy and convenience of parking spaces existing in or for the MU and NC zones;

(C) The adequacy and scope of commodities and services provided within those MU and NC zones; and

(D) The size and character of the apartment house, since the tenants of the apartment house will be expected to furnish all or substantially all of the financial support of the requested adjunct;

Subparagraph (4) of paragraph (h) is amended to read as follows:

(h) A parking garage constructed as a principal use on a lot other than an alley lot in an RA-5 zone subject to the following conditions:

...

(4) Before taking final action on an application for the use, the Board of Zoning Adjustment shall submit the application to the D.C. Department of Transportation for review and report; and

A new paragraph (i) is added to read as follows:

(i) In the RA-1 and RA-6 zones, a continuing care retirement community subject to the conditions of Subtitle U § 203.1(f), except for 203.1(f)(3).

On April 13, 2017, upon the motion of Vice Chairman Miller, as seconded by Commissioner Shapiro, the Zoning Commission took **PROPOSED ACTION** to **APPROVE** the petition at its public meeting by a vote of **5-0-0** (Anthony J. Hood, Robert E. Miller, Peter A. Shapiro, Peter G. May, and Michael G. Turnbull to approve).

On July 10, 2017, upon the motion of Commissioner Shapiro, as seconded by Chairman Hood, the Zoning Commission took **FINAL ACTION** to **APPROVE** the petition at its public meeting by a vote of **5-0-0** (Anthony J. Hood, Robert E. Miller, Peter A. Shapiro, Peter G. May, and Michael G. Turnbull to approve).

In accordance with the provisions of 11 DCMR § 2038, this Order shall become final and effective upon publication in the *D.C. Register*; that is, on July 28, 2017.

BY THE ORDER OF THE D.C. ZONING COMMISSION
A majority of the Commission members approved the issuance of this Order.

ANTHONY J. HOOD
CHAIRMAN
ZONING COMMISSION

SARA A. BARDIN
DIRECTOR
OFFICE OF ZONING

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
AND
Z.C. ORDER NO. 17-01
Z.C. Case No. 17-01
(Text Amendment – 11 DCMR)
(Continuing Care Retirement Community)
July 10, 2017

The full text of this Zoning Commission Order is published in the "Final Rulemaking" section of this edition of the *D.C. Register.*