BOARD OF ZONING ADJUSTMENT

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN BZA CASE NO. 19751 OF MAHCA

Application of MED Developers, LLC
2619-2623 Wisconsin Avenue, NW, Washington, DC 20007
Square 1935, Lots 44 and 812

HEARING DATES: September 26, 2018, November 14, 2018 and December 19, 2018

DECISION DATE: January 30, 2019

DECISION AND ORDER

The Board of Zoning Adjustment (the "Board" or "BZA") held a hearing, following corrected notice, on the application of MED Developers, LLC for a development at 2619-2623 Wisconsin Avenue, NW (the "Project") under the Board's jurisdiction to grant special exception relief pursuant to 11-U DCMR § 203, 11-X DCMR § 901.2 and 11-Y DCMR § 100.3. The BZA is responsible for applying the law and regulations to the facts of the case by analyzing the governing provisions of the DC Zoning Regulations of 2016 ("Zoning Regulations or Code"), as updated and amended, and the adverse impact and objectionable conditions of the Project on immediate and nearby neighbors and neighboring properties (11-X DCMR § 901.3 and 11-U DCMR § 203.1(f)).

I. FINDINGS OF FACT

A. Description of Parties

1. The applicant, MED Developers, LLC ("MED" or the "Applicant"), seeks a special exception to construct, on two lots in an R-1-B zone, a Continuing Care Retirement Community ("CCRC") which would function exclusively as a memory care facility.

2. MED authorized the law firm of Cozen O'Connor to represent MED before the BZA in this case (Exhibit 9, Letter of Authorization).

3. MED's application lists the following as the only owners of the Property: (i) Mary A. Rubino (Francis Massino, Michael Massino and Joanna Norville (Massino)) and (ii) the Marital Trust U/Sheaffer Family Trust (collectively, the "Owners") (Exhibit 10, Letter of Authorization (Owner)).

4. MED does not own or have any ownership rights in the Property. In the Agent Authorization letter for Glover Park Developers LLC, Glover Park Developers LLC is referred to as the "contract purchaser" of the Property (Exhibit 10), but MED has proffered no documents demonstrating or describing its legal relationship with the Owners. There is no document showing ownership by MED in the record, nor is there a contract to purchase the Property between MED or any of its affiliates and the Owners in the record.

5. MED is a developer of multi-family residential housing (http://www.meddevelopers.com/about/company). MED has never before built, managed, operated or owned an assisted living facility or a memory care facility (Exhibit 471, Testimony of Anita Crabtree, p. 2). MED has been seeking to develop the Property at issue for the last several years with various types of large and tall, multi-unit buildings.

6. The Board granted party-in-opposition status to the Massachusetts Avenue Heights Citizens Association ("MAHCA"), a non-profit citizens' association, which represents the majority of the neighboring properties within 200 feet of the site at issue. This is not a case where some neighbors are for a proposed development and others are against it. The neighborhood is on record as being against this proposed development because of objectionable conditions to neighboring properties.

7. Advisory Neighborhood Commission ("ANC") 3C is a party in this case. See summary of ANC 3C's position below in Section B(1).

8. On September 5, 2018, over five months after MED filed its application without an operator, MED stated in its first Prehearing Statement that Guest Services Senior Living LLC ("GSSL"), a subsidiary of Guest Services, Inc. ("GSI"), will operate the proposed memory care facility (Exhibit 41, p. 5).

B. Agency and ANC Reports

1. ANC 3C entered into a resolution concerning the Project on September 17, 2018, which it submitted to the record on September 19, 2018 (Exhibit 146). ANC 3C voted against the Project (4 to 1) after having heard Applicant present at the ANC 3C Planning and Zoning Committee meeting in early May 2018, at the ANC 3C Planning and Zoning Committee meeting shortly before the September 17, 2018 ANC 3C meeting, and at the ANC 3C meeting on September 17, 2018. ANC 3C found that "[A]pplicant has not met its burden to show that this facility would not create objectionable conditions, and thus, cannot support this application for a Special Exception" (Exhibit 146, ANC 3C Resolution, p. 2) .

2. The Department of Transportation ("DDOT") submitted: (i) a report on Applicant's proposal on September 14, 2018 (Exhibit 45), (ii) a response on September 24, 2018 (Exhibit 476) to Councilmember Mary Cheh's September 17, 2018 letter (Exhibit 145) which Councilmember Mary Cheh found unsatisfactory and problematic and therefore submitted a letter to the BZA record in opposition to the Project dated October 5, 2018 (Exhibit 260), (iii) a supplemental report dated November 26, 2018 (Exhibit 481), and (iv) a second supplemental report dated December 18, 2018 (Exhibit 488). DDOT states in its reports that it supports the application for the proposed project, but DDOT did not attend either the November 14, 2018 or the December 19, 2018 hearings and was, therefore, not available for cross-examination by MAHCA.

3. The Office of Planning ("OP") submitted: (i) its report on this proposal dated September 14, 2018 (Exhibit 50) and (ii) a supplemental report dated December 14, 2018 (Exhibit 486).

C. Description of Property

1. The two lots at 2619-2623 Wisconsin Avenue, NW are zoned single-family, detached, R-1-B, and are in a Neighborhood Conservation Area (Exhibit 146, ANC 3C Resolution; Exhibit 46, Testimony of Robert McDiarmid). The surrounding neighborhood, which is east of Wisconsin Avenue, has the same zoning and is composed of two-story single-family detached homes, most of which within a 200-foot radius of the Property are approximately 100 years old (See www.dc.gov (Office of Tax and Revenue)). Notably, the west side of Wisconsin Avenue is zoned RA-4 (Exhibit 146, ANC 3C Resolution; Exhibit 46, Testimony of Robert McDiarmid).

2. The Property consists of two lots, 2619 and 2623 Wisconsin Avenue, NW, the former of which is currently developed with a two-story single-family, detached brick home that was built in 1935. Applicant would raze this home. Both lots face Wisconsin Avenue, NW and the corner lot faces Edmunds Street, NW to the north. There is a narrow alley behind the lots, which is used by ten neighboring homes to access residential garages and back gates by car and on foot.

D. Description of Proposal

1. Applicant seeks special exception relief to establish a Continuing Care Retirement Community (CCRC) use in the R-1-B District, pursuant to 11-U DCMR § 203.1(f)(1)-(6). Applicant originally sought another special exception under Subtitle C § 703.2 to reduce the number of parking from the 17 spaces that Applicant believed to be required to nine spaces, but Applicant amended its proposed plan following the first hearing on November 14, 2018.

2. MED is seeking to construct a building that is to include 34 memory care units housing 36 residents served by staff. Applicant and its operator, GSSL, have provided estimates of the overall number of employees to be present at the facility at any one time, but have not provided a break-down of the categories of employees or vendors and contractors, such as private aides, who would be coming to the facility (Exhibit 41, Applicant's Prehearing Statement; Exhibit 399, Applicant's Supplemental Prehearing Statement).

3. Although initially Applicant proposed only nine surface parking spaces, following the initial hearing, Applicant proposed to construct a below-grade parking garage with 19 spaces because Member Miller indicated at the November 14, 2018 hearing that Applicant did not meet all the CCRC conditions (November 14, 2018 Transcript, pp. 228, 235-236). At the December 19, 2018 hearing, Applicant testified that although it would build an underground parking garage with 19 spaces, only half of those spaces would be used at any time (December 19, 2018 Transcript, p. 53).

4. The proposed memory care facility building would be located:

   a. eight feet from the southern property line and a mere 15 feet from the single-family home at 2617 Wisconsin Avenue, NW (November 14, 2018 Transcript, p. 188, testimony of Amiee Aloi). No other assisted living facility in Ward 3 in an R-1-B neighborhood is so close to a single-family home (November 14, 2018 Transcript for

Sunrise Case);

b. 15 feet from the Edmunds Street, NW property line; and

c. 25 feet from the property line on the 13.9-foot two-way alley at the back of the proposed site which is shared by six homes that front 36th Place, NW, four that front Wisconsin Avenue, NW, and one home that fronts Davis Street, NW.

5. The alley will be the sole access point for vehicular traffic leading to (i) the parking garage, (ii) the open, exposed commercial loading dock, (iii) a dumpster and garbage collection area, and (iv) a drop-off area for memory care facility patient residents (Exhibit 489, Applicant's Updated PowerPoint Presentation).

6. Over five months after MED filed its application, MED found GSSL to operate its proposed facility. GSI, GSSL's parent entity, is a hospitality company (See https://www.guestservices.com/about-us/). Neither GSI nor GSSL has any experience operating a memory care facility (Exhibit 471, Testimony of Anita Crabtree, p. 2).

E. November 14, 2018 Public Hearing

1. The November 14, 2018 BZA hearing began at 9:30 a.m. Consideration of the instant case began at approximately 11:00 a.m. (November 14, 2018 Transcript, p. 44) and concluded at approximately 4:30 p.m. (November 14, 2018 Transcript, p. 299). BZA Chairman Frederick Hill excused himself from participating in the case (November 14, 2018 Transcript, p. 44).

2. The following individuals testified on behalf of MED and presented the proposed project: (i) Nick Finland, Director of Development at MED, (ii) John Gonzales of GSSL, (iii) Claire Dickey, architect with Perkins Eastman, (iv) Erwin Andres, traffic advisor with Gorove/Slade Associates, (v) Stephen Varga, Director of Planning Services at Cozen O'Connor, (vi) Meridith Moldenhauer, land use counsel with Cozen O'Connor, (vii) Jeff Keller, Ph.D. of the Dementia Institute in Baton Rouge, Louisiana, and (viii) Thomas Gale of Lancaster Pollard investment banking firm.

3. The following individuals testified on behalf of MAHCA: (i) Dr. Nathan Billig, expert witness in geriatric psychiatry, (ii) Joe Mehra, expert witness in the area of traffic engineering; (iii) Anita Crabtree, MAHCA Zoning Coordinator; (iv) John Cunningham, expert witness in real estate finance, and (v) neighbors who would be impacted by the proposed facility including Robert McDiarmid, Amiee Aloi, William Brownfield, Susan Tannenbaum, Daniel Crabtree, Mandy Warfield, Lisa Hayes and Tom Henneberg.

4. Residents testified that the proposed facility would produce the following objectionable conditions and adverse impacts: hazards to pedestrians, including children, in the alley; significant increase in vehicular traffic including delivery trucks and emergency vehicles such as ambulances and fire trucks; increased vehicular noise and exhaust fumes which will be funneled into neighbors' backyards and remain trapped in the narrow alley; loss of privacy; loss of natural light; excessive lighting at night, needed in order to secure the perimeter of the property, which would shine into neighboring homes; and increased trash

and rodents from the operation of what amounts to a restaurant, clinic and hotel in one (November 14, 2018 Transcript, pp. 158-159, 163, 191; Exhibits 146, 471 and 484).

F. December 19, 2018 Continued Public Hearing

1. The December 19, 2018 BZA hearing began at 9:30 am. Consideration of the instant case began at 10:53 a.m. (Transcript pg. 8) and concluded at 12:59 p.m. (Transcript pg. 102). The MED witnesses testified to their altered plan, which includes a 19 space underground parking garage of which MED witnesses testified only half of the spaces will be used (December 19, 2018 Transcript, p. 36).

II. CONCLUSIONS OF LAW

A. Applicant Has Not Met Its Burden of Proof

"The Board of Zoning Adjustment is authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2), to grant special exceptions, as provided in this title, where, in the judgment of the Board of Zoning Adjustment, the special exceptions:

(a) will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps;

(b) will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps; and

(c) will meet such special conditions as may be specified in this title" (Subtitle X, Section 901.2).

1. In order to be granted a CCRC special exception, Applicant must meet the definition of a CCRC at 11-B DCMR § 100.2, which includes "providing a continuity of residential occupancy and health care for elderly persons."

a. Complete definition: "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 (11-B DCMR § 100.2).

b. The record contains conflicting information from Applicant as to whether or not the proposed facility would qualify as a CCRC facility.

c. On the one hand Mr. John Gonzales of GSSL has stated that the proposed facility is a facility that provides medical services:

- "As you know, memory care is a specialized program in a secure setting that

provides assisted living and healthcare services to seniors with various forms of dementia, including Alzheimer's disease. We also in these settings provide broader assistance with the activities of daily living, including dressing, bathing, and grooming, in addition to medical and cognitive therapeutic programs … Our direct care staff will be scheduled in accordance with D.C. law. We will be employing licensed nurses, certified nursing assistants, and certified medication assistants" (November 14, 2018 Transcript, pp. 54-55).

- Below are definitions of Licensed Nurse, Certified Nursing Assistant and Certified Medication Assistants which are readily available on the internet and which show that these individuals are licensed medical professionals who provide healthcare and medical services to patient residents.

  - Licensed Nurse
    - Definition of ***licensed practical nurse*** from the Merriam-Webster Dictionary: a person who has undergone training and obtained a license (as from a state) conferring authorization to provide routine care for the sick (https://www.merriam-webster.com/dictionary/licensed%20practical%20nurse)

  - Certified Nursing Assistant
    - Definition of ***certified nursing assistant (CNA)*** from legal.com: a person who assists patients with healthcare needs and cares for a patient who is ill or recovering from a surgery or disease. A CNA's duties are assigned by a registered professional nurse. Sometimes they provide service on activities of daily living, bedside care, including basic nursing procedures under the supervision of a registered nurse. A CNA is a person who has successfully completed a training program or course with a curriculum prescribed by the state in which s/he resides. Classes for CNAs are conducted by a nurse or certified instructor in a community college or nursing home. Upon completion of classes, a certificate will be awarded. Later upon qualifying the state certification exam they become CNA. (https://definitions.uslegal.com/c/certified-nursing-assistant-cna/)

    - Definition of ***certified nursing assistant (CNA)*** from cna.plus: Certified Nursing Assistant (CNA) provides direct care to patients, clients, or residents of the facility or agency that he or she works for. Working as a team member, the CNA takes vital signs and helps patients bathe, dress, eat, and go to activities. A certified nurse assistant works under the supervision of a Registered Nurse (RN) or Licensed Practical or Vocational Nurse (LPN/LVN) to give personal, hands-on care to patients, residents, or clients. The CNA provides assistance with essential daily task such as dressing, eating, toileting, and personal hygiene. (https://cna.plus/what-is-certified-nursing-assistant-cna/)

  - Certified Medication Assistant

- Definition of ***certified medication assistant (CNA)*** from betterteam.com: A Certified Medication Aide is a certified nursing assistant (CNA) responsible for administering daily medication to patients in a hospital or medical facility. Also referred to as Medical Aide Technicians, their duties include monitoring patients, reporting changes, and collecting samples. (https://www.betterteam.com/certified-medication-aide-job-description)

- Description of ***certified medication assistant*** duties and training on www.chron.com: When they're not actively dispensing medications or preparing medications for the next set of rounds, certified medication aides revert to the duties they share with other certified nurses' aides. Those consist of basic hands-on nursing care, such as bathing and feeding patients, helping them with toilet visits and basic hygiene, or supervising their participation in exercise or physical therapy. When functioning as a nursing aide, the aide is supervised by practical or registered nurses. Supervision for medication aides must come from the registered nurse acting as charge nurse for that shift. In most states, medication aides must work first as certified nurses' aides or nursing assistants. Some train on the job, but many states require CNAs to graduate from a formal training program lasting up to one year. They're also required to pass a state licensing exam. Not all states permit the use of medication aides, and those that do vary widely in their training requirements. They can range from as little as four hours' training to as much as 100 hours. Some states administer their own licensing exams. Others recognize a certification exam administered by the National Council of State Boards of Nursing, which awards the Certified Medication Aide credential. (https://work.chron.com/job-description-certified-medication-aide-19817.html)

d. On the other hand, Applicant attempts to make the case that no medical services will be provided at the proposed CCRC facility. But, the facility cannot be a CCRC if no health care is provided.

- Ms. Moldenhauer, Applicant's counsel, stated "there are no medical directors in our facility" (November 14, 2018 Transcript, p. 115).

- Mr. Keller, Applicant's expert witness, attempted to bolster Ms. Moldenhauer's claim that there will be no medical care at the proposed facility, thereby completely contradicting Mr. Gonzales who Mr. Keller praised just before he made these points. Mr. Keller stated, "People don't – most people don't understand the difference between assisted living, memory-care, nursing homes, CCRCs in the way that we understand them. Memory-care is its own entity. It is for – there is no medical care provided at this place. There will not be medical care. This is a higher level of assisted living for people that are memory-impaired. So the individuals are secured. That's a requirement for these locations. The staffing will be different because it's smaller – it's a universal worker model. So when we hear about the staffing ratios compared to Sunrise and all these other

places and you're going to have the business model. The way Sunrise is operated is they have people that cook. They have people that clean. They have people that do – and in this mode, you're going to have a universal worker model. And I've seen John [Mr. Gonzales] do it and it's actually running in Florida at one place I was personally involved with him" (November 14, 2018 Transcript, p. 254).

- Mr. Keller also stated "you're going to have to have very clear intake on who is appropriate for this place. So people that have severe psychiatric issues, chemical restraints for example aren't going to be allowed here. And they're working through all of the details. But I've been speaking with John about it over the past few weeks. And he's very well-versed in the fact that you're going to have to have clear rules on who's allowed to come to this place because of its limitations. And when people are no longer appropriate for this place, which is going to happen. So I just want to set the tone that this is not a nursing home. This is not a place where medical care is going to be provided. It is a place to hold individuals in the best nurturing type of environment possible who are no longer able to be safely within their homes." He then went on to say that "[p]eople do not go see their loved ones once they enter memory-care. It is not an assisted living. It is assisted living memory-care." (November 14, 2018 Transcript, p. 258). Whose testimony is accurate – Mr. Gonzales' or Ms. Moldenhauer's and Mr. Keller's? Mr. Keller's testimony does not seem credible and seems to be an attempt to say anything Applicant wants and needs Mr. Keller to say. Mr. Keller testified that he was involved with working on a facility with Mr. Gonzales. Perhaps Mr. Keller is hoping to gain new business through Applicant and Mr. Gonzales. (November 14, 2018 Transcript, p. 253).

- MAHCA's expert, Dr. Nathan Billig, confirmed that "[m]emory care facilities require trained nurses, nursing assistants" (November 14, 2018 Transcript, p. 118).

- If the facility does not provide health care, it is, by definition, not a CCRC and Applicant's application must be denied by the BZA.

2. Neither MED nor GSSL has demonstrated the requisite experience or performed the planning necessary to operate the proposed facility.

   a. MED seeks to develop the lots at the proposed site and MED and GSSL seek to enter the memory care facility market. MED has stated that the facility would be high-end and would exceed industry-standard criteria (e.g. staffing ratio). However, MED and GSSL have provided no information as to how exactly the facility would be staffed, how the parties, both new market entrants, would attract patient-residents, what the cost of a unit would be per month, or how MED and GSSL would comply with D.C. law that residents obtain the medical care they need when several individuals on the MED team contradicted Mr. John Gonzales and testified that no medical services would be provided at the proposed facility. MED and GSSL failed to identify, quantify and document their operational costs and existing and anticipated revenue.

See 11 DCMR Subtitle B, §100.2 (defining a CCRC as "[a] building or group of buildings providing a continuity of residential occupancy *and* health care for elderly persons") (emphasis added); D.C. Code § 44-102.01 (defining "Assisted Living Residence" as "an entity . . . that combines housing, *health,* and personalized assistance . . . for the support of individuals who are unrelated to the owner or operator of the entity") (emphasis added).

b. Dr. Nathan Billig, a leader in the field of geriatric psychiatry and MAHCA's expert witness, testified that for a pure memory care facility, the ratio should be one caretaker to five patient residents (November 14, 2018 Transcript, p. 120). Mr. John Gonzales testified that the proposed facility would have an even better, industry-leading ratio of one caretaker to every 4.2 patients (id. at p. 241). Since they can identify a precise ratio, MED and GSSL appear to have an exact staffing plan, but have not submitted it to the record. Nor has MED or GSSL explained on the record how employing so many staff members is possible and/or sustainable. This is particularly relevant because neither MED nor GSSL has operated or managed such a facility before, so neither party has a track record for anyone to look to.

c. Applicant stated on the record that it expects the facility would receive "food deliveries between one and two times per week" (November 14, 2018 Transcript, p. 55, testimony of John Gonzales), which cannot be a true statement given that all meals for at least 36 residents (if not also for staff and visitors, which is the norm, though Applicant is silent about this on the record) "will be prepared onsite in the commercial kitchen on the cellar level (id.). As Member Miller stated, "[r]egarding the food and the trash, that's more than twice – that's way more than two trips per week. To say nothing of the other things that have to go on … for this facility" (November 14, 2018 Transcript, p. 235). Mr. Joe Mehra, MAHCA's traffic expert, testified that there would be many vehicle trips to the proposed facility per week (Exhibit 472, Testimony of Joe Mehra, p. 5). Gorove/Slade, Applicant's traffic expert, is also Sunrise's traffic expert and is familiar with the number of trips that will be generated at the Sunrise facility proposed in case number 19823. If Gorove/Slade advised MED to provide accurate information in its application, MED did not take that advice.

3. Application fails to meet "such special conditions as may be specified in this title," in particular two of six conditions required for the CCRC special exception (11-U DCMR § 203.1(f)(1)-(6)).

a. In order to receive a special exception for a CCRC, Applicant must meet the six CCRC conditions set forth in 11-U DCMR § 203.1(f)(1)-(6). These conditions were added to the Zoning Regulations in 2017 and the language is unambiguous that the conditions must be met in order for the Board to grant a special exception for a CCRC use.

b. Applicant's proposed project does not meet the condition in subsection (4) that "the use and related facilities shall provide sufficient off-street parking spaces for employees, residents and visitors." Applicant's proposed project also does not meet the condition in subsection (5) that "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, therefore, the CCRC special exception cannot be granted (11-U DCMR § 203.1(f)(1)-(6)).

c. Applicant has not provided any explanation or analysis as to why the off-street parking spaces it would provide would be sufficient:

- Applicant has not provided for the record any analysis as to why 19 parking spaces would be sufficient for the proposed facility's employees, residents and visitors. Applicant stated that there would be 18 employees at the facility during the day (November 14, 2018 Transcript, p. 85; Exhibit 41, Applicant's Prehearing Statement, p. 4), but has not provided any estimates about the number of service providers who will come to the facility regularly (e.g. physical therapists, physicians, beauticians, activity facilitators, etc.) or any substantiated estimates about how many visitors there would be at the proposed facility at various times of the day. MAHCA's expert, Dr. Billig, noted in his written testimony that having visitors is an important part of a memory care patient's treatment plan – much more so than for someone just in assisted living (Exhibit 473, p. 3). Mr. Gonzales merely stated that he thinks it is unusual for there to be visitors equal to more than 10% the number of residents on any day (November 14, 2018 Transcript, p. 245). Dr. Billig is an expert in the area of geriatric psychiatry while Mr. Gonzales is not, and Dr. Billig has worked in the DC metro area for the last 40 plus years and Mr. Gonzales has not worked in the DC metro area.

- Neither OP, DDOT nor Applicant has rebutted the record established in this case that:

  (i) the "residential standard" of two units to one parking space no longer applies now that the CCRC parking condition exists as of 2017,

  (ii) if the residential parking standard of one space per two units were good enough and provided for enough parking in all cases, the requirement of sufficient off-street parking would not have been added to the CCRC special exception,

  (iii) the requirement of sufficient off-street parking was added as a CCRC condition deliberately and should not be ignored; only five of the seventeen special exceptions provided under Subtitle U, § 203.1 include a parking standard: (*(f) CCRC, (h) emergency shelter, (i) health care facility, (j) parking, (l) private schools and residences for teachers and staff*),

  (iv) sufficient means "enough to meet the needs of a situation or a proposed end" according to the Merriam-Webster dictionary. Enough off-street parking in this case for employees (at least 18 plus service providers, vendors, etc.), residents, and visitors (all visitors for 36 patient-residents plus personal aides) is more than 19 spaces, even if 10% were not to drive to the proposed facility (Exhibit 45, DDOT report). Applicant asserts that

fewer than half of the 19 spaces would be used. IT is not credible that Applicant will pay to construct a 19 space underground parking garage and then not use half of those spaces,

(v) based on similarly situated facilities (Exhibit 146, ANC 3C Resolution), 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 of longer than 95 to 120 minutes if they were to take public transportation, which is why it is highly likely that they would drive instead, requiring daily parking (resulting in an especially heavy load at shift changes) (See also Mehra's testimony),

(vi) individuals employed at other similarly-located facilities (i.e. on bus routes, but not on a Metro line) mostly drive and do not take public transit, and Applicant did not make any study or analysis of said facilities to determine the likely number of staff who would drive to work (Exhibit 146, ANC 3C Resolution, p. 2).

- There is no credible testimony in the record for applying the historical residential standard to the proposed facility in lieu of the CCRC parking condition, or for assuming they are one and the same. Mr. Joel Lawson of OP acknowledged on the record that he did not know about the 2017 change to the CCRC special exception regulation (November 14, 2018 Transcript, pp. 173-177). Mr. Lawson does subsequently acknowledge that "the sufficient number of spaces could be more than what the zoning requires [meaning the residential standard of one space per two units which was historically applied to the CCRC special exception] or it could be less," but the OP report does not include any sufficiency analysis based on the information Applicant provided (Exhibit 50). Mr. Lawson cannot apply the latest, current Zoning Regulations to the case at hand if he does not know what they are and if he did not receive any training on how to change the analysis given the new conditions. OP's report, therefore, cannot be given any deference in light of Mr. Lawson's lack of knowledge of and failure to provide analysis or opinion about the parking conditions added to the CCRC special exception provisions.

- Applicant must show that it is providing enough off-street parking for all staff (which Applicant estimates will be 18 in number during the day) (November 14, 2018 Transcript, p. 55), 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 Applicant and others) and for whom Applicant does not provide an estimate in the record, and for reasonably expected visitors. The 19 parking spaces provided are unlikely to be sufficient to accommodate these visitors, workers, and employees.

d. The facility (including outdoor spaces) is located and designed so that it is objectionable to neighboring properties due to noise, traffic, and other objectionable

conditions:

- Applicant has not rebutted the testimony in the record demonstrating that:

  - Using the narrow residential alley will cause grave safety issues for neighbors who access their back gates and garages via the alley on foot and by car, who walk up and down the alley and who play in the alley (Exhibits 49, 54 and 58, Testimony of Neighbors),

  - There would be a significant increase in vehicular traffic, including commercial traffic, to the alley and the neighborhood, which will bring noise and air pollution to the alley and neighboring properties,

  - The impacted alley is already burdened by the non-conforming building that is the Glover Park Hotel whose trucks deliver on Davis Street, NW, right across from the mouth of the alley, with the result that trucks trying to get into the alley would likely not be able to do so,

  - The proposed facility built across two lots would be taller than the building that could be built on just lot 44 because the land is on an incline, which means that the neighbors living on lot 43, would have a much taller building next to their home than any single-family home built on lot 44 could be. The neighbors living on lot 43 would lose privacy and light (Exhibit 474, Testimony of Amiee Aloi).

  - The increased traffic in this narrow alley which would serve both the proposed facility and the neighboring single-family homes will impede neighbors from leaving or returning to their garages if even just one truck or other vehicle is blocking the alley (See Exhibits 56, 58, 158 and 482 for photos). The record of this case includes ample photo evidence of how narrow the alley is and how close the vehicles which drive along the alley are to the neighboring single-family homes.

  - The proposed facility is not designed to be a facility suited for memory care patients (Exhibit 473, Testimony of Dr. Nathan Billig).

- Applicant has not addressed these concerns other than to assert that the alley would act as a buffer for the residents when, in fact, the alley would be the main artery for bringing the objectionable conditions to the neighboring properties. The traffic to the facility would enter and egress via the alley, and the open and exposed loading area would be a stone's throw from several residential homes (*supra*, Section I.D.2.a.-c.).

- Potential neighbors of the proposed facility testified compellingly about the objectionable conditions the location and design of the proposed facility would produce (Exhibits 33, 40, 44, 47, 49, 51-106, 108-144, 147-151, 153, 154, 157-159, 163, 164, 166, 168-378, 381-398, 400-426, 429-461, 463-465, 467, 468, 474,

475, 479, 482).

- There will be regular trips to the proposed facility by emergency vehicles with loud sirens. As MAHCA's expert, Dr. Nathan Billig, testified, "[s]ince residents of the memory care center are all elderly, they will be vulnerable to medical emergencies and may necessitate emergency transfer via ambulance to nearby hospitals" (November 14, 2018 Transcript, p. 120).

- Applicant failed to rebut Mr. Joe Mehra's testimony that access on Wisconsin Avenue would be more appropriate than access from the alley.

- At the September 26, 2018 BZA hearing, several Board members noted the high number of opposition letters and petition on the record (September 26, 2018 Transcript, pp. 16-21). At that time, there were approximately 100 opposition letters and petitions on the record. The level of opposition has only increased and there are now several hundred opposition letters and petitions on the record. **Not one single resident of the impacted neighborhood has submitted a letter of support to the record**.

4. 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)).

   a. ZR 16 states that "[t]he provisions of this chapter [R-1 Districts] are intended to stabilize the residential areas and to promote a suitable environment for family life. For that reason, only a few additional and compatible uses shall be permitted" (11 DCMR Section 200.2).

   b. The proposed facility will not be in keeping with the residential, single-family home R-1-B neighborhood in which the two lots are located. The facility will be a commercial, institutional and secured healthcare facility, which Applicant acknowledged on the record. Mr. John Gonzales of GSSL stated (i) "memory care is a specialized program in a secure setting that provides assisted living and healthcare services to seniors with various forms of dementia, including Alzheimer's disease," and (ii) "[m]eals will be prepared onsite in a commercial kitchen on the cellar level, and onsite staff will be doing housekeeping and laundry in our commercial laundry" (November 14, 2018 Transcript, pp. 54-55).

   c. The proposed facility would increase the density of the lots. Instead of the lots being developed with two to three single-family homes, they would be developed with one four story building with a penthouse which spans both lots and which will house 36 residents and accommodate on a daily basis employees, contractors, vendors and visitors so that there may be up to 70 individuals in the proposed facility at any given time. That is far more individuals than would reside in and regularly come and go from two to three single-family homes.

   d. The proposed facility is not in keeping with the character of the R-1-B neighborhood in which the site for the proposed facility is located. Most of the single-family homes

are red brick or stucco are built in the colonial or craftsman style. Applicant admitted on the record that the building is designed in the art deco style and that it was inspired by a building in Atlanta, Georgia. Applicant's architect claims to have looked at the houses in the neighborhood, but instead of designing a facility that resembles those homes and blends into the neighborhood, she and the Applicant decided on a style that looks nothing like the homes in the neighborhood. (November 14, 2018 Transcript, pp. 59-60, 132).

e. Applicant's proposed facility is inconsistent with the zone plan and Applicant attempts to compare the building height and massing of its proposed facility to the building height and massing of buildings across Wisconsin Avenue and to the Glover Park Hotel. The other side of Wisconsin Avenue is zoned RA-4, not R-1-B, and the Glover Park is a non-conforming building.

f. The D.C. Comprehensive Plan is relevant to this case, as established by ANC 3C in its resolution (Exhibit 146) and as acknowledged by Applicant in the testimony of Mr. Stephen Varga, Applicant's Zoning Specialist and LEED Green Associate at the firm of Applicant's counsel, Ms. Meridith Moldenhauer, who is the former Chair of the BZA (Exhibit 41A, Tab B, Exhibits to Prehearing Statement). On page 171 of the November 14, 2018 Transcript, Member John questions whether the D.C. Comprehensive Plan is relevant to this case and Mr. Lawson of OP simply states that it is not. The statements in the ANC 3C resolution were not rebutted by Mr. Lawson or any of Applicant's other witnesses.

5. 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)).

a. See Section I.A.3.d. above on objectionable conditions including loss of safety, noise, traffic, pollution (air, noise and light), loss of natural light, loss of privacy, etc.

6. Proposed project causes undue adverse impact and application should be denied

a. "The applicant for a special exception shall have the full burden to prove no undue adverse impact and shall demonstrate such through evidence in the public record. If no evidence is presented in opposition to the case, the application shall not be relieved of this responsibility" (11-X DCMR § 901.3).

b. Applicant does not acknowledge that the proposed facility will cause adverse impacts and does not address how such adverse impacts will be avoided, addressed or mitigated. Applicant simply states that since the CCRC special exception is presumed to be residential in nature, there is no undue adverse impact (Exhibit 15, Statement of the Applicant). To make that simple statement demonstrates nothing through evidence in the public record and indeed shifts the burden to the party in opposition to do Applicant's work for Applicant (Exhibit 471, Testimony of MAHCA). MED's counsel, Ms. Moldenhauer, acknowledges that "the burden is with applicant" (December 19, 2018 Transcript, p. 83). However, Ms. Moldenhauer's reasoning for why Applicant has met its burden is simply that OP says Applicant has (December 19,

2018 Transcript, p. 83) (please see flaws in OP report set forth in Section II.C.2. below)." Ms. Moldenhauer then proceeds to attempt some logical acrobatics and states that "if the applicant satisfies the burden, the burden then switches to the opposition party to present evidence, which then might switch the burden back to us. And so, we believe that obviously we have satisfied the burden, but that the opposition party does have a burden, as well, to potentially show substantial adverse impacts, which then might potentially switch the burden back to your side" (December 19, 2018 Transcript, p. 83). Even if this were accurate, which it is not, Applicant cannot point to any evidence in the record to show that it has met its burden, other than the gravely flawed OP report.

c. The proposed facility would have an undue adverse impact on the neighboring properties for all the reasons set forth above and documented extensively in the record.

B. Inviability

1. Given Applicant's and GSSL's lack of experience with building, managing and operating memory care facilities, considering the viability of the proposed facility is warranted. Inviability is an undue adverse impact for neighboring properties – in particular, in this case, where an existing building is being repurposed. This is a case in which an existing single-family home would be torn down and a new building would be built for the proposed facility – a new building which would never be used as a single-family home in the event the proposed use fails. ANC 3C has routinely had to deal with finding new uses for non-conforming buildings. This is not an easy process and can lead to neighboring properties being forced to acquiesce to even more burdensome uses just to find another tenant or owner for an existing structure. The BZA should consider the undue adverse impact it would cause to neighboring properties by foisting an inviable memory care facility in a non-conforming structure upon the neighborhood.

2. Applicant has not rebutted any of the statements on the record that:

   a. MED may purchase the Property and then sell it on immediately once the property has effectively been up-zoned;

   b. MED is looking to secure the property in advance of a Request for Proposals from the District of Columbia and plans to enter into a lucrative contract with D.C., which it may then use to flip the property at a large profit; and

   c. This proposed project is designed to fail and MED will request additional, potentially more burdensome zoning relief from the BZA in order to repurpose the facility it built (November 14, 2018 Transcript, p. 139; Exhibit 470, Testimony of John Cunningham, p. 6; Exhibit 471, Testimony of Anita Crabtree, p. 9).

3. Applicant has not provided evidence that its proposed facility is financially viable.

   a. Mr. John Cunningham, MAHCA's real estate finance expert, explained the criteria for obtaining financing and Applicant did not provide any evidence for the record that it would be able to finance the proposed facility. While Applicant's finance expert, Mr.

Tom Gale, thinks the Applicant's team "works" (November 14, 2018 Transcript, p. 251), he also stated that it is his job to find them the right financing vehicle and that he's always in competition to be involved in a deal, so Mr. Gale has a vested interest in this application being approved by the BZA. Mr. Gale did acknowledge that no financing is secured yet for this proposed facility and that the devil will be in the details when the project is analyzed (viability, operational efficiencies, appraisal, etc.) (id. at p. 280).

b. Neither Applicant nor GSSL has a name in the area of memory care, the facility is poorly designed with respect to resident care (Exhibit 473, Testimony of Dr. Nathan Billig) and Sunrise Senior Living, a seasoned company in the area of memory care in the D.C. metro area, has testified in BZA case number 19823 that a CCRC facility it is looking to build approximately two miles up the street cannot be financially sustainable unless the CCRC has a minimum of 86 units. Sunrise states that as a senior living facility it needs a 1.5-acre lot to accommodate 86 units in order to be financially viable (November 14, 2018 Transcript, testimony of Sunrise Senior Vice President Kroskin, pp. 337-338). How then is MED's 34-unit facility to be viable?

c. Sunrise testified at the BZA hearing on November 14, 2018 that there were two major drivers of this conclusion that they needed 86 units. Those two issues were (1) staff needs and (2) costs of construction (November 14, 2018 Transcript, testimony of Alice Katz, expert witness for Sunrise, p. 393).

d. Sunrise's own expert agreed that the same construction-related considerations, like safety, fire code, elevators, bathrooms, laundry facilities that increase the costs of the proposed Sunrise facility would also apply in the case of a facility that was exclusively a memory care facility (November 14, 2018 Transcript, pp. 355-56).

e. Mr. Heath, Sunrise's architect, also agreed that the smaller building for 34 residents, which was proposed in BZA Case No. 19751 before the BZA on the same day, and Sunrise proposal in the instant case for 121 residents "should be built very similarly. They both have very high levels of acuity and they both need to have very safe and secure buildings, they both have very sophisticated life safety systems and they'll be very well monitored. So, the cost in construction shouldn't be that much different, except in a matter of scale. This building's more expensive, because it has a garage. They're not building a garage. That's a huge, huge cost difference…" (November 14, 2018 Transcript, p. 395). Now Applicant has revised its architectural drawings and plans to build a garage, which makes the viability question even more critical and raises serious questions, such as why Applicant would take on the cost of building an underground garage containing 19 spaces but only use half those spaces, as Applicant testified at the December 19, 2018 hearing and how this 34-unit facility would be viable as a memory care facility.

C. Failure of DDOT and OP to Produce Credible Reports and Testimony

1. DDOT neglected to address the following important points in the documents it submitted to the record:

a. DDOT does not respond to the expert and neighbor testimony regarding the objectionable traffic impacts and safety issues associated with Applicant being allowed to use the 13.9-foot wide residential alley in an R-1-B zone as the *sole* means of vehicular access for a memory care facility (November 14, 2018 Transcript, p. 130, testimony of Joe Mehra, p. 235; Exhibits 49, 54 and 58).

b. DDOT does not address in any of its submissions the testimony of MAHCA's traffic expert that a curb-cut on Wisconsin Avenue would be a better access point for vehicular traffic to and from the proposed facility than using the alley as the sole vehicular access point for the memory care CCRC (November 14, 2018 Transcript, testimony of Joe Mehra, p. 129). A curb-cut on Wisconsin Avenue would allow all traffic, including deliveries and garbage and recycling vehicles, to access the facility from Wisconsin Avenue, thereby likely preventing much of the burden from being pushed to the back of the facility and onto neighboring residential properties.

c. DDOT fails to address the safety and traffic impacts resulting from the addition of eight parking spaces in the CCRC's new underground parking garage.

2. OP failed to adequately perform its role in this case, neglecting its duty to provide the BZA with a rigorous, independent assessment of the project application

a. OP has not rebutted the MAHCA assertion that OP's report is largely a verbatim regurgitation of Applicant's application and also includes some information that was not in the documents Applicant filed.

b. Even though Applicant provided no analysis in the record as to why the proposed facility is not objectionable, OP states in its report that it believes the proposed facility is not objectionable to neighboring properties (Exhibit 50; Questions of Member White in November 14, 2018 Transcript, p. 170). When asked by Member White why OP came to the conclusion that there are no objectionable conditions because of noise or traffic, Mr. Joel Lawson of OP stated that "[w]ith respect to traffic and transportation, we would defer to DDOT which issued a report stating no concerns or no objections to this application" (November 14, 2018 Transcript, p. 170). In determining the critical point of whether there are objectionable conditions as a result of traffic, noise and safety issues, OP is relying solely on a flawed, incomplete and legally inaccurate DDOT analysis (Exhibit 145, Letter from Councilmember Mary Cheh; Exhibit 260, Letter in Opposition from Councilmember Mary Cheh). Mr. Lawson goes on to state that "the regulations are pretty clear in terms of what the review criteria are … [o]ur report goes through those criteria mostly with regards to the special exception for the continuing are use," yet OP applies those criteria incorrectly, contravening the language of the regulation on its face (November 14, 2018 Transcript, pp. 170-171).

c. Even though OP's report should be prepared based only on information in the record, in this case, OP included information in its report that was not in the record, as acknowledged by Applicant and Mr. Lawson (November 14, 2018 Transcript, pp. 179-180; Cross examination of OP by Ms. Andrea Ferster). Such information could only

have been obtained by OP in conversations with Applicant or Applicant's counsel. OP should not have taken it upon itself to include information from such conversations in its report. Applicant has not rebutted this information in the record. When asked by Ms. Andrea Ferster, counsel to MAHCA, why OP made an assertion that underground parking would be financially inviable for Applicant, Mr. Lawson replied, "What I suspect happened is that OP basically extrapolated that comment due to the considerable cost of doing underground parking. We often hear from people that underground parking is considerably more expensive. The Applicant is actually correct in this case that a financial hardship is not really part of the review criteria. So actually I'm happy to simply withdraw that comment from our report" (id.). OP repeatedly told MAHCA that only information from the record could be included in its report, but it then chose to opine on the financial viability of underground parking for Applicant, about which nothing was in the record. When OP was questioned on its inconsistency, it suddenly wanted to withdraw its claim.

d. OP did not perform a site visit and, like Applicant, did not acknowledge the significant objectionable conditions the proposed facility would cause. Of all the objectionable conditions and adverse impacts neighbors of the proposed site have submitted to the record, one OP acknowledged is the drainage issue on the proposed site (November 14, 2018 Transcript, pp. 174-175).

e. The OP report appears to have been hastily and sloppily prepared. When asked by Ms. Ferster about all the mistakes in the OP report regarding number of units, residents and parking spaces, Mr. Joel Lawson simply replied in each case that the figure given was a mistake and should be corrected (November 14, 2018 Transcript, pp. 173-174; cross examination of OP by Ms. Andrea Ferster). This explanation is plainly unsound. If the mistakes had been consistent with one another, Mr. Lawson's pretense might have been reasonable, but the incorrect number of units, does not match the incorrect number of residents, nor is either number in accord with the incorrect number of parking spaces discussed in the report. The report does not appear to have been vetted, proofread, or checked. It should, therefore, not be given any weight.

D. Failure to Allow Cross Examination

1. Although each BZA hearing is intended to be a time when parties in opposition may make their case before the BZA and cross-examine an applicant's witnesses, Vice Chairman Hart routinely prevented MAHCA's attorneys from asking cross-examination questions. While the BZA may be quasi-judicial, the fact remains that any BZA cases may be appealed to the D.C. Court of Appeals and so it is important that attorneys of parties in opposition be allowed to cross-examine. Under 11-Y § 408.9 and D.C. Official Code §2-509(b), "Every party shall have the right … to conduct such cross-examination as may be required for a full and true disclosure of the facts." MAHCA was not adequately allowed this opportunity.

2. DDOT's role in this case is critical given that many of the objectionable conditions involve the use of the residential alley. These objectionable conditions could, at least in part, be remedied by a curb-cut on Wisconsin Avenue such that all vehicular traffic to and from

the facility would access the proposed facility via Wisconsin Avenue and not via the 13.9-foot residential alley. Because, as noted above in Section I.B.2., DDOT was not in attendance at any of the hearings and could not be cross-examined, the DDOT report (Exhibit 45) and the Supplemental DDOT Report (Exhibit 481) should be stricken from the record. It is a violation of MAHCA's rights to due process that DDOT did not show up to the BZA hearings and that MAHCA was denied the opportunity to cross-examine DDOT.

E. Relevant Case Law

Relevant case law seems unnecessary since applying the zoning regulations as they are written on their face, would require that the BZA vote against MED's application. If the BZA follows the language of the regulations, this is an open and shut case and MED's application gets denied. If the BZA is looking for guidance from cases, BZA case 18190 (of ASG Group Inc. - Esther's Childcare and Development Center) is on point. The application was for a special exception for a childcare center pursuant to 11 DCMR § 3104.1 under §205. The zone at issue was R-1-B and the Applicants proposed to use a similarly narrow residential street for all access to the center. The BZA denied the application for the special exception for traffic and safety reasons, as well as other objectionable conditions. The exclusive use of the alley for all access to the facility presents equally serious traffic and safety issues and memory care patients are a vulnerable population analogous to children at a daycare facility.

F. Issues and Concerns Raised by ANC 3C Must be Given Great Weight

ANC 3C voted not to recommend approval of MED's application, citing many concerns, in particular about objectionable conditions and undue adverse impact for neighboring properties (See Exhibit 146). The issues, concerns and conditions ANC 3C raised must be given great weight by the BZA.

G. Concern About Applicant's Trustworthiness

MAHCA is concerned about Applicant's trustworthiness and treatment of the neighbors of the proposed facility. In conversations with Applicant before Applicant submitted its application in March 2018, MAHCA expressed concern to Applicant about numerous objectionable conditions set forth above, including concern about the scale and density of the building, the building fitting into the neighborhood aesthetically, and MAHCA requested that Applicant consider including an underground parking garage. Applicant promised MAHCA that the building would blend in with the R-1-B neighborhood – Applicant even suggested the façade may be red brick. Those conversations yielded nothing for MAHCA because Applicant did not acknowledge or address any of MAHCA's concerns in its application and did not try to make the building blend in and look less monolithic by, for example, breaking up the roofline. Applicant appears to have made a deliberate effort to design a building that would not be in harmony with the surrounding neighborhood and instead look like the buildings across Wisconsin Avenue, NW which are zoned RA-4.

Applicant never responded to MAHCA about the parking garage, but never included it in any of its plans – not until Member Miller suggested on November 14, 2018 that he would vote against

the application because it did not meet the CCRC conditions. Applicant then managed to change its plan to include an underground parking garage within a couple of weeks. At each turn, Applicant has only provided the least amount of information it could get away with providing and MAHCA is concerned that this approach by Applicant does not bode well for having a good neighborly relationship with Applicant.

Applicant has repeatedly demonstrated that it does not care about the neighborhood or the objectionable conditions and adverse impact it is proposing to foist upon the neighborhood. Applicant undoubtedly harbors resentment toward the neighborhood because of the lucrative shelter deal Applicant had made for the lots at issue several years ago, but that fell through when the D.C. Council shone the light of day on the deal and exposed it for the exorbitant, wasteful payday it would have been.

* * *

Based on the findings of fact and conclusions of law, the Board concludes that the Applicant has not satisfied the burden of proof to grant special exception relief pursuant to 11-X DCMR § 901.2 and 11-Y DCMR § 100.3 with respect to the property in the R-1-B District at 2619-2623 Wisconsin Avenue, NW pursuant to the Board's jurisdiction. Accordingly, it is, therefore, **ORDERED** that the application is **DENIED**.

VOTE:

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

A majority of Board members approved the issuance of this order.

_____
Sara Bardin
Director, Office of Zoning

ATTESTED BY:

FINAL DATE OF ORDER: _____

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

PURSUANT TO 11 DCMR SUBTITLE Y § 702.1, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANTS FILE PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANTS FILE A REQUEST FOR A TIME EXTENSION PURSUANT TO SUBTITLE Y § 705 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED. PURSUANT TO SUBTITLE Y § 703.14, NO OTHER ACTION, INCLUDING THE FILING

OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO SUBTITLE Y §§ 703 OR 704, SHALL TOLL OR EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR SUBTITLE Y § 604, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES., THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

CONDITIONS REQUESTED BY MAHCA
In the event the BZA approves Application 19751 (MED Developers, LLC)

The sixth CCRC special exception condition provides that "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" (11-U DCMR § 203.1(f)(6)). The Board of Zoning Adjustment ("BZA") may also impose: (a) "requirements pertaining to design, appearance, size, signs, screening, landscaping, lighting, building materials, or other requirements it deems necessary to protect adjacent or nearby property, or to ensure compliance with the intent of the Zoning Regulations" (Subtitle X, Section 901.4) and (b) "a term limit on a special exception use when it determines that a subsequent evaluation of the actual impact of the use on neighboring properties is appropriate, but shall consider the reasonable impacts and expectations of the applicant in doing so" (Subtitle X, Section 901.5).

MAHCA hereby requests that, in the event the BZA fails to apply the Zoning Regulations correctly and approves the application of MED Developers, LLC, ("Applicant" or "MED") that the BZA impose the conditions set forth below. MAHCA and any neighboring property within 200 feet of lots 44 and 812 or any property impacted by the operations of the facility shall have the right to raise any issues by contacting the CCRC facility neighbor liaison who will be designated as set forth below. Any such impacted neighbor has the right to enforce the below conditions.

1. **Curb-Cut**: That MED shall make every effort to obtain a curb-cut on Wisconsin Avenue and that all vehicular traffic, including delivery, garbage and recycling trucks, shall go to and from the facility via Wisconsin Avenue.

2. **Roofline of Building**: That the roofline of the building be broken up into gabled rooves so that the facility looks like a group of townhouses, looks less monolithic and more in keeping with the neighborhood

3. **Building Height**: That, like Temple Micah, about two blocks north of lots 44 and 812 on Wisconsin Avenue, the building height of the proposed facility be lowered to match the neighboring houses so that the building does not tower over neighboring houses.

4. **No Blocking of the Alley**: That MED, GSSL and any of their successors ensure that the alley is never blocked and that neighboring residents shall always be able to access the alley and exit the alley by car and on foot. If the alley is blocked from any individual going to or from the facility and the blockage is not remedied immediately, a fine in the amount of $500 shall be owed to MAHCA by MED and GSSL or their successors.

5. **All Garbage and Recycling Storage**: That all garbage and recycling shall be stored inside and in temperature-controlled conditions, including all dumpsters and any other garbage or recycling containers.

6. **Loading Dock**: That there shall be no more than one (1) delivery to the facility per day and all deliveries shall be between the hours of 9 AM and 5 PM. Delivery trucks shall be

no larger than 24-foot straight body trucks and vans.

7. **No Loitering in the Alley**: That MED and GSSL and any of their successors shall prohibit loitering in the alley – by residents, employees, contractors, vendors, visitors, and all others and that no smoking be allowed in the alley.

8. **Underground Parking Garage**: That, in accordance with their testimony, MED and GSSL shall ensure that no more than half of the spaces in the underground parking garage are occupied at any one time.

9. **Control of Anyone Driving to the Facility**: That MED, GSSL and any of their successors ensure that their employees, vendors, contractors, service providers and visitors drive no faster than 10 miles per hour in the alley and refrain from blocking the alley. If any vehicle going to or from the facility drives more than 10 miles per hour in the alley, a fine in the amount of $500 shall be owed to MAHCA by MED and GSSL or their successors.

10. **Maintenance of Alley**: That MED and GSSL and any of their successors shall be responsible for maintenance of the alley, including plowing/de-icing the alley when it snows and for making sure that water run-off in the alley is managed appropriately and safely.

11. **Management of Rodents and other Vermin**: That MED and GSSL and any of their successors shall have a rodent and vermin management policy in place and in effect. In the event MAHCA or any neighboring property within 200 feet of lots 44 and 812 raises a rodent or vermin issue with MED, GSSL or any of their successors, then MED, GSSL or their successors shall respond immediately and make best efforts to resolve the issue as expeditiously as possible.

12. **Emergency Vehicles**: That MED and GSSL and any of their successors shall make every possible best effort to have emergency vehicles come to and go from the front of the facility, and that emergency responders be instructed not to use their sirens within three blocks of the facility.

13. **Management of Air Pollution**: That MED and GSSL shall make every possible best effort to mitigate the amount of pollution emitted into the alley and thereby into the backyards of neighboring properties.

14. **Lighting at the Facility Not to be Disruptive to Neighbors**: That light pollution from artificial lights shall be kept to the lowest possible minimum. That no lights shine directly into any hones, that all lights on the roof or other lights situated in high places face downward.

15. **Discreet Signage**: That any signage for the facility be discreet, not too large and not garish in color or style.

16. **Restriction on Number of Residents**: That there shall never be more than 36 residents in the facility or any other building, regardless of the use, on lots 44 and 812. For the sake

of clarity, that is 36 residents across both lots, NOT on each lot.

17. **Use Restriction**: That the facility built shall only be used as a CCRC memory care facility, regardless of who owns the facility, and that once it is no longer a CCRC memory care facility for any reason, that the building shall be torn down.

    - That the use restriction shall be implemented in the form of a deed restriction because, as MAHCA has testified, MAHCA is concerned that this application is an effort by MED to have the lot up-zoned through the backdoor of a special exception and that once the use fails, MED or a party MED sold the facility to, will seek to get another, potentially an even more burdensome use for neighboring properties approved.

    - If and when MED or any of its affiliates seeks another use, MAHCA requests that these conditions be strictly enforced.

18. **Ownership Restriction**: That in order to receive the special exception, MED must purchase and hold the land for at least five (5) years and shall only have the right to sell the facility to a reputable memory care facility owner and/or operator; and that MED or any of its successors shall be prohibited from selling the facility to an entity that is not in the private sector.

19. **Certificate of Need**: That MED shall obtain a certificate of need before commencing any construction on the proposed facility, as the proposed facility qualifies as a Health Care Facility under 11-B DCMR § 100.2 and, therefore, MED should be required to obtain a certificate of need:

    - Section 100.2 includes the following definition of Health Care Facility

        - "Health Care Facility: A facility that meets the definition for and is licensed under the District of Columbia Health Care and Community Residence Facility, Hospice and Home Care Licensure Act of 1983, effective February 24, 1984 (D.C. Law 5-48; D.C. Official Code §§ 32-1301 et seq.)" (11-B DCMR § 100.2).

        - D.C. Official Code §44-501(a)(3) provides the following definition of Nursing Home:
            - "Nursing home" means a 24-hour inpatient facility, or distinct part thereof, primarily engaged in providing professional nursing services, health-related services, and other supportive services needed by the patient/resident.

        - Ms. Moldenhauer asked Mr. Joel Lawson of OP to confirm that the facility qualifies as a CCRC and not as a healthcare facility, which Mr. Lawson did (November 14, 2018 Transcript, p. 172). Notably, however, Mr. Joel Lawson is neither an attorney or an expert in healthcare. According to the definitions set forth above, the proposed facility qualifies as a CCRC and as a healthcare facility and therefore requires a Certificate of Need.

20. **Drainage**: That all drainage issues shall be resolved before any construction commences,

as recommended by OP (Exhibit 50 – OP report, p. 5; November 14, 2018 Transcript, p. 174-175) and that porous materials be used in order to allow water to seep into the ground.

21. **Designated Neighbor Liaison**: MED and GSSL and any of their successors shall establish a point of contact to whom the neighbors will report any violations of these conditions, and who shall promptly take corrective action.

22. **Construction Management Agreement**: MED, GSSL and any other parties involved in the construction of the CCRC facility shall enter into a Construction Management Agreement with MAHCA in order to address all issues regarding impact on the neighborhood in connection with construction of the facility.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing proposed findings of fact and conclusions of law were served January 23, 2019, via email, on the following:

Counsel for Applicant
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Chair Nancy MacWood
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_/s Paul Cunningham_____
Paul Cunningham
MAHCA President