

[APPLICANT'S DRAFT ORDER]

Application No. 19751 of MED Developers, LLC, pursuant to 11 DCMR Subtitle X § 901.2, for a special exception under Subtitle U § 203.1(f) for a continuing care retirement community use to allow a memory care facility in the R-1-B Zone at premises 2619-2623 Wisconsin Avenue NW (Square 1935, Lots 812 and 44).

HEARING DATES: May 23, 2018, June 6, 2018, June 27, 2018, September 26, 2018, November 14, 2018, December 19, 2018

DECISION DATE: January 30, 2019

DECISION AND ORDER

On March 26, 2018, MED Developers, LLC (the “Applicant”), the contract purchaser of the subject premises, submitted a self-certified application (the “Application”), as subsequently amended, requesting special exception relief for a continuing care retirement community use, to allow a 34-room memory care facility (the “Project”) in the R-1-B zone at 2619-2623 Wisconsin Avenue NW (Square 1935, Lots 812 and 44) (the “Property”).¹ For the reasons explained below, and following public hearings, the Board of Zoning Adjustment (the “Board”) voted unanimously to approve the Application.

PRELIMINARY MATTERS

Notice of Application and Notice of Public Hearing. By memoranda dated April 3, 2018, the Office of Zoning sent notice of the application to the Office of Planning (“OP”); Advisory Neighborhood Commission 3C (“ANC”), the ANC for the area within which the subject property is located; the single-member district ANC 3C08; Advisory Neighborhood Commission 3B, the Office of Advisory Neighborhood Commissions; the District Department of Transportation (“DDOT”); each of the four At-Large Councilmembers; and the Chairman of the Council. (Ex. 17-28). A public hearing was initially scheduled for May 23, 2018. Pursuant to 11 DCMR Subtitle Y § 402.1, the Office of Zoning mailed notice of the public hearing to the Applicant and the owners of property within 200 feet of the subject Property on April 3, 2018. (Ex. 29). Pursuant to 11-Y DCMR § 402.1(a), notice of the public hearing was also published in the *D.C. Register* on _____.

Requests for Party Status. The Applicant and the ANC were automatically parties in this proceeding. The Board granted a request for party status in opposition to the application from the Massachusetts Avenue Heights Citizens Association (“MAHCA”), a group of residents living near the subject property.

Motion to Dismiss. On September 24, 2018, MAHCA filed a Motion to Dismiss or, in the Alternative, to Postpone the hearing scheduled for September 26, 2018. (Ex. 155). The basis for MAHCA’s Motion to Dismiss was that the Applicant had not met the requirements of Subtitle Y

¹ The Applicant initially requested special exception relief from the requirements of Subtitle C § 701.5 regarding vehicular parking. However, that request for relief was subsequently removed prior to approval of the application. See Ex. 483, 483B.

§ 300.8(g) of the Zoning Regulations. MAHCA argued that the Application concerned two parcels of property – Lot 44 and Lot 812 in Square 1935; however, the Applicant had only submitted a list of persons owning property within 200 feet of Lot 44 in Square 1935.

The Board considered MAHCA’s Motion to Dismiss at the public hearing on September 26, 2018. The Board determined that the Applicant had complied with the language of Subtitle Y § 300.8(g). The Board found that Lot 44 and Lot 812 are adjoining, and notice to all property owners within 200 feet of Lot 44 would be adequate to provide notice to the broader community. Further, the Board found that the surrounding community had actual notice of the Application due to the high level of interest in the Application from the surrounding community, as well as other forms of public notice, including the publication of notice in the *D.C. Register* and the public hearing notice posted at the Property. Subsequently, the Applicant supplemented the 200-footer list (Ex. 261) and the required notice was provided. The Board denied MAHCA’s Motion to Dismiss by a vote of 5-0-0.

Public Hearings. The originally-scheduled public hearing on May 23, 2018 was postponed several times. The first postponement was requested by the ANC (Ex. 31), and the hearing was postponed to June 6, 2018. The Applicant then requested two postponements (Ex. 35, 37), and the hearing was postponed to September 26, 2018. The fourth postponement was requested by MAHCA (Ex. 155), and the hearing was postponed to November 14, 2018. On November 14, 2018, the Board held a full public hearing on the Application. At the end of the hearing, the Board requested additional information and continued the hearing to December 19, 2018. After a limited scope hearing on December 19, 2018, the Board closed the record and scheduled the Application for a decision meeting on January 30, 2019.

Applicant’s Case. The Applicant provided evidence and testimony in support of the Application. The Applicant produced expert testimony from John Gonzales, President of Guest Services Senior Living (“GSSL”), the proposed operator for the Project, regarding operations and management of senior housing facilities. Erwin Andres of Gorove/Slade Associates (“Gorove/Slade”), an expert in traffic and transportation, testified regarding traffic, parking, loading and related transportation issues. The Applicant also produced expert testimony from Stephen Varga, an expert in land use and planning, regarding the Project’s consistency with planning policies in the Comprehensive Plan and the R-1-B zone. The Project architect, Claire Dickey, also spoke in an expert capacity regarding design elements of the Project.

The Applicant had two rebuttal expert witnesses testify in support of the Application. Dr. Jeffrey Keller testified as an expert in memory care facilities, and Thomas Gale testified as an expert in financing memory care and senior living facilities.

ANC Report. At a regularly-scheduled and duly-noticed public meeting held on September 17, 2018, with a quorum present, the ANC voted to adopt a resolution opposing the Application, including the requests for relief under Subtitle U § 203.1(f) and Subtitle C § 701.5. (Ex. 146).

In its resolution, the ANC raised general concerns regarding noise, light pollution, traffic congestion in the Alley, increased demand for on-street parking, potential reduction in on-street parking to facilitate service and delivery traffic, and storm water. (Ex. 146). The ANC specifically

noted that the Applicant's proposed loading area was "unbuffered" and the Applicant had not explained how the loading area would be "managed and how it would operate to avoid conflicts in the 15-foot Alley" to the rear of the Property. (Ex. 146). The ANC also found that residents living close to the Property would be harmed due to "light emanating potentially 24-hours" from the Project as well as "sirens and flashing lights from ambulances parking in the loading area or Alley." (Ex. 146). The ANC stated that the Applicant had not presented a landscape plan to demonstrate that the Project would be buffered from neighboring uses. (Ex. 146).

Additionally, the ANC found that the Applicant had not met its burden as to special exception condition four under Subtitle U § 203.1(f), which requires the Applicant to show that there will be sufficient off-street parking to meet the needs of employees, residents and visitors of the Project. (Ex. 146). In coming to this conclusion, the ANC noted that the Applicant had not provided information on the amount of visitors or a reliable number of staff for the proposed facility. (Ex. 146). The ANC also questioned whether there were enough unrestricted on-street parking spaces for staff and whether staff could utilize public transportation, including metrobus, to commute to the Project. (Ex. 146).

OP Report. By memorandum dated September 14, 2018, the OP recommended approval of the zoning relief requested in the Application. (Ex 50). OP conditioned its approval on any Board Order clearly stating that "both the special exception for use and for the parking are for this specific use; any change in use, including to a different form of Continuing Care Retirement Community, should require a new application to the BZA for re-evaluation of it against the relevant regulations." (Ex. 50).

OP submitted a supplemental memorandum dated December 14, 2018 (Ex. 486) in review of the Applicant's revised plans with an underground parking garage. OP continued to recommend approval of the Application with the revised plans. (Ex. 486). OP's supplemental memorandum also notes that DDOT staff "have advised OP that they have no concerns related to the addition of the underground parking spaces for the facility, or the alterations to the loading." (Ex. 486). At the public hearings on the Application, OP also recommended its approval of the requested relief.

DDOT Report. DDOT submitted three reports. In DDOT's first report, dated September 14, 2018, DDOT stated that it had no objection to the relief requested in the Application. (Ex. 45). DDOT found persuasive the Applicant's Transportation Assessment Memorandum prepared by the Applicant's traffic expert, Gorove/Slade. (Ex. 45). DDOT conditioned its recommendation on the Applicant adopting two transportation demand management conditions. (Ex. 45).

DDOT's second report, dated November 26, 2018, was filed in response to Board comments during the November 14, 2018 hearing. (Ex. 481). DDOT's second report reiterates its support for the Application. (Ex. 481). Specifically, DDOT found that "the site design, amount of traffic generated, quantity of on-site parking proposed, usage of on-street parking, usage of the adjacent public Alley, and TDM Plan" are all "appropriate" for the Project. (Ex. 481). In the second report, DDOT also references its response to a letter written to DDOT by Ward 3 Councilmember Mary Cheh. (Ex. 481). DDOT's letter to Councilmember Cheh notes that nine parking spaces at the Project are "adequate" given the on-street parking availability, private parking garages nearby, staggered employee work schedules and the Applicant's commitment to encouraging non-

automotive travel for employees. (Ex. 476).² DDOT's letter to Councilmember Cheh also affirms that 15-foot Alley will adequately serve the site's loading and vehicle parking access. (Ex. 476).

DDOT's third report, dated December 18, 2018, was filed in review of the Applicant's revised plans with an underground parking garage. (Ex. 488). MAHCA requested that DDOT file a report in review of the revised plans. (Ex. 485). DDOT reiterated that it had no objection to the relief requested in the Application. (Ex. 488).

Party in Opposition. MAHCA stated that the Project would have a "significant adverse impact on the immediate neighbors of the proposed facility, as well as on the wider community." (Ex. 43A). MAHCA argued that the Project does not meet the special exception standards because the parking provided is not "sufficient" to meet the needs of visitors, staff and residents. (Ex. 43A). MAHCA believes that the Applicant cannot rely on restricted on-street parking to supplement off-street parking provided for the Project. (Ex. 43A). MAHCA states that the use of the Alley for parking and loading access would be "undue overuse of the Alley" and would interfere with the neighbors use of the Alley. (Ex. 43A). MAHCA asserted additional general objections concerning loss of privacy, loss of light and air, noise, safety concerns, and other environmental impacts (Ex. 43A).

MAHCA also argued that the Applicant does not have any experience "building or managing independent living facilities or assisted living facilities." (Ex. 43A). As such, MAHCA concluded that the Project had been poorly designed and was not financially viable. (Ex. 43A).

In support of its positions, MAHCA submitted expert statements and testimony from Joe Mehra regarding traffic, parking and loading. (Ex. 472). MAHCA also submitted testimony from Dr. Nathan Billig, an expert in geriatric psychiatry, regarding design and staffing of a memory care facility. (Ex. 473).³ Finally, MAHCA submitted testimony from John Cunningham, an expert in financing memory care facilities, regarding the financial viability of the Project. (Ex. 470).⁴

Persons in Support. The Board received four letters of support for the Application. (Ex. 48, 162, 165, 462). Guest Services Senior Living, the proposed operator of the Project, submitted a letter regarding its support for the Project. (Ex. 48). Dr. Jeffrey Keller submitted a letter of support regarding the growing need for memory care facilities across the country, and the viability of a small community similar to the Project. (Ex. 162). Other letters noted general support for the Project and that the design would have a limited impact on the neighborhood. (Ex. 165, 462).

² DDOT's letter to Councilmember Cheh was written before the Applicant increased the number of off-street parking spaces at the Project by adding the underground garage.

³ The Applicant objected to MAHCA's request to qualify Dr. Billig as an expert in "the operational characteristics of the memory care facility from a patient care perspective." (11/14/18 Hearing Tr. 113-116). The Applicant and MAHCA agreed to qualify Dr. Billig as an expert in geriatric psychiatry, which the Board accepted. (11/14/18 Hearing Tr. 116).

⁴ The Applicant objected to MAHCA's request to qualify Mr. Cunningham as an expert witness based on relevancy of the proposed testimony and Mr. Cunningham's qualifications. (11/14/18 Hearing Tr. 134-137). The Board accepted Mr. Cunningham as an expert witness in financing memory care facilities. (11/14/18 Hearing Tr. 145). However, the Board determined that Mr. Cunningham's testimony was not relevant to the special exception standard or the Application before the Board.

Persons in Opposition. The Board received numerous letters and testimony from persons in opposition to the Application. A majority of the letters are identical “form” letters with the same general objections to the Project. Persons in opposition objected to the proposed off-street parking plan, the negative impacts the Project would have on noise, light, the environment, and privacy. The letters also noted that the Applicant and GSSL did not have experience running a memory care program. Other persons in opposition noted increases to traffic from the proposed Project and negative effects to the on-street parking supply.

At the hearing on November 14, 2018, eight persons in opposition, including Robert McDiarmuid, Amiee Aloï, William Brownfield, Susan Tannenbaum, Daniel Crabtree, Mandy Warfield, Lisa Hayes and Tom Henneberg, testified regarding potential objectionable conditions and adverse impacts. The persons in opposition expressed their concern that the proposed facility would produce the following objectionable 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 that could be funneled into neighbor’s backyards and remain trapped in the 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 on neighboring homes; and increased trash and rodents from the operation of what could amount to a restaurant, clinic, and hotel in one. (11/14/18 Hearing Tr. 158-159, 163, 191; Exhibits 46, 471 and 484).

Continued Hearing Procedure and Motions. At the close of the Board’s hearing on November 14, 2018, the Board scheduled a continued hearing on the Application for December 19, 2018. The Board explicitly stated that the December 19th hearing would be “a continued hearing date,” which was acknowledged by the parties. (11/14/18 Hearing Tr. 294-295). Under Subtitle Y § 103.9, the Board schedules hearings “for the purpose of receiving evidence and testimony on specific applications.” Further, under Subtitle Y § 409.3, “every party shall have the right to present in person or by counsel their case by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.”

At the beginning of the December 19, 2018 hearing, the Board stated that MAHCA has its “opportunity to provide their comments, as well, and a presentation” in opposition to the revised plans during the limited continued hearing. (11/14/18 Hearing Tr. 9). MAHCA chose not to present any witness or make a presentation during the December 19, 2018 hearing. (12/19/18 Hearing Tr. 67-68). The Zoning Regulations are clear that MAHCA was permitted to make a presentation on December 19, 2018 but chose not to do so.

MAHCA requested that the parties be able to submit proposed findings of fact and conclusions of law (12/19/18 Hearing Tr. 14), and it is within the Board’s discretion to receive proposed findings of fact and conclusions of law from parties to an application. *See* Subtitle Y § 601.2. Over the objection of the Applicant, which called it “unnecessary,” the Board requested that the parties submit proposed findings of fact and conclusions of law.

In lieu of a presentation, counsel for MAHCA stated that it would make a closing statement. (12/19/18 Hearing Tr. 16-17, 68). Under Subtitle Y § 409.1, the Board is not required to allow a party-in-opposition to make a closing statement. However, the Board authorized MAHCA to make

a closing statement and ensured that the Board would spend “sufficient time to be able to go through the material that has been submitted.” (12/19/18 Hearing Tr. 16). The Board provided MAHCA 15 minutes for its closing statement, which is the same length of time provided for the Applicant to make its presentation. (12/19/18 Hearing Tr. 19-20, 72-73).

During the December 19, 2018 hearing, MAHCA made two oral Motions to Strike. The first Motion to Strike concerned the third report from DDOT. (12/19/18 Hearing Tr. 20). MAHCA argued that “DDOT is not present for the hearing,” and that MAHCA did not have sufficient time to review DDOT’s third report prior to the hearing. (12/19/18 Hearing Tr. 20). As permitted under *Acott Ventures, LLC v. District of Columbia Alcoholic Bev. Control Bd.*, 135 A.3d 80, 21, 22 (D.C. 2016), the Board denied the Motion, noting that MAHCA had an opportunity to cross-examine the Applicant regarding the revised plans with the parking garage. (12/19/18 Hearing Tr. 23-24). The Board further noted that OP’s second report had referenced any concerns from DDOT regarding the revised plans. (12/19/18 Hearing Tr. 20-21). MAHCA’s traffic expert, Mr. Mehra, was not present at the December 19th hearing. (12/19/18 Hearing Tr. 23-24).

MAHCA also made an oral Motion to Strike “the testimony” regarding the Applicant’s response to MAHCA’s sun study. (12/19/18 Hearing Tr. 39). MAHCA argued that the testimony was not filed in the record and was “untimely and prejudicial.” (12/19/18 Hearing Tr. 39). The Board generally objected to the Motion to Strike and allowed the evidence. (12/19/18 Hearing Tr. 41-42). The Board admitted the testimony as a decision was made to continue the hearing for the purpose of accepting evidence and testimony regarding the sun studies. (12/19/18 Hearing Tr. 41-42). MAHCA had the opportunity to cross-examine the Applicant or present its own witnesses during the continued hearing, but MAHCA chose not to do so.

FINDINGS OF FACT

THE SUBJECT PROPERTY

1. The subject Property comprises two adjacent lots (Lots 812 and 44 in Square 1935) with frontage on Wisconsin Avenue NW.
2. The Property is located in the R-1-B zone and has a total land area of 19,113 square feet.
3. Lot 812 is vacant and unimproved. Lot 44 is improved with a single-family home that has an accessory garage to the rear.
4. The Property abuts an alley to the east that is 15-feet in width (the “Alley”). (Ex. 13).⁵ The Alley can be accessed from Davis Street NW or Edmunds Street NW.
5. There are existing accessory buildings and mature trees abutting the Alley. (12/19/18 Hearing Tr. 31).
6. The Property has no curb cut and is only accessible from the Alley.

⁵ MAHCA disputed the width of the Alley. However, the Baist Map filed with the Application reflects that the Alley is 15-feet in width.

7. The Property's topography slopes downward considerably from north to south.
8. There is a 15-foot-wide building restriction line along the Property's western and northern lot lines. (Ex. 3).
9. The Property is located in the Observatory Circle neighborhood of upper Wisconsin Avenue NW. The Russian Embassy complex is directly across Wisconsin Avenue from the Property. To the south of the Property, the Wisconsin Avenue corridor is comprised of commercial establishments, including a hotel, bars and restaurants. To the north of the Property on Wisconsin Avenue are several high-density apartment buildings. Farther north is the St. Albans School and Church as well as the National Cathedral.
10. To the east and northeast of the Property between Wisconsin Avenue and Massachusetts Avenue are primarily low-density neighborhoods with detached, single-family homes.
11. The Property is not located in an historic district.
12. The Property is well-served by public transportation. There is a bus stop directly in front of the Property at the corner of Wisconsin Avenue and Edmunds Street NW, which services bus lines 30N, 30S, 31, and 33. Additional bus lines can be accessed within .4 miles of the Property, including D1, D2, N2, N3, N4 and N6. There are two Capital Bikeshare stations located within 0.5 miles of the Property. There is ample access to car-sharing services near the Property as well.

THE APPLICANT'S PROPOSAL

13. The Applicant proposes to subdivide Lots 44 and 812 and raze the existing single-family home and accessory garage in order to construct the Project, a 34-room memory care facility at the Property.
14. Memory care is a residential use pursuant to Subtitle B of the Zoning Regulations.
15. The Project will be three stories plus a cellar level and mechanical penthouse. (Ex. 483A).
16. The Applicant revised the architectural plans (the "Revised Plans") for the Project to incorporate a below-grade garage with 19 parking spaces, which exceeds the required 17 spaces under the Zoning Regulations. (Ex. 483A). The garage level is accessed from the Alley to the rear of the Property. (Ex. 483A). The garage level will also have administrative offices, laundry facilities, mechanical equipment and a bicycle storage room. (Ex. 483A).
17. The main entrance to the Project is from Wisconsin Avenue NW. (Ex. 483A). The ground level will have eight dwelling units as well as a reception area and a recreational/library space. (Ex. 483A).
18. The second and third levels have the same floor layout and will feature 13 dwelling units, including a double occupancy unit on each floor. (Ex. 483A). Each floor will also have common space and a staff nook. (Ex. 483A).

19. The cellar level features common space, including a commercial kitchen, dining facilities, a fitness center, and a trash room. (Ex. 483A). The cellar level offers direct access to a garden area to the rear of the Project. The garden area will be surrounded by a fence that is approximately 6-6.5 feet in height. (Ex. 483A; 12/19/18 Hearing Tr. 50). The Project will also feature a planted buffer between the garden area and the Alley. (Ex. 483A).
20. Although a loading berth is not required by the Zoning Regulations, the Applicant proposes a 50' x 10' loading area perpendicular to the Alley at the northeast corner of the Property. (Ex. 483A). Directly adjacent to the loading area is a service entryway for deliveries and trash removal. (Ex. 483A).
21. The Project meets all the physical development standards applicable to a building in the R-1-B zone. (11/14/18 Hearing Tr. 221-222).
22. The Project will have a 25-foot front setback from Wisconsin Avenue NW and a 27'10" rear yard. The southern side yard will be 10'8" and the northern side yard will be 15-feet in width.

THE BZA APPLICATION AND REQUESTED RELIEF

23. On March 26, 2018, the Applicant submitted the self-certified Application seeking special exception relief for a Continuing Care Retirement Community use (Subtitle U § 203.1(f)) and from the requirements for vehicular parking (Subtitle C § 701.5).
24. At the request of Commissioner Miller, the Applicant submitted the Revised Plans with a below-grade parking garage featuring 19 parking spaces. As a result of the Revised Plans, on November 26, 2018, the Applicant withdrew its request for relief from Subtitle C § 701.5. (Ex. 483B).

CONTINUING CARE RETIREMENT COMMUNITY USE

25. The country's population is aging, and it is expected that there will be an increase of 10 million people with Alzheimer's Disease over the next 22 years. (11/14/18 Hearing Tr. 256; Ex. 162). The District's Comprehensive Plan reflects this need to serve senior citizens by providing more assisted living housing. (11/14/18 Hearing Tr. 73; Ex. 41B)
26. Memory care is a subset of assisted living that provides specialized programming for seniors with forms of dementia, including Alzheimer's Disease. (Ex. 41). Memory care programs offer broader assistance with daily living activities, including dressing, bathing and grooming. (11/14/18 Hearing Tr. 54).
27. In addition to assistance with daily living activities, the memory care program will offer medical and cognitive therapy activities, such as music therapy, sensory stimulation, virtual outings, exercise classes, and aroma therapy. (11/14/18 Hearing Tr. 54-55; Ex. 41).
28. There will be planned off-site activities approximately 2-3 times a week. (Ex. 41). Residents would be transported to off-site activities by private van. (Ex. 41).

29. There will be in-house staff that does housekeeping and laundry. (Ex. 41). Laundry facilities are located on-site.
30. GSSL will be the provider for the proposed Project. (Ex. 41). As the provider, GSSL will be in charge of operating the memory care program, including hiring staff.
31. The President of GSSL, John Gonzales, has worked in the senior services industry for over 30 years. (Ex. 41, 41C). Mr. Gonzales has experience operating dozens of memory care facilities. (11/14/18 Hearing Tr. 227).
32. GSSL will obtain a license from the D.C. Department of Health in order to operate the memory care facility. (11/14/18 Hearing Tr. 240).
33. The Project will be staffed in accordance with District law. (Ex. 41). It is expected that there will be a maximum of 17 staff on-site at a given time. (11/14/18 Hearing Tr. 272). Staff will be comprised of direct care staff, including nurses, certified nursing assistants and certified medical assistants, as well as administrative staff. (Ex. 41). Staffing schedules will be staggered throughout the day. (Ex. 41; 11/14/18 Hearing Tr. 273).

PARKING, LOADING, AND TRAFFIC

34. The Project will include 19 vehicular parking spaces in the underground garage level. (Ex. 483A). Pursuant to Subtitle C § 701.5, the Project is required to have 1 parking space per 2 dwelling units, which would be a total of 17 vehicular parking spaces.
35. Residents of the memory care facility will not have personal vehicles. (Ex. 107; 11/14/18 Hearing Tr. 66).
36. The Applicant's traffic expert, Mr. Andres, testified that, based on industry standard, the Project will generate a parking need of seven spaces. (Ex. 107; 11/14/18 Hearing Tr. 66). This expected parking generation is from the Institute of Transportation Engineers' manual. (11/14/18 Hearing Tr. 85).
37. Gorove/Slade submitted two reports detailing the availability of on-street parking in the nearby area. (Ex. 39, 399A). The parking studies were conducted on four different days of the week. (Ex. 39, 399A). The parking studies determined that there are over 100 on-street parking spaces available during the study period. (Ex. 39, 399A; 11/14/18 Hearing Tr. 67-68). As such, Gorove/Slade concluded that the "observed supply of on-street parking options will adequately serve the Project." (Ex. 39, 399A).
38. Approximately 45% of staff will use non-auto transit to commute to the Project based on industry standard and census tract data. (Ex. 107).
39. The staggering of staff schedules will limit the occasions where multiple staff are exiting or entering the Project at the same time. (11/14/18 Hearing Tr. 85-86).
40. Mr. Gonzales testified that, based on his experience in the field, the number of visitors on a given day is equivalent to 10 percent or less of the total number of units. (11/14/18 Hearing Tr. 245). It is expected that the Project would have approximately 2-4 visitors per day. (11/14/18 Hearing Tr. 225, 245).

41. There are three private parking garages within one-half-mile of the Property, as well as a bus stop in front of the Property. (Ex. 107).
42. The Applicant proposed a Transportation Demand Management Plan to further limit any impact of the Project on parking and traffic in the surrounding area.
43. The Project will incorporate a loading area at the northeast corner of the site. (Ex. 483A). Gorove/Slade produced “Autoturn” diagrams establishing that a 30-foot truck can access the loading area. (Ex. 483C). A 30-foot truck can enter the Alley via Davis Street NW and exit the Alley to Edmunds Street NW. (Ex. 483C). Gorove/Slade’s “Autoturn” diagrams also establish that vehicles can appropriately enter and exit the parking garage level. (Ex. 483C).
44. DDOT required the Applicant to provide loading access, if any, via the Alley. (11/14/18 Hearing Tr. 233, 264). DDOT’s Design and Engineering Manual dictates that if a property abuts an alley, loading access should be provided through that alley. (11/14/18 Hearing Tr. 233).
45. There will be two food deliveries per week at the memory care facility. (11/14/18 Hearing Tr. 55, 234; Ex. 41)
46. For its garbage removal, the Applicant intends to utilize the existing trash service on the Alley. (11/14/18 Tr. 234). Similarly, any mail delivery would be through the same mailman that services the entire block. (11/14/18 Tr. 235).
47. The Alley is adequate to provide safe ingress and egress for vehicles to the Property.(Ex. 488, 11/14/18 Hearing Tr. 233)
48. The Applicant proposed a Loading Management Plan to minimize impacts on neighboring properties from loading activities. (Ex. 107).
49. Wisconsin Avenue is a principal arterial street that is the most intensive, non-freeway designation. (11/14/18 Hearing Tr. 70).
50. DDOT concluded that the Project will “lead to a minor increase in vehicle, transit, pedestrian and bicycle trips” to the Property. (Ex. 45). DDOT concluded that the traffic generated by the Project is appropriate for the site. (Ex. 481).

CONCLUSIONS OF LAW AND OPINION

The Applicant requests special exception relief pursuant to Subtitle U § 203.1(f) for a Continuing Care Retirement Community use in the R-1-B zone. The Board is authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (2012 Repl.) to grant special exceptions, as provided in the Zoning Regulations, where, in the judgment of the Board, the special exception will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Map, subject to specific conditions. *See* 11 DCMR Subtitle X § 901.2.

Relief granted through special exception is presumed appropriate, reasonable, and compatible with other uses in the same zone. The Board’s discretion “is limited to a determination of whether the

exception sought meets the requirements of the regulations.” See *First Baptist Church of Washington v. D.C. Bd. of Zoning Adjustment*, 432 A.2d 695, 701 (D.C. 1981) (quoting *Stewart v. D.C. Bd. of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973)). Once the applicant has met its burden, the Board ordinarily must grant the application. See *id.*

Continuing Care Retirement Community Use

A Continuing Care Retirement Community use is permitted in the R-1-B zone if approved by the Board as a special exception under Subtitle X, Chapter 9 provided the Applicant meets the specific conditions set forth under Subtitle U § 203.1(f). Pursuant to Subtitle U § 203.1(f), the Applicant must prove that the use includes 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 (Subtitle U § 203.1(f)(1)); if the use does not include assisted living or skilled nursing facilities, the number of residents shall not exceed eight (8) (Subtitle U § 203.1(f)(2)); the use may include ancillary uses for the further enjoyment, service, or care of the residents (Subtitle U § 203.1(f)(3)); the use and related facilities shall provide sufficient off-street parking spaces for employees, residents, and visitors (Subtitle U § 203.1(f)(4)); 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 (Subtitle U § 203.1(f)(5)); and “[t]he 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.” (Subtitle U § 203.1(f)). As outlined below, the Board finds that the Applicant has met these special conditions and is therefore entitled to relief for the Continuing Care Retirement Community use in the R-1-B zone.

The use includes 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 (Subtitle U § 203.1(f)(1))

The Zoning Regulations define a “Continuing Care Retirement Community” (“CCRC”) as:

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.

MAHCA asserts that the record contained conflicting information from the Applicant as to whether or not the Project would qualify as a CCRC facility because of statements made by the Applicant, Applicant’s counsel, and expert witnesses regarding the level of medical and health care that would be provided at the Project. MAHCA argues that if the Project will not be providing health care, it will not be a CCRC by definition.

The Board is not convinced by MAHCA’s argument as the specific level of health care to be provided is not relevant to the finding of whether the Project is a CCRC as defined by the Zoning

Regulations. The record shows the Project will provide health care in the form of “assisted living and healthcare services to seniors with various forms of dementia, including Alzheimer’s disease.” (11/14/2018 Tr., pp.54-55). The Board is not persuaded by MAHCA’s argument that Ms. Moldenhauer’s statement “there are no medical directors in our facility” (11/14/2018 Tr. 115) and Mr. Keller’s statement that there “will not be medical care” conflict with the Project’s mission to provide assisted living, as the Board does not find those statements, taken in the context of the November 14, 2018 hearing and the evidence in the record, as indicative that the Project will not be offering “skilled nurses” and health care.

The Board finds that the Applicant has met the requirements of Subtitle U § 203.1(f)(1) because the Project will include assisted living facilities. The Applicant proposes a memory care program, which is a subset of assisted living. The Board credits the Applicant’s testimony concerning the nature of the Project’s programming, which includes healthcare in the form of broader assistance with daily living activities and cognitive therapy activities in comparison to a standard assisted living facility.

If the use does not include assisted living or skilled nursing facilities, the number of residents shall not exceed eight (8) (Subtitle U § 203.1(f)(2))

The Board also finds that the Project will have assisted living units and therefore the Project is not subject to the capacity restriction of Subtitle U § 203.1(f)(2).

The use may include ancillary uses for the further enjoyment, service, or care of the residents (Subtitle U § 203.1(f)(3))

Pursuant to Subtitle U § 203.1(f)(3), the Project will incorporate ancillary amenities for the care of the residents. The Project will include recreational space, dining facilities, a fitness center, and a barber/beauty salon.

The use and related facilities shall provide sufficient off-street parking spaces for employees, residents, and visitors (Subtitle U § 203.1(f)(4))

As to Subtitle U § 203.1(f)(4), the Board finds that the Applicant has met this requirement because the Project will provide sufficient off-street parking spaces for employees, residents, and visitors. The Board’s conclusion is based on the Applicant’s provision of parking spaces in excess of the minimum requirement under the Zoning Regulations as well as the evidence and testimony regarding the expected parking demand for the Project and available transportation alternatives.

The Project will have 19 parking spaces in the underground garage, which exceeds the minimum required 17 parking spaces under the Zoning Regulations. The parking schedule set forth in Subtitle C § 701.5 is instructive of the amount of parking spaces that is “sufficient” because the schedule is designed to guide the appropriate amount of parking needed for a particular use. The Board has previously found that the minimum zoning requirement for parking is a favor in determining a “sufficient” number of spaces for a particular use. *See* BZA Case No. 14292, 17726, 18392. The proposed use for the Project is a “residential” use, as that term is defined in Subtitle B § 200.2(bb), and, therefore, the Project is subject to the parking requirements for a residential

use. Accordingly, the Board concurs with OP's conclusion that the minimum parking requirement is an appropriate factor in determining the "sufficient" amount of off-street parking. (Ex. 486).

MAHCA argues that the Applicant has not provided for the record any analysis as to why 19 parking spaces would be sufficient for the Project's employees, residents and visitors. Applicant stated that there would be 18 employees at the facility during the day (11/14/2019 Hearing Tr. 85; Ex. 41 at 4), but MAHCA asserts the Applicant has not provided any estimate about the number of service providers who will come to the facility regularly (e.g. physical therapists, physicians, beauticians, activity facilitators, etc.) or any substantial estimates about how many visitors there would be at the Project 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. (Ex. 473 at 3). However, Mr. Gonzales stated that it would be unusual for there to be visitors equal to more than 10% of residents at any day (11/14/2018 Hearing Tr. 245).

The Board acknowledges the difference in opinion between MAHCA's expert and Mr. Gonzales, but does not find MAHCA's argument more persuasive than the evidence in the record supplied by the Applicant and outlined below regarding the sufficiency of 19 spaces.

MAHCA also asserts that the Project should not be subject to the "residential" parking standard, because the requirement to provide sufficient parking was added to the special exception for CCRCs in 2017. In support of its argument, MAHCA notes that only five of the 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). Further, MAHCA asserts that sufficient means "enough to meet the needs of a situation or a proposed end" according to the Merriam-Webster dictionary. In this case, MAHCA contends that enough off-street parking for employees (at least 18 plus service providers, vendors, etc.), residents, and visitors (all visitors for 36 patient-residents plus personal aides) would be more than 19 spaces, even if 10% were not to drive to the Project (Exhibit 45, DDOT report).

The Board finds that MAHCA has not provided legal basis for its assertion that the Project should be not subject to a "residential" parking standard. (12/19/18 Hearing Tr. 76; Ex. 43A). The Board rejects MAHCA's argument because it would require the Board to expressly ignore the Property's use classification and the applicability of the parking requirements in Subtitle C § 701.5.

Further, the minimum zoning requirement for parking is not the sole factor relied upon by the Board in finding the Applicant has met the condition of Subtitle U § 203.1(f)(4). There is ample evidence and testimony in the record regarding the functional parking needs for the Project as well as other mitigating factors. This evidence establishes that 19 spaces is sufficient parking for the Project. In this regard, the Board credits the expert testimony and studies from the Applicant's traffic expert, Gorove/Slade. On behalf of Gorove/Slade, Mr. Andres testified as to the expected parking demand of seven spaces for the Project, which is based on industry standards reflected in the Institute of Transportation Engineers' ("ITE") manual. The ITE manual takes into account the Property's urban location in determining the practical parking demand for the Project. (12/19/19 Hearing Tr. 36; Ex. 107).

The Board further credits the fact that residents will not have personal vehicles as a factor reducing the Project's parking needs. As a result, parking will be limited to staff and visitors. The Board heard extensive testimony as to the expected usage of parking by staff and visitors. In particular, the Board credits the expert testimony of Mr. Gonzales, based on his history operating memory care facilities, that approximately 2-4 visitors are expected per day, although not all visitors would be at the facility at the same time. (11/14/18 Hearing Tr. 225, 245). As to staff, it is expected that there will be a maximum of 17-18 staff on-site at a given; however, staff schedules will be staggered to prevent an excess of people entering or exiting the Project at a given time. (11/14/18 Hearing Tr. 55, 85-86, 272). The residents' need for personal aids will be reduced because the Project will employ a "universal worker model" where staff members are expected to provide extensive services that may not be available in similar facilities. (11/14/18 Hearing Tr. 254).

The Board finds that there are additional mitigating factors as to "sufficient" parking for the Project. Mr. Andres testified that approximately 45% of staff will take alternative forms of transportation to the memory care facility, whether it is via public transportation, bicycle or walking. (11/14/18 Hearing Tr. 224-225; Ex. 107). This estimated mode share is based on census tract data and takes into account the Property's location. (11/14/18 Hearing Tr. 263). Gorove/Slade found that the Project offers convenient access to multiple, alternative forms of transportation, including several bus routes adjacent to the Property as well as bike-share and car-share facilities. (Ex. 39). The Board notes that the Applicant's Transportation Demand Management plan will help to incentivize staff to use alternative forms of transportation, including through a public transportation stipend. There are also three nearby private parking garages that can supplement parking for staff and visitors. (Ex. 107).

The Board further credits Gorove/Slade's parking studies, which found an excess of on-street parking available in the nearby area. (Ex. 39, 107). Pursuant to the parking studies, there are over 100 available on-street parking spaces that will supplement the off-street parking provided at the Project. The Board has previously relied on the availability of on-street parking as a factor in finding that off-street parking is sufficient. *See* BZA Case No. 14251, 16344, 18392, 1888, 18785, 19230. DDOT concurred that on-street parking could be considered as a supplement to off-street parking. (Ex. 45).

The Board rejects MAHCA's argument that the Applicant has failed to meet its burden in proving the Project will have sufficient off-street parking. MAHCA does not offer a particular number that would allegedly be "sufficient" for the Project, nor does MAHCA provide any other basis for its interpretation of the condition in Subtitle U § 203.1(f)(4). The Board further notes that MAHCA's statements regarding parking demand are generally anecdotal in nature. While MAHCA did produce expert testimony from Mr. Mehra, the Board does not find Mr. Mehra's testimony to be persuasive. The Board finds that Mr. Mehra failed to sufficiently rebut the conclusions of Gorove/Slade, including as to the parking study methodology.

As such, the Board credits the expert testimony of Gorove/Slade over Mr. Mehra in finding that the Project will be provide sufficient off-street parking in satisfaction of Subtitle U § 203.1(f)(4), a conclusion that was supported by DDOT.

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 (Subtitle U § 203.1(f)(5)).

As to Subtitle U § 203.1(f)(5), the Board finds that the Applicant has met this condition because the proposed use, including outdoor spaces, is not likely to become objectionable to neighboring properties due to noise, traffic, or other objectionable conditions. The Board credits the testimony and evidence from Ms. Dickey, the Project architect, and Mr. Gonzales of GSSL that the Project has been designed and will be programmed to minimize impacts on neighboring properties.

The Project is designed to be self-contained with a majority of programming occurring within the proposed building. The Project will offer residents access to a fitness center, a beauty salon and recreational space. All meals will be prepared on-site in the commercial kitchen, and the Project will have in-house laundry facilities. The Project has also been designed to incorporate extensive safety measures for residents, including a front desk that will be staffed during much of the day. (11/14/18 Hearing Tr. 62, 230-231, 258-259).

The Property is a corner lot that only directly abuts one residential property. Further, the Board notes that the proposed building will have side yards and a rear yard that exceed the minimum requirements in the R-1-B zone, which will further minimize any effects on neighboring properties. (Ex. 483A). The Project's outdoor space is substantially buffered from neighboring properties. While residents will be able to utilize an outdoor garden area, the space will be circumscribed by a 6 to 6.5-foot tall fence. (12/19/18 Hearing Tr. 25). There will also be a 14-foot-wide planted buffer between the garden area and the Alley. (12/19/18 Hearing Tr. 27). The Alley itself provides an additional buffer for neighboring properties to the east.

MAHCA asserts that 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 built on lot 44 could be and therefore, the neighbors living on lot 43 would lose privacy and light. (Ex. 474).

In regard to the neighboring property directly to the south of the Project, the Board finds that the neighboring property will be adequately buffered from the Project as a result of the 10'8" southern side yard as well as the proposed landscaping elements for that side yard. (11/14/18 Hearing Tr. 64; Ex. 483A, 483G). The Board also notes that the Revised Plans further limit any impact on the neighboring property to the south. The Applicant's architect testified that "in response to some of the comments that were made last time, that the generator and the laundry, which were areas of concern, would be relocated to a different area where they would be less objectionable." (12/19/18 hearing Tr. 42; Ex. 483A). As a result, the laundry facilities will vent in the direction of Edmunds Street NW as opposed to the neighboring property to the south.

Noise and Traffic or Other Objectionable Conditions

While the Board acknowledges MAHCA's concerns, as well as the letters and testimony from potential neighbors⁶ of the Project, the Board finds the evidence in the record is persuasive to show the Project will be adequately buffered from the neighboring properties and will not bring objectionable noise and traffic.

MAHCA asserts that other neighbors would experience negative impacts due to noise and traffic at the Project. In particular, members of MAHCA and other community members stated that there would be too much traffic on the Alley, including to the Applicant's planned loading area. MAHCA asserts 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). Further, MAHCA argues that 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. MAHCA also stated concerns regarding noise from emergency response vehicles.

The Board finds that objections concerning noise from the Project are unfounded. The Project is substantially buffered from neighboring properties through both natural buffers and the Project's design elements. The Board credits the Applicant for moving the proposed loading area, the laundry facilities, and the generator away from the neighboring property to the south to the northern end of the site in the Revised Plans. (12/19/18 Hearing Tr. 25). As noted above, the Project architect testified that the modifications to the laundry facilities and generator were made with neighbors' concerns in mind. As such, the Board finds that the Revised Plans will reduce noise impacts from the Project.

In regard to ambulances, Mr. Gonzales testified that "there's always the option for private ambulance services that mitigate the loud sirens and noises." (11/14/18 Hearing Tr. 257). Mr. Gonzales also noted that ambulance trips would be reduced because "there's a lot technology that will be bringing to bear in this community that will allow us to determine whether or not an ER admission is appropriate or not." (11/14/18 Hearing Tr. 257). Mr. Andres testified that in certain situations, an ambulance "would stop where they could on Wisconsin Avenue" in order to quickly access the building. (11/14/18 Hearing Tr. 242).

The Board also credits the testimony of Mr. Varga regarding the nature of the surrounding area and existing conditions at the Property. Mr. Varga testified that the Property is located on Wisconsin Avenue, which is a principal arterial street. (11/14/18 Hearing Tr. 70-71). As such, the Board finds that the Project will buffer the residential neighborhood from noise emanating from Wisconsin Avenue NW.

MAHCA presented testimony about concerns related to the increased traffic in the narrow Alley stating that because the Alley would serve both the Project and the neighboring single-family homes, neighbors would be impeded from leaving or returning to their garages if even just one

⁶ Potential neighbors of the proposed facility wrote letters in opposition and testified 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, 13 475, 479, 482).

truck or other vehicle is blocking the Alley (See Exhibits 56, 58, 158 and 482 for photos). MAHCA pointed to the record of this case, which includes photo evidence of the width of the Alley and how close the vehicles which drive along the Alley are to the neighboring single family homes.

As to MAHCA's concerns regarding traffic on the Alley, the Board credits Gorove/Slade's "Autoturn" diagrams in finding that personal vehicles will be able to enter and exit the parking garage through the Alley. (Ex. 483C). The "Autoturn" diagrams establish that a 30-foot truck can access the loading area from Davis Street NW and exit via Edmunds Street NW as well. (Ex. 483C). Likewise, the Board credits Mr. Andres' testimony concerning the Project utilizing garbage and delivery trucks that already service the homes along the Alley, which will not create additional delivery trips. In addition to the Applicant's testimony regarding the expected parking and the loading needs for the Project, the Board relies on DDOT's conclusion that the projected traffic flow from the Project and projected "usage" of the Alley are appropriate. (Ex. 45, 481, 488).

The Board also finds that the proposed loading area will not create objectionable conditions for neighboring properties. The Board notes that a formal loading berth is not required by the Zoning Regulations for the Project. Further, the Applicant has designed the Project to incorporate a loading area specifically to minimize impacts on neighboring properties. A service entrance is directly adjacent to the loading area, which can be accessed by a 30-foot truck. To that end, Gorove/Slade produced turning diagrams that trucks could sufficiently enter and exit the loading area. (Ex. 483C).

While residents raised issues concerning the planned loading area off the Alley, the Board notes that the Zoning Regulations require that a loading berth to be accessed from a public alley where an alley of at least 15-feet in width exists. *See* Subtitle C § 904.5. DDOT's Design and Engineering manual dictates a similar conclusion. Further, Mr. Andres testified that DDOT directed the Applicant to utilize the Alley for any parking or loading access. (11/14/18 Hearing Tr. 233). In addition, the Applicant has incorporated a Loading Management Plan to further limit any potential impacts to neighboring properties.

MAHCA points the Board to BZA Case No. 18190 for guidance regarding traffic, safety and objectionable conditions. In BZA Case No. 18190, the Board denied an application for a childcare facility in the R-1-B zone, which was accessed by a narrow street, due to traffic and safety reasons, as well as objectionable conditions. In BZA Case No. 18190, the Board found that "with a proposed enrollment of 45 children, the child development center would likely generate a high number of vehicle trips to and from the child development center, particularly during the morning and evening peak periods." (BZA Order No. 18190 at 5). The Board does not find BZA Case No. 18190 persuasive as it involves a child development center and this case involves a memory care center. The Board relies on the testimony and information in the record provided by Gorove/Slade regarding the low number of trips likely to be generated by the Project, and thus finds the cases clearly distinguishable as a memory care facility would not generate a high number of trips for pick up and drop off at morning and evening peak periods like a child development center. (11/14/18 Hearing Tr. 225, 246).

In addition to noise and traffic concerns, MAHCA and residents raised other potential objectionable conditions, including loss of light and privacy, potential stormwater issues, excessive lighting at night, and increases in trash and rodents through their in letters and by testimony at the hearing on November 14, 2018. (11/14/19 Hearing Tr. 158-159, 163, 191; Ex.s 146, 471 and 484). The Board does not find these potential objectionable conditions persuasive as the building complies with the zoning standards and the Applicant addressed or mitigated any concerns regarding their use.

Accordingly, for the reasons above, the Board finds that the Project will be adequately buffered from the neighboring properties and will not bring objectionable noise and traffic.

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.” (Subtitle U § 203.1(f))

This condition is not applicable because the Board did not request that the Applicant incorporate any design conditions or other special treatment for the Project.

Based on the foregoing reasons, the Board finds that the Applicant has met each special condition under Subtitle U §203.1(f) in order to have a Continuing Care Retirement Community use in the R-1-B zone.

The Board further finds that the Applicant has met the general special exception conditions pursuant to Subtitle X § 901.2 for the Project’s use.

The requested special exception relief will be in harmony with the general purpose and intent of the Zoning Regulations and Maps

The Board concludes that the proposed Continuing Care Retirement Community use is in harmony with the Zoning Regulations because the Project is a residential use that complies with all the applicable development standards in the R-1-B zone.

The Board acknowledges the concerns of MAHCA regarding the Project’s compatibility and design coherence with the single family homes. (11/14/18 Hearing Tr.). However, the Board credits the testimony of Ms. Dickey that the Project was designed to be appropriate for its use while having a residential feel so that it would be aesthetically similar to nearby single-family homes. (11/14/18 Hearing Tr. 58, 90-91). The compatibility with the surrounding neighborhood is depicted in the perspective renderings filed by the Applicant. (Ex. 483E). Further, Ms. Dickey testified as to the substantial yards provided at the Project as well as the landscaping that will similarly allow the Project to be in harmony with neighboring properties. (11/14/18 Hearing Tr. 64).

The Zoning Regulations state that “[t]he Residential House (R) zones are residential zones, designed to provide for stable, low- to moderate-density residential areas for family life and supporting uses. (Subtitle D § 100.1)

MAHCA argues that the proposed facility will not be in keeping with the residential, single-family homes in the neighborhood in which the two lots are located because the Project will be a commercial, institutional, and secured healthcare facility. MAHCA further asserts that 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 three story building with a cellar and penthouse, which spans two lots, and which will house 36 residents and accommodate on a daily basis employees, contractors, vendors and visitors.

The Board does not find MAHCA's argument persuasive. The use proposed by the applicant is a use permitted by special exception in the R-1-B zone and is therefore one of the "few additional and compatibles uses" permitted by the Zoning Regulations in the R-1-B zone. In addition, while the Board acknowledges MAHCA's concerns regarding the density, mass, and height of the Project, the Board notes that the mass and height of the Project are permitted in the R-1-B zone by the Zoning Regulations and therefore are not inconsistent with the zone plan.

The Board also credits the testimony of the Applicant's expert in land use and planning, Stephen Varga, regarding the Project's location on a principal arterial street, Wisconsin Avenue. (11/14/18 Hearing Tr. 70-71). Mr. Varga provided extensive testimony as to the neighborhood context, including several high-density buildings on Wisconsin Avenue. (11/14/18 Hearing Tr. 71-72). Mr. Varga also testified regarding the Project's consistency with several Comprehensive Plan policies.

For these reasons, the Board rejects MAHCA's argument that the Project cannot be harmonious with the R-1-B zone. The Board notes that it has found several similar facilities, including housing for the mentally ill and independent living/retirement communities, to be harmonious with the "R" zones. *See* BZA Case Nos. 18791, 18898, 18392, and 18400.

The use will not tend to affect adversely the use of neighboring property.

As to the second prong of the special exception standard, the Board finds that the proposed use will not affect adversely the use of neighboring property. The Board draws this conclusion for many of the same reasons outlined above in connection with special condition five under Subtitle U § 203.1(f). In addition to concerns regarding noise and traffic, MAHCA raised issues pertaining to impacts on light and air, privacy, environmental concerns and storm water management.

As to light and air, the Board credits the Applicant's sun study demonstrating the Project will have a minimal impact on light and air. (Ex. 483F). The Board may rely on a sun study as evidence that a project will not impact the light and air available to neighboring properties. *See St. Mary's Episcopal Church v. D.C. Zoning Comm'n*, 174 A.3d 260, 272 (D.C. 2017). The Applicant's sun study reflects that the Project will create a shadow on neighboring properties only during the late-afternoon hours. (Ex. 483F). For a majority of the day, the Project projects a shadow on the Wisconsin Avenue NW right-of-way, which will not affect neighboring properties. Further, the Board finds that there are existing two-story structures and thick vegetation along the Alley that already create shadows for neighboring properties to the east. Accordingly, the Board finds that the Project will have a limited impact on light and air for a relatively short portion of the year.

MAHCA also produced a sun study. (Ex. 484). After review of MAHCA's sun study, the Board does not find MAHCA's sun study to be accurate or persuasive. The Board heard extensive testimony from Ms. Dickey regarding the method for generating the sun studies. The Board credits Ms. Dickey's testimony in finding that MAHCA rendered its sun study without including surrounding buildings or vegetation. (12/19/18 Hearing Tr. 32-35). "As the trier of fact, the Board may credit the evidence upon which it relies to the detriment of conflicting evidence." *See Fleischman v. D.C. Bd. of Zoning Adjustment*, 27 A.3d 554, 562 (2011). As such, the Board relies on the findings of the Applicant's sun study over that of MAHCA's sun study.

The Board finds that issues regarding environmental and storm water management concerns are not germane to the special exception standard. The Project will be subject to other regulatory schemes governing environmental and storm water compliance and finds no adverse effects due to the proposed use.

In regard to adverse effects, the Board finds that the Applicant met its burden of proof through testimony and evidence in the record. *See* Subtitle X § 901.3. Upon meeting its burden of proof, the Applicant shifted the burden to MAHCA to produce rebuttal testimony and evidence establishing that the Project would have adverse effects on neighboring properties. *See St. Mary's Episcopal Church*, 174 A.3d at 271. The Board held a limited-scope continued hearing on December 19, 2018 on the issues of adverse impacts, particularly as related to parking and traffic as well as light and air.⁷ Before and during the limited-scope continued hearing, the Applicant produced additional evidence and testimony that the special exception relief would not have adverse effects on neighboring properties. MAHCA submitted its sun study, but MAHCA did not provide any further rebuttal evidence or testimony in support of its position. Therefore, MAHCA failed to meet its burden on rebuttal and did not shift the burden of proof back to the Applicant to provide additional evidence. Accordingly, the Board was warranted in concluding that the Applicant met its burden of proof as to the special exception standard.

The Board concludes that approval of the requested special exception relief will be in harmony with the general purpose and intent of the Zoning Regulations and Maps and will not tend to affect adversely the use of neighboring property.

Viability of the Project

MAHCA maintains that the Project is not "viable" because the Applicant did not provide evidence of its financial viability and because of the Applicant's alleged lack of experience and preparation in running a memory care center. Further, MAHCA argues that inviability is an undue adverse impact for neighboring properties-in particular where an existing building is being repurposed. MAHCA explained that ANC 3C has repeatedly had to deal with finding new uses for non-conforming buildings, and that should the Project fail, it would be even more burdensome to find a tenant or new owner for the structure. To ensure proper review of MAHCA's arguments, the

⁷ In connection with the proposed parking, the limited-scope hearing also concerned condition four under Subtitle U § 203.1(f) regarding "sufficient" parking. The Applicant presented the Revised Plans and entered expert testimony, through Mr. Andres, regarding sufficiency of the proposed parking. MAHCA did not produce any further evidence regarding the sufficient parking condition during the limited-scope hearing and MAHCA's presentation was limited to legal arguments by counsel.

Board carefully considered the information submitted to the record and the testimony from MAHCA at the hearings regarding their assertions as to the Project's viability.

MAHCA asserts that the neither the Applicant nor GSSL demonstrate the requisite experience to enter the memory care facility market. MHCA notes that the Applicant stated that the facility would be high-end and would exceed industry standard criteria (e.g. staffing ratio), but did not provide information as to how exactly the facility would be staffed, how the Applicant would attract patient-residents, what the cost of the unit would be per month, or how medical care not offered at the facility would be provided. Further, MAHCA argues that the Applicant did not provide the Project's anticipated operating costs or revenue. MAHCA notes that Mr. Gonzales testified that the proposed facility would have an industry leading ratio of one caretaker to every 4.2 patients, but contends that there was nothing on the record to explain how employing this number of staff members was sustainable. (11/14/18 Hearing Tr. 120).

The Board heard expert testimony on behalf of MAHCA from Dr, Nathan Billig, Sunrise Senior Living, and John Cunningham. John Cunningham testified that the Project is designed to fail, explained the criteria for financing memory care facilities and noted that the Applicant had not provided any evidence to the record that it would be able to finance the proposed facility. (11/14/18 Hearing Tr. 129, Ex. 470). Sunrise Senior Living testified as to their opinion that to be financially viable based on staff needs and construction costs, a CCRC facility needs to have a minimum of 86 units and be on a 1.5 acre lot. (11/14/18 Hearing Tr. 337-338). Therefore, MAHCA argues that as the Project will only have 34 units and a parking garage, and based on the information in the record, the Project was not financially viable.

MAHCA maintains that information about the details of the Project's business plan and the Applicant's financial details and business experience are relevant because the Applicant does not have a track record for running memory care facilities. Accordingly, MAHCA asserts the Application should not be approved.

The Board concludes that a particular project's economic "viability" and an applicant's business experience is not germane to the special exception standard. The Board's inquiry is limited to a finding as to "whether the exception sought meets the requirements of the regulations." *See First Baptist Church of Washington v. D.C. Bd. of Zoning Adjustment*, 432 A.2d 695, 701 (D.C. 1981). The general special exception standard nor the special conditions under Subtitle U § 203.1(f) require consideration of "viability" in order for the Board to find that the Application can be approved. Thus, the Board rejects MAHCA's arguments concerning the viability of the Project.

Notwithstanding, and contrary to MAHCA's assertions, the Board finds there is substantial evidence in the record as to GSSL's lengthy experience operating memory care facilities as well as extensive evidence and testimony from expert witnesses, including Dr. Keller and Mr. Gale, regarding the viability of the Project from both a programmatic perspective and a financial perspective. Dr. Keller testified regarding the growing need for memory care facilities as a result of the increasing rate of dementia across the country. (11/14/18 Hearing Tr. 256). As Dr. Keller concluded, the Project "will have a waiting list before it's opened." (11/14/18 Hearing Tr. 253).

In sum, the Board finds that the Applicant has met the general special exception standard under Subtitle X § 901.2 and the special conditions pursuant to Subtitle U § 203.1(f) for a Continuing Care Retirement Community use in the R-1-B zone.

Great Weight

The Board is required to give “great weight” to the recommendations made by OP. D.C. Code § 6-623.04. For the reasons discussed above, the Board concurs with OP’s recommendation that the Application should be approved.

The Board is also required to give “great weight” to the issues and concerns raised by the affected ANC. D.C. Code §§ 1-309.10(d)(3)(A). Great weight means acknowledgement of the issues and concerns of the ANC and an explanation of why the Board did or did not find their views persuasive.⁸

On September 17, 2018, the ANC voted to adopt a resolution opposing the Application, including the request for relief under Subtitle U § 203.1(f).⁹ (Ex. 146). The ANC raised the following issues and concerns in connection with the proposed Continuing Care Retirement Community use:

- General concerns from the community regarding noise, traffic congestion, on-street parking and storm water.
- The proposed loading area was “unbuffered” and the Applicant did not explain how the loading area would be “managed and how it would operate to avoid conflicts in the 15-foot Alley” to the rear of the Property.
- Negative impacts on neighboring properties due to “light emanating potentially 24-hours” from the Project as well as “sirens and flashing lights from ambulances parking in the loading area or Alley.”
- The Applicant did not include a landscape plan to demonstrate that the Project would be buffered from neighboring uses.
- The Applicant has not provided reliable information on the amount of visitors or staff to prove sufficient off-street parking.
- There are not be enough unrestricted on-street parking spaces for staff
- The Applicant has not provided information establishing that staff will utilize public transportation or bicycles to access the Project.

⁸ The D.C. Court of Appeals has interpreted “great weight” regulatory requirement to mean that the BZA must acknowledge the ANC’s concerns and articulate reasons why those concerns and issues were rejected and the relief requested from the zoning regulations was granted. See *Metropole Condo Asso. V. Bd. of Zoning Adjust.* citing *Kopff v. District of Columbia Alcoholic Beverage Control Bd.*, 381 A.2d 1372, 1384 (D.C. 1977) (“We conclude that ‘great weight’ . . . means . . . that an agency must elaborate, with precision, its response to the ANC issues and concerns.”); see also *Levy v. District of Columbia Bd. of Zoning Adjustment*, 570 A.2d 739, 746 (D.C. 1990) (“[T]he [Board] is required . . . to give issues and concerns raised by the ANC ‘great weight’ [through] ‘the written rationale for the government decision taken.’”). However, the Court is clear that the Board is only required to give great weight to those issues and concerns that are “legally relevant” to the relief requested. *Bakers Local 118 v. D.C. Bd. of Zoning Adjustment*, 437 A.2d 176, 179 (D.C. 1981).

⁹ The ANC also opposed the parking relief under Subtitle C § 701.5. However, the Applicant withdrew that request for relief and, therefore, the ANC’s opposition is moot.

The Board has already addressed several of the issues and concerns raised by the ANC, including as to noise, traffic congestion, on-street parking and stormwater.

As to the ANC's concern regarding management of the "unbuffered" loading area, the Board finds that the Applicant's proposal to locate the loading area adjacent to the Alley is both appropriate for the Project and encouraged by both the Zoning Regulations and DDOT. The ANC's views are not persuasive in light of the expert testimony of Gorove/Slade regarding the expected use of the loading area. In particular, the loading area will be used for food deliveries twice per week but will not require additional loading trips beyond the existing garbage and delivery services for homes near the Alley. There is also evidence in the record that the Project can utilize private ambulance services to limit impacts to the Alley. Alternatively, emergency services vehicles may access the Property via Wisconsin Avenue. To further manage the loading area, the Applicant has proposed a Loading Management Plan. As such, the Board finds that the Project will not have an adverse impact on the Alley or neighboring properties along the Alley.

Similarly, the Board does not find the ANC's concerns regarding light emanating from the Project or ambulances in the Alley to be persuasive. The Project is a residential use and will operate similar to other residential uses. It is unlikely that there will be activity late at night given that residents will be senior citizens with forms of dementia. As noted above, ambulance activity can be controlled through the use of a private ambulance service.

The Board also rejects the ANC's concerns regarding the lack of a landscape plan. The Applicant has produced plans and renderings that reflect the expected plantings at the Property. (Ex. 41A, 483E, 483G). The Board also finds that the Project will have an extensive planted buffer along the Alley as well as fencing around the garden area. These design features, in addition to the rear and side yards, will offer a sufficient buffer to neighboring uses.

Finally, the ANC questions the information provided by the Applicant regarding staff and visitor parking needs, the availability of on-street parking, and the expected mode split of staff commuting to the Project. The Board finds that the ANC's concerns are misguided. The Applicant has provided sufficient and substantial information as to these matters through testimony and evidence from expert witnesses, including Mr. Andres and Mr. Gonzales. The Applicant's expert witnesses testified regarding the functional need for parking based on industry standards and experience with memory care facilities. The Board also accepts Gorove/Slade's conclusions regarding the excess of on-street parking available in the surrounding area. Likewise, Mr. Andres' testimony regarding the percentage of staff that will commute to the Project using non-automobiles modes of transportation is based on census tract data, which takes into account the Property's urban location. As such, the ANC has no basis to question this information, which is reinforced with official data.

Based on the findings of fact and conclusions of law, the Board concludes that the Applicant has satisfied the burden of proof with respect to the request for a special exception under Subtitle U § 203.1(f) for a Continuing Care Retirement Community use in the R-1-B Zone at premises 2619-2623 Wisconsin Avenue NW (Square 1935, Lots 812 and 44). Accordingly, it is ORDERED that the application is GRANTED AND, PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED PLANS AT EXHIBIT 483A AND THE FOLLOWING CONDITIONS:

1. Any change in use, including to a different form of Continuing Care Retirement

Community, would require a new application to the Board of Zoning Adjustment for re-evaluation against the relevant regulations

2. Applicant will offer full-time and shift employees a transit subsidy of no less than \$10 per week, which equates to 50 percent of the weekly cost of a standard Metrobus or Capital Bikeshare commute.
3. Applicant will identify a TDM leader to work with employees to distribute and market transportation alternatives.
4. Applicant will work with DDOT and goDCgo to implement TDM measures
5. Applicant will share the full contact information of the TDM leader with DDOT and goDCgo.
6. Applicant will provide staff who wish to carpool with detailed carpooling information and will be referred to other carpool matching services sponsored by the Metropolitan Washington Council of Governments.
7. Applicant will install a Transportation Information Center Display within the lobby of the building that contains information related to local transportation alternatives
8. Applicant will identify nearby parking garage facilities that can provide additional parking for guests and staff.
9. A loading manager will be designated by building management. The manager will schedule deliveries and will be on duty during delivery hours.
10. The loading manager will coordinate with trash service to help move loading expeditiously between the service area inside the building and the loading area.
11. Trucks using the loading area will not be allowed to idle and must follow all District guidelines for heavy vehicle operation including, but not limited to, DCMR Title 20, Chapter 9, Section 900, the regulations set forth in DDOT's Freight Management and Commercial Vehicle Operations document, and the primary access routes listed in the DDOT Truck and Bus Route System.
12. The loading manager will be responsible for disseminating DDOT's Freight Management and Commercial Vehicle Operations document to drivers as needed in order to encourage compliance with District laws and DDOT's truck routes. The loading manager will also post these documents in a prominent location within the service area.

VOTE: 4-0-1 (Lesyllee M. White, Carlton Hart, Robert Miller, and Lorna John to Approve, Chairman Frederick Hill not voting.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT A majority of the Board members approved the issuance of this order.

ATTESTED BY: _____
SARA A. BARDIN
Director, Office of Zoning

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 APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES 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.