BOARD OF ZONING ADJUSTMENT

Regarding Wisconsin Avenue Baptist Church and Sunrise Senior Living
3920 Alton Place, NW, Washington, DC 20016
Square 1779, Lot 14
CASE NO. 19823

Tenleytown Neighbors Association
Pre-Hearing Statement in Opposition

THE ISSUES BEFORE YOU

THIS MASSIVE BUILDING IS TOO LARGE ON A SINGLE-FAMILY (R-1-B) LOT AND IS TOO CLOSE TO OUR SINGLE FAMILY HOMES.

FRONT (church area in orange, which includes second floor space above sanctuary)

REAR - 5 single family homes occupy the property across the foreground.

Sunrise Drawings, Exhibit 69E2, pages 5.3 and 5.1

Executive Summary

THERE ARE SINGLE FAMILY HOMES ON ALL SIDES OF THIS PROPOSED BUILDING.

In order for Sunrise, Inc. to locate its proposed building at 3920 Alton Place NW, they are asking for at least three area variances and at least two special exceptions. The requested relief is four stories instead of three stories, 58% lot occupancy instead of 40%, no 8-foot side yard setback, 76-foot steeple instead of 60 feet, special exception for a 13 foot rather than 4 foot retaining wall and a special exception to locate a Continuing Care Retirement Community in an R-1-B single family neighborhood. The requested multiple and dramatic changes to zoning should result in a disapproval by the Board of Zoning Adjustment (BZA).

The proposed building would use the entire lot. It would be 4.8 inches from the property line on the Yuma Street side; on the property line of the National Park Service; 10 feet from the Alton Place property line where the drop-off - pick up and entrance to the truck ramp will be; and on the fourth side, where they share the property line with 5 single family homes facing 39th Street, there would be a truck ramp dropping 13 feet where loading and an open roll off trash container would be located. Those homes have short lots so they are very close to the truck ramp; some 9 ½ feet from the lot line. It is putting 20 pounds of flour in a 5-pound bag.

Despite its name, the church is not on Wisconsin. It is on Alton. The neighborhood is a quiet neighborhood. Wisconsin Avenue is a main thoroughfare with 6 lanes of traffic during rush hour. Wisconsin cuts straight through Tenley Circle so most cars never leave Wisconsin to get on the Circle unless they wish to use Nebraska Avenue, which has federal park land on both sides and is not zoned commercial, nor are there commercial establishments on Nebraska. Alton Place and Yuma see even less traffic.

Exacerbating the volume of use in this single family neighborhood, the Applicant, Wisconsin Avenue Baptist Church (WABC) and Sunrise, Inc**,** is asking to put <u>two</u> uses on one lot.

The applicant alleges that their request for a special exception for the CCRC must include the granting of at least three area variances in order to provide financial viability of a failing church and a CCRC is in reality an attempt to rewrite the zoning regulations. It should be rejected by the BZA. Sunrise argues that a CCRC, as allowed by the regulations, would require a 1.5 acre lot, but have chosen a 0.81 acre lot. Thus, they posit that they deserve multiple and severe variances to build their facility. Sunrise's argument is wrong and 3920 Alton Place is the wrong site for Sunrise.

WABC and Sunrise collectively are the applicant(s) in this case, a claim which is confusing the issues before the BZA. As discussed below, it is undisputed that WABC is the current owner of the property. It is also clear that only a property owner can request a variance for its own use, and that in considering the request, the BZA may

consider only the needs to the property owner. Yet all of the extensive zoning relief requested in this case is based on what Sunrise needs in order for it to construct a senior living facility that generates enough profit to satisfy its shareholders upon sale of the facility to Welltower. Applicant has made no case that the property as zoned is not a viable site for a church. In fact, one option cited by WABC is that they could sell to another church.

The lot and neighborhood are single family detached R-1-B on the Future Land Use Map (FLUM) and the site is located in a Neighborhood Conservation Area on the Generalized Policy Map. See relevant Comprehensive Plan sections at bottom.

The proposed volume of use exceeds what is allowed in a single-family detached zone. The zoning plan does not contemplate a commercial (CCRC) senior assisted living business with approximately 200 people on site (121 residents and more than 70 staff) plus a 250-seat church on a lot zoned for single family detached homes and located in a neighborhood of single-family detached homes. For a total of 450 people. Is it appropriate for 450 people to be allowed to be on a lot intended for single families? This 450 does not include church activities besides worship service or visitors to the CCRC residents or events, such as the concerts they tout. Plus, many residents of Sunrise facilities hire their own assistants and are visited by their personal healthcare providers. We have no way to estimate that number.

Consider that the 200 people affiliated with Sunrise on this lot every day is approximately 172 more people than would likely be on site if it were the 7 single family lots that existed before the church consolidated 7 lots into one large lot to build their church. We are approximating 4 people per house.

These dramatic requests place a heavy burden on applicant.

Requested Area Variances for 58% (from 40%) lot occupancy, 4 stories (from 3 stories) and elimination of the required 8-foot side yard setback

The variances requested are dramatic. Sunrise alleges that they must have 86 units and 121 residents to be financially viable. From this they extrapolate that the square footage required by such a large facility means that the BZA must approve the area variances. The drafters of the Special Exception for a CCRC did not include any reference to two uses on the same lot – a church and a CCRC – and the extra units and residents sought for revenue generation to pay WABC for use of their land.

Only an **owner** can request a variance for its own purposes. To request a variance, the applicant for whom the variance is sought must be the <u>owner</u> of the property at the time of the request. 11-X DCMR § 1000 and 11-Y DCMR § 300. The requestor cannot merely be a contract purchaser or an agent of the owner. They must have the legal status of being a current owner of the real property when they make the request for an area variance.

Here all the variances requested are to allow Sunrise to operate a for-profit senior facility. Sunrise is not the owner of the property. Sunrise owns no property in Tenleytown. WABC, which is the property owner, will occupy less than 13 percent of the proposed building. WABC does not need these variances to operate as a church. If we assume in the alternative, that an entity that owns no property relevant to the application can nonetheless request variances for the lot they do not own, then they must pass the three-pronged test imposed by the court in *Draude v. District of Columbia Board of Zoning Adjustment,* 527 A.2d 1242 (D.C.1987) at 1254, citing D.C. Code 5-424(g)(3) (1981) for granting of an area variance:

> "An area variance may be granted for improvement of a property if all of the following conditions are met:
>
> (1) the property suffers from 'exceptional narrowness, shallowness, or shape' or from 'exceptional topographical conditions or other extraordinary or exceptional situation or condition;'
>
> (2) these exceptional circumstances 'result in peculiar and exceptional practical difficulties' to the owner unless he or she can obtain a variance; and
>
> (3) variance relief will not create 'substantial detriment to the public good' or 'substantially impair […] the intent, purpose, and integrity of the zone plan as embodied in the zoning regulations and map."

The WABC property has no exceptional narrowness, shallowness, shape, configuration or topographical conditions or other extraordinary or exceptional situation or condition that would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property. The "confluence of factors" alleged by the applicant does not constitute an extraordinary of exceptional situation or condition.

The applicants' invocation of the "public service organization" doctrine is inappropriate to be applied to this project. Neither Sunrise or the church made a showing that they are public service organizations. This project does not meet the criteria for flexibility that might be applied if there was a "public service organization" making these requests. Sunrise is a multinational corporation. No affordable units are being provided.

Many of the BZA's cases relating to church properties also involve the creation of affordable housing. See Emory United Methodist, BZA No. 17964 decided February 23, 2010, which created 99 units of affordable housing. St. Thomas Episcopal included affordable units and added 4 additional affordable units, most at 60% AMI, as part of a settlement. See NW Current, July 11, 2018, *Pact Reached on Church Street Project*. Note that St. Thomas was located in a Special Purpose District where 80 percent lot occupancy was allowed (which has now been increased to 100 percent allowed) and St. Thomas' sole request was to increase lot occupancy.

There is no “institutional necessity” as Hillel demonstrated in the *St. Mary’s* case, which was in a medium to high density RA-4 zone with lot occupancy of 75 percent and height of 90 feet. Here the lot is in R-1-B low density zone. WABC, which has only 18 congregants, will not be “preserved” as a Baptist church. Becoming “non-denominational” was how they first described their plans but on October 10, 2018, they described this change as dropping “Baptist” from the name of the church but retaining relations with the Baptist Convention. They make no argument that the project is necessary because they are expanding or because they need to accommodate any religious practice, such as was presented in other court cases involving churches.

WABC has made no showing how the proposed project is necessary to its future or will ensure its future. WABC would occupy less than 13 percent of the proposed building. The variances and special exceptions are solely for the benefit of the operations of Sunrise, which is an international for-profit business in partnership with Welltower Real Estate Investment Trust (REIT) traded on the New York Stock Exchange.

Applicants do not meet the standard to be granted variances because they cannot show that they are doing no harm to nearby property. Empirical evidence shows their proposal has already negatively affect market value. They are asking for variances for 58% lot occupancy (instead of 40%) and four stories (instead of 3) and no 8-foot side yard set-back so they can build to the lot line. All of these variances are to increase volume of use in a huge building in a single-family neighborhood on a single family lot.

Sunrise cannot show that they have to build 86 units as opposed to fewer units. They cannot show how a two-level underground garage, 4 stories, plus a penthouse, 20 trucks, and 450 people, would not violate the integrity of the zone plan in an R-1-B single family detached neighborhood of two-story homes, including part of an historic district within 200 feet, a house built in 1890 within 200 feet and, within 250 feet, there is The Rest (Lyles-Magruder House) that is listed on the DC Inventory of Historic Sites. See Exhibit 36.

Although WABC would occupy less than 13 percent of the building, Sunrise is trying to base its arguments for a lot occupancy variance and number of stories on zoning that is applicable to a church. Even churches are allowed only 3 stories. No measurements are provided, but it appears that the church façade is designed to be 76 feet in height despite the fact that WABC occupies only a small portion of the 1st and 2nd floors.

The existing church is **28** feet high from ground to roof on the other side of the driveway from the 5 homes. From the bottom of the truck ramp to the top of the penthouse the proposed facility would **68** feet high – **a 40-foot increase** next to those same houses.

All of these variances, including the request to eliminate an 8-foot side yard setback are at their core about volume of use. All are to expand the building beyond anything zoning would allow in order to move 450 people on to a single-family lot.

Sunrise, a multinational private corporation, is asking for so many dramatic variances and exceptions that taken together they constitute rewriting zoning law and regulations in this R-1-B neighborhood.

The proposed project, with its increase in density, would affect the entire neighborhood not just those within 200 feet. This request for Zoning Relief should be rejected because it would be a dramatic precedent in an R-1-B zone allowing a density of use far in excess of the low density contemplated in the Comprehensive Plan, the regulations and the maps.

Special Exception Request for a Retaining Wall

The second special exception that Sunrise requests is for a Retaining Wall to allow construction of a truck ramp for the more than 20 trucks – some 28 tons and 30 feet long - that Sunrise expects every week.

The Retaining Wall of 13 feet [recently Applicant has said "13 feet" but unclear whether this is precise] next to single family homes – a wall that presents a safety hazard to young children - needs a special exception from the four-foot limit provided in 11-C DCMR § 1401.3 (c). The wall is described by Sunrise on their website as 13 feet and the measurement starts at the finished floor level, which is several feet below grade, thus the wall is perhaps 15 feet?

This special exception would allow a drop of 13 feet only 8 feet from nearby homes. It is objectionable, a public nuisance and a safety hazard both because of the drop itself and because of the 20 trucks, some of them 28 tons and some 30-foot long box trucks, on narrow streets and next to detached family homes.

Special Exception Request for a Continuing Care Retirement Community

To be granted a special exception for a CCRC on a lot zoned R-1-B, an applicant must meet the 6 conditions at 11-U DCMR § 203.1(f), including that they provide sufficient off street parking spaces for employees, residents and visitors and that their proposal is not objectionable to neighbors due to traffic, parking, noise, odors, and other objectionable conditions, and that they are not adversely affecting nearby properties. A special exception is just that. Not a given just because it is requested.

First, to be granted a CCRC special exception, applicant needs to meet the definition of a CCRC, 11-B DCMR § 100.2, which includes "providing a **continuity** of residential occupancy **and health care**." This definition requires health care. Sunrise emphatically states they do not provide health care despite that they are providing assisted living and memory care with the average age being 86 and people having dementia, including alzheimer's disease. Exhibit 69, page 4. Contrary to their claim regarding no health care, a DC Health Department audit of Sunrise on Connecticut Avenue, 8 blocks away, speaks of registered nurses administering medications and that Sunrise facility is licensed by the Health Department and for the proposed 3920 Alton development,

Sunrise's website says they are creating 65-75 "health care" jobs. If they do provide health care, DC zoning regulations prohibit them from locating at 3920 Alton because zoning does not allow two health care facilities to be within 1000 feet of each other and the Psychiatric Institute of Washington is less than 1000 feet away. 11-U DCMR § 203.1(i)(1) and 11-U DCMR § 203.1(i)(6). This can only be waived if the BZA finds "that the cumulative effect of the facilities will not have an adverse impact on the neighborhood because of traffic, noise, or operations."

"Continuity of care" when used by the federal government means that a person can enter, stay on site and graduate up through the levels of care provided by the community. Sunrise has made no presentation that they are providing continuity of care.

Sunrise needs to make a case that they meet the definition. If Sunrise is providing no health care, what makes them different from a very expensive hotel - $8,000 - $15,000 per month (up to $500 per day). And does a very expensive hotel for those over 60 get to locate in a single family neighborhood?

To be granted a CCRC special exception under **11-U DCMR § 203.1 (f),** applicant must show that:

> "The use shall include one or more of the following services: Dwelling units for independent living; Assisted living facilities; or A licensed skilled nursing care facility; and If the use does not include assisted living or skilled nursing facilities, the number of residents shall not exceed eight (8); The use may include ancillary uses for the further enjoyment, service, or care of the residents;
>
> The use and related facilities shall provide sufficient off-street parking spaces for employees, residents, and visitors; 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 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."

It is evidence that this proposed CCRC is per se objectionable because it is adversely affecting nearby properties as evidenced by the fact that 2 of the 5 houses with whom they share a property line have been put on the market and sold at below expected value since Sunrise announced their plans last fall. Those 5 houses are on short lots, about half the usual size in an R-1-B zone and, if this project is allowed, they will be overlooking the truck ramp with the loading berth and trash roll off container. A third house within 200 feet sold within the same time frame. This sales activity is very unusual because the Tenleytown neighborhood is very stable and sales are infrequent.

One condition that must be met to be granted a CCRC special exception is that an applicant must show that it is honoring zoning law (the Comprehensive Plan), including

the maps, as well as the zoning regulations. The law, maps and regulations contain many protections for single family neighborhoods. The 3920 Alton site is in a single family detached R-1-B zone in a neighborhood conservation area. It is not in or next to a commercial zone.

The Sunrise CCRC is definitely not honoring the zoning plan or Comprehensive Plan. The proposed building is dramatically out of scale with nearby homes. In plain English, the building would be lot line-to-lot line in a single-family neighborhood. It is directly on the property line on the National Park Service side, 4.8 inches from the property line on the Yuma side, 10 feet from the property line on the Alton side where their drop off/pick up and shuttle bus parking are located, and on the remaining side, there is a truck ramp, a retaining wall of 13 feet and a replacement fence placed next to the property line shared with neighbors.

According to Sunrise, the truck ramp is for the use of an expected 20 trucks per week, including a 7-ton shuttle multiple times a day, 28-ton trucks and 30-foot box trucks delivering food and linens, plus all the car trips generated by the 450 people. This volume of use is totally out of scale with low density R-1-B single family detached zoning. There has been no analysis about how the 30-foot and 28-ton trucks can make a right turn on to the truck ramp from Alton, which is only 30 feet wide and is 2-way with parking on both sides. A similar problem is presented on Yuma, only 34 feet wide. DDOT's report neglects to mention any of these facts. The DDOT report fails to address the issue of whether the applicant met the CCRC regulatory standard to provide "sufficient off street parking" for all employees, residents and visitors

It is an open question whether they need special exceptions for parking or pervious surface requirements. Whether a parking special exception is required or not, parking is an element specifically to be examined under the conditions for the special exception to allow a CCRC in a residential zone. The fact that the Zoning Administrator said the number of spaces required for a residential facility applies to CCRCs is a factor to be considered but 11-U DCMR § 203.1(f) requires that all CCRCs must demonstrate that they have enough parking for all residents, visitors and employees. Merely meeting the requirements for "residential" on the zoning parking charts is not the equivalent of meeting the CCRC condition. It has to be demonstrated that the CCRC condition is met. Nor has there been any shared parking management plan provided showing how the CCRC and WABC will share the spaces seven days a week. Also, applicant has not provided a plan for drop off and pick on Yuma Street, where the main entrance to the church is located.

Sunrise has made two arguments relating to other senior facilities – (1) they are "just like" the many nearby senior homes regarding buffers and use of their proposed lot and (2) Ward 3 is a "desert" regarding availability of any nearby senior homes.

To compare how far other senior facilities in Ward 3 are from homes near their buildings: **Friendship Terrace** is 90 ft to the closest home; **Lisner** is 107 feet from nearest lot line; **Ingleside** is 322 feet to nearest lot line where nearest private home is

located; and **Forest Hills** is 50 feet from the nearest lot line and 105 feet to the nearest home. These measurements are from the building to the lot line since many of these facilities did not have BZA Orders that are relevant. When Forest Hills proposed an addition to their facility they proposed to set the building "45 feet and 8 inches from the eastern property line for a total set back of 95 feet at the one-story enclosed building link, and 102 feet at the two-story healthcare addition. The Home noted that all parties, including the opponents, agreed upon the alternate plans." BZA Case No. 15831 (1993).

There is also **Grand Oaks** next to Sibley Hospital in Ward 3 which is not next to any homes. In addition, there are 2 Sunrise facilities: **Sunrise on Connecticut Avenue**, which is 8 blocks away, in a commercial zone, and **Brighton Gardens Sunrise** on Friendship Boulevard, 2 blocks across Western Avenue, in other words, 2 blocks from Ward 3 into Maryland. Sunrise also operates Sunrise at Fox Hill, a mega-facility within 4 miles of Tenleytown, just off River Road.

So, Ward 3 is not a "desert" in light of these many senior facilities and Ward 3 could be said to be hoarding the senior facilities in Washington because almost all such facilities are in Ward 3 while other Wards go begging. See "Gentrification" at p.112.

There are other options for both WABC and Sunrise

To finance renovation of their building, WABC can sell two full size R-1-B zoning compliant lots and raise approximately $1.7 million. See Exhibits 80 and 79.

Sunrise has been asked repeatedly to consider other options on the commercial avenues. For example, the Federal National Mortgage Association, a few blocks down Wisconsin, is being developed by Roadside and they have said they would like to include something for seniors. Sunrise should explore commercial options if they cannot build a facility on a much smaller scale.

Conclusion

Applicant has not sustained their burden to show there is no adverse impact. Sunrise's failure to adhere to zoning regulations is unfair to tax paying homeowners whose family homes, their primary investment, are jeopardized by this out-of-scale project.

The number and magnitude of requests for zoning changes should convince the BZA that this is the wrong site for multiple entities with multiple functions to locate in a single-family neighborhood.

Thank you

RELEVANT PROVISIONS OF THE COMPREHENSIVE PLAN

Policy RCW-1.1.1: Neighborhood Conservation … Protect the low density, …existing scale, function, and character of these neighborhoods. (2308.2)

Policy RCW-1.1.8 Managing Institutional Land Uses … ensures that their operations are harmonious with surrounding uses, that expansion is carefully controlled, and that potential adverse effects on neighboring properties are minimized consistent with all provisions of the Comprehensive Plan and the underlying zoning rules and regulations. Densities and intensities … on such sites should reflect surrounding land uses …2308.9

Policy RCW-1.2.3: National Park Service Areas. Conserve and improve the more than 2,000 acres of natural open space in the forested neighborhoods including… the Fort Circle Parks. 2309.4

Policy LU-2.1.5: Conservation of Single Family Neighborhoods. Protect and conserve the District's stable, low density neighborhoods and ensure that their zoning reflects their established low density character. Carefully manage …the alteration of existing structures in and adjacent to single family neighborhoods in order to protect low density character, preserve open space, and maintain neighborhood scale. 309.10

Policy LU-2.2.1: Code Enforcement as a Tool for Neighborhood Conservation … maintain the general level of residential uses, densities, and height; … 310.2

Policy LU-2.3.1: Managing Non-Residential Uses in Residential Areas … (a) prevent the encroachment of inappropriate commercial uses in residential areas; and (b) limit the scale and extent of non-residential uses that are generally compatible with residential uses, but present the potential for conflicts when they are excessively concentrated or out of scale with the neighborhood. 311.3

Policy LU-2.3.5: Institutional Uses… Ensure that when such uses are permitted in residential neighborhoods, they are designed and operated in a manner that is sensitive to neighborhood issues and that maintains quality of life. Encourage institutions and neighborhoods to work proactively to address issues such as traffic and parking, hours of operation, outside use of facilities, and facility expansion. 311.7

Policy LU-2.3.7: Non-Conforming Institutional Uses …Carefully control and monitor institutional uses that do not conform to the underlying zoning to ensure their long-term compatibility. In the event such uses are sold or cease to operate as institutions, encourage conformance with existing zoning and continued compatibility with the neighborhood. 311.9

These below refer to Commercial Development in Commercial Zones – showing concern for nearby residential even when constructing <u>in the Commercial Zone</u>:

Policy LU-2.3.2: Mitigation of Commercial Development Impacts
Manage new commercial development so that it does not result in unreasonable and unexpected traffic, parking, litter, shadow, view obstruction, odor, noise, and vibration impacts on surrounding residential areas. Before commercial development is approved, establish requirements for traffic and noise control, parking and loading management, building design, hours of operation, and other measures as needed to avoid such adverse effects. 311.4

Policy LU-2.3.3: Buffering Requirements
Ensure that new commercial development adjacent to lower density residential areas provides effective physical buffers to avoid adverse effects. Buffers may include larger setbacks, landscaping, fencing, screening, height step downs, and other architectural and site planning measures that avoid potential conflicts. 311.5

Zoning Maps

- On the **Future Land Use Map (FLUM),** the lot in question – 3920 Alton Place – is designated as low density residential. R-1-B, single family detached. The Comprehensive Plan Glossary of terms states that Residential character: Refers to the physical features associated with a residential area, such as homes, lawns, yards, street trees, low traffic volumes, and limited commercial uses.

- On the **Generalized Policy Map**, 3920 Alton Place is located in a Neighborhood Conservation Area. The Comprehensive Plan Glossary of Terms states that a Neighborhood Conservation Area is a Comprehensive Plan Policy Map category used to describe stable areas with little vacant land and little potential for change. Policies in these areas support maintaining and enhancing existing uses.

Table of Contents

108 Discussion of Lot Diagram
110 **Lot Diagram**
111 Does "Need" qualify as grounds to change zoning?
113 Gentrification to concentrate senior facilities in Ward 3 - Senior Population Stats.
114 Healthcare: Will Sunrise provide health care? To qualify as CCRC, must they provide health care?

120 CCRC Special Exception Conditions Sunrise must meet.
121 Parking and Traffic as it relates to CCRC
124 How much traffic would the CCRC/WABC at 3920 Alton generate?
125 Routes that will experience traffic
126 Policy and Spirit of "No Through Trucks'
128 Sunrise 65-75 Employees' Shift Schedules
129 Sunrise Hours of Operation next to single family homes
129 Traffic on Alton Place and Yuma Street
130 Truck Turn Rotations
130 Noise from Events and Traffic
131 Truck Noise
131 Trash from 121 residents, more than 70 staff, and a 250-seat church
133 Expectation of Privacy – rooftop and porch use, concerts
133 "Other objectionable conditions"
134 "Objectional conditions" defined
135 "Other objectionable conditions" - applicable Comprehensive Plan Provisions and Zoning Maps
136 Many objectionable conditions: trash, open containers, fumes, odors, loading, waste collection, total number of residents, employees and visitors.
139 *Per se* Objectionable - the value of homes next to the proposed project have already diminished

140 If BZA grants these requests, Sunrise must indemnify neighbors for damage from construction vibrations

140 WMATA tunnel going diagonally under the lot is of concern regarding damage

SLOPE, LOADING PLATFORM, SERVICE DELIVERY SPACE
141 Additional Issues: slope, loading, service delivery space
143 Does Sunrise need a special exception for exceeding 12% slope maximum?
144 Loading platform and service delivery space – Sunrise must meet the zoning requirements
147 **Upper Level Garage Plan Diagram**

148 Pervious – Sunrise should demonstrate they have met the required 50% of the lot is pervious.

149 **CONCLUSION**

Appendix: Court Cases Distinguished
151 *St. Mary's Episcopal v. Hillel* Distinguished.
159 *Dupont Circle Citizens* (*St. Thomas*) Distinguished

Addendum: Construction Issues
161 Construction Vibrations – Harm to homes next to site

Jurisdiction of the Board

The Board of Zoning Adjustment (the “Board” or “BZA”) has jurisdiction to grant special exception relief pursuant to 11-X DCMR § 901.2 and 11-Y DCMR § 100.3. The Board has jurisdiction to grant variance relief pursuant to 11-X DCMR § 1000.1 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") and the adverse impact of this project on the immediate and nearby neighbors. 11-X DCMR § 901.3.

THE NEIGHBORHOOD

At the March 13, 2018 ANC Meeting, Sunrise SVP for Real Estate Development Philip Kroskin said “The neighborhood is beautiful. We like to locate our facilities in beautiful neighborhoods.” We agree with the first part.

Wisconsin Avenue Baptist Church (WABC) is not located on Wisconsin Avenue but is at 3920 Alton Place NW. The WABC retained the original “Wisconsin Avenue” name when it moved to Alton Place in the 1950’s. WABC’s R-1-B lot is surrounded by a neighborhood zoned R-1-B. There are single family residents bordering the lot on all sides – on Yuma Street, on Alton Place and on 39th Street, with the homes on this last street sharing a property line with the church. And across the federal park land on the fourth side within 200 feet are the single-family homes on Grant Road.

On the fourth side of the lot, the property shares a property line with the National Park Service (NPS) land that borders on a sizeable DC property setback. Specifically, the NPS land is Federal Reservation 399, which is a portion of Fort Circle Park (commonly referred to as Fort Reno). *BZA Final Order in Case No.17726* (November 10, 2009), page 6**,** regarding the same lot. (See Exhibit 38 herein)

Wisconsin is a main thoroughfare with 6 lanes of traffic during rush hour. Wisconsin cuts straight through Tenley Circle so most cars never leave Wisconsin unless they wish to use Nebraska Avenue, which has federal park land on both sides and is not zoned commercial, nor are there commercial establishments on Nebraska.

In 1954, WABC bought 7 single family lots and combined them to create the church lot. Church Bulletin of September 24, 2017.

The Neighborhood is zoned R-1-B and is composed of two-story single family detached homes, with well-tended yards and full growth trees. The streets are narrow, with Alton qualifying for “Place” rather than Street because it is only a 30-foot wide roadway, with a 60-foot wide right-of-way. Yuma Street has only a 34-foot wide roadway, with a 90-foot wide right-of-way. *BZA Final Order in Case No.17726* (2009), (Exhibit 38 herein, p. 6), regarding the same lot.

Many residents or their families lived in the neighborhood before Metro opened in Tenleytown. Most of the neighboring homes are approximately 100 years old - having been built when our neighborhood was known as Armesleigh Park. Several of those within 200 feet, however, are older. The 200-foot designation overlaps with the Grant Road Historic District, with pre-Civil War houses, as well as the Curran house on the corner of Alton Place and 39th Street that was built in 1890. "The Rest" at 4343 39th Street is one house beyond the 200-foot mark. Many of the homes surrounding the lot have brick or stone basements. See Exhibit 36 describing many of the historic homes mentioned here.

The five houses facing 39th Street that share a property line with the lot in question were built in 1942 by Architect Joseph H. Abel, who designed many Washington residences as well as over 100 apartment buildings. Historian James Goode stated that Abel "was a pioneer in modernistic design in Washington," and responsible for such notable apartment houses as the *Broadmoor* in 1928, the *Shoreham* in 1930, the *Irene* in 1964, and the *James* in 1960, the first apartment building in DC to feature a rooftop pool.

The five houses facing 39th Street have been described as fine examples of Joseph Abel's residential work. The houses feature a floor plan that incorporates use of the basement as family space for recreation – making it that much more of a significant issue if harm were to come to those basements. The addresses for those homes are 4404-4412 39th, 3900 Alton and 3901 Yuma. See Exhibit 37 for photos of the 5 houses.

Over 200 *immediate* neighbors have signed a petition opposing the Sunrise project at 3920 Alton Place. Many of those neighbors have been attending and speaking at ANC meetings. There are only 3 couples and 1 individual that support the project. See Petition, Exhibit 19.

WABC at 3920 Alton Place

WABC has approximately **18 congregants[1]*** on a usual Sunday. The Agape Congregation was renting space but recently ended their search for a pastor and may have temporarily joined the WABC congregation before hiring a pastor without any final decision regarding location, which is dependent on the BZA decision in this case. The Agape congregation is not a party to the zoning relief application.

[1] At an October 10, 2018, meeting, Reverend Bergfalk distributed a document in which he stated that WABC's congregation is "approximately 80 current participants including children and adults," … He also mentions Agape and Real Life congregations who are tenants and conduct services in the building. At the October 12, 2017 ANC meeting, Rev. Bergfalk described his congregation as "small" and, in response to neighbors stating that they had never observed more than 18 congregants on a Sunday, Rev. Bergfalk said he had "twice that many when you include children," which would be 36. In a January 2018 email exchange, Rev. Bergfalk stated that "Since 2000 WABC has been a small but stable congregation…and said "I understand the challenges of helping churches 'turn around.' Wisconsin Avenue is now at a point where new resources from Sunrise will unlock significant potential growth…" He also stated that "Cycles of organizational growth and decline are normal, and it usually is a mistake to extrapolate the future from the present circumstances…" Note he is not alleging that WABC is growing now, unlike other court cases where expansion is necessary to accommodate increased numbers.

Currently, the site is occupied by WABC and a parking lot with curb cuts on Yuma Street and Alton Place. The building currently occupies 20.9 percent of the lot. Exhibit 5, Self-Certification, page 2. At various times over the years, the facility has been rented to two other small congregations and there have been several non-profit, for-profit and private schools renting space. See *BZA Order No. 17726* (2009) relating to the operation of the schools at 3920 Alton. In that *Order*, the BZA mandated that a for-profit school, CommuniKids, must move off the lot. (Exhibit 38 herein)

A few weeks ago, on July 25, 2018, WABC announced that CommuniKids was returning to the site at 3920 Alton.[2] We do not know if this new arrangement is compliant or non-compliant with the 2009 BZA Order. (Exhibit 38 herein)

We do, however, know that although WABC claims that its facility suffers from functional obsolescence and major disrepair, in August 2018 it contracted with (CommuniKids**)** to house part of its daycare program at 3920 Alton Place. On August 21, 2018, WABC's building received approval for a certificate of occupancy, including a fire inspection, from the D.C. Office of the State Superintendent of Education (OSSE) after a finding that the building is ADA compliant and that the facility is "heated, cooled and ventilated to maintain the required temperatures, and air exchange…' (page 2). Exhibit 77**,** CommuniKids Certificate of Occupancy Report.

Should zoning protections be ignored to preserve an 18-person congregation? WABC argues that the project must be approved in order to allow the church to continue to be economically viable; but if a church is being "preserved" here, it will not be the same Baptist church that currently operates on the lot. WABC has stated that they will be become a non-denominational church sharing a building with Sunrise and that "Baptist" will no longer be part of the name of the church. Sunrise SVP Kroskin stated that the church would become non-denominational at the September 24, 2017 meeting with neighbors at the church. On October 10, 2018, Rev. Bergfalk stated that they were not leaving the Baptists but that they would no longer identify as Baptists by removing the word "Baptist" from the name of the church.

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[2] **From:** "Mindi Susskind mindi.s@communikids.com [tenleytown]" <tenleytown-noreply@yahoogroups.com>
Date: July 25, 2018 at 2:22:30 PM EDT **To:** undisclosed-recipients:;
Subject: [tenleytown] Can you please post
Reply-To: Mindi Susskind <mindi.s@communikids.com> **CommuniKids to Temporarily House its Award-Winning Preschool Program at The Wisconsin Avenue Baptist Church.** CommuniKids and the Wisconsin Avenue Baptist Church are pleased to announce that CommuniKids will **temporarily** house its University of the District of Columbia Campus classes at the Church's facilities at 3920 Alton Place in Tenleytown. Starting August 23, 2018 CommuniKids will be using several classrooms to house its Language immersion preschool program for children ages 2.5 to 5 years of age while our new facilities at UDC Van Ness location are being prepared for our arrival. CommuniKids and the Wisconsin Avenue Baptist Church will host a joint informational meeting where you will be able to meet and greet CommuniKids Founders, Marketing Director, and UDC Center Director and find out more about this joint venture. We would like to invite all members of the community to join us. Light refreshments will be served. Please note classes for 3 and 4 years old are filled but limited spots still remain for our 2.5-year-old class.
Date: August 1, 2018 Time: 7pm-8pm; Location: 3920 Alton Place NW Washington DC 20016
Mindi Susskind, CommuniKids Marketing Director at 301-785-0632; mindi.s@communikids.com

THE LOT

Of great significance, the WMATA tunnel goes under the lot. The Washington Metropolitan Area Transit Authority (WMATA) after exploring other possibilities, built the tunnel, for the route between the AU-Tenleytown station and the UDC station, diagonally under the lot in question. The tunnel is approximately 100 feet below the surface and underneath the proposed 2-story underground garage, which would have to support the 4-story, plus 5th level penthouse – of concrete and steel construction.

The lot is not zoned for commercial use and it is not next to a commercial zone or commercial properties. The applicant's resort to the term "visually contiguous" to describe its alleged proximity to Wisconsin Avenue only underscores the fact that the Mixed-Use zones are not close to the site, i.e. are not "contiguous". See applicant's pictures of the current church showing a vast grassy lawn (NPS land). If the lot was next to commercial businesses, applicant would have angled the camera to make sure commercial enterprises were in the frame. Directly across Nebraska Avenue there is more National Park Service land.

At this location, Nebraska Avenue has park land on both sides of the street. It is not zoned commercial, nor are there any commercial establishments on Nebraska Avenue until you get to the intersection with Connecticut Avenue, 8 blocks away. Across the Circle, which is very wide, there are several lots also zoned R-1-B where St. Ann's Catholic Church and St. Alban's Early Childhood Center are located as well as American University, a non-profit, which is surrounded by wide green landscaped set-backs as approved by the Zoning Commission in the AU Campus Plan.

Applicant referred to "multifamily residents that line 39th Street." Exhibit 8, page 2. This is a mischaracterization. As 39th Street merges into Wisconsin Avenue after crossing Warren Street (3 blocks away), there is a 3-story building with several units. Note 3 stories, which is less than applicant requests. And that lot is not zoned R-1-B, single family. As 39th Street, a one-way street, dovetails into Wisconsin Avenue, the DC Department of Transportation (DDOT) has installed 14 bollards to prevent people, as best they can, from using the street for through traffic. In addition, DDOT put a bike lane on 39th Street because there is far less traffic than Wisconsin or Nebraska Avenues.

Applicant has also said that there is an apartment building a block away, but this again misstates the facts. The Mixed-Use zones, containing the non-residential uses mentioned by applicant are directly on Wisconsin Avenue – a MU-7 zoned area near the Metro Stop, which is 4 blocks away (almost 1000 feet – 975 feet to walk it – not the "500 feet" that applicant states). There are also MU 3 and 4 zones on Wisconsin Avenue to the South - - but not on Nebraska.

A prospective buyer purchasing a home on Alton Place, Yuma Street or 39th Street near WABC, observing that all of the land was zoned R-1-B single family detached on those streets –and that the lot on the other side of the church between the church and Tenley

Circle was historically and federally preserved park land, would rely on the zoning to conserve the neighborhood as single family detached.

To sum up, the lot is not near commercial establishments. The numerous people listed on the 200-foot list are families. See Exhibit 7.

The lot in question is not on Wisconsin Avenue. Nebraska Avenue is framed by National Park Service land on both sides of it and is not zoned commercial. The lot is fairly flat, with a less than 2-foot drop over the 220-foot long lot from Alton Place (387.2 elevation) to Yuma Street (385.5 elevation). The slope of the lot from Alton to Yuma is 9 inches in 100 feet or 0.77% or an angle of less than half a degree (0.4 degrees). The bottom line is that the lot is basically flat. It is approximately rectangular in shape and bordered by Yuma, 39th, Alton and National Park Service land that is part of Fort Reno National Park. With the exception of the NPS land, the lot is surrounded on all sides by single family detached homes, and even on the NPS side there are single-family homes on Grant Road across the park land but within 200 feet.

The 3920 Alton lot is zoned R-1-B, which the BZA referred to as "the most restrictive residential zone" repeatedly when discussing this same lot less than 10 years ago. *BZA Final Order in Case No.17726* (2009), (Exhibit 38 herein, pages 12, 13, and 14), regarding the same lot.

BACKGROUND ON SUNRISE

Sunrise builds rental facilities and operates them as a landlord. Shortly after their facilities are up and running they sell them to Welltower Real Estate Investment Trust (REIT), traded on the NY Stock Exchange as WELL, which owns more than 325 facilities internationally – none with collective bargaining agreements. The Sunrise on Connecticut Avenue as well as the Brighton Gardens Sunrise just across Western Avenue in Bethesda was recently packaged with 2 other Sunrise facilities and sold to Welltower for $368 million. Since its initial $243 million acquisition by Welltower in 2013, Sunrise and Welltower have completed $5.5 billion in investments. See Welltower Press Release of April 25, 2018. Exhibit 78.

Sunrise is fast growing in the Washington metro area. They are strictly for profit. Some Sunrise projects provide health care. The proposed development does not have affordable units nor do other Sunrise facilities. Sunrise evicts residents who exhaust their funds, actually need health care beyond visiting a doctor, or become a "behavioral" problem. Sunrise charges $8,000-15,000 per month and will not be providing any "inclusionary, affordable" units. The top two floors of the building would be occupied solely by Sunrise. Sunrise plans to distribute their 121 occupants over 86 units. The units are 1 single room, 50 studios; 22 two room suites accommodating 44 people; and 13 Denver suites accommodating 26 people. Denver suites accommodate 2 people – per definitions provided by Sunrise' architect, Steve Ruiz of Moseley Architects at ANC Meeting of June 14, 2018. See also Exhibit 69E2 for the floor plans.

Sunrise seeks to wrap their for-profit residential facility in the robes of a Church: If the Sunrise project is allowed to go forward, WABC would occupy **less than 13 percent** of the building. Sunrise business would occupy more than **87 percent of the building.** They have stated that they are not in a joint venture. Currently the only owner of the property at 3920 Alton Place is WABC. See Exhibit 4 Statement of Existing and Intended Use. They state that the plan in the future is to operate under a two-condo arrangement with each owning their respective spaces and each property separately and independently operated. To summarize, Sunrise has stated that they do not own property on Alton Place. https://www.sunriseseniorliving.com/tenleytowndevelopment

THE PROPOSED PROJECT

The Applicant, Wisconsin Avenue Baptist Church (WABC) and Sunrise, Inc, is asking to put two uses on one lot and that severely magnifies the volume of use in this single family neighborhood. As discussed below, it is undisputed that WABC is the current owner of the property. It is also clear that only a current property owner can request a variance, and that in considering the request, the BZA may consider only the needs of such a property owner. Yet all of the extensive zoning relief requested in this case is based on what Sunrise, not a current owner, needs in order for it to construct a senior living facility that generates enough profit to satisfy its shareholders upon sale of the facility to Welltower. Applicant has made no case that the property as zoned is not a viable site for a church. In fact, one option cited by WABC is that they could sell to another church.

In order for Sunrise, Inc. to locate its proposed building at 3920 Alton Place NW, they need at least two special exceptions and three area variances. The drafter of the Special Exception for a CCRC did not include any reference to two uses on the same lot – a church and a CCRC. Nor did the drafters contemplate the extra units and residents sought for revenue generation to pay WABC for use of their land at 3920 Alton Place. As an aside, applicant frequently refers to their proposed building as a “mixed use” building – it is not located in a “mixed use” zone. It is a single family lot surrounded by family homes.

Sunrise SVP Kroskin began work at Sunrise in 2009. Sunrise and WABC stated that they began planning the 3920 Alton project on October 14, 2014 (per a statement made at the September 24, 2017 meeting at WABC). The neighbors were first told of the plans on Sunday evening, September 9, 2017 – the day before the soil sampling trucks were coming to drill the WABC yard. SVP Kroskin, who began working for Sunrise in 2009, surely, knew the Sunrise profit formula - 86 minimum units at 900 SF each - long before he started planning this project on this lot in 2014.

Now Sunrise says “without variance relief from the number of stories and lot occupancy restrictions, the church cannot partner with Sunrise to construct the proposed church and CCRC facility, due to the financial constraints and design parameters of a CCRC use.” Exhibit 69, page 26.

So, if his formula required a 1.5-acre lot to comply with zoning, why not pursue other locations rather than ask for multiple variances and special exceptions to locate in a single-family neighborhood? The lot at 3920 Alton is only 0.81 acre or about half what they say they need.

The proposed building would be 40 feet in height (four stories) plus a penthouse of 12 feet for a total of at least 52 feet, four stories, and would occupy approximately 58 percent of the lot. The first story would begin 3 feet below ground so Sunrise is proposing 4 stories in 43 feet. WABC would have use of less than 13 percent of the building, which would be on the Yuma Street side on the first floor, less on the second floor and several offices on the upper level of the garage. The Zoning Administrator on August 1, 2018 stated that this should be likened to a FAR calculation; therefore, anything below ground does not count in the calculation. The main entrance to the church will be on Yuma Street, N.W., with "a secondary entrance in the west façade fronting on National Park Service land." No provision for drop-off/pick up has been made on the Yuma side. Sunrise's 86 units will occupy more than 87 percent of the building on the entire 3rd and 4th floors, most of the 2nd, the majority of the 1st floor and a portion of the cellar. See applicants' description of their proposal (Exhibit 8, pages 2-3 and Exhibit 69, pages 7-9).

The main entrance to Sunrise would be on Alton Place, N.W., which includes a drop-off driveway to the front door. The drop-off entrance on the Alton Place side is approximately 60 feet from Nebraska Avenue. The intersection of Alton Place and Nebraska Avenue is not perpendicular but rather at a pronounced angle – an estimated 60-degree angle traveling northeast and an estimated 120-degree angle traveling northwest - thus creating a traffic and pedestrian hazard. Alton is only 30 feet wide and the Sunrise driveway is immediately after the turn. Parking is allowed on both sides of Alton blocking the view further. This will be a safety hazard if Sunrise is allowed to create a situation where ambulances, accompanied by fire trucks come to Alton Place. The many curb cuts will prevent pedestrian use of the sidewalk on that side of Alton.

This description below is dependent on whether the BZA approves elimination of the set back next to NPS land. Sunrise has moved the building back and forth by 8 feet over the course of deliberations. The most recent iteration includes zero set back on the NPS side. If that is not granted, presumably Sunrise will attempt to move the building back toward the 5 houses who share a property line. If they moved it toward 39th Street, however, how would they anchor the retaining wall without crossing the property line?

VIEW FROM THE FIVE HOMES THAT SHARE PROPERTY LINE WITH WABC

The existing church is **28** feet high from ground to roof on the other side of the driveway from the 5 homes. The proposed facility would be 13 feet below grade (the truck ramp and retaining wall), 43 feet to the roof (40 feet plus the 3 feet of the first floor that is below natural grade) plus 12 feet for the penthouse. So, the 5 families in those houses would be looking at a façade of 13 feet + 43 feet + 12 feet equals **68** feet as compared to the existing building, which is 28 feet in height – **a 40-foot increase**.

Currently, the proposed building will be 36 feet from the property line but that has many uses. Moving from the property line toward Sunrise building, the 36 feet will contain:

a. An 8- to 16-foot-wide landscaped strip on the Sunrise side of a replacement 6-foot board fence. The landscaping is not for the 5 families who will be looking at the backside of the fence. Unclear why the landscaping is sometimes 8 feet and sometimes 16 feet given this results in a 12-foot wide driveway on the Yuma side – a width described by the BZA in their 2009 Order as "relatively narrow" even though at the time it accommodate only car traffic not Sunrise big trucks. See *BZA Final Order in Case No.17726* (2009), (Exhibit 38 herein, p.8).

b. A retaining wall that drops 13 feet to accommodate the truck ramp for the 20 trucks per week – some 7 tons, some 28 tons, some 30 feet long.

c. A through ramp for trucks and other vehicles, which would also provide entry to the underground parking garage. There will be 66 parking spaces. See applicant's description of proposal (Exhibit 8, pages 2-3 and Exhibit 69, page 11)

d. A 12 X 30 (360 SF) foot loading berth and a lift.

e. A Roll Off Trash Container that is present at other Sunrise facilities.

APPLICANT SEEKS THE FOLLOWING VARIANCES AND SPECIAL EXCEPTIONS

1. Variance relief to increase lot occupancy to 58 percent from the 40 percent allowed for a commercial business, pursuant to 11-D DCMR § 304.1. Their lot occupancy requested is specifically 57.53 percent because they request 20,389 SF occupancy and the lot is 35,443 SF. So, if rounding, they request 58 percent lot occupancy. Exhibit 6A1, page 2. [Applicant erroneously cites 11-C DCMR § 304.1.]

2. Variance relief to increase the maximum number of stories from 3 to 4 stories pursuant to 11-D DCMR § 303.1;

3. Variance relief from the 8-foot side yard requirement on the west thereby allowing the building to sit on the shared property line with the National Park Service, pursuant to 11-D DCMR § 307.1;

4. Variance relief **may** be required to allow a steeple of 76 feet when only 60 feet is allowed. No measurement been provided but drawings indicate 76 feet. Exhibit 69E2, pages 5.1 – 5.3. Since WABC has no presence above the 2nd story, can they or should they have a steeple of even 60 feet? See. 11-X DCMR **§** 1001.3 (a) designating a change

in height as an area variance. Thus, all the requirements that must be met to grant an area variance apply;

5. Variance relief **may** be required to allow only 66 parking spaces pursuant to 11-B DCMR § 200.2 (bb) but this must also be deemed "sufficient" parking as required by 11-U DCMR § 203.1(f)(4). This exception was not formally requested but no record has been made that they are complying with all relevant provisions. See also it is an area variance for minimum parking greater than what may be permitted by special exception. 11-X DCMR § 1001.3(b);

6. Special exception relief to allow a retaining wall of 13 feet rather than the 48-inch retaining wall allowed pursuant to 11-C DCMR § 1401.3 (c); and

7. Special exception relief to establish a CCRC use in the R-1-B District, pursuant to 11-U DCMR § 203.1(f).

Other special exceptions that **may** be required since the record does not demonstrate compliance:

8. Special exception if Sunrise is a health care facility and is therefore too close to Psychiatric Institute of Washington under the 11-U DCMR § 203.1(i)(1) and 11-U DCMR § 203.1(i)(6) prohibition that health care facilities are prohibited within less than 1000 feet of each other. This can only be waived if the BZA finds "that the cumulative effect of the facilities will not have an adverse impact on the neighborhood because of traffic, noise, or operations."

9. Special exception relief from the requirement that a driveway ramp cannot exceed a 12% slope (drop of 12 feet over 100 feet). The slope maximum is included in 11-C DCMR §§ 904.2 is to ensure safety. A special exception can be granted to the slope requirement (11-C DCMR §909.3) but no special exception has been requested.

10. There is no evidence that applicant complying with the regulatory requirements for a Loading Platform and Service Delivery Space pursuant to 11-C DCMR §§ 900 - 909. There are no special exceptions available for the relevant issues.

11. Special exception from the requirement that in a residential zone, the lot must be 50 percent pervious as required by 11-D DCMR § 308.1.

RELEVANT PROVISIONS OF THE COMPREHENSIVE PLAN

Policy RCW-1.1.1: Neighborhood Conservation
Protect the low density, stable residential neighborhoods west of Rock Creek Park and recognize the contribution they make to the character, economy, and fiscal stability of the District of Columbia. Future development in both residential and commercial areas must be carefully managed to address infrastructure constraints and **protect and enhance the existing scale, function, and character of these neighborhoods.** (2308.2)

Policy RCW-1.1.8 Managing Institutional Land Uses
Manage institutional land uses in the Rock Creek West Planning Area in a way that ensures that their operations are harmonious with surrounding uses, that expansion is carefully controlled, and that potential adverse effects on neighboring properties are minimized. Ensure that any redevelopment of institutional land is compatible with the physical character of the community and is consistent with all provisions of the Comprehensive Plan and the underlying zoning rules and regulations. Densities and intensities of any future development on such sites should reflect surrounding land uses as well as infrastructure constraints and input from the local community. 2308.9

Policy RCW-1.2.3: National Park Service Areas
Conserve and improve the more than 2,000 acres of natural open space in the forested neighborhoods that lie between the Potomac River and Rock Creek Park, including … the Fort Circle Parks. 2309.4

Policy LU-2.1.5: Conservation of Single Family Neighborhoods
Protect and conserve the District's stable, low density neighborhoods and ensure that their zoning reflects their established low density character. Carefully manage the development of vacant land and the alteration of existing structures in and adjacent to single family neighborhoods in order to protect low density character, preserve open space, and maintain neighborhood scale. 309.10

Policy LU-2.2.1: Code Enforcement as a Tool for Neighborhood Conservation
Recognize the importance of consistent, effective, and comprehensive code enforcement to the protection of residential neighborhoods. Housing, building, and zoning regulations must be strictly applied and enforced in all neighborhoods of the city to prevent deteriorated, unsafe, and unhealthy conditions; reduce illegal activities; maintain the general level of residential uses, densities, and height; and ensure that health and safety hazards are promptly corrected. 310.2

Policy LU-2.3.1: Managing Non-Residential Uses in Residential Areas
Maintain zoning regulations and development review procedures that: (a**) prevent the encroachment of inappropriate commercial uses in residential areas; and (b) limit the scale and extent of non-residential uses that are generally compatible with residential uses, but present the potential for conflicts when they are excessively concentrated or out of scale with the neighborhood.** 311.3

Policy LU-2.3.5: Institutional Uses
Recognize the importance of institutional uses, such as private schools, child care facilities, and similar uses, to the economy, character, history, and future of the District of Columbia. **Ensure that when such uses are permitted in residential neighborhoods, they are designed and operated in a manner that is sensitive to neighborhood issues and that maintains quality of life. Encourage institutions and neighborhoods to work proactively to address issues such as traffic and parking, hours of operation, outside use of facilities, and facility expansion**. 311.7

Policy LU-2.3.7: Non-Conforming Institutional Uses
Carefully control and monitor institutional uses that do not conform to the underlying zoning to ensure their long-term compatibility. In the event such uses are sold or cease to operate as institutions, encourage conformance with existing zoning and continued compatibility with the neighborhood. 311.9

These below refer to Commercial Development <u>in Commercial Zones</u> – showing concern for nearby residential even when constructing in the Commercial Zone:

Policy LU-2.3.2: Mitigation of Commercial Development Impacts
Manage new commercial development so that it does not result in unreasonable and unexpected traffic, parking, litter, shadow, view obstruction, odor, noise, and vibration impacts on surrounding residential areas. Before commercial development is approved, establish requirements for traffic and noise control, parking and loading management, building design, hours of operation, and other measures as needed to avoid such adverse effects. 311.4

Policy LU-2.3.3: Buffering Requirements
Ensure that new commercial development adjacent to lower density residential areas provides effective physical buffers to avoid adverse effects. Buffers may include larger setbacks, landscaping, fencing, screening, height step downs, and other architectural and site planning measures that avoid potential conflicts. 311.5

Zoning Maps

- On the **Future Land Use Map (FLUM),** the lot in question – **3920 Alton Place – is designated as low density residential. R-1-B, single family detached**. The Comprehensive Plan Glossary of terms states that **Residential character**: Refers to the physical features associated with a residential area, such as **homes, lawns, yards, street trees, low traffic volumes, and limited commercial uses**.

- On the **Generalized Policy Map, 3920 Alton Place is located in a Neighborhood Conservation Area.** The Comprehensive Plan Glossary of Terms states that a **Neighborhood Conservation Area** is a **Comprehensive Plan Policy Map category used to describe stable areas with little vacant land and little potential for change. Policies in these areas support maintaining and enhancing existing uses.**

- 3920 Alton Place is **NOT** in any Transit Zone.

Basic zoning regulations in the R-1-B zone

11-D DCMR § 207.5 A place of worship may be erected to a height of sixty feet (60 ft.); provided, that it shall not exceed the number of stories permitted in the district in which it is located.

Chapter 3 Residential House Zones – R-1-A, R-1-B, R-2, A

11-D DCMR § 300.3 The R-1-B zone is intended to provide for areas predominantly developed with detached houses on moderately sized lots.

§ 303 Height

§ 303.1 The maximum permitted building height, not including the penthouse, in the R1A, R2B, R and R3 zones shall not exceed forty feet (40 ft.) and the number of stories shall not exceed three (3) stories.

11-D DCMR § 304 Lot Occupancy

§ 304.1 ... [excerpt from chart showing-]

Zone	Structure	Max Percentage of Lot Occupancy
R-1-B	Places of Worship	60%
	All Other Structures	40%

§ 305.1... Front Setback.... Same as other structures on the street

§306.1 ... Rear Yard.. A minimum rear yard of twenty-five (25 ft.) shall be provided in R-1-B.

§307.1 ... Side Yard. A minimum side yard of eight feet (8 ft.) shall be provided in ... R-1-B.

VARIANCES REQUESTED

Sunrise requests:

1) Variance relief to increase **lot occupancy** to **58 percent** from the **40 percent allowed** for a commercial business, pursuant to 11-D DCMR § 304.1, which states that in R-1-B a place of worship is limited to 60% lot occupancy and "all other structures" are limited to 40% lot occupancy. Their lot occupancy requested is actually **57.53 percent** because they request 20,389 SF occupancy and the lot is 35,443 SF. So, if rounding, they are requesting 58 percent. See Exhibit 6A1, page 2, (and repeated in Exhibit 46) for lot occupancy statistics. [Applicant mis-cites 11-C DCMR § 304.1, which should be 11-D DCMR § 304.1.]

2) Variance relief to increase the **maximum number of stories** to 4 stories from 3 stories (as required by 11-D DCMR § 303.1, which states; "The maximum permitted building height, not including the penthouse, in the R-1-A, R-2-B, R and R-3 zones shall not exceed forty feet (40 ft.) and the number of stories shall not exceed three (3) stories."; Also 11-D DCMR § 207.5, states that "A place of worship may be erected to a height of sixty feet (60 ft.); provided, that it shall not exceed the number of stories permitted in the district in which it is located."

3) Variance relief from the 8-foot **side yard requirement** on the west thereby allowing the building to sit on the shared property line with the National Park Service. 11-D DCMR § 307.1 states "**Side Yard: A minimum side yard of eight feet (8 ft.) shall be provided in … R-1-B.. zones.**"

4) Variance relief **may** be required to allow a steeple of 76 feet when only 60 feet is allowed. No measurement been provided but drawings indicate 76 feet. Exhibit 69E2, pages 5.2 and 5.3. Since WABC has no presence above the 2nd story, can they or should they have a steeple of even 60 feet? See. 11-X DCMR §1001.3 (a) designating a change in height as an area variance. Thus, all the requirements that must be met to grant an area variance apply; and

5) Variance relief **may** be required to allow only 66 parking spaces pursuant to 11-B DCMR § 200.2 (bb) but this must also be deemed "sufficient" parking as required by 11-U DCMR § 203.1(f)(4). This exception was not formally requested but no record has been made that they are complying with all relevant provisions. See also it is an area variance for minimum parking greater than what may be permitted by special exception. 11-X DCMR § 1001.3(b).

Pertinent zoning regulations:

Title 11, SUBTITLE X CHAPTER 10 VARIANCES
1000 GENERAL PROVISIONS

1000.1 With respect to variances, the Board of Zoning Adjustment has the power under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(3) (formerly codified at D.C. Official Code § 5-424(g)(3) (2012 Repl.)), "[w]here, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations, or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property, the strict application of any regulation adopted under D.C. Official Code §§ 6-641.01 to 6-651.02 would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, to authorize, upon an appeal relating to the property, a variance from the strict application so as to relieve the difficulties or hardship; provided, that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map."

1000.2 Only the owner of the property for which a variance is sought, or an agent authorized by the property owner, may apply for variance relief. (emphasis added)

1000.3 Except for those variances heard by the Zoning Commission as part of any discretionary review process, variance cases are heard by the Board of Zoning Adjustment and follow the procedures of Subtitle Y, Chapter 4.

SOURCE: *Final Rulemaking & Order No. 08-06A published at 63 DCR 2447* (March 4, 2016 – Part 2).

11-X DCMR § 1001 VARIANCE TYPES

1001.1 Variances are classified as area variances or use variances.

1001.2 An area variance is a request to deviate from an area requirement applicable to the zone district in which the property is located.

1001.3 Examples of area variances are requests to deviate from:

(a) Requirements that affect the size, location, and placement of buildings and other structures such as height and FAR;

(b) Minimum parking or loading requirements to an extent greater than what may be permitted by special exception; ...

1001.4 A use variance is a request to permit:

(a) A use that is not permitted matter of right or special exception in the zone district where the property is located; ...

SOURCE: *Final Rulemaking & Order No. 08-06A published at 63 DCR 2447* (March 4, 2016 – Part 2); *Final Rulemaking & Order No. 08-06E published at 63 DCR 10932* (August 26, 2016); *Final Rulemaking & Order No. 08-06J published at 64 DCR 6110* (June 30, 2017).

11-X DCMR § 1002 VARIANCE REVIEW STANDARDS

1002.1 The standard for granting a variance, as stated in Subtitle X § 1000.1 differs with respect to use and area variances as follows:

(a) An applicant for an area variance must prove that, as a result of the attributes of a specific piece of property described in Subtitle X § 1000.1, the strict application of a zoning regulation would result in peculiar and exceptional practical difficulties to the owner of property; and

(b) An applicant for a use variance must prove that, as a result of the attributes of a specific piece of property described in Subtitle X § 1000.1, the strict application of a zoning regulation would result in exceptional and undue hardship upon the owner of the property.

1002.2 The applicant for a variance shall have the burden of proof to justify the granting of the application according to these standards and shall demonstrate such through evidence in the public record. If no evidence is presented in opposition to the case, the applicant shall not be relieved of this responsibility.

SOURCE: *Final Rulemaking & Order No. 08-06A published at 63 DCR 2447* (March 4, 2016 – Part 2).

See also 11-Y DCMR § 300.4 and 300.5 below.

Note that under **11-X DCMR § 1002.2**, the Applicant must demonstrate that they have met all conditions to be granted a variance. The burden is on the applicant to prove that they meet the requirements, not on the neighbors to demonstrate that they do not meet the burden of proof. Nonetheless let us discuss the burden that applicant must meet.

The court imposes a three-prong test for area variances

> "An area variance may be granted for improvement of a property if all of the following conditions are met:
>
> (1) the property suffers from 'exceptional narrowness, shallowness, or shape' or from 'exceptional topographical conditions or other extraordinary or exceptional situation or condition;'
>
> (2) these exceptional circumstances 'result in peculiar and exceptional practical difficulties' to the owner unless he or she can obtain a variance; and
>
> (3) variance relief will not create 'substantial detriment to the public good' or 'substantially impair […] the intent, purpose, and integrity of the zone plan as embodied in the zoning regulations and map."

Draude v. District of Columbia Board of Zoning Adjustment, 527 A.2d 1242 (D.C.1987) (Draude I) at 1254, citing D.C. Code 5-424(g)(3) (1981); Capitol Hill Restoration Society v. District of Columbia Board of Zoning Adjustment, 398 A.2d 13, 15-16 (D.C.1979).

THE REQUESTED VARIANCES DISCUSSED

The requested variances are all to make room for a much larger institutional building for a commercial CCRC in an R-1-B neighborhood. There are three requested: lot occupancy, number of stories, and elimination of a side yard.

LOT OCCUPANCY: Request to increase to 58 percent from the 40 percent allowed for a commercial business, pursuant to 11-D DCMR § 304.1.

To be specific, the lot occupancy requested is 57.53 percent because they request 20,389 SF occupancy and the lot is 35,443 SF. A commercial entity is allowed only 40% lot occupancy or 14,177.2 SF.

Zoning allows 60 percent for a church and 40 percent for the senior living facility (non-church) use. Eighty-seven percent of the building is Sunrise, not a church. Since Sunrise occupies more than **87** percent of the building, the business requirements should apply. Therefore, lot occupancy should be held to 40 percent. At less than **13** percent of the building, WABC does not need all the variance and special exceptions. This is all strictly for Sunrise's use.

There is a big difference between church use and senior living facility use. For one thing a church can have many activities but a church does not have 121 people living there with more than 70 staff and 28-ton trucks and 30-foot box trucks delivering food linens, and other supplies.

Sunrise tries to argue that allowing them, a for-profit business, a 58 percent lot occupancy rather than the 40 percent that is allowed should be okay because a church, which they are not, is allowed more. They also assert that "effectively" they are using less than 58 percent if you count the federal park land as if they own it as well. Exhibit 8 at p.7. Exhibit 69, page 30. But we the taxpayers own that land. NPS land is dedicated to the soldiers who served at Fort Reno and is for the use of the general public.

Over its requested four floors, the Sunrise/WABC building would be 81,556 SF + penthouse of 3,400 SF = 84,956 SF or approximately **eighty-five thousand (85,000) square feet total in the building. This is huge in a single family zone.**

Existing Building Compared to Proposed Building: The existing WABC building is only 7,392.6 SF or 20.86 percent of the lot currently. Thus, an increase to 20,389 SF lot occupancy (57.5 percent lot occupancy) under applicant's proposal is almost THREE TIMES the size of the existing structure. Plus, the current building is three stories, with the first story being partially below ground. By comparison the proposed building is FOUR stories plus penthouse - all above ground - next to 2-story single family detached homes.

For the source of these measurements, see Exhibit 39, surveyor's measurements of existing building. The proposed building has a footprint of 20,389SF. Exhibit 6A1. Using the surveyor's measurements attached, the existing building has a footprint of 7,392.6 SF, which is 20.86 percent occupancy of a 35,443 SF lot.

NUMBER OF STORIES FROM 3 TO 4 ALLOWS 25% INCREASE IN VOLUME OF USE FOR SUNRISE

Under the Zoning Code, the development standards in R zones are intended to control the mass or volume of structures, including height and lot occupancy. The applicable standards for a CCRC in an R-1-B zone is 3 stories, 40-foot height, 40% lot occupancy, and 8 foot side yard setback.

Sunrise's argument that it should be granted a variance to allow 4 floors rather than the prescribed 3 floors because the building will be 40 feet high is specious. The number of stories is an important development standard for a CCRC in an R-1-B zone because it limits the occupancy level. Here, Sunrise would gain a 25% increase in occupancy capacity by adding a 4th floor which equates to 35-50 more people living on the site plus staff, aides, and visitors.

This requested variance is solely for the benefit of Sunrise. The degree of this variance for the number of stories is severe and dramatically increases the occupancy capacity. Thus, the variance violates the development standards and is not merited.

Sunrise argues that they should be allowed 4 stories when only 3 stories are allowed in R-1-B, because they can fit 4 stories into the 40 feet allowed. But if the drafters of residential zoning thought all residential buildings could have 4 stories, they would have

said so. The 40 feet but 3 stories limit allows some homes to have higher ceilings, for example, without having to request BZA approval each time. More significantly, the 3-story limit is an element in controlling the massing of structures and the concentration of population in residential zones.

Height Regulations: **11-D DCMR § 207.5** A place of worship may be erected to a height of sixty feet (60 ft.); provided that it shall not exceed the number of stories permitted in the district in which it is located. [This lot is located in R-1-B therefore 3 stories is the limit even for a church.]

Sunrise occupies most of the 1st and 2nd floors and all of the 3rd and 4th floors. This variance to allow 4 stories has nothing to do with the tiny amount of space that the church will be allowed in the building. Allowing a 4th story means that 35-50 more people will reside on the lot plus there would be the attendant staff, private aides and visitors.

Sunrise keeps trying to justify their request for 4 stories by citing the regulations that a church can have a height of 60 feet. But even churches are limited to 3 stories.

Sunrise is allowed a penthouse, which they include in their plans, and the penthouse does not count as a story. The penthouse is, however, 12 feet in height (1 story), with required 1 for 1 setback and will be 3,400 SF. Sunrise has not provided information as to how this penthouse will be used. They should be required to do.

All of this taken together means that in a single family neighborhood there would be 40 feet plus 12 feet for the penthouse plus a drop of 13 feet below grade on the 39th Street side and the first story counted in the 40 feet starts below grade, meaning that the building as viewed from the 39th Street side has an exposed side of over 65 feet.

ELIMINATION OF EIGHT FOOT SIDE YARD SETBACK TO ALLOW 9% INCREASE IN BUILDING TO ACCOMMDATE SUNRISE.

Under the Zoning Code, the development standards in R zones are intended to control the mass or volume of structures, including height and lot occupancy. The applicable standards for a CCRC in an R-1-B zone is 3 stories, 40-foot height, 40% lot occupancy, and 8 foot side yard setback.

Sunrise, by eliminating the side yard setback on its western property line shared with the NPS, gains approximately 5,400 square feet for the CCRC project. This additional space provides increased occupancy capacity for about 11 people to live at the site plus staff, aides, and visitors. As a basis for comparison, the area gained by the elimination of the side yard exceeds the total living area of 3 of the 5 single family homes on Yuma Street.

This requested variance is solely for the benefit of Sunrise. The degree of this variance for elimination of the side yard setback is severe and dramatically increases the occupancy capacity. As such it violates the development standards and is not merited.

Elimination of the side yard setback and the lot occupancy increase are inextricably intertwined. To provide context, Sunrise SVP Kroskin has repeatedly said that if the side yard is not eliminated, then he again will move the building back 8 feet on the other side closer to the 39th Street homes.

The footprint in square feet of the proposed building is 20,389 SF (this includes the 1,832.48 available if the side yard setback is eliminated). Elimination of the side yard setback would allow Sunrise to add 1,832.48 SF in lot occupancy. This is a 9% increase (1,832.48 SF portion of 20,389 SF lot occupancy).

The elimination of the side yard setback allows an 1,832.18 SF increase in the proposed facility, equating to **7,329.92 SF** spread over 4 floors with the concomitant increase in the volume of people residing in the building.

To relate this to the existing WABC building, that building occupies **7,392.6 SF** of the lot. So, by requesting an elimination of the 8-foot setback, Sunrise is asking for the equivalent of the footprint of the entire current WABC building spread over 4 floors.

Note that compared to the existing WABC building, which occupies 7,392.6 SF of the lot, the Applicant's request for 20,389 SF lot occupancy is almost THREE TIMES the size of the existing structure.

For supporters of green space, if the side yard setback is not eliminated there will be 1,832.48 SF retained as grass.

DOES APPLICANT NEED A VARIANCE FOR THE HEIGHT OF THE STEEPLE?

Since WABC has no presence above the 2nd story, can they or should they have a steeple of 60 feet? Yet it appears that the steeple is **76 feet**.

No measurements for the façade have been provided despite multiple requests. Based on the scale drawing provided, however, the steeple appears to be 76 feet in height. Exhibit 69E2, page 5.2 and 5.3.

Thus, it appears that a variance must be requested and, to be granted such a variance, applicant needs to show "institutional necessity" for the 76-foot façade across the street from the single-family homes on Yuma Street.

See. 11-X DCMR §1001.3 (a) designating a change in height as an area variance. Thus, all the requirements that must be met to grant an area variance must be met.

IS A VARIANCE NEEDED FOR PARKING?

Do 66 spaces meet the condition for a CCRC, which is "*sufficient off-street parking spaces for employees, residents, and visitors?"*

Although applicant is not seeking any variance there remains a question whether 66 parking spaces meets the parking condition required for approval of a CCRC.

Sunrise states the Zoning Administrator confirmed that "assisted living facilities" are 'residential". See Letter of June 18, 2018 at Exhibit 23. But this does not mean that Sunrise's proposed parking plan meets the CCRC conditions that zoning requires.

The Zoning Administrator merely said that under the definitions at 11-B DCMR § 200.2 (bb), an assisted living facility is included in the definition of "residential". Sunrise then jumped to the conclusion that based on the parking chart at 11-C DCMR § 701.5, they only need to provide 66 spaces by adding the 41 required for a "residential, multiple dwelling unit" plus 25 required under the "institutional, religious" category for the church.

A multiple dwelling unit, however, would not be allowed in R-1-B as a Matter of Right and there is no special exception for a multi-family residential dwelling unit in R-1-B. Applicant's proposal comes before you as a special exception for a CCRC and such a special exception has its own specific conditions regarding parking requirements.

The Zoning Administrator made no attempt, and might view it as solely within the jurisdiction of the BZA, to ascertain how many parking spaces meet the requirements of the CCRC condition at 11-U DCMR § 203.1 (f) (4), where the applicant must show that *"The use and related facilities shall provide sufficient off-street parking spaces for employees, residents, and visitors..."*

DDOT's Traffic Report, Exhibit 53, merely recites the same analysis as the Zoning Administrator, however, it would be useful if DDOT's analyzed whether the 66 spaces provided do in fact meet the CCRC condition requiring "sufficient off-street parking spaces for employees, residents and visitors…"

Applicant on Parking

> The use and related facilities shall provide sufficient off-street parking spaces for employees, residents, and visitors - A total of 66 parking spaces will be provided on site in a below-grade parking garage, which meets the required number of parking spaces for the religious and CCRC uses under the Zoning Regulations. Based on the updated Comprehensive Transportation Review ("CTR") prepared by Gorove/Slade Associates, and submitted to record as Exhibit 52A, the proposed number of parking spaces exceeds the expected demand for the church and the CCRC employees, residents and visitors. The table from page 12 the CTR (Exhibit 52) summarizes the anticipated demand and supply.

> In the unlikely and unanticipated scenario where all parking spaces in the building are occupied, Sunrise will direct visitors and employees to park in metered spaces on the street or parking garages in the vicinity. …[T]here is ample RPP-restricted on-street parking to accommodate area residents. Many houses in the vicinity also have off-street parking, as well.

The CTR, DDOT and now Applicant in their pre-hearing statement all provide the same "shared parking" table that shows that Sunrise parking is normally 43 vehicles but on Sunday will drop to 25 vehicles. Why and how will it drop? See table on page 97 herein..

There does not seem to be any plan for event parking although Sunrise and the church plan to hold events. There is no plan for drop off and pick up on the church side in order to avoid congestion on Yuma Street.

Where is parking for people with disabilities who want to enter either the church or Sunrise? Is there an accommodation in the garage for people with disabilities who are transported by vans that either let them out the back or the side of the van?

Bottom line, much more thought needs to be applied before anyone can conclude that 66 spaces meets the requirements of the CCRC condition at 11-U DCMR § 203.1 (f) (4), where the applicant must show that *"The use and related facilities shall provide sufficient off-street parking spaces for employees, residents, and visitors..."*

WHICH PARTIES CAN REQUEST VARIANCES – OWNERSHIP REQUIRED

Applicant seeks several area variances, including lot occupancy increase of almost 50% (40% to 58%), number of stories from 3 to 4 floors, and elimination of an 8-foot side yard setback that allows an increase in the size of the building and the volume of people who would live in the building. Here, all three requested variances, lot occupancy, number of stories, and side yard setback must each meet the regulatory requirements and the standards set by court decisions. In addition, there is probably a variance necessary for the height of the steeple.

SUNRISE IS NOT AN *OWNER* THERFORE, AS A PRELIMINARY ISSUE, SUNRISE HAS NO STANDING UNDER THE APPLICABLE REGULATIONS TO ASK FOR VARIANCES OR TO ASSERT ITS NEEDS FOR VARIANCES

As a fundamental issue the Sunrise case should be dismissed because Sunrise is not the owner of the 3920 Alton Place site. Sunrise cannot ask for any variances and all the variances sought are for the sole benefit of Sunrise. Thus, dismissal is the appropriate conclusion.

The standard for granting an area variance is strict and the applicant for the variance must be the **owner** of the property – the current owner not some suggestion that they might be the owner in the future. Here, WABC is the only owner of the property and Sunrise has clearly stated that the WABC and Sunrise are two separate legal entities, not in a joint venture. As such, Sunrise's assertions of its own interests concerning the property are irrelevant.

1000 GENERAL PROVISIONS (11-X DCMR § 1000)

1000.1 With respect to variances, the Board of Zoning Adjustment has the power under ... peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, to authorize, upon an appeal relating to the property, a variance..."

1000.2 Only the owner of the property for which a variance is sought, or an agent authorized by the property owner, may apply for variance relief. (emphasis added)

CHAPTER 3 APPLICATION REQUIREMENTS

300 APPLICATION REQUIREMENTS: SPECIAL EXCEPTION AND VARIANCE

11-Y DCMR § 300.

300.4 The owner of property for which zoning relief is sought or an authorized representative, shall file an application with the Office of Zoning.

300.5 If the owner will be represented by a third party, including the lessor or contract purchaser of the property, a letter of authorization signed by the owner authorizing the representative to act on the owner's behalf with respect to the application, and a certification signed by the representative that they have read the Board's Rules of Practice and Procedure (Subtitle Y) and are able to competently represent the owner shall be submitted into the record. The Board may at any time require additional evidence demonstrating the authority of the representative to act for the owner.

Source: Final Rulemaking published at 63 DCR 2447 (March 4, 2016 – Part 2).

WABC has authorized Sunrise and the law firm of Donovan and Stearns, PLC. to act **as an agent** representing WABC before the BZA in this proceeding. See Exhibit 9. But **an agent, or a law firm, or even a contract purchaser, acting as a designated agent to represent a principal, can only present the interests of the principal not the interests of the agent.**

WABC at Exhibit 9 states:

> ***"As owner of the above-referenced property (3920 Alton Place NW), the Wisconsin Avenue Baptist Church hereby authorized Sunrise Senior Living and the law firm of Donohue & Stearns, PLC, to represent it before the Board of Zoning Adjustment for a special exception application and related variances to establish a continuing care retirement community and church at the property."*** **- Signed Patricia Dueholm, Trustee, WABC, May 1, 2018.**

The letter of authorization is essentially a ministerial function and does not confer any ownership rights to Sunrise or the law firm.

And at Exhibit 4 **Statement of Existing and Intended Use**, it says: The property at 3920 Alton Place, N.W. (Square 1779, Lot 14) is **currently owned by the Wisconsin Avenue Baptist Church** and used as a church. The intended use of the site is a church and continuing care retirement community.

The terms **"agent"** and "authorized representative" are not defined by the regulations, which direct the reader to Webster's Dictionary in such cases. Webster's defines "agent" as "a person or business authorized to act on another's behalf." Black's law Dictionary defines an "agent" as a "representative," citing a professional sports agent as an example.

"In the basic formulation in the Restatement (Second) of Agency, "[u]nless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency." Restatement (Second) of Agency § 387 (1958)." Deborah A. DeMott, The Lawyer as Agent, 67 Fordham L. Rev. 301, 316 n. 60 (1998).

"As a fiduciary, an agent owes duties of loyalty to the principal, which encompass more specific constraints on self-dealing, representation of adverse interests, competition, and the use of information acquired in connection with the agency. The agent's fiduciary position, moreover, obliges the agent to interpret the principal's instructions reasonably, in light of facts that the agent knows or should know at the time the agent acts, and consistently with the **principal's interests** and objectives made known to the agent. It will often be reasonable for the agent to ask the principal to clarify instructions that are ambiguous or incomplete. This aspect of the agent's fiduciary position facilitates the principal's exercise of the right to control the agent". (Emphasis supplied.) Deborah A. DeMott, The Lawyer as Agent, 67 Fordham L. Rev. 301, 307 (1998).

In Restatement (Third) of Agency (2006) - American Law Institute: Chapter 8. Duties Of Agent And Principal To Each Other, Topic 1 Agent's Duties to Principal:

§ 8.01 General Fiduciary Principle: An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship.

§ 8.05 Use Of Principal's Property; Use Of Confidential Information: An agent has a duty (1) not to use property of the principal for the agent's own purposes or those of third party; and (2) not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party.

§ 8.12 Duties Regarding Principal's Property; Segregation, Record-Keeping, And Accounting: **An agent has a duty, subject to any agreement with the principal, (1) not to deal with the principal's property so that it appears to be the agent's property;** (2) not to mingle the principal's property with anyone else's; and (3) to keep and render accounts to the principal of money other than property received or paid out on the principal's account.

In *Palmer* v. *Board of Zoning Adjustment*, 287 A.2d 535, 541-42 (D.C. 1972), the Court of Appeals in discussing the nuanced construction of a statute concerning the burden of proof for a use variance ("undue hardship") versus an area variance ("practical difficulties") held that the applicant failed to meet either standard because "[t]he statute expresses in clear and unambiguous language that the showing, whether of 'practical difficulties' or 'undue hardship,' must be upon the *owner*. (italics in original.) The court continued, "... we look only to evidence of hardship or difficulty befalling the owner." In *Palmer*, the court stated, "[t]here is no evidence in the record that the owner cannot reasonably adapt the premises or find a tenant to produce a reasonable income for a use in conformance with … the regulations. Accordingly, the record before us fails to support a finding of 'hardship upon the owner'."

Applicant cites the following cases regarding the standard for review for an area variance: *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1035 (D.C. 1995) (quoting *Roumel v. District of Columbia Bd. of Zoning Adjustment,* 417 A.2d 405, 408 (D.C. 1980)); *Capitol Hill Restoration Society, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 534 A.2d 939 (D.C. 1987). Exhibit 8, pages 3-4 and Exhibit 69, page 10.

French states that the applicant for the special exception has the burden of showing that the proposal complies with the regulations, including any specific conditions. *French*, in discussing the area variance and citing *Roumel*, discusses the three general conditions needed for the variance: the property is unique because of physical attributes, the owner would encounter practical difficulties, and variance would not cause substantial detriment. *French* emphasizes that it is the **owner** who must encounter practical difficulties if regulations were strictly applied.

In *Capitol Hill*, the court reversed the BZA grant of an area variance finding that the applicant had failed to meet its burden of showing some extraordinary or exceptional situation related to the particular property (not unique) and, thus, did not meet the first requirement for a variance. The Court also discussed the allegation that the lot was

unusually large but concluded that the record did not show that the property was unique in that sense. Again, this case involved the **owners** seeking the variance.

Here, WABC, the owner, would occupy less than 13 percent of the building. Sunrise would occupy more than 87 percent of the building. The record indicates that WABC currently owns the land. WABC and Sunrise have stated many times that they are not in a joint venture and will have no legal relationship other than sharing the building on the property as separate condominiums. *All the variances and special exceptions are to accommodate Sunrise, a non-owner, not WABC*.

Applicant has cited no court decisions where variances were granted to a non-owner. In all of the following cases, variances were granted to **owners**: *Monaco, Draude, St. Mary's and Dupont Circle Citizens.* In *Foxhall*, the court reversed the BZA's approval of a variance to the owner of the property.

Nothing in the Zoning Regulations allow a non-owner to request a variance on their own behalf or for their own benefit. Sunrise cannot ask for variances for itself. Here the applicant dedicates considerable discussion to the needs of a CCRC and Sunrise in its requests for multiple variances. Exhibit 8, pages 5-6, Exhibit 69, pages 25-30. The application states that the lot occupancy of 40% and three stories in an R-1-B zone are insufficient allowance for any CCRC use. Such assertions are irrelevant as Sunrise is not the property owner.

VARIANCES ARE NOT FOR WABC. THEY ARE FOR SUNRISE.

Sunrise says "without variance relief from the number of stories and lot occupancy restrictions, the church cannot partner with Sunrise to construct the proposed church and CCRC facility, due to the financial constraints and design parameters of a CCRC use." Exhibit 69, page 26.

Here, WABC, the owner, will occupy less than **13 percent of the building**, so it is not WABC that needs the dramatic increases in lot occupancy, elimination of a side yard or number of stories. It is Sunrise that needs the variances. The 57.53 percent lot occupancy of the proposed project exceeds the 40 percent regulatory standard by almost 50 percent, the elimination of the side yard setback allows the building to be increased by 9%, and the four stories requested exceed the maximum allowed three stories by 33 percent. The project would be a massive structure greatly exceeding the development standards set forth in the zoning regulations. There are many reasons to deny these requests but one reason is because all the increases are for Sunrise only and Sunrise owns no property in Tenleytown.

These variances do not serve the needs or mission of WABC as a church, including any of its programs. Because all the variances requested herein are for Sunrise and not WABC, WABC, as the property owner, cannot claim that the variances are needed to alleviate practical difficulties to or relieve undue hardship. The application cites no

authority for the proposition that a variance may be granted to a non-owner nor has it cited any cases where the non-owner was the applicant for the variances sought. Accordingly, all variances should be denied.

THE COURT ARTICULATES THE STANDARDS FOR GRANTING A VARIANCE

The DC Court of Appeals, citing the zoning regulations, has held that an applicant for a variance "must show, first, that the property is unique because of some physical aspect or 'other extraordinary or exceptional situation or condition' inherent in the property…" *National Black Child Development Institute, Inc. v. District of Columbia Board of Zoning Adjustment*, 483 A.2d 687, 690 (D.C.1984); *Roumel v. District of Columbia Board of Zoning Adjustment*, 417 A.2d 405, 408 (D.C.1980); *Monaco v. District of Columbia Board of Zoning Adjustment*, 407 A.2d 1091, 1096 (D.C.1979). Secondly, the court's three-prong test for an area variance requires the applicant to show that practical difficulties to the owner will occur if the zoning regulations are strictly enforced.

In *Monaco*, the court affirmed the BZA grant of a variance for the Republican National Committee to build another office building next to its existing office building on Capitol Hill, recognizing for the first time that "when a public service has inadequate facilities and applies for a variance to expand into an adjacent area in common ownership which has long been regarded as part of the same site, then the Board of Zoning Adjustment does not err in considering the needs of the organization as possible 'other extra-ordinary and exceptional situation or condition of a particular piece of property'." While observing that normally an owner suffers no undue hardship when his property can produce a reasonable profit in a permitted use, the court determined that the applicant's good faith detrimental reliance on previous zoning actions was relevant to determining its undue hardships under the second prong of the variance test. Given that the past zoning history could be taken into account in the uniqueness facet of the variance test, the court examined the situation to assess whether the BZA erred in considering the needs of the Republican National Committee, the proximity of the site to the Capitol, the restrictive covenant, and existence of the first two buildings as contributing to uniqueness.

The *Monaco* decision was reexamined by the court in *Draude I* when the court found that the BZA erred in granting an area variance to George Washington University to expand its ambulatory health care facilities. The court in *Draude I* held that:

> "[t]he concept of an 'exceptional condition' in the variance context refers to unusual conditions of the property, not merely to unusual circumstances personal to the owner and related to the property only in the sense that the owner's personal situation makes it difficult to develop the land consistently with the zoning regulations. See *Capitol Hill Restoration Society*, 398 A.2d at 16. Furthermore, the BZA generally cannot grant a variance just because the property makes it difficult for the owner to construct a particular building or to pursue a particular use without a variance if the owner could use or improve the land in other ways compatible with zoning restrictions. *Palmer v. District of Columbia Board of Zoning Adjustment*, 287 A.2d 535, 540 (D.C.1972). Rather than creating practical

difficulties for a particular owner with its special requirements, the exceptional condition must create practical difficulties for conforming development for any owner and for any purpose." *Draude I* at 1255.

In *Draude I* the Court recognized that "when a public service has inadequate facilities and applies for a variance to expand into an adjacent area in common ownership which has long been regarded as part of the same site, then the Board of Zoning Adjustment does not err in considering the needs of the organization as [a] possible 'other extraordinary and exceptional situation or condition of a particular piece of property'." *Monaco v. District of Columbia Board of Zoning Adjustment*, 407 A.2d 1091, 1099 (D.C.1979) (quoting D.C. Code § 5-424(g)(3) (1981)) (emphasis added).

In this situation, the possibility of alternative uses does not necessarily show that no "exceptional condition" exists. The need to expand does not, however, automatically exempt a public service organization from all zoning requirements. Where a public service organization applies for an area variance in accordance with Monaco, it must show (1) that the specific design it wants to build constitutes an institutional necessity, not merely the most desired of various options, and (2) precisely how the needed design features required the specific variances sought. *Draude I* at 1256.

In *St. Mary's Episcopal Church v. DC Zoning Commission and Hillel at GWU, Intervenor, 174 A.3d 260 (2017)*, the court found with respect to the first prong, that "it is fundamental that the difficulties or hardships [be] due to unique circumstances peculiar to the applicant's property and not to the general conditions in the neighborhood." *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1990) (quoting *Palmer v. Board of Zoning Adjustment*, 287 A.2d 535, 539 (D.C. 1972)). The court further noted that "[t]he statute does not preclude the approval of a variance where the uniqueness arises from a confluence of factors." *St. Mary's* at 269.

Additionally, the *St. Mary's* court noted that in *Monaco v. District of Columbia Bd. of Zoning Adjustment*, 407 A.2d 1091, 1097 (D.C. 1979) the court had determined that the need to expand an existing building may be an exceptional condition and that the Zoning Commission "may be more flexible when it assesses a non-profit organization." Id. at 270. The court reiterated applicant's need to show its compliance with the *Draude I* requirements concerning institutional necessity to satisfy the second prong of the variance test.

In *Dupont Circle Citizens Ass'n v. District of Columbia Bd of Zoning Adjustment*, 182 A. 3d. 138 (D.C. 2018) the court observed that "[t]he extraordinary or exceptional conditions affecting a property can arise from a confluence of factors; however, the critical requirement is that the extraordinary or exceptional condition must affect a single property." *Metropole Condo Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 141 A.3d 1079, 1082–83 (D.C. 2016). The requirement may be satisfied by, inter alia, features of the lot such as irregular shape or narrow width, "a characteristic of the land, [a] condition inherent in the structures built upon the land, or prior zoning actions regarding the property." *Ait–Ghezala*, 148 A.3d at 1217 (citations and internal quotation

marks omitted). In discussing what constitutes an exceptional condition, the court pointed out that a property's inclusion in a historic district does not qualify. *Capitol Hill Restoration Soc'y v. District of Columbia Bd. of Zoning Adjustment*, 534 A.2d 939 (D.C. 1987); see also *Palmer v. District of Columbia Bd. of Zoning Adjustment*, 287 A.2d 535, 539 (D.C. 1972) ("If the circumstances affect the whole area the reasonableness of the regulations are challenged and the proper remedy is to seek an amendment of the regulation rather than a variance.").

In *Dupont Circle Citizens Ass'n,* the court summarized the history of the principles to be applied if a variance is requested.

"The first case in which we explicitly recognized the relevance of a variance petitioner's status as a public service organization was *Monaco v. District of Columbia Board of Zoning Adjustment*, 407 A.2d 1091 (D.C. 1979), where we affirmed the grant of a variance allowing the Republican National Committee to build another office building next to its existing office building on Capitol Hill. We recognized that the site's location near the Capitol and the existing building did not make the site unique but did make it uniquely suitable for the RNC's needs. Id. at 1098. … BZA may be more flexible when it assesses a non-profit organization…. RNC, … which is a well-established element of our governmental system. Id. Restating this rule of additional flexibility, we held that "when a public service has inadequate facilities and applies for a variance to expand into an adjacent area in common ownership which has long been regarded as part of the same site, then the Board of Zoning Adjustment does not err in considering the needs of the organization as part of the exceptional condition prong. Id. at 1099.

We refined this doctrine in *Draude v. District of Columbia Board of Zoning Adjustment,* 527 A.2d 1242 (D.C.1987) (Draude I), where we remanded for further proceedings after holding that the Board erred in granting an area variance to the George Washington University Hospital to construct an addition to an existing medical building. *Id*. at 1255-57. Interpreting *Monaco*, we held that [w]here a public service organization applies for an area variance… it must show **(1) that the specific design it wants to build constitutes an institutional necessity, not merely the most desired of various options, and (2) precisely how the needed design features require the specific variance sought.** Id. at 1256. [court's footnote 4: In *Draude II*, we held that the hospital had met this standard and that "the existence and purpose" of the neighboring medical building was a permissible factor in finding an exceptional condition. 582 A.2d at 956.] We have referred to the public service organization doctrine only occasionally since *Draude I*, without further refinements. See *Williams v. District of Columbia Bd of Zoning Adjustment,* 535 A.2d 910, 911 n.2 (D.C. 1988); *Draude II*, 582 A.2d at 956.

We have approved the application of the doctrine to the RNC in *Monaco*, to a hospital in *Draude I* and *Draude II*, and to a non-profit social service center in *National Black Child Development Institute, Inc. v. District of Columbia Board of Zoning Adjustment*, 483 A.2d 687 (D.C.1984). Although none of these cases explicitly answers the

question whether a church is a 'public service organization" within the meaning of the doctrine, we have undoubtedly extended the scope of that term beyond how we initially defined it in *Monaco* as "a non-profit organization" which is a well-established element of our governmental system. 407 A.2d at 1098. In both *National Black Child Development Institution*, 483 A.2d at 690, and *Foxhall Community Citizens Association v. District of Columbia Board of Zoning Adjustment*, 524 A.2d 759, 764 n. 6 (D.C. 1987), we equated "public service" with a "nonprofit entity." And in *Foxhall*, we also noted that the Monaco doctrine did not apply because the church that sought the variance "did not seek the variance to alter its own use of the property [but rather] in order to sell the church to a contract purchaser who would not buy it unless the way was clear for him to use it for another purpose.' 525 A.2d at 764 n.6. The suggestion is that, if a church did seek a variance for its own ends, it would receive the greater flexibility reserved for public service organizations in variance analysis. Under these circumstances, it requires no extension of the *Monaco* doctrine to hold that a church may be a public service organization entitled to additional flexibility in the Board's variance analysis.

In this case, however, the Board did not explicitly find that the Parish was a public service organization or that it had made the showings required by *Draude I* in order to receive the additional flexibility owed to such organizations. The bare and unexplained sentence in the Board's decision stating that the church has a 120-year history at the present location and requires new and expanded facilities to accomplish its mission is not sufficient to show "(1) that the specific design it wants to build constitutes an institutional necessity, not merely the most desired of various options, and (2) precisely how the needed design features require the specific variance sought." *Draude I*, 527 A.2d at 1256. [court's footnote 5: The Parish's brief on appeal asserts, with no support in the Board's findings of fact, that the "Parish Hall is no longer an adequate facility" because "[I]t has become too small for the church's needs and would require a significant and costly modernization and expansion for any continued use," that the Parish needs "a new and larger facility for it to continue its services," and that it does not have the money to rebuild in the expensive Dupont Circle neighborhood without adding the residential development." These alleged facts, if found to by the Board and supported by the record, would go some distance toward satisfying the requirements laid out in *Draude I*. When addressing these questions, the Board should consider that the variance seems to have been requested because of applicant's desire to erect both a church and a residential building on this lot, which formerly was occupied only by a church."

Prong 1

Prong 1 of area variance test.

> "An area variance may be granted for improvement of a property if all of the following conditions are met: (1) the property suffers from 'exceptional narrowness, shallowness, or shape' or from 'exceptional topographical conditions

or other extraordinary or exceptional situation or condition;' … Draude I at 1254, citing D.C. Code 5-424(g)(3) (1981); *Capitol Hill* at 15-16.

Applicant's assertion that there is an extraordinary or exceptional situation or condition and that the public service organization doctrine gives them more flexibility when standards are applied.

APPLICANT:

Extraordinary or exceptional situation or condition: Under the first prong of the variance test, an applicant must demonstrate that "the property is unique because of some physical aspect or other extraordinary or exceptional situation or condition inherent in the property." *Capitol Hill Restoration Society v. District of Columbia Bd. of Zoning Adjustment*, 534 A.2d 939, 941 (D.C. 1987). An exceptional or extraordinary situation or condition may arise from many factors, including history, shape, and location; may encompass the buildings on a property, not merely the land itself; and a "confluence of factors" may combine to give rise to the exceptional condition. *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*¸ 579 A.2d 1164, 1168 (1990). It is not necessary that the property be unreservedly unique to satisfy this prong. Rather, the applicant must provide that a property is affected by a condition unique to the property and not related to the general conditions in the neighborhood. *Id.*

In assessing compliance with the variance test, the Board may apply flexibility to non-profit organizations and churches. The exceptional condition is not limited to the land or the improvements, but also applies to the needs of an organization devoted to public service which seeks to upgrade and expand its existing inadequate facilities. *Monaco v. District of Columbia Bd. of Zoning Adjustment*, 407 A.2d 1091, 1097-99 (D.C. 1979); *see also St. Mary's Episcopal Church* at 270 (not disturbing Zoning Commission's finding of exceptional condition for non-profit religious organization seeking lot occupancy variance to better serve the needs of its members).

When a public service or non-profit organization has inadequate facilities and applies for a variance, the Board may also consider the needs of the organization as an exceptional condition. *Monaco*, 407 A.2d at 1099. Under the *Monaco* standard, the church is required to show "(1) that the specific design [the church] wants to build constitutes an institutional necessity, not merely the most desired of various options, and (2) precisely how the needed design features require the specific variance sought." *Draude v. District of Columbia Board of Zoning Adjustment*, 527 A.2d 1242 (D.C. 1987).

Here, the Property is like no other in the R-1-B zone in the Tenleytown neighborhood. First, its size, shape, and configuration are all unusual in comparison to other lots in the R-1-B area of Tenleytown.

Excerpt from Property Quest map showing size of lots in vicinity of WABC site (www.PropertyQuest.dc.gov)

The lot is an irregularly shaped, five-sided parcel that spans the full depth of the lot, which is 220 feet deep on its east side. The west property line is angled and is also approximately 220 feet in length. The site fronts on both Alton Place, N.W., and Yuma Street, N.W., with 126.11 feet of frontage to the north (Alton Place) and 180 feet of frontage to the south (Yuma Street).

Approximately seven feet of Lot 14 also fronts on Nebraska Avenue, N.W. The total land area is 35,443 square feet, or seven times larger than the average of the other five lots on the square.

Unlike the majority of lots in the vicinity, this site is bounded on the west by the NPS parcel, which is designated as an open, landscaped area that will not be built upon. It is part of the Fort Circle Connector of the civil war defenses that comprise Fort Circle Park. The lot's character as a through lot, along with the open NPS lot to the west, effectively render this site uniquely exposed on four thoroughfares: Wisconsin Avenue/Tenley Circle, Nebraska Avenue, Yuma Street, and Alton Place.

The site's location at the intersection of a major commercial corridor, low-density residential areas, and high-traffic urban crossroads also present extraordinary condition unique to this lot. The site is on the edge of the boundary of the residentially-zoned neighborhood immediately adjacent to the Wisconsin Avenue commercial corridor, the public and institutional uses along Nebraska Avenues, and is within about 500 feet of the Tenleytown Metrorail Station. This unique position is unlike any improved property in its square, and unlike the majority of lots in the R-1-B zone in the neighborhood. The NPS lot provides a small open space buffer, effectively leaving the Property physically and visually exposed to the heavily trafficked mixed-use area.

Beyond its exceptionally uncommon physical characteristics, the Property is further

burdened by the particular situation of its current non-profit, public service organization occupant. WABC has been a part of the Tenleytown neighborhood for over 100 years, including 60 years in its current location. The existing church building suffers from functional obsolescence and major disrepair. In addition to failing mechanical systems, roof issues, and other building deficiencies, other aspects of the church do not allow for adequate church-related services. Lighting and acoustics are poor, the electric grid is inadequate, kitchen facilities are barely operational, security or sprinkler system are non-existent, asbestos tiles are deteriorating, and poor spatial configurations do not meet the needs of the nursery area and classrooms. One of the congregations' greatest challenges is that the existing church is not compliant with the Americans with Disabilities Act ("ADA") accessibility requirements, which is antithetical to the church mission to be inclusive for all citizens. Although the WABC congregation has a valuable property, it sorely lacks the liquid assets needed to make necessary repairs and renovations, and to continue to operate in its present location. The congregation will not survive on this site without leveraging its land value.

In order to survive, WABC will sell its property to Sunrise, which will construct a new, right-sized, modern parish for WABC that fits its members and mission. As part of the new construction, Sunrise will also construct a CCRC in an area of town lacking housing options for its aging population. The WABC will gain new facilities and financial solvency that will allow it to continue its missions into the future. Upon completion, the building will be comprised of two condominium lots, with WABC owning the church portion and Sunrise owning the CCRC portion.

Between the pressing needs of the church, and the unique size, shape and location of the lot, the site is unlike any other in its zone. Thus, the property's exceptional configuration and characteristics constitute the necessary exceptional situation or condition required to meet the first prong of the variance test, as established in the cases cited above. The specific design of the building is an institutional necessity in order for the church to leverage its property with a mission-compatible use. As described in greater detail below, the design features of the building require the specific variance relief sought.

NEIGHBORS' RESPONSE:

Prong I of area variance test.

> "An area variance may be granted for improvement of a property if all of the following conditions are met:
>
> (1) the property suffers from 'exceptional narrowness, shallowness, or shape' or from 'exceptional topographical conditions or other extraordinary or exceptional situation or condition;' …
>
> Draude I at 1254, citing D.C. Code 5-424(g)(3) (1981); *Capitol Hill* at 15-16.

Attributes of the Property

Applicant states that they pass the first prong of the test for variances because *"the property is affected by exceptional size, shape or topography or other extraordinary or exceptional situation or condition."*

Contrary to applicants' contentions, the WABC lot is not uniquely sized, shaped or configured. The lot is not narrow or shallow. The applicant posits that "[t]he shape and disposition of the lot is unusual and exceptionally large relative to other lots in the R-1-B District." Although the 3920 Alton lot has five sides, it is close to rectangular, measuring 220 feet on the east side, a total of 226 feet on the west side, 180 feet on the south side, and approximately 126 feet on the north side. Such configuration allows for six to seven R-1-B lots that would be very similar in configuration to the other neighboring R-1-B lots.

As to the claim that the lot is large, we observe that the 3920 Alton lot was originally 7 individual single family lots in a single-family neighborhood before the WABC bought them and combined them to build the existing church. Church Bulletin of September 24, 2017. See also Exhibit 37. Clearly, the lot could be used for 7 single family homes as that was the original use of the lot. R-1-B zoning allows as a matter of right lots that are 50 feet wide and 5,000 SF, which fit nicely on WABC's 35,449 SF lot at 3920 Alton Place, NW. See Exhibit 37, last page, which includes a diagram with the 7 lots designated. Further, there are at least two lots within two blocks that are large; one on Grant Road is more than 20,810 square feet and the other is more than 17,400 square feet (The Rest, an historic home).

There are no exceptional topographical conditions. The lot is so close to flat that when Tenleytown had a baseball team that played in a District-wide league, this is where that team practiced. See *Tenleytown, D.C. – Country Village into City Neighborhood, Judith Beck Helm, 1981, page 135.* To compare the elevations: on the Alton side the lot is at 387.2 and on the Yuma side it is at 385.5. In other words, a slope of approximately 20 inches across a lot that is 220 feet wide. [The slope of the lot from Alton to Yuma is 9 inches in 100 feet or 0.77% or an angle of less than half a degree (0.4 degrees).] Bottom line - basically flat. There is nothing physically unique, exceptional or extraordinary about this lot in the negative sense. Again, all of its attributes are positives for development, including being a through lot.

Any slope that may exist cannot be a problem because it is Sunrise that is requesting an exception for a retaining wall of 13 feet so they can build a truck ramp with a slope with a drop of 13 feet across a 220-foot wide lot. So, there is no indigenous slope barrier to development because they are artificially creating a far greater slope.

Sunrise has asked for no special exception to the maximum slope allowed for a ramp or driveway. The maximum slope allowance of 12 feet over 100 feet can be found at 11-C DCMR § 904.2. A special exception can be granted by the BZA under 11-C DCMR § 909.3, if Sunrise demonstrates that "(a) The lot has unusual topography, grades, shape,

size, or dimensions; or (b) Alternate access arrangements would improve site design, landscaping, or traffic patterns or provide safer ingress or egress."

Applicant claims that the 3920 Alton Place lot is a through lot uniquely exposed on four thoroughfares including Wisconsin Avenue, Tenley Circle and Nebraska Avenue. To be clear, the lot is a through lot only as to Yuma Street and Alton Place, as the BZA discussed in their 2009 Order.

The lot borders two tree lined single family (R-1-B) residential streets, Alton Place and Yuma Street NW, providing valuable access. Thus, the through lot would be ideal for conforming R-1-B housing as originally intended or for another place of worship. Sunrise plans to utilize the "through" nature of the lot when they drew their proposed truck ramp going from Alton to Yuma. Make no mistake that we are opposed to this proposed development as far too large for the site but the "through" attribute of the lot appears to be more of a benefit than a detriment for both WABC and Sunrise.

In 2009, WABC was before the BZA asking for various approvals and as part of that proceeding, the BZA supported an additional curb cut – a curb cut that was supported by the neighbors to make use of the driveway and parking lot more viable. The neighbors made a statement in support of WABC's request at the Public Space Committee. The BZA thought the through driveway was a plus when the BZA said,

> "…the ability to flow through from Alton Place to an exit on Yuma Street will greatly increase safety within the parking lot itself and will also result in less drop-off/pick-up and queuing activity on local streets. This activity, some of which currently does occur on Alton Place, has resulted in traffic congestion in the past. Such congestion will be alleviated by the new parking lot design…"

BZA Final Order in Case No. 17726 (2009), (Exhibit 38 herein, page 15-16), regarding the same lot.

It is unclear what the Applicant means when they say the lot is "uniquely exposed" to Nebraska Avenue, Wisconsin Avenue or Tenley Circle. The lot does not touch Tenley Circle or Wisconsin Avenue. The National Park Service land touches the lot on that side – with the Grant Road houses visible across Nebraska Avenue and park land on both sides of Nebraska Avenue. There are many commercial lots that are **actually located** on Wisconsin as opposed to being "exposed" to it from a long distance. Nebraska Avenue is not zoned commercial. It is zoned residential. Consider that the property, zoned R-1-B, is surrounded by single family detached homes in all directions.

The suggestion that the lot is unique because it has a seven-foot exposure to the Nebraska Avenue right of way and is in the vicinity of Wisconsin Avenue and Tenley Circle is not persuasive. Nebraska Avenue in Tenleytown cuts through large R-1-B zones and includes matter of right schools. Yes, there is traffic on these roads embedded in R-1-B neighborhoods, including the neighborhood here, but that certainly is not unique to this lot. "To support a variance, it is fundamental that the difficulties or

hardships be due to unique circumstances peculiar to the applicant's property and not to general conditions in the neighborhood." *Palmer* at 539. If applicant's argument is accepted, then virtually all of Washington, D.C., including the hundreds of R-1-B homes along Nebraska Avenue, would be eligible for variance relief.

Further, the implied argument that R-1-B homes near the perimeter of the zone should be accorded less protection has no authority in the regulations, plan, case law, or fairness and common sense. Erosion of the perimeter of an R-1-B zone ultimately destroys the core of single-family homes.

In fact, when the Comprehensive Plan speaks to "transition," it is clearly speaking of development in the Commercial Zone near residential – not jumping into the residential zone as an approved approach to a transition.

> ***Policy LU-2.3.2: Mitigation of Commercial Development Impacts***
> **Manage new commercial development so that it does not result in unreasonable and unexpected traffic, parking, litter, shadow, view obstruction, odor, noise, and vibration impacts on surrounding residential areas. Before commercial development is approved, establish requirements for traffic and noise control, parking and loading management, building design, hours of operation, and other measures as needed to avoid such adverse effects.** 311.4
>
> ***Policy LU-2.3.3: Buffering Requirements***
> **Ensure that new commercial development adjacent to lower density residential areas provides effective physical buffers to avoid adverse effects. Buffers may include larger setbacks, landscaping, fencing, screening, height step downs, and other architectural and site planning measures that avoid potential conflicts.** 311.5

The lot is not "unique" for purposes of granting zoning relief to allow the applicant to overcome impediments. There are no impediments that must be overcome on this lot. The only "unique" thing here is that all these variances and special exceptions are being asked for a single-family zoned lot in order to accommodate construction of a huge for-profit CCRC that is far too big for the site.

There is nothing about the size, shape or grade of the lot that creates practical difficulties to or hardships for WABC for its use as a church as evidenced by WABC stating that one of its options is to sell to another religious organization. Exhibit 8 at page 5 and Exhibit 69 at page 30. Another option is to sell to a developer to build family homes, especially as the lot is l zoned R-1-B. See Exhibit 80, Alternative Matter of Right Option.

Confluence of Factors

Applicant

Applicant asserts that a "confluence of factors contribute to the exceptional condition of the property: In addition to the physical attributes of the property, WABC has been located in the Tenleytown for over 100 years but will not survive in its current building." They also assert that "the needs of Wisconsin Avenue Baptist Church, a non-profit, public service organization, to expand, provides an exceptional

condition that warrants additional flexibility from the Board." Exhibit 8, page 4 and Exhibit 69, page 21. See also above discussion regarding extraordinary or exceptional situation or condition.

Neighbors' Response

WABC

WABC only has 18 congregants*. Although Agape Baptist Church and Real Life Church rent space from WABC, Agape Church and Real Life Church and their congregants are not a party to this application and are not mentioned in the applicant's Preliminary Statement at Exhibit 8 or in the Pre-hearing Statement at Exhibit 69. WABC does not need to "expand" its facility to accommodate its congregation or mission. The majority of the 18 people who currently attend WABC do not live in the neighborhood. In fact, in a January 2018 email exchange, when this fact was cited, Rev. Bergfalk states that "In today's world there is little to no correlation between a church and its immediate neighborhood… in terms of congregational strength or growth…" The lot is not "unique" and does not "present unavoidable changes, constraints or requirements for any likely future use" as a church. Applicant admits this when they note that one alternative open to WABC is to "sell the property … likely to another religious institution." Exhibit 8, page 5 and Exhibit 69, page 30. Nor does anything about the size, shape or grade of the lot create hardships for use as a church. WABC frequently states that they have operated on the site for 60 years.

> ** At an October 10, 2018, meeting, Rev. Bergfalk distributed a document in which he stated that WABC's congregation is "approximately 80 current participants including children and adults," … He also mentions Agape and Real Life congregations who are tenants and conduct services in the building. At the October 12, 2017 ANC meeting, Rev. Bergfalk described his congregation as "small" and, in response to neighbors stating that they had never observed more than 18 congregants on a Sunday, Rev. Bergfalk said he had "twice that many when you include children," which would be 36.*

WABC has not claimed nor demonstrated that it has unique institutional or religious needs. For example, WABC does not show that its building can no longer serve as a base for its religious and institutional mission; that it needs space for program expansion; that it needs to be located at this site to serve its congregants; or that it needs special features in its church building to accommodate its unique programmatic needs. The applicant has not presented any information showing that it considered the feasibility of renovating the existing building.

WABC claims that its facility suffers from functional obsolescence and major disrepair but in August 2018 it contracted with a school (CommuniKids**)** to house part of its daycare program at 3920 Alton Place. Only a few months ago, on August 21, 2018, WABC's building received approval for a certificate of occupancy, including a fire inspection approval, from the D.C. Office of the State Superintendent of Education (OSSE) after a finding that the building is ADA compliant and that the facility is "heated, cooled and ventilated to maintain the required temperatures, and air exchange…' (page 2). Exhibit 77, CommuniKids Certificate of Occupancy Report.

WABC is a dwindling congregation, with roughly 18 congregants. There is no basis for the claim that the WABC needs to "expand" or that the church's growth depends on the existence of the proposed project. WABC has stated that if the proposed development goes forward, then they are leaving the Baptist convention so whatever else may be achieved here, the church as it currently configured is going out of existence. A church does not need a 250-seat sanctuary for a handful of congregants. Many of WABC's missions are of very recent origin or primarily web based, and none are to meet any needs in Tenleytown.

WABC is not in the same situation as St. Thomas or Hillel. A representative of St. Thomas stated that the church had 110 congregants. 70 to 80 on any given Sunday and was growing. Northwest Current of July 11, 2018 article entitled *Pact Reached on Church Street Project*. See similar statements regarding need for expansion of their building necessitated by a growing congregation made by Hillel in *St. Mary's v. D.C Zoning Comm'n (Hillel at GWU)* 174 A.3d 260 (D.C. 2017).

WABC, as a "place of worship," was allowed to build its church as a matter of right in the R-1-B zone in Tenleytown many years ago. WABC's failure to thrive as a traditional church is unfortunate. With only 18 congregants, in recent years most of its activities have been through a non-profit, City Gate, either receiving rent from tenants or operating in other wards. These activities have little if any nexus to its R-1-B Tenleytown neighborhood. Moreover, see below where Rev. Bergfalk states that "City Gate has nothing to do with any proposed development involving the Wisconsin Avenue Baptist Church site …." None of WABC's claimed difficulties or hardships pertain to the specific piece of property.

City Gate cannot be part of the consideration here at the BZA because Rev. Bergfalk has said it is unrelated to the site and has nothing to do with this proposal. A January 31, 2017 Northwest Current article featured an interview with Rev. Bergfalk regarding the project. Rev. Bergfalk focused the interview on City Gate, a Bergfalk controlled non-profit, using 3920 Alton Place as its management address.

But in a February 21, 2018 Northwest Current Viewpoint by *Lynn Bergfalk, as the president of City Gate, Inc. and pastor of WABC,* Rev Bergfalk described City Gate.

> "City Gate's administrative offices are located (at 3920 Alton Place) with multiple staff on site, that 15 years of English-as-a-Second-Language classes (were provided on site) …. that City Gate programs are held every summer on site (a six-week Youth Leadership Institute for sixty D.C. teens last summer), and also that City Gate operated a preschool on site for eight years. …most City Gate participants do live in public or subsidized housing in Wards 7 and 8… including out-of-school time programs onsite at (public) schools, including sites in Wards 1, 2, and 4, as well as 7 and 8. **That said, City Gate has nothing to do with any proposed development involving the Wisconsin Avenue Baptist Church site …."**

Rev. Bergfalk himself says City Gate has nothing to do with this project. It appears that City Gate, whatever its finances, has little need to be located at 3920 Alton Place and almost all of the City Gate programs occur in other Wards.

The instant situation is very different from that found in *St. Mary's* where the Zoning Commission and court found that in addition to the exceptional physical condition of Hillel's lot, Hillel had unique institutional and religious needs that resulted in practical difficulties in meeting certain zoning regulation requirements. For example, Hillel needed a larger sanctuary, a dining space large enough for holiday meals, two kitchens to allow kosher food preparation, a rooftop that hold a sukkah, and space for an increasing Jewish student population. Hillel needed its facility to be on or near GWU in order to carry out its mission to GWU's Jewish students.

The bare and unexplained assertions in the Application that WABC has a 100-year history in Tenleytown and will not "survive" in its current building are not sufficient to show a "confluence of factors" sufficient to establish the exceptional condition regarding the property. The applicant states that in order to survive it needs to "right size" its facilities.

The current sanctuary is approximately 294 seats. See Exhibit 38, BZA Order of 2009. The proposed sanctuary is 250 seats. What is different about the reduction of 44 seats that will "right size" the church? WABC has made no case why this proposed development will allow it to "survive." As previously noted, if the proposed development goes forward, the WABC will no longer identify as Baptist convention so the church as it currently configured is going out of existence. WABC has not shown that its building can no longer serve as a base for its religious and institutional mission.

The applicant's bald assertions concerning its history and new "right size" are particularly lacking in the absence of any unique and exceptional attributes of the property and institutional and religious needs of WABC.

Public Service Organization Doctrine (*Monaco* Decision and its progeny)

Applicant: To reiterate, Applicant asserts that a *"confluence of factors contribute to the exceptional condition of the property: In addition to the physical attributes of the property, WABC has been located in the Tenleytown for over 100 years but will not survive in its current building." They also assert that "the needs of Wisconsin Avenue Baptist Church, a non-profit, public service organization, to expand, provides an exceptional condition that warrants additional flexibility from the Board." Exhibit 8, page 4 and Exhibit 69, page 21.*

Neighbors' Response:

WABC

WABC in order to support its application for multiple variances relies upon the application of the public service organization doctrine also known as the *Monaco*

Doctrine. The public service doctrine affords an applicant for an area variance greater flexibility in meeting the first prong of the variance requirements. Here such reliance is misplaced and inappropriate.

In *Dupont Circle Citizens* v. *St. Thomas*, the court noted that it had first approved the application of the public service doctrine to the RNC in *Monaco*, to a hospital in *Draude I* and *Draude II*, and to a non-profit social service center in *National Black Child Development Institute*. Noting that none of these cases explicitly answered the question of whether a church is a 'public service organization" within the meaning of the doctrine, the *Dupont Circle Citizens* court observed that it had extended the scope of that term beyond how they initially defined it in *Monaco* as "a non-profit organization" which is a well-established element of our governmental system. Further, the court noted in both *National Black Child* and *Foxhall* that it had equated "public service" with a "nonprofit entity," and in *Foxhall* found that the *Monaco* doctrine did not apply because the church that sought the variance "did not seek the variance to alter its own use of the property [but rather] in order to sell the church to a contract purchaser who would not buy it unless the way was clear for him to use it for another purpose." The *St. Thomas* court noted that, if a church did seek a variance for its own ends, it would receive the greater flexibility reserved for public service organizations in variance analysis. As such, the court found that it required no extension of the *Monaco* doctrine to hold that a church may be a public service organization entitled to additional flexibility in the Board's variance analysis, but in the *St. Thomas* case the Board did not explicitly find that the Parish was a public service organization. Accordingly, on remand the court directed the Board to determine if the Parish is entitled to additional flexibility as a public service organization. *Dupont Circle Citizens (St. Thomas)*, 182 A.3d 138,143.

Applicant must be a public service organization to invoke the public service organization doctrine

Here, the applicant must show first that it is a public service organization in order to benefit from the application of the *Monaco* doctrine. *Dupont Circle Citizens* at 143. The conclusory assertion of such does not suffice. As WABC is the only owner of the property, we must assume that it alone is seeking recognition as the public service organization. Further, inasmuch as the court has equated "public service" with "nonprofit entity," *Dupont Circle Citizens* at 143, citing *National Black Child* and *Foxhall*, Sunrise, a for-profit company, or WABC on behalf of Sunrise, cannot claim status as a public service organization. Although it is not disputed that a church may qualify as a public service organization, such does not relieve the applicant of establishing this status. *Dupont Circle Citizens* at 143-144. Based on the presentation made by Applicant, the record does not include a showing that WABC is a public service organization.

WABC

WABC has not shown religious or institutional needs that support granting of a variances and has not shown that WABC in the past or in the future is serving the community as required to benefit from the public service organization doctrine.

While we dispute Rev. Bergfalk's characterization of WABC's prior rental of church space to CommuniKids, CommuniKids preschool (Caterpillar), and the Washington Conservatory of Music as meeting then existing community needs, the recent letter from Reverend Bergfalk to the neighbors on October 6, 2018 states that "the uses and issues related to our 2008 BZA application [CommuniKids and Conservatory] are not part of the present or to future plans." Reverend Bergfalk also states that "CommuniKids has returned temporarily last month as a preschool until their space at UDC is ready for occupancy perhaps as early as this January." Thus, Reverend Bergfalk makes clear that none of the claimed community programs will be a part of the proposed project with Sunrise.

Rather, Reverend Bergfalk states that “Today the church is working with one partner – Sunrise…” He goes on to say "[t]he project with Sunrise now allows the church to receive payment from our land value through construction of a new church facility (which we will own) and a significant endowment which provides resources for a variety of community ministries, largely to be determined and to organically develop in the future based on the needs, vision, and opportunities of both church and community." In other words, WABC is focused on getting its endowment from Sunrise and has made no plans regarding “public service” to the community.

Rev. Bergfalk's letter, although not directly addressing the repeated question posed by neighbors concerning land ownership, strongly suggests that after the project is completed WABC will have no ownership of the land and only a condominium interest of unknown duration in the building.

Many of the cases coming before the BZA that involve churches also involve the creation of affordable housing. See Emory United Methodist, BZA No. 17964 decided February 23, 2010, which created 99 units of affordable housing. St. Thomas Episcopal included affordable units and added 4 additional affordable units, most at 60% AMI, as part of a settlement. See Northwest Current of July 11, 2018 article entitled *Pact Reached on Church Street Project*. There are no affordable units at Sunrise.

The policy of the District of Columbia is already stated in the Comprehensive Plan Glossary of Terms, which defines **Senior housing** as Housing designed and reserved for senior citizens, **particularly those of low or moderate income**. (emphasis supplied). So clearly the Comprehensive Plan could be read to favor housing for low and moderate-income seniors when it comes to making any accommodations in the zoning regulations. Sunrise has demonstrated no interest in that part of zoning law even when asked.

Foxhall - Variances not for WABC's own end and the public service organization doctrine cannot be used to allow flexibility for a for-profit corporation.

In order for the *Monaco* doctrine to apply, the applicant claiming to be a public service organization needs to show that the variances are for its own ends.

In Foxhall the court noted that "the Monaco doctrine did not apply because the church that sought the variances did not seek the variance to alter its own use of the property [but rather] in order to sell the church to a contract purchaser who would not buy it unless the way was clear for him to use it for another purpose." *Dupont Circle Citizens (St. Thomas)*, 182 A. 3d 138,143 citing *Foxhall*.

Here, as in *Foxhall*, WABC has not demonstrated that it is seeking the three variances for its own ends. The requested variances for lot occupancy, number of stories, and elimination of a side yard are solely for the purpose of allowing Sunrise to construct a massive building to accommodate maximum CCRC occupancy and to serve the financial goals of an international for-profit company, Sunrise. These variances do not serve the needs or mission of WABC as a church, including any of its programs. Accordingly, the *Monaco* doctrine is inapplicable and the variances should be denied.

SHOULD WABC'S FINANCES BE A FACTOR WHEN CONSIDERING APPLICATION OF THE PUBLIC SERVICE ORGANIZATION DOCTRINE AND/OR VARIANCES?

WABC's desire for money is not an appropriate reason to invoke the public service organization doctrine or to extend the doctrine to include a for-profit multinational corporation.

The applicant's preliminary statement and prehearing statement essentially argue that WABC needs the three requested variances so that it can accommodate Sunrise who in turn needs these variances to construct a CCRC that will produce a large enough profit for itself and to pay WABC a lifetime endowment and to construct a new church for WABC. WABC invokes the public service organization doctrine (*Monaco* Doctrine) to advance this argument. The application is attempting to merge WABC's "needs" with Sunrise's "needs" for three major variances, thereby avoiding the jurisdictional issue that an area variance may be granted only to the owner of the property for which the variance is sought. Further, it is an inappropriate expansion of the public service organization doctrine to include a commercial for-profit multinational corporation.

First, as previously discussed, the zoning regulations specifically provide that an area variance may be granted only to the owner of the property for which the variance is sought. Nothing in the regulations allow a non-owner to request a variance on their own behalf or for their own benefit. Sunrise cannot ask for variances for itself. 11-X DCMR 1000.1, 1000.2, 1002.1; Palmer at 541-42.

The church would occupy less than 13 percent of the new building. Sunrise would occupy more than 87 percent of the building. There is nothing in the record to show who would own the land in the future. We know that WABC has owned the land in the past. WABC and Sunrise will have no legal relationship other than sharing the building on the property as separate condominiums. They have stated that they are not in business together and this project is not a joint venture. All three variances are to accommodate Sunrise, not WABC.

The application states that WABC's tenuous financial standing is a reason to grant variances. The variances are not for the use of WABC, but let's explore WABC's claims. These claims of financial viability are not appropriate factors for consideration to disregard the controlling language of the Zoning regulations and easily can become a slippery slope: it cannot be the task of the BZA to grant multiple zoning variances and special exceptions in order to "rescue" a property owner - be it a church, business or homeowner – who cites economic distress as a "need" justifying a variance or exception to makes its continued occupation of the property financially viable.

In *Capitol Hill Restoration Society, Inc., v. Board of Zoning Adjustment*, 398 A.2d 13 (1979), the court rejected the possibility that the unique circumstances under prong 1 of the variance test could refer to the personal misfortunes of the applicant. The application urges the granting of 2 exceptions and 3 variances to allow Sunrise to make more money, some of which they will pay WABC in an arrangement they are unwilling to disclose. The *Palmer* court stated, '[I]t is certain that a variance cannot be granted where property conforming to the regulations will produce reasonable income but, if put to another use, will yield a greater return." *Palmer* v. *Board of Zoning Adjustment*, 287 A.2d 535, 542 (D.C. 1972).

Some of WABC's financial difficulties have resulted from a lack of due diligence in managing its finances. A very direct connection that impacted WABC's finances is the fact that the church manager was convicted of stealing over $150,000 from the church in 2016. **(**US Attorney's Office, Department of Justice Statement, July 14, 2016). Public records show City Gate was denied $76,000 it sought as a contractor (*Youth Engaged for Success, Inc. and City Gate Inc. v. D.C. Office of State Superintendent of Education*, Case No. 2011- OSSE-00003, Office of Administrative hearings, March 6, 2012). Both of these cases can be found at Exhibit 74. These losses total approximately $230,000 which is a great deal of money for a tiny congregation. These are unfortunate incidents, but neighbors cannot be asked to make up for these losses that due diligence might have prevented.

PROVIDING FINANCING CANNOT BUY STANDING OR VARIANCES FOR SUNRISE

In *St. Mary's* the court noted the arguments concerning the leasing of the top two floors of the Hillel building by GWU. *St. Mary's* cannot be cited as supporting any contention that financing is the basis for granting of a variance. In *St. Mary's Episcopal Church v. District of Columbia Zoning Comm'n,* 174 A.3d 260, 271 (D.C. 2017), *St. Mary's* argued that the height of the building was due to a twenty-year lease of the top two

floors by GWU and therefore did not constitute institutional necessity. In response, the court noted that the Zoning Commission found that Hillel could not secure financing for its project without the GWU lease, and that even without the top two floors, the building's footprint would have to remain the same due to the building code requirements and institutional needs. Thus, the financing provided by the lease was not the reason the variance was requested.

The court then discussed at great length the many institutional needs of Hillel – kosher kitchen, sanctuary to accommodate a sukkah, multiple elevators, two kosher kitchens -- and concluded that there was "substantial evidence in the record to satisfy the second prong of the area variance test and to support the Commission's conclusion that Hillel satisfactorily proved that the specific design [of its new facility] is driven by institutional need for a single contiguous worship space and dining space of a certain size, and that such spaces could not be constructed in a facility that complies with the requirements of the Zoning Regulations."

SUNRISE IS NOT A NON-PROFIT PUBLIC SERVICE ORGANIZATION AND IS NOT "COMPATIBLE WITH WABC'S MISSION"

In the Application, the applicant states that WABC chose to partner with Sunrise Senior Living, a continuing care retirement community, because it is the only potential buyer that is "mission-compatible and financially strong enough to support the development of both a right-sized church and a CCRC."

Although the applicant emphasizes the needs of Sunrise as a CCRC in the application for three major variances, Sunrise is by no means a non-profit public service organization.

Sunrise builds rental facilities and operates them as a landlord. They sell their buildings to Welltower Real Estate Investment Trust (REIT), which is traded as WELL, and owns more than 325 facilities internationally – none with collective bargaining agreements. Sunrise functions as an apartment building for elderly residents in an R-1-B zone for single families. Sunrise is not providing any charitable or affordable services. Sunrise evicts their renters if they exhaust their funds, require health care, or become a "behavioral problem." Sunrise is a multi-national for profit, no risk business.

Sunrise is strictly for profit. Sunrise projects have no affordable units for low-income seniors. Sunrise evicts people if they exhaust their funds (even if Sunrise helped them sell their house to pay the rent initially), actually need health care beyond visiting a doctor, or become a "behavioral" problem. Sunrise charges $8,000-15,000 rent per month and will not be providing any "inclusionary, affordable" units.

The policy of the District of Columbia is already stated in the Comprehensive Plan Glossary of Terms, which defines **Senior housing** as Housing designed and reserved for senior citizens, **particularly those of low or moderate income**. (emphasis supplied). So clearly the Comprehensive Plan could be read to favor housing for low

and moderate-income seniors when it comes to making any accommodations in the zoning regulations. Even when directly asked, Sunrise has demonstrated no interest in the zoning law provisions that prioritizing services for low-income seniors. See also discussion of "Gentrification of Senior Services by Concentration in Ward 3" at page 112.

We emphasize that the Application requests dramatic zoning relief to accommodate a massive for-profit "senior facility" that functions as an apartment building, in an R-1-B zone for single families, and benefits only Sunrise, who is not the owner of the property. Nor can Sunrise buy the mantle of "public service."

SUNRISE IS NOT COMPATIBLE WITH A CHURCH MISSION

Although these questions may be somewhat direct, we must ask. Is it the mission of a church to partner with an entity, Sunrise, that helps people sell their homes, so they can pay $8,000 to $15,000 a month for room and board and then evicts them when they run out of money? Is it the mission of a church to partner with an entity, Sunrise, that provides dementia care but evicts those residents if they demonstrate "behavioral problems?" Is it the mission of a church to partner with an entity, Sunrise, that evicts people if they need health care? If you do not pass certain Sunrise "wellness" tests, given on a regular basis, you are evicted.

Sunrise, a large for-profit multi-national corporation, seeks greater profits from this requested zoning relief. WABC, in its desire to obtain funds from Sunrise, does not seek the variances for its own use of the property; rather, WABC wants the variances in order to obtain funds from Sunrise under an undisclosed agreement. We know that they plan to share the building in a condo arrangement. Sunrise, apparently, will not be part of this arrangement unless the zoning relief is granted and it can make a larger profit for its own business as a landlord in a building located in an R-1-B zone. See *Foxhall*, n. 6.

The request for at least two special exceptions and at least three variances to overcome the R-1-B zoning for this neighborhood of single family homes should be denied. Sunrise's commercial for-profit business is attempting to piggyback onto the church's non-profit and matter of right status. Such expansive application of the exceptional condition prong of the variance test is a distortion of the public service organization doctrine, which, as an aside, has no authority in statute or regulation.

IF WABC'S FINANCIAL NEEDS COUNT THEN THOSE OF NEARBY HOMEOWNERS MUST ALSO WEIGH IN THE BALANCE

If the BZA believes that weight should be accorded to the financial claims of Sunrise and WABC, then correspondingly due consideration must be given to the compelling claims of reduced property values by the immediate neighbors to the site. (In Draude I, the court recognized that surrounding property values may be considered in evaluating the adverse impact of a special exception.)

Since Sunrise announced it plans for the site last fall, three houses in the 39th Street block next to the proposed site were put on the market. This is a dramatic turnover for a neighborhood known for stability with few houses put on the market over many years. Of the 5 homes that share a property line with the proposed Sunrise project, 2 were put on the market. These homes have sold below market due to the announced project. The middle home of the 5, was placed on the market at $895,000 although it was assessed for tax purposes at $903,260 – and assessments traditionally are below market value. The other house that is at the end of the 5 that share a property line was listed at $1.095 and eventually sold for $1.05 million.

This area of Tenleytown is a very stable neighborhood. This is very unusual for 3 houses on the same block to be put on the market within a few months. This neighborhood is not on Wisconsin Avenue. 121 residents, more than 70 staff and a 250-seat church inevitably will have an impact on the character of the neighborhood. Discussed in greater detail later but 20 trucks per week, a 7-ton shuttle bus with multiple trips per day sitting on the Alton curb cut, emergencies that bring ambulances and firetrucks, major shift changes at 6:30 am every day of the week next to single family homes, and events where they invite the families of the 121 residents. There is no possibility that all of these commercial activities generated by the landlord of a for-profit facility will do anything but "affect adversely, the use of neighboring property." See the *BZA Order in Case No.17726,* issued November 10, 2009, (Exhibit 38 herein) where the BZA discussed the traffic and parking issues created by the use of the lot – and that was far fewer people on the lot than is contemplated here.

DRAUDE AND PUBLIC SERVICE ORGANIZATION DOCTRINE

Under *Draude*, a public service organization must show that the specific design is an institutional necessity and how that the needed design features require the special variances sought.

APPLICANT:

"*It is not financially viable for WABC and Sunrise to construct a facility that is consistent with the zoning requirement of lot occupancy and number of stories. This zone provides for only 40 percent lot occupancy for non-religious uses and no more than three stories in the maximum permitted height of 40 feet. This is an insufficient allowance for any CCRC use.*

The WABC lot size is 35,443 square feet. If the church and CCRC had to comply with the 40 percent lot occupancy and three-story height limit, the total building could be no larger than 42,532 square feet over three stories. A typical assisted living facility (referred to as CCRC by the zoning regulations) requires approximately 900 gross square feet per unit. This includes the residential unit itself and all common spaces, including the common living space on the ground floor, dining facilities, kitchen, staff offices, and hallways. A 42,532 square foot building would yield only 47 units. In this scenario, there is no space remaining for the church. Due to

accelerated construction and operating costs over the last 10 to 15 years, newly constructed assisted living communities typically cannot be built with less than 85 units to generate the required revenue. Unlike other residential buildings, CCRC facilities must be constructed of steel and concrete due to fire safety and evacuation regulations and due to CCRC licensing requirements, which require extensive support service space for residents and staff. All these factors significantly increase the cost of constructing and operating the building.

An 86-unit building is approximately 77,400 square feet (assuming 900 square feet per unit). At three stories, the footprint of the building would need to be 25,800 square feet. At 40 percent lot occupancy, this building would require 64,500 square feet or 1.48 acres of land. Any new CCRC use in the city within an R-1 through RA-1 District will necessarily require lot occupancy variance if the site is less than approximately 1.5 acres. The Zoning Regulations recognize the need for CCRC uses in the low- and moderate-density zones through special exception approval [applicant's footnote: A use permitted by special exception approval is deemed a conforming use.] but the regulations do not provide the necessary amount of lot coverage or number of stories to make them viable without variance relief.

Here, in order for the CCRC use to be financially viable and provide the needed care to D.C. residents and allow the church to continue its presence on the site, the combined structure requires a minimum lot occupancy of 57 percent and four stories within the allowed height of 40 feet. Significantly, the proposed lot occupancy is less than the 60 percent coverage and 60-foot height allowed if the site were to be developed solely as a religious institution."

Exhibit 8, pages 5-6. Also see Exhibit 69, pages 27-28.

Neighbors' Response:

DRAUDE QUALIFICATION THAT THE SPECIFIC DESIGN MUST BE NECESSASRY TO THE PUBLIC SERVICE ORGANIZATION'S FUTURE

Although the BZA and the court have recognized that when a public service organization is the applicant there may be a more flexible standard in finding exceptional conditions and that the applicant's need for a particular site may be considered as part of the exceptional condition prong, such flexibility is not without qualification or limitation. Interpreting *Monaco*, the *Draude I* court held that [w]here a public service organization applies for an area variance… it must show (1) that the specific design it wants to build constitutes an institutional necessity, not merely the most desired of various options, and (2) precisely how the needed design features require the specific variance sought. *Draude v. District of Columbia Board of Zoning Adjustment,* 527 A.2d 1242 (D.C.1987) (Draude I) at 1256.

WABC, not Sunrise, is to be considered regarding need for "specific design"

Here, the applicant focuses its arguments concerning the *Draude I* requirements on the needs of Sunrise in building a CCRC. But what *Draude* requires is a showing by the public service organization of how the specific design it wants to build is an institutional necessity based on the unique institutional and religious needs of WABC and how the

needed design features require the specific variances sought. *Dupont Circle Citizens (St. Thomas) at 143*; *St. Mary's* at 271; *Draude I* at 1256. Here, WABC is the claimed non-profit public service organization. There is no claim or assertion that Sunrise qualifies as a non-profit public service organization.

The only reference to the specific design based on institutional necessity of WABC pertains to the sanctuary, which will have a slightly smaller sanctuary capacity than the present church. WABC's allegations concerning its need for new and expanded facilities for its dwindling congregation is not grounded in reality. They currently have 294 sanctuary seats, according to the BZA Order of 2009. The proposal is to reduce this number to 250 not expand capacity.

WABC needs a variance for its proposed 76-foot "church" façade but as WABC occupies only part of the first and second floors, and has no presence on the top two floors or the penthouse, there is no "institutional necessity" for even a 60-foot façade across the street from the single-family homes on Yuma Street.

The variances requested include an increase in lot occupancy from the allowed 40% to 58%; an increase in the 3 stories allowed to 4 stories; and the elimination of an 8-foot side yard. All these variances are to allow an unacceptable increase in density and volume of use in a single family R-1-B zone. These variances are for Sunrise to construct a building that would provide the profit they desire, not to construct a larger church building. For greater detail regarding the Variances Requested, please see pages 26-27.

WABC has not shown "(1) that the specific design it wants to build constitutes an institutional necessity, not merely the most desired of various options and (2) precisely how the needed design features require the variance(s) sought." *Draude*, 529 A.2d at 1256. Therefore, the variances should be denied.

We emphasize that Sunrise is attempting to meet the showings required by *Draude I* in order to receive the additional flexibility accorded to non-profit public service organizations by supplanting WABC's needs and institutional necessity with that of Sunrise and its for-profit CCRC. Sunrise claims it requires the variances for its CCRC to be profitable. This ignores the *Draude I* requirements and attempts to impermissibly expand the public service organization doctrine beyond reasonable application and recognition.

Prong 2: Practical Difficulties

Title 11, SUBTITLE X CHAPTER 10 VARIANCES
1000 GENERAL PROVISIONS *1000.1 With respect to variances, ...peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, (the BZA may) authorize, upon an appeal relating to the property, a variance from the strict application so as to relieve the difficulties or hardship; ...*

See the full text for relevant regulations at the beginning of the Variances Requested Section at pages 26-27. Especially, Title 11, Subtitle X Chapter 10 Variances - §1000 General Provisions §1000.1 and §1002 Variance Review Standards.

APPLICANT

<u>Practical Difficulties Created by the Exceptional Conditions:</u> *Applicants for an area variance must demonstrate they will encounter "practical difficulties" in the development of the property if the variances are not granted. Palmer v. District of Columbia Bd. of Zoning Adjustment, 287 A.2d 535, 540-41 (D.C. 1972) (noting that "area variances have been allowed on proof of practical difficulties only while use variances require proof of hardship, a somewhat greater burden"). An applicant experiences practical difficulties when compliance with the Zoning Regulations would be "unnecessarily burdensome." Gilmartin, 579 A.2d at 1170. The nature and extent of the burden that will warrant an area variance is best left to the facts and circumstances of each particular case. Palmer, 287 A.2d at 542. It is well settled that the BZA may consider "a wide range of factors in determining whether there is an 'unnecessary burden' or 'practical difficulty.'" Gilmartin, 579 A.2d at 1171 (citing Barbour v. District of Columbia Bd. of Zoning Adjustment, 358 A.2d 326, 327 (D.C. 1976)); see also Tyler v. District of Columbia Bd. of Zoning Adjustment, 606 A.2d 1362, 1367 (D.C. 1992). Other factors to be considered by the BZA include: "the severity of the variance(s) requested;" "the weight of the burden of strict compliance;" and "the effect the proposed variance(s) would have on the overall zone plan." Gilmartin, 579 A.2d at 1171. Thus, to demonstrate practical difficulty, an applicant must show that strict compliance with the regulations is burdensome, not impossible.*

Here, without variance relief from the number of stories and lot occupancy restrictions, the church cannot partner with Sunrise to construct the proposed church and CCRC facility, due to the financial constraints and design parameters of a CCRC use. Newly constructed assisted living communities in high density urban locations typically cannot be built with fewer than approximately 90 units to generate the required revenue to cover land, construction and operating costs. Unlike other residential buildings, which can often be constructed using less expensive wood-framing (Type V), CCRC facilities must use more costly steel and concrete construction (Type I-2) due to D.C. Building and Fire Code requirements, which are triggered by facilities with more than six residents who are incapable of self-preservation in an emergency situation. See 12-A DCMR § 308.4; INT'L BLDG. CODE § 407 et seq. (the international building code is adopted and modified in the District by regulation). The proposed building has been designed to meet the I-2 Use Group requirements of the D.C. Building Code and is proposed to be constructed as a 1B Non-Combustible Construction Type, which includes two-hour fire protection and includes an NFPA 13 Full Sprinkler System. Licensing requirements, including the provision of extensive support service space for residents and staff, also add to construction costs. Together, these factors significantly increase the cost of constructing and operating the building, particularly in urban regions with higher land costs. This, in turn, requires a greater number of units over which to spread the costs.

According to the National Investment Center, in the last five years, CCRCs constructed across the United States where the majority of units are devoted to assisted living ("AL") units, and a smaller proportion devoted to memory care ("MC") units, the buildings have averaged approximately 90 units. In the high-density markets of Washington, D.C., northern Virginia, Philadelphia, New York, and Chicago, the average number of units constructed in the last five years is closer to 100. This can be attributed to the higher cost of land and construction in these markets. [Table omitted.]

A typical assisted living facility requires approximately 900 gross square feet per unit. This includes the residential unit itself and all common spaces, including the common living space on the ground floor, dining facilities, kitchen, staff offices, and hallways (not including underground parking). Multiplying the average unit size of 900 square feet by 90 units (the average number necessary for a financially viable CCRC), the typical facility would require approximately 81,000 square feet. Based on the specific financial parameters of the WABC site, Sunrise would be able to reduce the number of units to 86 and still remain financially viable. An 86-unit facility would translate to a building with approximately 77,400 square feet.

But none of the low- or moderate-density residential districts where CCRC uses are permitted as a special exception (R-1 through RA-1) have sites that are large enough to accommodate a CCRC. At three stories, the footprint of the building would need to be 25,800 square feet. At 40 percent lot occupancy, this building would require 64,500 square feet of land or 1.48 acres. [fn. 77,400 SF/3 stories – 25,800 SF; 25,800 SF/ 40% lot occupancy = 64,500 SF of land area required.] <u>Any</u> new CCRC use (comparable to the Sunrise proposed care model with both assisted living and memory care) in the city within an R-1 through RA-1 District will necessarily require lot occupancy variance if the site is less than approximately 1.5 acres. The Zoning Regulations recognize the need for CCRC uses in the low- and moderate-density zones through special exception approval but the regulations do not provide the necessary amount of lot coverage or number of stories to make them viable without variance relief.

Here, the WABC lot size is 35,443 square feet. If the church and CCRC had to comply with the 40 percent lot occupancy and three-story height limit, the total building could be no larger than 42,532 square feet over three stories. A 42,532 square foot building would yield only 47 units without any space remaining for the church use.

For the CCRC use to be financially viable, provide the needed care to D.C. residents, and allow the church to continue its presence on the site with a mission-focused compatible use, the combined structure requires a minimum lot occupancy of 57 percent and four stories within the allowed height of 40 feet. Significantly, the proposed lot occupancy is less than the 60 percent coverage and 60-foot height allowed if the site were to be developed solely as a religious institution.

When considered outside the parameters of the specific lot size and in context of the surrounding environment, the lot occupancy of 57% does not adequately describe the actual limited impact this new building will have on its surrounding neighbors. In traditional urban planning, lot occupancy and setbacks in residential zones are established to provide adjacent residential neighbors with adequate light and air. When considered along with the National Park Service land, the sizable right of way widths of Alton Place and Yuma Street and the provided 36-foot wide buffer along the 39th Street side, this building presents minimal impact on its surrounding neighbors.

The unusual site configurations also necessitate relief from the side yard requirements on the western portion of the Property. The through-lot condition on this 35,443 square-foot site dictate a building arrangement where each use fronts on a street to create an appropriate urban design that (i) responds to the neighboring single-family dwellings by following building lines along streets, and (ii)

reflects the site's adjacency to the Wisconsin Avenue commercial corridor and institutional uses on Tenley Circle and in the immediate vicinity.

On the eastern side of the Property, the Applicants will provide an expansive, 36-foot wide side yard to create a significant landscape buffer between the five detached single-family houses that front on 39th Street and the new church and CCRC use. Within this setback, the Applicant will provide an 8 to 16-foot wide planting strip along the rear yards of these houses, running from Alton Place to Yuma Street, as shown on the drawings. Tall evergreens and a new six-foot fence will be planted within this green strip. In order to accommodate this extensive green buffer, the Applicants cannot provide a side yard on the west property line that abuts NPS land. If the Applicants were to shift the building eight feet to the east to meet the strict application of the side yard provisions, they would have to eliminate the green buffer on the east side because this setback area must also accommodate the garage ramp and access drive to the loading facilities, as shown on the drawings.

Because of the exceptional and extraordinary conditions of this particular Property, however, the Applicants can push the building to the west property line without creating any harm to the NPS parcel maintained as open space. This parkland will provide the same aesthetic and qualitative buffer that the regulations desire. The Applicants have been in discussions with NPS over the past 18 months on an appropriate landscape treatment for this federal parcel. The Applicant will design, improve and maintain this area, as shown on the concept plans included with the drawings, if approved by all required regulatory agencies. NPS and the Applicants presented their initial plans to the U.S. Commission of Fine Arts in September and will return with refinements to the design in November 2018.

Exhibit 69, pages 5 and 25-30

NEIGHBORS' RESPONSE

Applicant has not shown an exceptional condition of the 3920 Alton property. We strongly disagree with Applicant's arguments regarding the applicability of the *Monaco* doctrine and Applicant's assertion that they meet the design requirements articulated in *Draude I*. Nonetheless, we address the question of whether Applicant would suffer their alleged peculiar and exceptional practical difficulties as a result of the claimed exceptional condition of the property.

SUNRISE AND ITS CCRC SHOULD NOT BE CONSIDERED IN MEETING PRONG 2 REQUIREMENTS AS SUNRISE IS NOT THE OWNER AND, IF THEY WERE, THEY DO NOT QUALIFY AS A PUBLIC SERVICE ORGANIZATION.

The *Capitol Hill Society* court said:

> "The threshold requirement to show that the property is unique with respect to the hardship or difficulty asserted as grounds for the variance means the **property owner** (emphasis added) must present proof that 'the circumstances which create the hardship uniquely affect the petitioner's property' Taylor, supra note 6, 308 A.2d at 234. Where the circumstances which create the hardship or

> difficulty affect the entire neighborhood rather than merely a specific piece of property, the problem is properly addressed by seeking amendment of the regulations from the Zoning Commission. Id. If the BZA were to grant variances where the hardship or difficulty is not peculiar to a particular piece of property, similar requests could follow from property owners similarly situated, 'which, as a matter of due process, would have to be granted.' Id. The effect of such decisions by the BZA would be an amendment of the zoning regulations by that body, an action which the BZA is not empowered to take. Id." *Capitol Hill Society* at 941-942.

For a more detailed discussion of the requirement that only an owner can request a variance, see page 34 herein.

NO SHOWING OF "PRACTICAL DIFFICULTIES" WITH REGARD TO WABC

With respect to WABC, which would occupy less than 13 percent of the proposed building, there is no showing they would face "practical difficulties" if the zoning regulations were strictly enforced. As previously discussed, WABC has identified no unique institutional, religious, or programmatic needs that require the variances sought. WABC has no need for expansion, greater lot occupancy, additional stories or elimination of a side yard setback. There is no showing of exceptional physical or topographical attributes of the property or other extraordinary or exceptional situation or condition of the specific piece of property. There is no confluence of factors demonstrating the uniqueness of the property and the public service organization doctrine is not appropriate for application. There would be no peculiar and exceptional difficulties to the owner of the property resulting from the attributes of the lot in question. The lot has served as a perfectly suitable site for a church for the past 60 years and can continue to do so without the requested relief.

Further, WABC has made no showing that it considered the feasibility of renovating the existing building or partnering with other entities that meet conforming zoning. WABC makes unsubstantiated claims that it has limited options to avoid demise and that Sunrise is the only potential buyer that can enable the church's survival. This claim is unsupported in the record. WABC has more choices than selling to Sunrise or selling to another religious organization. Selling to another religious organization – despite applicants acting like this is a "threat' - is an option WABC should consider. WABC has stated that any sale would have to keep the lot devoted to a religious purpose. Nothing wrong with that but that is their opinion. It is not a requirement of zoning. A **third option**, selling to a developer to build family homes is a perfectly legitimate option. The lot was originally 7 single-family lots located in a single-family neighborhood; and it is still zoned R-1-B. Presenting Sunrise as the only viable choice is not supported by the facts.

FOXHALL AND SELF-CREATED HARDSHIP - WABC

WABC claims that the existing church building suffers from functional obsolescence (including non-ADA compliance) and major disrepair (roof, mechanical systems, and

other similar building elements) and due to these issues and others, the congregation cannot survive on the site without leveraging its land value. Exhibit 8 at pages 4-5. Also, at Exhibit 69 at page 24-25.

Or is the building in better shape than claimed in this case? As a factual issue, although WABC claims that its facility suffers from functional obsolescence and major disrepair, in August 2018 it contracted with a school (CommuniKids**)** to house part of its daycare program at 3920 Alton Place. On August 21, 2018, WABC's building received approval for a certificate of occupancy, including a fire inspection approval, from the D.C. Office of the State Superintendent of Education (OSSE) after a finding that the building is ADA compliant and "heated, cooled and ventilated to maintain the required temperatures, and air exchange…' (page 2). Exhibit 77, CommuniKids certificate of occupancy.

In *Foxhall* the court points out that the BZA, in finding extraordinary or exceptional condition affecting the site, mentions St. Patrick's problems with the heating, cooling, and bathroom facilities, but "[t]hese observations beg the question because they ignore that St. Patrick's itself is responsible for the "extraordinary or exceptional situation or condition" the BZA described." Here, WABC's claimed obsolescence begs the question of whether WABC should benefit from its own lack of management and maintenance.

EVEN IF THE NEEDS OF SUNRISE AND ITS CCRC ARE CONSIDERED, APPLICANT HAS NOT SHOWN IT MEETS THE "PRACTICAL DIFFICULTIES" TEST TO BE GRANTED A VARIANCE.

Here, again to avoid the inconvenient truth that the property presents no difficulties for use as a church by its owner, WABC, the application focuses its arguments on difficulties faced by Sunrise and Sunrise's need for three variances for its CCRC to be more profitable. The clear and unambiguous language of the regulation states that the peculiar and exceptional practical difficulties must be to the **owner of the property.** The court decisions support this position. Palmer at 541-542. In *Palmer*, the court found that in evaluating the BZA's order it looks only to evidence of difficulty befalling the **owner**. *Palmer* at 541.

All the variances requested herein are for Sunrise and not WABC. WABC, the property owner, cannot and does not claim that the variances are needed to alleviate practical difficulties or relieve undue hardship. At less than 13 percent of the proposed building, WABC does not need the extra space available if the variances were granted. Accordingly, all variances should be denied.

Nor does it pass muster if WABC and Sunrise argue that granting 2 exceptions and 3 variances will allow Sunrise to make more money, some of which they will pay WABC in an arrangement they are unwilling to disclose. The *Palmer* court stated, '[I]t is certain that a variance cannot be granted where property conforming to the regulations will produce reasonable income but, if put to another use, will yield a greater return." Id. at 542.

FINANCIAL VIABILITY ARGUMENT FOR INCREASED LOT OCCUPANCY, NUMBER OF STORIES AND ELIMINATION OF SIDE YARD SETBACK

First, the applicant contends that the variances are necessary because it is not financially viable for WABC and Sunrise to construct a facility that is consistent with the zoning requirements for lot occupancy and number of stories. Although devoting much discussion to the building requirements for a CCRC, neither Sunrise or WABC has shared any financial information concerning this matter. Bare and conclusory assertions that Sunrise needs these variances to produce enough income to provide sufficient profit for its corporation and to financially support WABC are not sufficient, in addition to being inappropriate. Thus, the applicant has failed to make a showing for its claimed "practical difficulties" based on its financial viability argument.

Further, the financial viability argument is premised on the need for very substantial income; income that is so substantial that it can meet the profit requirements of a large successful multinational corporation plus support WABC in its new facility. The court in *Palmer* declared that "a variance cannot be granted where property conforming to the regulations will produce a reasonable income, but, if put to another use, will yield a greater return." *Palmer*, supra at 542. The granting of a variance on this application would be, in essence, allowing a conforming property producing a reasonable income to be put to another use in order to "yield a greater return." Honoring the *Palmer* decision, the BZA cannot endorse such action. The Sunrise project, which states that they require these variances to be more profitable, should seek a more appropriate larger lot elsewhere.

Second, the alleged practical difficulties are not peculiar to this property. Rather, it is peculiar to the business of constructing a more profitable CCRC. The applicant states, "This zone provides only 40 percent lot occupancy for non-religious uses and no more than three stories in the maximum permitted height of 40 feet. This is an insufficient allowance for any CCRC use." Sunrise has "difficulties" with the R-1-B zoning and would have the same difficulties with any lot in a R-1-B single family detached zone.

Sunrise has problems with the development standards for CCRCs in general and seeks to remedy that problem by seeking three major area variances, lot occupancy, number of stories, and side yard setback. The effect of granting three variances by the BZA would be an amendment of the zoning regulations, an action which the BZA is not empowered to take. See *Capitol Hill* at 941 - 942.

The *Applicant also asserts that "[a]ny new CCRC use in the city within an R-1 through RA-1 District will necessarily require lot occupancy variance if the site is less than approximately 1.5 acres*." The Applicant does not allege that lots within the R-1 through RA-1 zones cannot be found that are 1.5 acres.

See Palmer v. District of Columbia Bd. of Zoning Adjustment, 287 A.2d 535, 539 (D.C. 1972) ("If the circumstances affect the whole area the reasonableness of the regulations

are challenged and the proper remedy is to seek an amendment of the regulation rather than a variance.").

There are CCRCs that are smaller but let's for the moment discuss the Sunrise plan for 86 units. We agree with them that R-1-B has "insufficient allowance" for them and that is why they should not be trying to locate on this lot. See our prior discussion rejecting Sunrise's argument that establishment of a CCRC special exception means all other zoning protections should be waived at page 104 herein. They argue that a special exception for CCRCs was added to residential zoning therefore they should get all their requests for variances and special exceptions to locate on the R-1-B lot at 3920 Alton Place. The drafters of the CCRC special exception, however, did not contemplate 2 intense uses on one residential lot

But as we stated earlier, the need for all these area variances and other special exceptions should be taken to mean that the special exception for a CCRC should not be granted for this lot. In addition, Sunrise's claim that the Zoning experts in DC wanted them to locate in R-1-B, as opposed to one of the other residential zones, does not hold water. There are many different variations of Residential zoning and many of those allow much greater lot occupancy, height and number of stories. Not to mention that Sunrise located in a commercial zone when they built on Connecticut Avenue about 8 blocks down Nebraska so that is and should be an option.

R-1-B, which allows 40 percent lot occupancy, 40 feet in height and 3 stories for a business, is probably least likely to provide a setting for a **large** CCRC, such as Sunrise desires. Other Residential zones are more suitable for their business model, if they are seeking to locate in a residential zone.

OTHER RESIDENTIAL ZONES THAT MIGHT BE MORE SUITABLE FOR SUNRISE

The CCRC Special Exception at 11-U DCMR § 203.1(f) of § 203.1 pertains to R-Use Groups A, B and C, most of which are probably more appropriate for smaller CCRCs.

See Title 11-U DCMR, Chapter 2, USE PERMISSIONS RESIDENTIAL HOUSE (R) ZONES, reads as follows:

> Paragraph (f) of § 203.1 of § 203, SPECIAL EXCEPTION USES – R-USE GROUPS A, B, AND C, reads as follows: The following uses shall be permitted as a special exception in R-Use Groups A, B, and C, if approved by the Board of Zoning Adjustment under Subtitle X, Chapter 9 subject to applicable conditions of each paragraph…

If a "residential" location is Sunrise's priority, there are options where their proposed CCRC could locate without any need for special exceptions or variances to accommodate the size of their building. RA (apartment) zones are a good example, except RA-1 and RA-6.

For example, Sunrise could locate in the following residential zones:

- RA-2 (moderate to medium density rowhouses and apartments with 60% lot occupancy and 50 feet height);
- RA-3 (moderate to medium density rowhouses and apartments with 75% lot occupancy and 50 feet height);
- RA-4 (medium to high density apartments with 75% lot occupancy and 90 feet height).
- Also, CCRC can locate in Mixed Use (MU) zoned areas but not MU Group A.

SUNRISE ASSERTS THEY WOULD HAVE "PRACTICAL DIFFICULTIES" IF ZONING WERE ENFORCED AS TO THE LOT OCCUPANCY, SIDE YARD SETBACK AND NUMBER OF STORIES

For a more detailed discussion of the attributes of the lot see page 46.

WABC Lot

The WABC lot is not narrow, shallow, or irregularly shaped. The applicant posits that "[t]he shape and disposition of the lot is unusual and exceptionally large relative to other lots in the R-1-B District." The 3920 Alton lot is close to rectangular, measuring 220 feet on the east side, a total of 226 feet on the west side, 180 feet on the south side, and approximately 125 feet on the north side.

The 3920 Alton lot was originally 7 individual single family lots in a single-family neighborhood before the WABC bought them and combined them to build the existing church. Church Bulletin of September 24, 2017. See also Exhibit 37.

Applicant says they cannot honor the side yard setback required because they want to build a 12 to 20-foot wide truck ramp with a 13-foot drop, an 8 to 16-foot wide tree box to allow anchoring of their 13 foot retaining wall and space for their loading berth, loading platform (lift) and roll off open trash container. They say in order to accommodate all of this within the 36-feet on the east side of the building they have to shove their building against the property line on the west side of the lot. The problem is not the lot.

The problem is their building is too big for the lot and the neighborhood. They state that the NPS has no objection to Sunrise putting its building on their property line and has signed off on Sunrise's landscaping proposals but since applicant filed Exhibit 8, the NPS has stated this is not an accurate representation of NPS position. Exhibit 69 at page 30 states that the required final approval has not been received from the several agencies that are included in the process.

Sunrise, by eliminating the side yard setback on its western property line shared with the NPS, gains approximately 6,360 square feet for the CCRC project. This additional space provides

increased occupancy capacity for at least 11 people plus staff, aides, and visitors. As a basis for comparison, the area gained by the elimination of the side yard exceeds the total living area of more than 3 1/2 of the 5 single family homes on Yuma Street. As to the Applicant's request for a fourth story, it is driven by Applicant's desire to locate a building on the lot that is too big and has nothing to do with any physical attributes or topographical difficulties presented by the lot itself.

Their fourth story does, however, violate the zoning principle that R-1-B should be low density and have low volume use. Sunrise's argument that it should be granted a variance to allow 4 floors rather than the prescribed 3 floors because the building will be 40 feet high is specious. The number of stories is an important development standard for a CCRC in an R-1-B zone because it limits the occupancy level. Here, Sunrise would gain a sizeable increase in occupancy capacity by adding a 4th floor which equates to 35 - 50 additional people plus staff, aides, and visitors.

And the slope cannot be a problem because it is Sunrise that is requesting an exception for a retaining wall of 13 feet so they can build a truck ramp with a slope with a 13-feet drop across a 220-foot wide lot. So, there is no indigenous slope barrier to development because they are artificially creating a far greater slope.

> ***Applicant*** *says that the "through-lot condition dictates a building arrangement where each use fronts on a street to create an appropriate urban design that (i) responds to the neighboring single-family dwellings by following building lines along streets, and (ii) reflects the site's adjacency to the Wisconsin Avenue commercial corridor and institutional uses on Tenley Circle and in the immediate vicinity." Exhibit 8, page 35.*
>
> *"The lot's character as a through lot, along with the open NPS lot to the west, effectively render this site uniquely exposed on four thoroughfares: Wisconsin Avenue/Tenley Circle, Nebraska Avenue, Yuma Street and Alton Place." Exhibit 69, page 24.*
>
> *The through-lot condition on this 35,443 square-foot site dictate a building arrangement where each use fronts on a street to create an appropriate urban design that (i) responds to the neighboring single-family dwellings by following building lines along streets, and (ii) reflects the site's adjacency to the Wisconsin Avenue commercial corridor and institutional uses on Tenley Circle and in the immediate vicinity. Exhibit 69, page 30.*

Sunrise and WABC plan to share the building so the fact that they can each front on one of the streets is an inherent convenience not a determent to overcome. Applicant's claim that it is "following building lines along streets" is inaccurate. First, the proposed building on the Yuma Street side is only 4.8 inches from the property line and dos not correspond to the house line of the neighboring single family dwelling at 3901 Yuma. In addition, the proposed massive four-story building that reaches - 76 feet at the church edifice, 52 feet measured from grade to penthouse and 65 feet measured from bottom of the truck ramp to the penthouse – dwarfs the nearby 2 story homes and is completely incongruous with those homes, which are located about 9 feet from the property line they share with the church.

The site is not "adjacent" to the Wisconsin Avenue commercial corridor or any institutional uses. So, the one factually correct statement in the above quote is a positive attribute and the rest of the description is factually incorrect.

The lot does not touch Wisconsin Avenue or Tenley Circle. Note that Wisconsin Avenue is 6 lanes during rush hour. Cars only leave Wisconsin for Tenley Circle if they wish to use Nebraska Avenue, which has federal park land on both sides and is not zoned commercial.

Note that Sunrise is not in compliance on building lines. As they have expanded their building so that it is now 4.8 inches from the property line on the Yuma side, they are no longer observing the building lines to be on the same line with 3901 Yuma, the house next door. Build-to-lines may be regulated by an "existing range of blockface" cited for the zone. Rules of Residential House (R) Zones state that a proposed building façade or structure facing a street lot line shall be located a distance not closer to the street than the point of the existing building façade closest to the street, based on all the buildings located along the blockface. When a zone has a front build-to requirement, the front façade of all buildings and structures must directly abut the build-to line. See 11-B DCMR §§ 313-316. Sunrise building appears to be substantially closer to the street than the home next door. See Exhibit 69E2, pages 3.0 – 3.3 and 3.6.

Sunrise plans to utilize the "through" nature of the lot when they drew their proposed truck ramp going from Alton to Yuma. In 2009, the BZA thought the through driveway was a plus when the BZA said,

"…the ability to flow through from Alton Place to an exit on Yuma Street will greatly increase safety within the parking lot itself and will also result in less drop-off/pick-up and queuing activity on local streets. This activity, some of which currently does occur on Alton Place, has resulted in traffic congestion in the past. Such congestion will be alleviated by the new parking lot design…" *BZA Final Order in Case No. 17726* (2009), (Exhibit 38 herein, page 15-16), regarding the same lot.

"To support a variance, it is fundamental that the difficulties or hardships be due to unique circumstances peculiar to the applicant's property and not to general conditions in the neighborhood." *Palmer* at 539. If applicant's argument is accepted, then virtually all of Washington, D.C., including the hundreds of R-1-B homes along Nebraska Avenue, would be eligible for variance relief. This would be an amendment to the Comprehensive Plan and the zoning regulations.

All of the requested variances – lot occupancy, elimination of the side yard setback and adding a fourth story are for Sunrise, which occupies over 87 percent of the building and wants the BZA to allow a massive building in an R-1-B zone.

The requested variances are solely for the benefit of Sunrise. The degree of these variances for the lot occupancy, number of stories and elimination of the side yard setback is severe and dramatically increases the occupancy capacity. Such violates the

development standards for R zones that are intended to control the mass or volume of structures. Here, there is no justification whatsoever to find that any condition of the lot creates practical difficulties for the owner.

THE SEVERITY OF THE VARIANCES REQUESTED

First, we should look at the *Gilmartin* decision to ascertain, how to look at the ramifications of a request for dramatic, severe variances from zoning rules.

Gilmartin v. D.C. Board of Zoning Adjustment, 579 A.2d 1164, 1171(1990):

> *It is possible that a factor underlying BZA's decision in the instant case was that the requested variances were de minimis in nature.[3] The one-foot difference in the size of the parking space is almost negligible, especially where, as here, the Board determined that the grant of the variance would not harm the public. The prohibition on parking in "front yards" seems more likely to have been aimed at lots such as petitioners' that front directly onto public streets than at lots along an alley, like intervenor's. In this case, because the lot is completely enclosed within other lots and a public area, the distinction between the "front" and "rear" yards appears at least negligible, if not irrelevant.*
>
> *In order for BZA to deal with circumstances such as those presented in the application for variances in this case, BZA has the flexibility to consider a number of factors including, but not limited to: 1) the weight of the burden of strict compliance; 2) the severity of the variance(s) requested; and 3) the effect the proposed variance(s) would have on the overall zone plan. Although BZA's consideration of such factors seems to flow implicitly from its conclusion that a failure to grant the variances would result in "practical difficulties" for the intervenor, and it is likely that BZA considered it significant that the specific variances requested were slight and would not harm the overall zone plan, we must require more specific findings as to what practical difficulties BZA identified.*

The variances requested here are definitely not *de minimis.* Applicant is asking for at least 5 zoning changes on a single-family lot is due great weight. We note that the severity of the three variances sought here is very significant. The lot occupancy allowed is 40% but the applicant seeks 58%. This is close to a 50 percent increase over what is allowed. Applicant is asking for an increase from the 3 stories allowed to 4

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[3] Footnote 6 of Gilmartin. This court may not substitute its reasoning for BZA's …. On remand BZA may consider whether the variance sought is *de minimis* in nature and whether for that reason a correspondingly lesser burden of proof rests on the intervenor. *See* 3 R.M. Anderson, American Law of Zoning, § 2051 at 534 (1986 ed.); *Stewart v. Zoning Hearing Bd. of Radnor Township,* 110 Pa.Cmwlth. 111, 531 A.2d 1180, 1182 (1987) ("infinitesimal deviation [lot a few feet short of one acre] from complete compliance is clearly within the de minimis exception for granting dimensional variances.").

stories. They repeatedly say that a church is allowed 60 feet in height therefore their 4 stories is conservative. This is not true.

A church is allowed 60 feet in height to accommodate a steeple or sanctuary. **Even a church is limited to 3 stories**. Sunrise, a business, should be limited to three stories. The additional story in their proposal gets topped by a penthouse so, in a single-family neighborhood, where almost all houses are two-stories, this proposed building would be seriously out of scale. And, finally, the request to eliminate the 8-foot side yard setback, if granted, would allow Sunrise to increase the size of the CCRC by 9 percent. All of these variance requests taken together are what allows Sunrise and WABC to put 450 people on the lot, 121 of them living there 24/7 plus more than 70 staff there daily, plus privately hired aides, visitors and others.

The building would be massive in a neighborhood of single-family homes that are mostly two stories and were built in the 1920's and 1940's. The only "open" space visible to the neighbors would be the paved front entrance and drop-off off Alton, a small setback on the Yuma Street side measuring 4.8 inches, and the paved descending/ascending driveway that descends 13 feet. The truck ramp is a "buffer" and "unoccupied" but in plain English it will have a terrible negative effect on the homes less than 10 feet away. The courtyard, at best would be visible from three homes. The applicant seeks total elimination of the side yard setback with the NPS land. There are exits from the building on the NPS side, which appear to have required a major cantilever of the building in order to install a walkway out to Yuma. Without the cantilever pushing the church backward under the overhanging Sunrise top floors, those exiting that side of the building would have crossed the property line as they stepped immediately on to federal land. To view cantilever, see Ex 69E1, page 2.1 and Exhibit 69E2, pages 3.0 and 3.1.

FOXHALL **AND THE SELF-CRETED HARDSHIP RULE**

In *Foxhall*, the court found that "hardship" as a condition of granting a use variance cannot be self-imposed. In that case, St. Patrick's had added many additions at different levels over the years that had resulted in a difficult design utilization. St. Patrick's claimed that this resulted in a hardship. The court disagreed because the situation was "created by the owner itself and therefore, cannot serve as a basis for a variance under D.C. Code § 5-424(g)(3)(1981) and 11 DCMR § 3107.2 (1986) 524 A.2d. 759, 761." The *Foxhall* court also suggested that the problems with the heating, cooling, and bathroom facilities beg the question whether St. Patrick itself is responsible for the claimed "extraordinary and exceptional situation or condition" that might support a variance. *Foxhall,* at 763.

In *Foxhall*, the court stated the following: **"**According to the 'self-created hardship rule': If the peculiar circumstances which render the property incapable of being used in accordance with the restrictions contained in the ordinance have themselves been caused or created by the property owner, ... the essential basis of a variance that is,

that the hardship be caused solely through the manner of operation of the ordinance upon the particular property is lacking. In such a case, a variance may not be granted."[4] The self-created hardship rule applies, for example, to owners who purchase property with actual or constructive knowledge of zoning restrictions from which they intend to seek administrative relief. 3 R. Anderson, AMERICAN LAW OF ZONING § 20.44, -.45; see, e.g., Salsbery, 357 A.2d at 404-05 (applicant contracted to purchase existing property for non-conforming use without conditioning contract upon obtaining use variance).

Sunrise SVP for Real Estate Philip Kroskin began work at Sunrise in 2009. Sunrise and WABC stated that they began planning the 3920 Alton project on October 14, 2014 (statement at Sept. 24, 2017 meeting at WABC). When he began planning this project, SVP Kroskin had worked for Sunrise for five years as their real estate lead. Surely, he knew the profit formula (business model) of approximately 86 minimum units at 900 SF each long before they started planning this project in 2014. So, if his formula required a 1.5-acre lot to comply with zoning, he knew he would be asking for *many* variances and special exceptions to locate in a single-family neighborhood on the lot at 3920 Alton, which is 0.81 acre. He should have sought a larger lot, perhaps in a commercial zone, as he did on Connecticut Avenue when he located a Sunrise eight blocks from this site.

Mr. Kroskin has repeatedly been asked if they have explored other sites. **He consistently has replied that he has not. When asked if they would explore other sites, even when several have been suggested, they emphatically have also said no, they would not.** When ANC Commissioner Greg Ehrhardt asked if he had explored becoming part of a large development that is in the early stages on the Federal National Mortgage Association (FNMA) site on Wisconsin Avenue five blocks away, mentioning that FNMA was building 4-6 mid-rise buildings, Sunrise SVP Kroskin said **he had no interest in pursuing that idea**. March 15, 2018 ANC meeting. Alternatives were also mentioned in *Trouble Still Brewing Over Proposed Sunrise, Baptist Church Project*, NW Current, March 21, 2018.

In the instant case, Sunrise chose a lot that was 35,443 square feet. The lot size has not changed in any way over the years. They selected this lot in the middle of this single-family neighborhood and now they claim "hardship" because they cannot build their massive building unless they are granted many variances and special exceptions. This is classic "self-imposed hardship." They contend it is not financially viable to

[4] Foxhall footnote at 761 - A. Rathkopf and D. Rathkopf, THE LAW OF ZONING AND PLANNING, § 39-01 (4th ed. 1986); accord, 3 R. Anderson, AMERICAN LAW OF ZONING, § 20.44, -.45, -.46 (3d ed. 1986); *Carliner v. District of Columbia Board of Zoning Adjustment*, 412 A.2d 52, 54 (D.C.1980); *De Azcarate v. District of Columbia Board of Zoning Adjustment,* 388 A.2d 1233, 1238-39 (D.C.1978); *Bernstein v. District of Columbia Board of *762 Zoning Adjustment, 376 A.2d 816, 820 (D.C.1977); Salsbery v. District of Columbia Board of Zoning Adjustment,* 357 A.2d 402, 404-05 (D.C.1976); *Dwyer v. District of Columbia Board of Zoning Adjustment,* 320 A.2d 306, 307-08 (D.C.1974); *Taylor v. District of Columbia Board of Zoning Adjustment*, 308 A.2d 230, 236 (D.C.1973).

observe zoning on the lot. They had all the relevant information at their fingertips in 2014 when they began to contemplate this development. They cannot be rewarded for creating their own "hardship."

In conclusion, for all the above reasons, the applicant fails to show that it meets the second prong of the variance test. The applicant for three area variances has not "prove[n] that, as a result of the attributes of a specific piece of property described in Subtitle X 1000.1, the strict application of a zoning regulation would result in peculiar and exceptional difficulties to the owner of the property."

PRONG 3: CAN THE VARIANCES BE GRANTED WITHOUT HARM TO THE ZONE PLAN OR TO THE PUBLIC GOOD?

Title 11, SUBTITLE X CHAPTER 10 VARIANCES
1000 GENERAL PROVISIONS *1000.1 With respect to variances, ...peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, (the BZA may) authorize, upon an appeal relating to the property, a variance from the strict application so as to relieve the difficulties or hardship; provided, that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map."*

APPLICANT:

No harm to the public good or to the zone plan: The requested variances can be granted without causing substantial detriment to the public good and without substantial impairment to the intent, purpose, and integrity of the Zoning Plan. The project will adhere to the residential character of the neighborhood, while simultaneously continuing the existing religious use of the property.

The increased lot occupancy to 57 percent is less than what would be permitted for a matter of right religious institution. When combined with the adjacent NPS parcel to the east, which will remain open and landscaped, it will create an effective lot occupancy of approximately 46 percent. Without Sunrise, WABC would have to seek another buyer. That buyer would be a religious institution that would take advantage of the by-right zoning and could build a larger facility at 60 percent lot coverage, with a more severe intensity of daily use than that contemplated by the combination of WABC and Sunrise.

The difference between 57 and 40 percent lot occupancy has marginal to no visual effect on the adjacent properties since it would not result in further setbacks from the streets. But for the practical, financial and operational difficulties described above, lot occupancy would be achieved by increasing the size of the interior courtyard, which would not affect the appearance of the building from the street. Similarly, if the building provided only three stories instead of four stories, there would be no change to the actual height of the building or its

appearance from the street since both fall within the maximum permitted height of 40 feet. Finally, if the building provided a side yard to the west, there would be little visible difference due to the adjacent lot that is maintained as open space by NPS. Building up to that lot line allows the Applicants to provide as much space as possible between the new building and the neighbors to the east.

The variances would not cause substantial detriment to the public good and, in fact, would serve the public good by allowing elderly residents to age within their community at a site that is adjacent to a commercial corridor but within a residential neighborhood. The CCRC use is a particularly quiet and compatible residential use that is not in conflict with the adjacent single family houses, especially as compared to the likely alternative use of the site as a home for a modern, transit-oriented, mega-religious institution. The proximity of the Tenleytown-AU Metrorail Station – only 500 feet away – further supports the CCRC use at the WABC site. Accordingly, the Applicants satisfy each part of the variance-relief test.

Exhibit 69, page 30-31.

NEIGHBORS' RESPONSE:

Prong III of the test for area variances

> "An area variance may be granted for improvement of a property if all of the following conditions are met: …. (3) variance relief will not create 'substantial detriment to the public good' or 'substantially impair […] the intent, purpose, and integrity of the zone plan as embodied in the zoning regulations and map."
>
> *Draude I* at 1254, citing D.C. Code 5-424(g)(3) (1981); *Capitol Hill* at 15-16.

HERE THERE WOULD BE HARM TO THE ZONE PLAN AND THE PUBLIC GOOD.

We live in a single-family detached neighborhood with historic homes, and a large parcel of federal park land. The homeowners bought their homes in full reliance on the R-1-B zoning designation of the Future Land Use Map (FLUM) and on the designation of this area as a Neighborhood Conservation Area on the Generalized Policy Map. There has already been a substantial negative impact in that 3 homes within 200 feet have been sold since the project was announced less than a year ago. Two of those share the property line with the proposed project, and both have sold for below market value. The Zoning Plan promises conservation of the neighborhood.

In *Monaco*, the court found that the applicant for an area variance "must still show the third element of the variance test, namely, that the variance will not harm the public or undermine the zone plan." *Monaco* at 1101. Factors considered in *Monaco* included whether the hours and functions of the building remained the same, that no new employees would be brought into the neighborhood, and that the structure would be

compatible with the design and height of surrounding buildings.

Sunrise has problems with the development standards in R-1-B in general and seeks to remedy that problem by seeking, besides two special exceptions, three major area variances, lot occupancy, number of stories, and side yard setback. The effect of granting three variances by the BZA would be an amendment of the zoning regulations, an action which the BZA is not empowered to take.

> "The threshold requirement to show that the property is unique with respect to the hardship or difficulty asserted as grounds for the variance means the **property owner** (emphasis added) must present proof that 'the circumstances which create the hardship uniquely affect the petitioner's property' Taylor, supra note 6, 308 A.2d at 234. Where the circumstances which create the hardship or difficulty affect the entire neighborhood rather than merely a specific piece of property, the problem is properly addressed by seeking amendment of the regulations from the Zoning Commission. Id. If the BZA were to grant variances where the hardship or difficulty is not peculiar to a particular piece of property, similar requests could follow from property owners similarly situated, 'which, as a matter of due process, would have to be granted.' Id. The effect of such decisions by the BZA would be an amendment of the zoning regulations by that body, an action which the BZA is not empowered to take. Id." Capitol Hill Society at 942-942.

Sunrise asserts that "[a]ny new CCRC use in the city within an R-1 through RA-1 District will necessarily require lot occupancy variance if the site is less than approximately 1.5 acres." The Applicant does not allege that lots within the R-1 through RA-1 zones cannot be found that are 1.5 acres. In addition, smaller CCRCs are possible and exist.

Rather, it is peculiar to the business of constructing a CCRC that reflects Sunrise business model. The applicant states, "This zone provides only 40 percent lot occupancy for non-religious uses and no more than three stories in the maximum permitted height of 40 feet. This is an insufficient allowance for any CCRC use." Sunrise has "difficulties" with the R-1-B zoning and would have the same difficulties with any lot in R-1-B single family detached. But they cannot jettison the zoning plan, they need to amend their business model or select a lot with different zoning.

We stress that granting the variances would lead to erosion of the single family character of the neighborhood in derogation of the zoning plan. The Future Land Use Map (FLUM) and the Generalized Policy Map designate the neighborhood, including 3920 Alton Place as R-1-B, single family detached and in a Neighborhood Conservation Area, respectively. There is no way to make a case that the project will "adhere to the residential character of the neighborhood," and applicant has not successfully made that case here.

The proposed WABC/Sunrise project in no way adheres to the single-family residential character of the neighborhood. The proposal would bring 450 people (121 residents

24/7, more than 70 staff, a 250-seat church) plus visitors, a 7-ton shuttle bus, 20 trucks a week, several weighing 28 tons, and many cars. Numerous individual deliveries to the 121 residents would be added. The project essentially eliminates the ability of neighbors to walk on the sidewalk on the both Alton and Yuma on the side next to the facility, and any pedestrians would have to be alert to the trucks and cars using the ramp or using the Alton drop-off/pick up curb cuts. The trucks need to accelerate up the ramp.

Interpretation and Application (of the Zoning Regulations, 11-A DCMR § 101.1.
101.1 In their interpretation and application, the provisions of this title shall be held to be the minimum requirements adopted for the promotion of the public health, safety, morals, convenience, order, prosperity, and general welfare to: (a) provide adequate light and air; (b) Prevent undue concentration of population and the overcrowding of land; ...

There are numerous zoning policies included in the Comprehensive Plan that speak to low density being protected as "low density."

COMPREHENSIVE PLAN

Provisions of the Comprehensive Plan that would not support granting of exceptions and variances to accommodate this massive development proposal by an increase in lot occupancy from 40% to 58%; by allowing addition of fourth story on top of the three stories allowed, or by allowing the elimination of a side yard in order to accommodate a 9% increase in the size of the building. These provisions of the Comprehensive Plan would not support allowing 121 residents, more than 70 staff and a 250-seat church on a single family lot 24/7. The following are provided in full at pages 24 – 25.

Policy RCW-1.1.1: Neighborhood Conservation 2308.2
Policy LU-2.1.5: Conservation of Single Family Neighborhoods 309.10
Policy LU-2.2.1: Code Enforcement as a Tool for Neighborhood Conservation 310.2
Policy LU-2.3.1: Managing Non-Residential Uses in Residential Areas 311.3
Policy LU-2.3.5: Institutional Uses 311.7
Policy LU-2.3.7: Non-Conforming Institutional Uses 311.9

NUMBER OF PEOPLE USING THE SITE IS FAR FROM "LOW DENSITY" USE AS THE ZONE REQUIRES

In 2009, the BZA accepted a cap, offered by the applicant, on the number of people who could be on the lot at 3920 Alton at any one time. The cap included the people affiliated with WABC and those affiliated with the numerous schools renting space in the building. The cap was **97 people maximum on the lot at any one time during the week.** *BZA Final Order in Case No.17726* (2009), (Exhibit 38 herein, page 8), regarding the same lot.

Sunrise and WABC are proposing 450 people on the site: 250 seat church, 121 living

there 24/7, more than 70 staff, visitors, and more.

The BZA must consider and address the adverse impact on neighboring properties. The regulatory language states that the purposes and intent of the R-1-B zones are to "protect quiet residential areas now developed with detached dwellings" and to "stabilize the residential areas and promote a suitable environment for family life."

If this massive building is allowed then the homes on 39th Street would live next to a truck ramp. Sunrise describes the side yard "setback" next to the property line shared with the houses facing 39th Street as being 36 feet from the property line to the actual building. But the 36 feet is filled with many uses. There would be a single line of trees next to the property line. The truck ramp is 12-20 feet wide and drops down over 13 feet. There would be a loading berth of 12 feet X 30 feet and a lift. The truck ramp has arrows for traffic in both directions on Alton side. See Exhibit 69E2, page 3.4 provided here at page 110. See also garage plan at page 147 herein. See also Exhibit 69E2 at pages 3.0-3.5 showing the massive building Sunrises proposes for 3920 Alton.

In 2009, the BZA was concerned about the 5 houses that share a property line, when the BZA noted that the playground would be on the opposite side of the WABC building and 75 yards from the rear yards of those houses. *BZA Final Order in Case No.17726* (2009), (Exhibit 38 herein, page 12), regarding the same lot. And the BZA endorsed the music rooms being specially outfitted to contain sound. *Id.*, page 13. "Studios and rooms intended for use by the private school shall be designed, engineered, and constructed to limit sound transfer. *Id.,* page 21.

COMPREHENSIVE PLAN PRIORITIZES AFFORDABLE HOUSING FOR LOW INCOME SENIORS

Many of the cases coming before the BZA that involve churches, also have involved the creation of affordable housing. See Emory United Methodist, BZA No. 17964 decided February 23, 2010, which created 99 units of affordable housing. St. Thomas Episcopal included affordable units and added 4 additional affordable units, most at 60% AMI, as part of a settlement. See Northwest Current of July 11, 2018 article entitled *Pact Reached on Church Street Project*.

The policy of the District of Columbia as stated in the Comprehensive Plan Glossary of Terms, defines **Senior housing** as Housing designed and reserved for senior citizens, **particularly those of low or moderate income**. (emphasis supplied).

So clearly the Comprehensive Plan could be read to favor housing for low and moderate-income seniors if there is any flexibility in the zoning regulations.

This is not a case, however, that includes **any** affordable housing or affordable units in the facility. The fees are $8,000 - $15,000 per month.

Sunrise has demonstrated no interest, even when directly asked, regarding the zoning law provisions that prioritizing services for low-income seniors. See also discussion of "Gentrification of Senior Services by Concentration in Ward 3" at page 112.

We emphasize that the Applicant requests dramatic zoning relief, that benefits only Sunrise, who is not an owner of the property, to accommodate a massive for-profit "senior facility" that functions as an apartment building for people over 60 years old, in an R-1-B zone for single families.

Sunrise makes no attempt to honor zoning or the Comprehensive Plan

In response to many suggestions that might bring the proposed development into compliance with zoning and the Comprehensive Plan, Sunrise has responded with nothing that would help address the neighbors' concerns.

Lot Occupancy

As to Lot Occupancy, Applicant says:

> "The difference between 57 and 40 percent lot occupancy has marginal to no visual effect on the adjacent properties since it would not result in further setbacks from the streets. But for the practical, financial and operational difficulties described above, lot occupancy would be achieved by increasing the size of the interior courtyard, which would not affect the appearance of the building from the street." *Exhibit 8 at page 8. Exhibit 69 at page 31*

Sunrise says if they had to honor the 40 percent lot occupancy allowed in R-1-B, they would shrink the courtyard and it would make no difference to the nearby homes. But when ANC3E Chairman Bender asked them to do exactly that, as a way to pull the massive building away from the nearby homes, Sunrise said they could not shrink the courtyard. The explanation was vague but it appeared that the courtyard dimensions were immutable because of the requirement of windows on each of the 86 units they plan to build. ANC meeting transcript, March 15, 2018. An increase in lot occupancy from 40% to 58% is close to a 50% increase to accommodate a much larger building that allows an increase in use that is part and parcel of putting 450 people on a single family lot in a single family neighborhood. R-1-B is low density low volume and in this location a neighborhood conservation area.

Side yard setback elimination

As to the side yard setback, Applicant says:

"*If the applicant were to shift the building eight feet to the east to meet the strict application of the side yard provisions, they would have to eliminate the green buffer on the east side because this setback area must also accommodate the two-way garage ramp and access drive to the loading facilities and a retaining wall, as shown on the drawings." Exhibit 8, page 7. See also Exhibit 69 at page 31.*

So, Sunrise says that if they honor the zoning code requirement to have an 8-foot side yard setback, then they will jam the building closer to the houses on 39th Street. Rather than entertain an option to reduce the massive size of the building. They come to the lot with one immutable size for their facility, and the zoning regulations and Comprehensive Plan are viewed as merely "in the way" of building their version of a senior facility. The elimination of the 8-foot side yard setback allows a 9% increase in the size of the CCRC, which is at least 11 more residents living on site plus attendant staff, visitors and aides, which allows an increase in use that is part and parcel of putting 450 people on a single family lot in a single family neighborhood. R-1-B is low density low volume and in this location a neighborhood conservation area.

Fourth Story

Regarding the fourth story, Applicant says:

Similarly, if the building provided only three stories instead of four stories, there would be no change to the actual height of the building or its appearance from the street since both fall within the maximum permitted height of 40 feet. Exhibit 8 at page 8. See also Exhibit 69 at p. 31.

So, the fourth story is described as making no difference to neighbors because they would build the facility to 40 feet even if they honored zoning code by having only 3 stories. This makes no sense. Even energy efficiency would seem to make building everything with high ceilings an unlikely choice for Sunrise, who appears very profit-driven. All R-1-B lots can have 40 feet buildings, but most do not. For example, the lot at 3920 Alton is surrounded by 2 story single family homes on R-1-B lots. The fourth story is a 25% increase in use that is part and parcel of putting 450 people on a single family lot in a single family neighborhood. R-1-B is low density low volume and in this location a neighborhood conservation area.

Sunrise has no interest in honoring the Comprehensive Plan or zoning regulations.

HARM TO THE PUBLIC GOOD

The Merriam Webster Dictionary Definition of *common good (noun) as*:
"the public good**:** the advantage of everyone. The organization works for the *common good*."

The best discussion we could find regarding "the public good, common good or public interest" is from the 2007 Land Use Law Update by Attorney Tim Bates, OEP Spring conference:

2007 Land Use Law Update - **COURT DEFINES "PUBLIC INTEREST**"

Chester Rod and Gun Club, Inc. v. Town of Chester, 152 N.H. 577 (2005)

One of the four tests other than "unnecessary hardship" that is applicable to both use and area variances is the requirement that granting the variance ***"will not be contrary to the public interest."*** *In this decision, the [New Hampshire] supreme court gave us some guidance about how "public interest" is defined.*

… [T]he NH Supreme Court, which began its analysis by noting that the requirement that the variance not be "contrary to the public interest" (an independent constituent of the 5-part
variance test) is "coextensive" with the requirement that granting the variance "will not injure
the public rights of others" (which is part of the third piece of the Simplex test for "unnecessary hardship" for a use variance (that granting the variance "will not injure the public or private rights of others")).

Moreover, both those requirements "are related to the requirement that the variance be consistent with the spirit of the ordinance." The supreme court offered some explanation of these principles by quoting the following text from a well-known treatise, ***Anderson's American Law of Zoning:***

'The standards which limit the power of administrative boards to vary the application of the zoning regulations in specific cases are intended to provide administrative relief in individual cases of unnecessary hardship, without injury to the rights of landowners other than the applicant, and without substantial interference with the community's plan for the efficient development of its land. Accordingly, an applicant for a variance must prove not only that a literal application of the ordinance will result in unnecessary hardship . . ., but also that the variance he seeks will not harm landowners in the vicinity of his proposed site, or prevent the accomplishment of the purposes of the zoning scheme. The public interests are protected by standards which prohibit the granting of a variance inconsistent with the purpose and intent of the ordinance, which require that variances be consistent with the spirit of the ordinance, or which permit only variances that are in the public interest.'

The court went on to explain that the first step in analyzing whether granting a variance would be contrary to the public interest or injurious to the public rights of others is the examine the zoning ordinance itself. As the provisions of the ordinance represent a declaration of public interest, any variance would in some measure be contrary to that public interest. Thus, to be contrary to the public interest or injurious to the public rights of others so as to justify the denial of the variance, the variance must unduly, and in a marked

degree conflict with the ordinance such that the variance violates the ordinance's basic zoning objectives.

The court then explained that ***one way to judge whether granting the variance would violate basic zoning objectives is to examine whether the variance would alter the essential character of the neighborhood. This is because the fundamental premise of traditional zoning restrictions is to segregate the land according to uses. Thus, the variance must be denied if the proposed use will alter the essential character of the neighborhood. Another approach to determining whether granting the variance would violate basic zoning objectives is to examine whether granting the variance would threaten the public health, safety or welfare, because the dominant design of any zoning act is to promote the general welfare.***

The court concluded that ***…. The record shows that the purpose of the ordinance creating the residential zone in which the plaintiff's property is located is to "recognize the unique scenic, historic, rural and natural characteristics" of this part of the Town, "while encouraging development . . . in a manner which will protect these important characteristics."***

Here the Sunrise proposal would be a commercial enterprise in a single family detached neighborhood. With its 121 residents, more than 75 staff, 250-seat church, 20 trucks a week, some 28 tons and some 30-foot box trucks, it would alter the very nature of the neighborhood.

To echo **Anderson's American Law of Zoning,** the variances requested here cannot be granted **'without injury to the rights of landowners other than the applicant, and… an applicant for a variance must prove … that the variance he seeks will not harm landowners in the vicinity of his proposed site, or prevent the accomplishment of the purposes of the zoning scheme.'** And the court elucidated that '**one way to judge whether granting the variance would violate basic zoning objectives is to examine whether the variance would alter the essential character of the neighborhood."**

The Sunrise proposal would dramatically alter the quiet, residential Tenleytown neighborhood at Alton, Yuma and 39th Streets. Sunrise has a facility 8 blocks away on a commercial lot. Alternative nearby sites have been mentioned to Sunrise and Sunrise has refused to consider alternatives. But to allow this massive project in the middle of this single family neighborhood is wrong and the requested variances –

58% lot occupancy when 40% is allowed a non-church, an extra story (plus penthouse) that allows increased volume of use to 121 people living in the building, and no side yard setback next to publicly owned park land thereby allowing a 9% increase in the building and more residents living there.

All of the requested variances should be denied because they individually and, in the aggregate, violate both the zoning plan and they harm the public good.

NATIONAL PARK SERVICE

Harming the Public Good: Request for Variance to eliminate required Side Yard Setback of 8 feet next to National Park Service land.

We have discussed earlier the ramifications of eliminating the 8-foot side yard setback to allow the building to have greater mass in a single family neighborhood. The extra 8 feet across the entire lot impacts the size of the building, the volume of people using the building and density. Here we are discussing, as taxpayers, the ramifications on the federal park land.

Sunrise asks for approval to **eliminate** the required set back of 8 feet so it can construct the building on the property line with federal land. There is no indication that the **National Park Service** has agreed to Sunrise's plan to put the building on the property line with the Park Service. Originally Sunrise had landscaping plans, which included constructing paths up to the Sunrise building and WABC so that the federal park land would look like it was their land and they could use federal land not only to showcase their commercial enterprise but also to actually use the federal land for their residents, staff and visitors. At that time, Sunrise stated that the National Park Service had signed off on this idea. The turned out to be false. NPS had not signed off. In their more recent filing applicant states that not all agencies who must sign off have signed off. Exhibit 69, page 30.

In the most recent iteration of their plans the building is not cantilevered by cutting space out of the church sanctuary and replacing that with a path so that people can walk to Yuma Street after they exit next to the NPS land without crossing the property line. See Exhibit 69E1 at page 2.1 and Exhibit 69E2 at pages 3.0 and 3.1.

The BZA should request an official statement from the National Park Service addressing the setback issue.

As neighbors we oppose the massive size of the building that elimination of the set back allows. As taxpayers, we do not support private businesses placing their massive buildings on the property line of National Park Service land.

The National Park Service land is meant to commemorate the route that civil war soldiers took to get to Fort Reno when there was a call to arms to defend the Union.

The Comprehensive Plan speaks to the need to conserve NPS areas:

Policy RCW-1.2.3: National Park Service Areas
Conserve and improve the more than 2,000 acres of natural open space in the forested neighborhoods that lie between the Potomac River and Rock Creek Park, including … the Fort Circle Parks. 2309.4

Although Sunrise and WABC have now eliminated, at National Park Service insistence, the paths up to the WABC/Sunrise building that were included in their original landscaping plan, the WABC-Sunrise building plans still include an entrances/exit next to National Park Service land. In the most recent iteration of their plans the building is not cantilevered by cutting space out of the church sanctuary and replacing that with a path so that people can walk to Yuma Street after they exit next to the NPS land without crossing the property line. See Exhibit 69E1, p. 2.1 and Exhibit 69E2, pp.3.0 and 3.1.

SPECIAL EXCEPTIONS DISCUSSED

Applicant requests the following:

1 Special exception relief to allow a **retaining wall of 13 feet** rather than the 48-inch retaining wall allowed pursuant to 11-C DCMR § 1401.3 (c), which applies to a retaining wall located within 25 feet of a rear property line; and

2 Special exception relief to establish a CCRC use in the R-1-B District, pursuant to 11-U DCMR § 203.1(f).

Other special exceptions that **may** be required since the record does not demonstrate compliance:

3. Special exception if Sunrise is a health care facility and is therefore too close to Psychiatric Institute of Washington under the 11-U DCMR § 203.1(i)(1) and 11-U DCMR § 203.1(i)(6) prohibition that health care facilities are prohibited within less than 1000 feet of each other. This can only be waived if the BZA finds "that the cumulative effect of the facilities will not have an adverse impact on the neighborhood because of traffic, noise, or operations." This is discussed as part of the special exception for a CCRC discussion.

4. Special exception relief from the requirement that a driveway ramp cannot exceed a 12% slope (drop of 12 feet over 100 feet). The slope maximum is included in 11-C DCMR §§ 904.2 is to ensure safety. A special exception can be granted to the slope requirement (11-C DCMR §909.3) but no special exception has been requested.

5. There is no evidence that applicant complying with the regulatory requirements for a Loading Platform and Service Delivery Space pursuant to 11-C DCMR §§ 900 - 909. There are no special exceptions available for the relevant issues.

6. Special exception from the requirement that in a residential zone, the lot must be 50 percent pervious as required by 11-D DCMR § 308.1.

Retaining Wall Special Exception Requested

Applicant needs special exception relief to allow a retaining wall of 13 feet (more than 156 inches) rather than the 48-inch retaining wall allowed pursuant to 11-C DCMR § 1401.3(c).

RETAINING WALLS - 11-C DCMR § 1400

The provisions of this chapter shall apply to the construction of a retaining wall in any R or RF zone.

1400.1. The height of a retaining wall shall be determined as follows: (a) The height of a retaining wall is the vertical distance measured from the natural grade at the base of the wall to the top of the wall; (b) When the height of a retaining wall varies, the height shall be measured at the highest point of the wall, from the natural grade at the base of the wall at that point; and (c) Berms or other similar forms of intermittent terrain elevation shall not be included in measuring retaining wall height.

1401.3 A retaining wall shall not exceed four feet (4 ft.) in height in the following locations, unless a lower height is required by Subtitle C § 1401.5 and 1401.6: (a) Along a street frontage or property line; (b) Within any required side setback; (c) In the R-1-A, R-1-B.... zones, within twenty-five feet (25 ft) of the rear property line, as measured from the rear property line inward; and...

SOURCE: *Final Rulemaking & Order No. 08-06A published at 63 DCR 2447 (March 4, 2016 – Part 2); Final Rulemaking & Order No. 08-06D published at 63 DCR 10620* (August 19, 2016).

The full burden is on the applicant to show they have met the standard to grant this special exception. 11-X DCMR § **901.3**

11-C DCMR § 1402 SPECIAL EXCEPTION FROM RETAINING WALL REQUIREMENTS

1402.1 Retaining walls not meeting the requirements of this section may be approved by the Board of Zoning Adjustment as a special exception pursuant to Subtitle X. In addition to meeting the general conditions for being granted a special exception as set forth in that subtitle, the applicant must demonstrate that conditions relating to the building, terrain, or surrounding area would to (sic) make full compliance unduly restrictive, prohibitively costly, or unreasonable. (Emphasis supplied)

SOURCE: *Final Rulemaking & Order No. 08-06A published at 63 DCR 2447* (March 4, 2016 – Part 2).

STANDARDS OF REVIEW FOR SPECIAL EXCEPTIONS

11-X DCMR **§ 901.2** states that 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.

Applicant misquotes 901.2 (c). Applicant consistently misquotes 901.2(c) as saying "subject **in specific cases** to special conditions specified in the Zoning Regulations." 11-X DCMR § 901.2. For example, see Exhibit 8, page 8. **There is no limit that the section applies only "in specific cases."** In applicant's pre-hearing statement, applicant misquotes 901.2(c) as saying "will meet any special conditions for each special exception requested as specified in the Zoning Regulations." Exhibit 69, page 10.

Applicant regarding BZA discretion

Relief granted through a special exception is presumed appropriate, reasonable and compatible with other uses in the same zoning district, provided the specific regulatory requirements for the relief requested are satisfied. The D.C. Court of Appeals has consistently emphasized the narrow scope of the Board's discretion in reviewing special exception applications:

> *In evaluating requests for special exceptions, the Board 'is limited to a determination of whether the exception sought meets the requirements' of the particular regulation on which the application is based. The applicant has the burden of showing that the proposal complies with the regulation; but once that showing has been made, 'the Board ordinarily must grant [the] application.*

National Cathedral Neighborhood Ass'n v. District of Columbia Bd. of Zoning Adjustment, 753 A.2d 984, 986 n.1 (D.C. 2000) (quoting French v. District of Columbia Bd. of Zoning Adjustment, 658 A.2d 1023, 1032-33 (D.C. 1995)); see also Stewart v. District of Columbia Bd. of Zoning Adjustment, 305 A.2d 516, 518 (D.C. 1973) (noting that "[s]pecial exceptions, unlike variances, are expressly provided for in the Zoning Regulations"). If the specific requirements of the regulation are met, the Board is generally precluded from denying an application for special exception relief.
Exhibit 69 pages 10-11.

NEIGHBORS' RESPONSE

Applicant's statement that the BZA is generally precluded from denying an application for special exception if the specific requirements are met is a bit overstated.

First, the regulations below speak to the BZA evaluating each request for a special exception against three considerations. The specific conditions that may apply to the requested special exception being one of those three. The BZA is also to determine if the request is in harmony with the general purpose and intent of the zoning regulations as a whole and with the maps – FLUM and Generalized Policy Map. Plus, the BZA is to

determine if the request for a special exception will not adversely affect the use of neighboring property. The BZA has been given a broad and comprehensive role.

11-X DCMR §901:

901 SPECIAL EXCEPTION REVIEW STANDARDS 901.1 The Board of Zoning Adjustment will evaluate and either approve or deny a special exception application according to the standards of this section.

901.2 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.**

901.3 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 applicant shall not be relieved of this responsibility.

901.4 The Board of Zoning Adjustment may impose 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.

901.5 The Board of Zoning Adjustment may impose 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.

SOURCE: Final Rulemaking & Order No. 08-06A published at 63 DCR 2447 (March 4, 2016 – Part 2); Final Rulemaking & Order No. 08-06E published at 63 DCR 10932 (August 26, 2016).

902 APPLICATION REQUIREMENTS
902.1 An application for a special exception shall meet the requirements of Subtitle Y § 300.

SOURCE: Final Rulemaking & Order No.08-06A published at 63 DCR 2447 (March 4, 2016 – Part 2).

11-Y DCMR § 300.8 …(e) A detailed statement of how the application meets each element of the review standards for special exceptions specified in Subtitle X § 901, or for variances specified in Subtitle X § 1002;

In BZA Order 18272 KS FBC LLC (Jan 10, 2012) (First Baptist) at pages 10-11, regarding the request for a special exception, the BZA stated:

> "Pursuant to § 3104 [now § 901] of the Zoning Regulations, the Board is authorized to grant special exceptions where, in its judgment, the relief 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. Similar to the variance analysis, the Board "reads the general § 3104 standards as encompassing not only the general purposes of the Zoning Regulations, but also the specific purposes of [in the instant case] the Overlay in which the property is located. "*Application No. 17337 of N Street Follies*, *Ltd.* (2010). Thus, this Applicant must demonstrate harmony with the purposes of the Dupont Circle Overlay as stated in § 1501.4. Certain special exceptions must also meet the conditions enumerated in the particular sections pertaining to them. In this case, along with the general requirements of § 3104, the Applicants also had to meet the requirements of § 411. Relief granted through a special exception is presumed appropriate, reasonable, and compatible with other uses in the same zoning classification, provided the specific regulatory requirements for the relief requested are met. In reviewing an application for special exception relief, the Board's discretion is limited to determining whether the proposed exception satisfies the requirements of the regulations and "if the applicant meets its burden, the Board ordinarily must grant the application." *First Washington Baptist Church v. D.C. Bd. of Zoning Adjustment,* 423 A.2d 695, 701 (D.C. 1981) (quoting *Stewart v. D.C. Bd. of Zoning Adjustment,* 305 A.2d 516, 518 (D.C. 1973)).

First, the Board has discretion in determining **whether the specific requirements are met**, i.e. *objectionable conditions*. Here, where the BZA is considering a CCRC, the regulations include many requirements that must be met – namely the six conditions. In *French*, the court stated that "the Board is authorized to grant special exceptions... where, in the judgment of the Board, those special exceptions will be in harmony with the general purpose and intent of the regulations." 11 DCMR sec. 3108.1. But *French also* states, "**The applicant has the burden of showing that the proposal complies with the regulation;** but once that showing has been made, 'the Board **ordinarily** must grant [the] application'." *French* citing *First Baptist Church v. DC BZA*, 432 A.2d 695, 698 (D.C. 1981).

Note that in *Draude I* the court, in assessing the evidence presented in a BZA case where the Board granted a special exception as to objectionable conditions, found that the Board must make "findings on each contested issue of fact'." "The Board must reach sufficiently detailed findings on basic factual issues to demonstrate that it has considered and ruled upon each of the party's contentions." See 11-Y DCMR § 300.8.

Thus, the applicant has the burden, the BZA makes a comprehensive and detailed review and exercises its judgment in finding whether conditions of special exception are met. Once that determination is made the special exception generally or "ordinarily" must be granted. But these decision-making steps are required.

Here the request for 13 foot retaining wall and a CCRC present many objectionable conditions and applicant has not carried its burden of showing that they are “not likely to become objectionable.”

APPLICANT ASSERTS THEY MEET THE BURDEN TO BE GRANTED A SPECIAL EXCEPTION FOR A RETAINING WALL.

APPLICANT:

Applicants Satisfy the Burden of Proof for a Special Exception to Construct a Retaining Wall greater than 4 feet. *The Retaining Wall will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps.* The proposed retaining wall will be in harmony with the purpose and intent of the zoning regulations and related maps. Unlike large retaining walls that dramatically alter steep, sloping topography, this retaining wall only serves to allow for a garage ramp to the below-grade parking. The retaining wall will be an average of 8’3.1” and 13’ at its deepest. Normally, such a wall would be part of the building and not require any relief. Here, because the Applicants are setting their building back significantly from the east property line, this wall now operates as a separate retaining wall instead of a building wall.

The retaining wall will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps. The retaining wall will have no adverse impact on the use of neighboring properties. An eight- to 16-foot wide planting strip will be located to the east of the retaining wall to create a pleasing green buffer between the residences on 39th Street and the new building. The plantings will consist of tall arborvitae to protect the privacy of adjacent homes and provide a visual and sound barrier between the adjacent uses. A new six-foot tall fence along the east property line with adjacent property will provide safety and security. A second fence on top of the retaining wall will add further protection.

Conditions Relating to Building and Surrounding Area Make Full Compliance Unduly Restrictive or Unreasonable. In addition to meeting the general conditions for being granted a special exception for a retaining wall, the applicant must further demonstrate that conditions relating to the building, terrain, or surrounding area would make full compliance unduly restrictive, prohibitively costly, or unreasonable. 11-C DCMR § 1402.1.

The retaining wall will allow access to a below-grade parking garage while at the same time providing the requisite side-yard setback from the adjacent houses fronting on 39th Street. Compliance with limitation of four feet in height for the retaining wall would be unduly burdensome on adjacent properties because it would require shifting the building to the east, thereby reducing the spacious side yard separation of uses, and the amount of available space within the building. At the suggestion of the Office of Planning and DDOT, the Applicants created the through-drive condition to enhance traffic circulation by allowing cars to access and depart the site to and from the west and minimizing any through-traffic to the east. Only residents of the CCRC will have direct views of the portion of the retaining wall exceeding four feet.

Exhibit 69, pages 18-19.

NEIGHBORS' RESPONSE:

Sunrise is requesting a special exception for the Retaining Wall. Their proposal includes a retaining wall of 13 feet (only 4 feet is allowed) next to buttress the truck ramp. They would replace the existing 6-foot high boundary fence on the property line shared with 5 single family homes that face 39th Street with a board fence. At 13 feet the request is more than THREE TIMES what is normally allowed under zoning in a residential area. The wall of 13 feet would hold back the soil in order to allow two converging ramps for cars and trucks to enter the garage. One ramp from Alton Place and the other from Yuma Street. See Garage Plan at page 147 herein. See also diagram at page 110.

Sunrise website states: "Retaining Wall – We are seeking a special exception to allow for the ramp down into the below grade parking decks. The retaining wall on the east side of the property down to the garage is expected to be **13 feet** at its depth **from the finished floor elevation**. The zoning regulations limit the wall to no more than 4 feet in height." As of October 14, 2018, the website has not been updated since June, 2018.

Sunrise for several months described the wall as "**more than 13 feet**." When asked for clarification they did not respond. Since the finished floor elevation is several feet below grade, **is the wall 13 feet plus…or more like 15 feet**? In their pre-hearing statement, they changed this to "13 feet." Confirmation of the precise measurement would be appreciated.

> **Applicant** states: The retaining wall will be an average of 8'3.1" and 13' at its deepest. Normally, such a wall would be part of the building and not require any relief. Here, because the Applicants are setting their building back significantly from the east property line, this wall now operates as a separate retaining wall instead of a building wall. Exhibit 69, pages 18-19.

The "average" height of the wall is totally meaningless unless someone plans to stand half way down the truck ramp.

> 11-CDCMR§1400.1 states: "The height of a retaining wall shall be determined as follows: (a) The height of a retaining wall is the vertical distance measured from the natural grade at the base of the wall to the top of the wall; (b) When the height of a retaining wall varies, the height shall be measured at the highest point of the wall, from the natural grade at the base of the wall at that point; and (c) Berms or other similar forms of intermittent terrain elevation shall not be included in measuring retaining wall height."

As to this would "normally" part of the building is disingenuous. Sunrise is proposing to put intense volume of use on this single family lot and by the time they have 58% of the lot occupied by the building, they are left only with a 12 foot strip next to 5 family homes to build a truck ramp to their underground garage.

This retaining wall is to hold back the dirt that Sunrise does not want on its truck ramp. But the stability of the neighbors' foundations and rear yards are dependent on this wall never wavering or deteriorating. No information has been offered as to how this wall

would be anchored without crossing into the 8-foot setback or perhaps crossing the property line and interfering with the foundations of the homes facing 39th Street.[5]

Only on the Sunrise side would the replacement 6-foot high fence be softened by a single line of trees in a "tree box" that ranges from 8-16 feet. The neighbors would not see these trees since they would be looking at the back side of the fence.

The tree box and wall of 13 feet would create an "attractive nuisance" for the neighborhood children. This arrangement creates a very serious safety hazard.

This precipitous drop of 13 feet would be next to homes owned by families with young children. This is not consistent with the regulatory requirement that the wall "not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps…"

11-C DCMR § 1402.1 states that "**the applicant must demonstrate that conditions relating to the building, terrain, or surrounding area would to (sic) make full compliance unduly restrictive, prohibitively costly, or unreasonable."**

There are several ways to look at this. If they complied with zoning, would a 48-inch wall get them and their many trucks into their underground garage? No. But the core issue is that a retaining wall of 13 feet would "**affect adversely, the use of neighboring property**" in a single-family zone and fail the condition imposed by 11-X DCMR § 901.2?

The wall and ramp are immediately adjacent to the "side yard setback" on the side behind the houses facing 39th Street. The Truck and Car Ramp would vary from 20 feet to 12 feet wide. The tree box would vary from 8 feet to 16 feet.

The lots that the 39th Street houses sit on are short lots, about half the standard lot size in R-1-B. This fact exacerbates the problems created because the trucks and truck ramp would be very close to the families and to the second-story bedrooms where they sleep and their children sleep.

An unanswered question is why the 8-foot wide tree box on top of this wall is 16-feet-wide near Yuma Street. What is this change accommodating? Does the anchoring require this change? Does Sunrise plan to park a roll off trash container on the Yuma side and reconfigure the tree box so it remains 8 feet all the way across the lot?

Sunrise describes the area next to the property line shared with the houses facing 39th Street as a 36 foot "buffer" from the property line to the actual building. But the 36 feet

[5] *Traditional retaining walls (DPR architects Cox Graae + Spack, Nov 2017): (1) soil below the retaining wall footings will require improvement using rammed aggregate piers…. Temporary soil excavation will be required to install concrete cantilevered retaining walls. The temporary soil excavation system (must) be designed and installed by a special contractor and will likely consist of steel soldier piles with tiebacks and wood lagging. Another option would be (2) Permanent soil retention system. Such a system may be designed and installed by a special contractor. The system would likely consist of galvanized steel soldier piles with welded shear studs to the piles. Permanent tie-backs would be installed…. These tiebacks would likely require additional corrosion protection. Wood lagging would be used for the excavation and then a permanent concrete wall would be cast along the piles.*

"buffer" is filled with unattractive uses: the truck ramp going down 13 feet; the wall of 13 feet; a 12 X 30-foot loading berth and a large loading platform/lift next to the building and close to the neighbors' homes. Large trash containers would be at the bottom of the ramp or just inside the open garage door. All of this is next to the neighbors' fence and 9 ½ feet from their baby's bedroom window. See Exhibit 69E2, page 3.4, which is included here at page 147. See also diagram at page 110.

The wall is directly opposite the building with the truck ramp and loading berth between the two walls creating a canyon effect for noise and fumes.

What zoning regulations permit is a 48-inch (4-foot) wall. The applicant requests a retaining wall of 13 feet, which is another indication that this project does not belong on this lot. If the BZA determines a special exception is required then the BZA should deny the special exception as failing to pass the required regulatory conditions necessary for approval. Or in the alternative, the wall creates an objectionable condition for granting of the special exception for a CCRC in a residential neighborhood.

SPECIAL EXCEPTION REQUESTED FOR A CCRC

Continuing Care Retirement Community

"Continuing Care Retirement Community" in **11-B DCMR § 100.2** is defined as follows:

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

Title 11-U DCMR, Chapter 2, USE PERMISSIONS RESIDENTIAL HOUSE (R) ZONES, reads

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

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

...

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

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

(A) Dwelling units for independent living;
(B) Assisted living facilities; or
(C) A licensed skilled nursing care facility;

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

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

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

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

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

As amended by Zoning Commission Order 17-01 on July 10, 2017 and effective July 28, 2017.

Title 11-U DCMR, Chapter 2, USE PERMISSIONS RESIDENTIAL HOUSE (R) ZONES, reads Paragraph (f) of § 203.1, SPECIAL EXCEPTION USES – R-USE GROUPS A, B, AND C, reads as follows:

See 11-U DCMR § 203.1(f)(i): [HEALTH CARE FACILITY WITHIN 1,000 FEET]

203.1 (i) Health care facility use for nine (9) to three hundred (300) persons, not including resident supervisors or staff and their families, subject to the following conditions:

(1) In R-Use Group A, there shall be no other property containing a health care facility either in the same square or within a radius of one thousand feet (1,000 ft.) from any portion of the property; ...
(6) More than one (1) health care facility in a square or within the distances of (1) and (2) above may be approved only when the Board of Zoning Adjustment finds that the cumulative effect of the facilities will not have an adverse impact on the neighborhood because of traffic, noise, or operations; ...

SOURCE: *Final Rulemaking & Order No. 08-06A published at 63 DCR 2447 (March 4, 2016 – Part 2); Final Rulemaking & Order No. 08-06E published at 63 DCR 10932* (August 26, 2016).

APPLICANT'S ASSERTION THAT THEY MEET THE BURDEN TO BE GRANTED A SPECIAL EXCEPTION FOR A CCRC IN A RESIDENTIAL NEIGHBORHOOD.

Applicant

Applicants Satisfies the Burden of Proof for a Special Exception to Operate a Continuing Care Retirement Community

Operating a Continuing Care Retirement Community will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps.

The Project will be in harmony with the purpose and intent of the zoning regulations and related maps. A CCRC is a residential use that fits comfortably within the R-1-B District. It is particularly suited to this site within the Tenleytown neighborhood, where the single-family community to the east meets the commercial Wisconsin Avenue corridor. It is an excellent transitional use between these two areas that allows senior residents to live in a multi-unit care facility at the edge of a commercial district while facility at the edge of a commercial district while remaining part of a single-family neighborhood. The size and the scale of the project conforms to the nature and character of the residential community. A nearby example of a CCRC use in an R-1-B District fitting comfortably within a neighborhood is the four-story Seabury at Friendship Terrace, approximately five blocks away at Butterworth and 43rd Street, N.W., across from St. Columba's Episcopal Church.

The Wisconsin Avenue corridor provides a variety of uses reflective and supportive of the proposed CCRC-church building. Directly across Tenley Circle are similar institutional, religious- based uses, such as St. Ann's Catholic Church and school, St. Alban's Early Childhood Center, Janney Elementary School, and American University Washington College of Law. Other nearby higher-intensity uses include Woodrow Wilson High School and the Restoration Church, which worships at the high school. The Property is located within a narrow gap between two mixed-use zones, and within 1/10th of a mile from the closest Metro access point. The project is surrounded on all sides by significant open space created by Alton Place, Yuma Street, National Park Service Land and a 36-foot buffer to the adjacent residential property lines. Given the close proximity to dense, more-active uses, the Project will provide an appropriate buffering and transitional use between the active commercial and institutional uses along Wisconsin Avenue and the residential uses to the east.

Operating a Continuing Care Retirement Community will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps.

The project will not affect adversely the use of neighboring properties. Specialized residential units for an elderly population will maintain the residential character of the neighborhood at a site that is immediately adjacent to the commercial and institutional spines of Wisconsin and Nebraska Avenues. Given the residents' status and need for assistance with daily living, they will not alter in any significant manner the existing quiet character of the neighborhood. Additionally, the shift rotation of the CCRC staff will be at non-peak vehicular and pedestrian times of the day. The existing religious use of the property will remain, but a with lower use intensity as there will be no child care services offered. As parking will be self-contained and consistent with code required number of spaces, there will be no added stress on street parking.

The Proposed Continuing Care Retirement Community use meets the requirements for a special exception under Subtitle U § 203.1(f).

The use shall include one or more of the following services: (A) Dwelling units for independent living; (B) Assisted living facilities; or (C) A licensed skilled nursing care facility.

The proposed CCRC use will provide assisted living and memory care units, but it will not offer units for independent living or skilled nursing facilities. As such, the proposed use is consistent with this section and is permitted through special exception approval. The assisted living units are designed for older adults who value their independence but need some assistance with daily activities such as bathing, dressing, transportation and medication reminders. Seniors may live in their own suites or with a companion and are relieved of household chores such as laundry, cooking, and cleaning. A separate portion of the building would be devoted to older adults living with memory loss, including Alzheimer's and other forms of dementia. Generally, these services include a secure floor with staff trained to understand the needs of people with dementia. Staff would be on site 24-hours to assist all residents, as needed.

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

The proposed use does include assisted living facilities and would have a total of 86 units with a maximum budgeted resident capacity of 103 residents. [fn. The maximum bed count is 121, but sunrise will only pursue licensing for a maximum of 115 beds.] The proposed use is consistent with this section.

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

The CCRC will include ancillary uses for the further enjoyment, service, and care of the residents. The premises will provide dining rooms, a multipurpose room, an entertainment room, a fitness center, a library, staff offices and areas devoted exclusively to memory care residents. The CCRC also offers a variety of activities and outings to enrich the lives of the residents. On an average day, the facility would offer three unique mind, body and spirit activities that can include music, art, light exercise or yoga classes, food and conversation events, games, and current events discussions. Offsite activities are also offered most days. A garden terrace in the center of the building and a rooftop terrace are proposed for recreation. A list of Sunrise's signature programs and activities, and a sample calendar of resident events, are attached as (Sunrise) Exhibit B.

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

A total of 66 parking spaces will be provided on site in a below-grade parking garage, which meets the required number of parking spaces for the religious and CCRC uses under the Zoning Regulations. Based on the updated Comprehensive Transportation Review ("CTR") prepared by Gorove/Slade Associates, and submitted to record as Exhibit 52A, the proposed number of parking spaces exceeds the expected demand for the church and the CCRC employees, residents and visitors. The following table from page 12 the CTR summarizes the anticipated demand and supply.

Table 2: Shared Parking Demand

Parking Demand/Supply	Parking Demand	
	Weekday (mid-day)	Sunday (late morning)
Sunrise Community	43 spaces	25 spaces
Church	3 spaces	23 spaces
Total Demand	**46 spaces**	**48 spaces**
Total Supply	66 spaces	66 spaces
Surplus	**+20 spaces**	**+18 spaces**

In the unlikely and unanticipated scenario where all parking spaces in the building are occupied, Sunrise will direct visitors and employees to park in metered spaces on the street or parking garages in the vicinity. Sunrise will include in its residential contracts a prohibition against CCRC residents applying for a residential parking permit ("RPP") to ensure that the supply of on-street spaces available to the immediate neighbors is not diminished. However, at an average age of 86 years old, Sunrise residents rarely drive or own cars. As shown in Figure 10 of the CTR, there is ample RPP-restricted on-street parking to accommodate area residents. Many houses in the vicinity also have off-street parking, as well.

CCRC staff will be offered SmartTrip Benefits to encourage the use of public transportation and reduce traffic and parking demand. The inclusion of secure long-term bicycle parking spaces within the development that meets or exceeds the zoning requirements will also reduce traffic and parking demands. Finally, as requested by the neighboring community, the Applicant will fund several pedestrian improvements if approved by DDOT. They include the implementation of an all-way-stop control at the intersection of 39th Street, N.W. and Alton Place, N.W.; increasing pedestrian crossing time (if needed) at Nebraska Avenue, N.W. adjacent to the Site; the addition of "Do Not Block Intersection" markings and signs at the intersection of Nebraska Avenue, N.W. and Alton Place N.W.; and possible curb extensions at several intersections.

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

The proposed CCRC is a quiet use that will serve as a buffer between Wisconsin Avenue, N.W., and the adjacent single-family neighborhood. It is not likely to become objectionable to neighboring proprieties because of noise, traffic, or other objectional conditions. Significantly, as indicated in the CTR and as documented by the District's Department of Transportation ("DDOT") report filed in the record at Exhibit 53, the proposed development will not generate a significant number of vehicular trips and does not meet the DDOT threshold for detailed capacity analysis.

Therefore, no further vehicular capacity analysis is required or necessary. The Property is well-served by regional and local transit services via Metrobus and Metrorail. The Tenleytown-AU Station Metrorail station is approximately 0.1 miles to the north and 19 Metrobus stops and 11 Metrobus routes are located within one-quarter of a mile. The proposed development will generate a low number of new transit trips, which are easily handled by the existing transit facilities. The bicycle infrastructure in the vicinity is well-established. There is a dedicated bike lane 39th Street, N.W., directly east of the Property that provides connection to a Capital Bikeshare to the south, shared lanes along River Road, 42nd Street, and Van Ness Street, and

signed routes along 36th and 37th Street. These facilities provide access to the Rock Creek Trail, Capital Crescent Trail, C & O Canal Trail, and bicycle facilities on the Key Bridge. Residential low volume streets surrounding the Site also provide bicycle connectivity.

Additionally, the Applicants conducted a noise study for the rooftop mechanical equipment, which found that the proposed uses will create imperceptible noise at or below existing background noise levels and well below the D.C. noise control regulations. The proposed use will be quieter than the surrounding ordinary urban life background sound along the Wisconsin Avenue and Nebraska Avenue corridors. In concert with the findings from the CTR and the noise study, the applicant has ensured the proposed uses have been designed to minimize noise, traffic, and other objectionable conditions. A copy of the noise study is attached as (Sunrise) Exhibit C.

All trash receptacles for the facility will be located inside a conditioned trash room, which will be part of the mechanical/utility area on the lower level. [fn while the interior partitions and lay out of this lower level may change, the Applicant commits to placing the trash receptacles inside a conditioned trash room.] Receptacles will be wheeled to the loading dock area on trash collection days. Because Sunrise will contract with private companies, the collection times will be controlled and will occur after 8:00 AM in the morning, three times a week, so as not to create any objectionable noise and odors to adjacent properties. All deliveries will be limited to occur between the hours of 8:00 AM and 6:00 PM.

The proposed facility is also not anticipated to create any objectional noise from ambulances. Based on the Sunrise facility on Connecticut Ave., N.W., the average number of ambulance trips was approximately ten a month between January 2016 and October 2017, as reported the D.C. Fire Department. Seventy-six percent of the trips occurred between 7:00 a.m. and 7:00 p.m. The Applicants expect the proposed project to have fewer ambulance visits as it is smaller than the Sunrise on Connecticut Ave (100 units vs. 86 units).

Finally, the CCRC use will not create any objectionable conditions with respect to lighting. First, exterior lighting is not proposed for the Tenleytown CCRC, except at the entrance and along the garage ramp and entrance. All lighting will be directed downward so as not interfere with adjacent properties. Limited exterior lighting will also be provided in the loading dock area during the early evening hours (approximately 4:00 PM to 6:00 PM). After 11:00 PM, any exterior illumination at the entrance and any required interior lighting will be dimmed to the greatest extent possible. Interior shades will also be installed to further reduce any lightwash from the building to adjacent properties. Modest path lighting and decorative wall sconces will also be installed at the church entrance, which will be residential in quality. Consequently, no adverse effects from lighting will result from the project

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.

The building design has been established to minimize its visual impact on the surrounding neighbors. These design features include the 36 foot heavily landscaped buffer and the removal of 40% of the building along the side yard to the 39th street neighbor's property line, the creation of a mansard roof element running along all the residential sides of the building starting at the top of the third floor to reduce the perceived height, the creation of various setbacks in the building along Alton Place and Yuma Street, and the placement of all parking, loading, and trash in below grade locations to limit noise and additional activity at grade. To date, no other special

requirements for special treatment for design, screening of buildings, planting and parking areas, signs, or other requirements have been requested by BZA, other than the architectural, pedestrian enhancements and parking restrictions described above.
Exhibit 69, pages 11 – 18

NEIGHBORS' RESPONSE:

1. **Operating a Continuing Care Retirement Community (CCRC) will not be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps.**

The project is not a "buffer" between Wisconsin Avenue and the homes. It is in between the homes. It is the residential zone and it is not on Wisconsin Avenue.

The project does not conform to the nature and scale of the neighborhood. On four sides the lot is surrounded by single family two-story detached homes. The project faces, across the federal park land but within 200 feet, the houses on Grant Road, an officially designated historic district. Exhibit 36. These homes are occupied by one family each. There are no commercial establishments within 200 feet. Sunrise will have 121 residents and more than 70 staff plus a 250-seat church in its building. The contrast is dramatic and not "conforming." The building will dwarf the homes on all sides. Even Sunrise acknowledges that their proposed facility is institutional in nature when they say "similar institutional" uses. Although in 2016 the zoning regulations were amended to allow a CCRC in a residential zone, that does not eliminate the intense need for careful scrutiny to determine if this proposal is right for this site.

All the denser uses are located ON Wisconsin Avenue. There are no six-story apartment buildings located anywhere near the lot in question. There are such buildings on the other side of Van Ness – 5 blocks away. NONE of the examples given, no matter what distance they are from the lot, has four sides surrounding it with single family detached homes. Friendship Terrace, which opened in 1970, is federally subsidized Section 202 housing that accommodates low income as well as moderate income seniors. The Friendship Terrace building is NOT within a few feet of any single-family home.

We have provided, at Exhibit 72, photos of several of the senior facilities in Ward 3 showing that ALL of them have substantial buffers – buffers that are green with trees, bushes and grass as opposed to truck ramps. Most of them are only 2 stories. Some are far larger. But all the facilities – Lisner, Ingleside, Friendship Terrace, Grand Oaks - all fit into their communities. Sunrise on Alton Place does not.

Providing some detail on measurements from their buildings to the nearest home for those other senior facilities in Ward 3:

Friendship Terrace is 90 ft to closest home; Lisner is 107 feet from nearest lot line; Ingleside is 322 feet to nearest lot line where nearest private home is located; and

Forest Hills is 50 feet from the nearest lot line and 105 feet to the nearest home. These measurements are from the building to the lot line since many of these facilities did not have BZA Orders that are relevant. When Forest Hills proposed an addition to their facility they proposed to set the building "45 feet and 8 inches from the eastern property line for a total set back of 95 feet at the one-story enclosed building link, and 102 feet at the two-story healthcare addition. The Home noted that all parties, including the opponents, agreed upon the alternate plans". BZA Case No. 15831 (1993)

None of the facilities in *Tenleytown* ***mentioned by Sunrise have single family homes next to their buildings****: St. Ann's Catholic Church, St. Alban's Early Childhood Center, Janney Elementary School, and American University Washington College of Law, Woodrow Wilson High School and the Restoration Church.*

Sunrise wrongly claims that the site is located in a "narrow-gap" between mixed use zones thereby suggesting that the residential zoning does not need to be honored. The gap is not narrow. Within this area there is the Grant Road Historic District and hundreds of single family homes. This area is a Neighborhood Conservation Area on the Future Land Use map and low density, R-1-B on the Generalized Policy Map accompanying the Comprehensive Plan. Sunrise refers to the residential area as "to the east" but it is also to the south (Yuma Street) and to the north (Alton Place). The lot is surrounded by homes and by federal park land. The suggestion that these homes are not entitled to the same protection because they are not as centrally located in an R-1-B zone as other homes is without authority in the regulations or policy.

In fact, the **Comprehensive Plan** states that Commercial Development is supposed to step down as it nears residential.

Policy LU-2.3.3: Buffering Requirements Ensure that new commercial development adjacent to lower density residential areas provides effective physical buffers to avoid adverse effects. Buffers may include larger setbacks, landscaping, fencing, screening, height step downs, and other architectural and site planning measures that avoid potential conflicts. 311.5

Sunrise SVP Kroskin in a Letter to the Editor of the Northwest Current published December 6, 2017 said that, "The scale of this building is consistent with other properties at the edge of residential and commercial uses along Wisconsin Avenue and within many Northwest neighborhoods." Kroskin turns LU-2.3.3 of the Comprehensive Plan on its head. Sunrise wants a massive development **in** the residential zone not in a commercial zone that borders a residential zone. Mr. Kroskin speaks of buildings "on Wisconsin Avenue." Perhaps the massive scale of the building would be appropriate on Wisconsin but 3920 Alton is not on Wisconsin Avenue.

2. **Operating a Continuing Care Retirement Community will affect adversely the use of neighboring property, which is protected by Zoning Regulations and Zoning Maps.**

NEIGHBORS' RESPONSE: We have discussed the Generalized Policy Map and Future Land Use Map (FLUM), in response #1 and they are pertinent here as well. As to "use of neighborhood property, it should speak for itself that 3 of the homes within 200 feet have been put on the market since this project was announced less than a year ago, including 2 of the 5 homes that share a property line with the proposed Sunrise project. These homes have sold well below market due to the announced project. The middle home of the 5, was placed on the market at $895,000 although it was assessed for tax purposes at $903,260 – and traditionally assessments are below market value. The other house that is at the end of the 5 that share a property line was listed at $1.095 million and went under contract but eventually sold for $1.05 million. Before the Sunrise project was announced, a similar home at the other end of the row of 5 facing 39th Street sold for $1.4 million. This area of Tenleytown is a very stable neighborhood. It is very unusual for 3 houses on the same block to be put on the market over the course of a few months.

If the BZA believes that weight should be accorded to the financial claims of Sunrise and WABC, then correspondingly due consideration must be given to the compelling claims of reduced property values by the immediate neighbors to the site. (In Draude I, the court recognized that surrounding property values may be considered in evaluating the adverse impact of a special exception.)

The project is reducing the value of nearby homes, frequently the largest investment for most families. **This constitutes adversely affecting neighboring properties.**

This neighborhood is not on Wisconsin Avenue. A facility with 121 residents, more than 70 staff and a 250-seat church inevitably will have an impact on the character of the neighborhood. Note that the 65 – 75 staff are actually Full Time Equivalents (FTEs) so some shifts would include 2 staff filling a position going and coming. We discuss in greater detail later the effects 20 trucks per week, some 28 tons and 30 feet long, a 7-ton shuttle bus with multiple trips per day sitting on the Alton curb cut, emergencies that bring ambulances and firetrucks, major shift changes at 6:30 am every day of the week next to single family homes, and events where they invite the families of the 121 residents. All of these commercial activities generated by the landlord of a for-profit facility will "affect adversely, the use of neighboring property." See the *BZA Order 17726* issued November 10, 2009 where the BZA discussed the traffic and parking issues created by the use of the lot – and that was far fewer people on the lot than is contemplated herein. (Exhibit 38 herein)

Operating a Continuing Care Retirement Community is subject to special conditions specified in the Zoning Regulations.

See 11-U DCMR § 203.1(f) provided in full above **at p. ___.** There are six special conditions. See especially 4 – 6:

> (4) The use and related facilities shall provide sufficient off-street parking spaces for employees, residents, and visitors;
>
> (5) The use, including any outdoor spaces provided, shall be located and designed so that it is not likely to become objectionable to neighboring properties because of noise, traffic, or other objectionable conditions; and
>
> (6) The Board of Zoning Adjustment may require special treatment in the way of design, screening of buildings, planting and parking areas, signs, or other requirements as it deems necessary to protect adjacent and nearby properties.

NEIGHBORS' DISCUSSION OF 11-U DCMR § 203.1 (f) – Conditions that must be met to be granted a special exception for a CCRC

Applicant must demonstrate that they have met the 6 conditions listed in 203.1(f), which they must do as a condition to be granted a CCRC special exception. The burden is on the applicant to prove that they meet the requirements, not on the neighbors to demonstrate that they do not meet the burden of proof. Nonetheless let us discuss the burden that applicant must meet in order to be granted a special exception for a CCRC. This is a special exception in a residential zone, not a matter of right that must be accommodated.

WABC and Sunrise must show that they are providing sufficient off-street parking spaces for employees, residents, and visitors; that their proposal, 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; that when compared to the Comprehensive Plan, including the zoning maps and the general purpose and intent of the zoning regulations, their proposal would not tend to affect adversely the use of neighboring property; and that their proposal would be in harmony with the law and regulations.

In the 2016 revision of the DC Zoning regulations, a new special exception was provided for CCRCs in Residential ("R") zones.

To be granted a **CCRC special exception** in a Residential zone, the applicant must meet certain prescribed conditions, limitations, and development standards. The granting of a special exception cannot be used to relieve a condition, limitation, or standard. 11-U DCMR § 101.1. The applicant has the full burden of proving the special exception is warranted.

Development standards in R zones are intended to control the mass or volume of structures, including height, stories and lot occupancy. The applicable development standards for a CCRC is **three stories,** 40-foot height, and **40 percent lot occupancy**. The site of the proposed project is in a R-1-B zone, which is for single family detached homes. The side of the building abuts National Park Service property, the other side of the building abuts five single family homes, and the front and back of the building are across the street from single family homes. The site is separated from Nebraska and Wisconsin Avenues and Tenley Circle by National Park Service land. And on the other side of Nebraska Avenue is more NPS land. Nebraska Avenue is not a commercial street.

Existing Building Compared to Proposed Building: Controlling the mass of buildings in R-1-B is required. See the **Comprehensive Plan** at LU 2.1.5 **Conservation of Single Family Neighborhoods** and the **Comprehensive Plan** at RCW 1.1.1 **Neighborhood Conservation**. Both provided in full at page 24-25.

The existing WABC building is occupying only 7,392.6 SF of the lot, so an increase to 20,389 SF lot occupancy under applicants' proposal is almost THREE TIMES the size of the existing structure. Plus, the current building is three stories, with the first story being partially below ground. By comparison, the proposed building is FOUR stories all above ground next to 2-story single family detached homes. The first story would actually start three feet below ground, so from the floor of first story to top of fourth story is actually 43 feet. Plus, there is a penthouse of 12 feet in height proposed for the top of the building – making the building at least 52 feet, even if you discount the berms being created. In addition, from the perspective of the 5 houses facing 39th Street, there will more than another 13 feet of building and garage entry exposed to view.

In the instant matter, the applicant should get no points for starting with a request absurdly outside the 40 percent lot occupancy that a non-church is allowed and then slightly reducing their original request of 69 percent to the current request of 57.53 percent lot occupancy. A CCRC is limited by zoning to 40 percent lot occupancy, so the requested 57.53 percent is almost one and a half times what is permitted.

Using the information provided by Sunrise, there will be 86 units with a capacity of 121 residents with a total of 900 square feet attributable to each resident, including both the unit and common area apportionment. We arrive at the number 121 residents by counting the units at Exhibit 6A2, floor plans. There will also be more than 70 staff serving these residents 24/7. Plus, there will be church staff and the church would accommodate 250 people.

Sunrise would inhabit more than 87 percent of the building with less than 13 percent inhabited by WABC. If allowed in the zone at all, the maximum height for a CCRC is **40 feet** and **three stories** with **40 percent lot occupancy**.

Sunrise said they could build a 47-unit facility and occupy only 40 percent of the lot but they contended that was not a viable business option for them. Sunrise cannot build anything on this site as a "matter of right" because a CCRC requires a special exception as a pre-condition and part of that consideration is whether the lot in question is appropriate for that use. Sunrise finds the size of the lot here too constraining.

SUNRISE ARGUES THE 2016 ESTABLISHMENT OF A CCRC SPECIAL EXCEPTION OVERRIDES ALL OTHER ZONING PROTECTIONS

Sunrise argues that:

(1) a CCRC special exception was included in the Zoning amendments of 2016,
(2) Sunrise's business model is based on a large facility of approximately 86 units,
(3) a building of that size requires 1.5 acres, which is unavailable in Tenleytown's single family detached (R-1-B) zone,
(4) therefore, in order to clear the way for Sunrise to use the new CCRC special exception, the BZA must remove all the "barriers" presented by residential zoning protections

Sunrise wants to build a very large CCRC in a residential zone, where to do so, they must get a special exception. Sunrise then argues that, ergo, the BZA must waive multiple zoning protections in an R-1-B zone because they are entitled to such zoning relief based on the special exception. This is circular reasoning.

It is a more legitimate conclusion, that if Sunrise needs a special exception for a retaining wall of 13 feet and area variances for an increase in lot occupancy of one and one half times that allowed, an increase in the number of stories from 3 stories allowed to 4 stories, and elimination of an 8-foot side yard, then Sunrise should not be granted the special exception for a CCRC in the first place, because they have selected the wrong site.

Many of the senior assisted living facilities in Ward 3, discussed elsewhere in this document, are located in residential zoning, but on sites where the lot is big enough and buffers of trees can be provided between the facility and the residential housing. The fact is that the lot at 3920 Alton is too small for Sunrise plans and Sunrise knew that when they selected 3920 Alton Place. They say they need 1.5 acres and the lot is 0.81 acres – about half of what they say they need.

86 UNITS NOT *REQUIRED*

The Applicant, Wisconsin Avenue Baptist Church (WABC) and Sunrise, Inc, is asking to put two uses on one lot and that severely magnifies the volume of use in this single family neighborhood. In order for Sunrise, Inc. to locate its proposed building at 3920

Alton Place NW, they need at least two special exceptions and three area variances. The drafter of the Special Exception for a CCRC did not include any reference to two uses on the same lot – a church and a CCRC. Nor did the drafters contemplate the extra units and residents sought for revenue generation to pay WABC for use of their land at 3920 Alton Place.

In addition, Sunrise's argument fails because it is based on a narrow view of residential zones. R-1-B is not the only residential zone, by a wide margin. There are many residential zones. A special exception for CCRCs was added to the zoning regulations in 2016. That special exception can be found at 11-U DCMR § 203.1 (f), Special Uses – R Use Groups A, B and C. THE SPECIAL EXCEPTION IS NOT LIMITED TO R-1-B.

OTHER RESIDENTIAL ZONES MORE SUITABLE

If you start with the premise that you must have 86 units at 900 square feet each plus room for a 250-seat church, then R-1-B, which allows 40 percent lot occupancy and 40 feet in height and 3 stories for a business, is the worst choice of all the residential zones for locating such a large CCRC, such as Sunrise desires.

Sunrise had and has three choices: (1) propose a much smaller facility, factoring in the R-1-B zoning requirements, and make a case that they meet the conditions for a special exception; (2) since Sunrise says they like to build in residential, search for a site that is residentially zoned but where they could build as a matter of right and would have more accommodating zoning requirements; or (3) build in a commercial area as they did on Connecticut Avenue where their large facility concept is more appropriate.

Where a CCRC could be built as a Matter of Right.

If Sunrise's priority is to locate in a residential zone, there are options where a CCRC can locate as Matter of Right in all RA (apartment) zones except RA-1 and RA-6.

Sunrise could locate as a **Matter of Right** here:

- RA-2 (moderate to medium density rowhouses and apartments with 60% lot occupancy and 50 feet height);
- RA-3 (moderate to medium density rowhouses and apartments with 75% lot occupancy and 50 feet height);
- RA-4 (medium to high density apartments with 75% lot occupancy and 90 feet height).
- Also, CCRC can locate in Mixed Use (MU) zoned areas but not MU Group A.

Chart of requirements for all zones: https://dcoz.dc.gov/page/summary-zone-districts

Zoning Regulations Regarding RA (apartment) zones:

CHAPTER 4 USE PERMISSIONS RESIDENTIAL APARTMENT (RA) ZONES
401 MATTER-OF-RIGHT USES (RA)
401.1 The following uses shall be permitted as a matter of right subject to any applicable conditions: ...(d) Except for the RA-1 and RA-6 zones: ... (3) A continuing care retirement community; and... 11-UDCMR § 401.1.

420 SPECIAL EXCEPTION USES (RA)
420.1 The following uses shall be permitted as a special exception if approved by the Board of Zoning Adjustment under Subtitle X, Chapter 9, subject to any applicable provisions of each section...
(i) In the RA-1 and RA-6 zones, a continuing care retirement community subject to the conditions of Subtitle U§ 203.1(f), except for 203.1(f)(3).
11-UDCMR § 420.

SOURCE: Final Rulemaking & Order No. 08-06A published at 63 DCR 2447 (March 4, 2016 – Part 2); Final Rulemaking & Order No. 17-01 published at 64 DCR 7254 (July 28, 2017).

502 MATTER-OF-RIGHT USES (MU-USE GROUP A)
502.1 In addition to the uses permitted by Subtitle U§ 501, the following uses shall be permitted in MU-Use Group A as a matter of right subject to any applicable conditions:
... (c) Continuing care retirement community; ... 11-UDCMR § 502.1.

SELF-CREATED HARDSHIP RULE

The D.C. Court of Appeals ("court"), in *Foxhall Community Citizens Association v. District of Columbia Board of Zoning Adjustment,* 524 A.2d. 759 (April 27, 1987) at page 762, stated: **The self-created hardship rule** applies, for example, to owners who purchase property with actual or constructive knowledge of zoning restrictions from which they intend to seek administrative relief. 3 R. Anderson, AMERICAN LAW OF ZONING § 20.44, -.45; see, e.g. *Salsbery*, 357 A.2d at 404-05 (applicant contracted to purchase existing property for non-conforming use without conditioning contract upon obtaining use variance). (Emphasis supplied.)

Although Sunrise seeks a special exception to the R-1-B use and special exception relief to locate a CCRC in an R-1-B zone, the self-created hardship rule, applied to variance relief, must also apply as a matter of public and legal policy to the granting of special exceptions.

The conclusion should be that Sunrise should seek a larger lot elsewhere that better accommodates their needs. Phil Kroskin, Sunrise SVP for Real Estate, has repeatedly been asked if they have explored other sites. **He consistently has replied that he has not. When asked if they would explore other sites, even when several have been suggested, he emphatically says no, they would not explore other sites.** When

ANC Commissioner Greg Ehrhardt specifically asked if Kroskin had explored becoming part of a large development that is in the early stages on the Federal National Mortgage Association (FNMA) site on Wisconsin Avenue five blocks away, mentioning that FNMA was building 4-6 mid-rise buildings, Sunrise SVP Kroskin said he had **no interest in pursuing that idea**. March 15, 2018 ANC meeting. This was also mentioned in a Northwest Current article entitled *Trouble Still Brewing Over Proposed Sunrise, Baptist Church Project*, March 21, 2018.

It is true that a special exception was added for CCRCs in 2016, but there was no language in that special exception or elsewhere that suggested that 5 variances and special exceptions should be granted so that a CCRC could fit on a residential lot too small and inappropriate for Sunrise's plans.

See also, "Gentrification" discuss at page 112 questioning why senior facilities are being concentrated in Ward 3.

In addition, regarding self-created hardship, some of WABC's financial difficulties have resulted from a lack of due diligence in managing its finances. A very direct connection that impacted WABC's finances is the fact that the church manager was convicted of stealing over $150,000 from the church in 2016. **(**US Attorney's Office, Department of Justice Statement, July 14, 2016). Public records show City Gate was denied $76,000 it sought as a contractor (*Youth Engaged for Success, Inc. and City Gate Inc. v. D.C. Office of State Superintendent of Education*, Case No. 2011- OSSE-00003, Office of Administrative hearings, March 6, 2012). For both cases, see Exhibit 74. These losses total approximately $230,000 which is a great deal of money for a tiny congregation. These are unfortunate incidents, but neighbors cannot be asked to make up for these losses that due diligence might have prevented.

FILLING THE ENTIRE LOT

WABC and Sunrise must show, among other conditions, that their proposal, 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 when compared to the Comprehensive Plan, including the zoning maps and the general purpose and intent of the zoning regulations would not tend to affect adversely the use of neighboring property and show that their proposal would be in harmony with the law and regulations. 11-U DCMR § 203.1(f); 11-X DCMR § 901.2.

Sunrise asks for a variance to allow them to occupy 58 percent of the lot rather than the 40 percent allowed in a residential R-1-B zone. The massive building allowed by such an expansion, taken with their request for an increase from 3 to 4 stories, allows a density and volume in an area zoned for single families that is in violation of zoning limits and the Comprehensive Plan.

11-B DCMR § 311.1 states:

> *Lot occupancy regulations are intended to provide a primary control of the total volume of buildings on a lot through the restriction of a building's horizontal area above a designated horizontal plane. The lot occupancy standards applied through land use subtitles are intended to contribute, along with height regulations, to ensuring that buildings within a zone are generally consistent in their volume*.

Sunrise's proposed plan is to have 200 people on this single-family lot every day. Plus, the church is to accommodate another 250. Consider that the 200 people affiliated with Sunrise on this lot every day is approximately 172 more people than would likely be on site if it were the 7 single family lots that existed before the church consolidated 7 lots into one large lot to build their church. We are approximating 4 people per house. The volume here is off the charts in a single-family zone and therefore should be rejected. It is putting 20 pounds of flour in a 5-pound bag.

The Sunrise building would be:

- on the property line by the National Park Service land,
- 4.8 inches from the rear property line on the Yuma Street side,
- 10 feet from the front property line on the Alton Place side, where they are locating a drop-off and pick up for their 200 people, and
- on the side where they share the property line with 5 single family homes facing 39th Street, Sunrise builds a retaining wall of 13 feet and a truck ramp. All of those homes are very close to the truck ramp; some of those homes are 9 ½ feet from the board replacement fence Sunrise is putting on the property line. Such design creates a serious safety hazard for an R-1-B neighborhood. The paved ramp comprises a large portion of the 40 percent "unoccupied" space as described by Sunrise, versus the 60 percent unoccupied area required by the Zoning Code standard of development for a business.

DISCUSSION OF LOT DIAGRAM

Below, you can observe that the building and truck ramp leave little of the lot unoccupied and that the building and truck ramp are very close to the nearby homes.

Homes on 39th Street side: On the side where Sunrise shares a property line with the 5 family homes, their proposed retaining wall of 13 feet exceeds the height limit of 4 feet by more than 300 percent and requires the BZA approval of a special exception. 11-C DCMR § 1401.3(c). They will plant some trees on top but those trees are to soften the view from Sunrise building as the neighbors are looking at the back side of the board replacement fence.

Yuma Street side: Sunrise describes the "rear yard" on Yuma to be 46.7 feet, but Sunrise's building is only 4.8 **inches** from the property line next to Yuma Street. Yuma Street only has a 34-foot wide roadway, with a 90-foot wide right-of-way. So, when the

“Rear Yard” is described by Sunrise as 46.7 feet that includes 45 feet (half of the 90-foot Yuma right-of-way). In other words, from the lot line to the building it is 1.7 feet or 4.8 inches. Not enough room for a lawn chair. A rear yard of 25 feet is required. 11-D DCMR 306.1.

Alton Place side: On the other side next to Alton, the building is 10 feet from the lot line, which is where the drop off and pick up is slated to occur, plus parking for the 7-ton shuttle bus. Alton Place only has a **30-**foot wide roadway, with a 60-foot wide right-of-way. All roadway and right-of-way data from *BZA Final Order in Case No.17726* (2009), (Exhibit 38 herein, page 6), regarding the same lot.

National Park Service side: To the right toward Nebraska Avenue is the National Park Service land – that side of the building has zero set back as the Sunrise building sits on the property line with the NPS. Sunrise is asking for elimination of the 8-foot set back required of a side yard so they can put the building on the property line with NPS.

Note that the Sunrise-WABC plans show an entrance/exit door from the WABC, and possibly Sunrise, going on to NPS land despite NPS has stated that no paths from or to the Sunrise/WABC building can be located on NPS property.

BZA should assume NPS has not signed off unless NPS officially states they have signed off on Sunrise sitting on their property line or the landscaping of the federal land or the WABC-Sunrise doors exiting directly on to federal land.

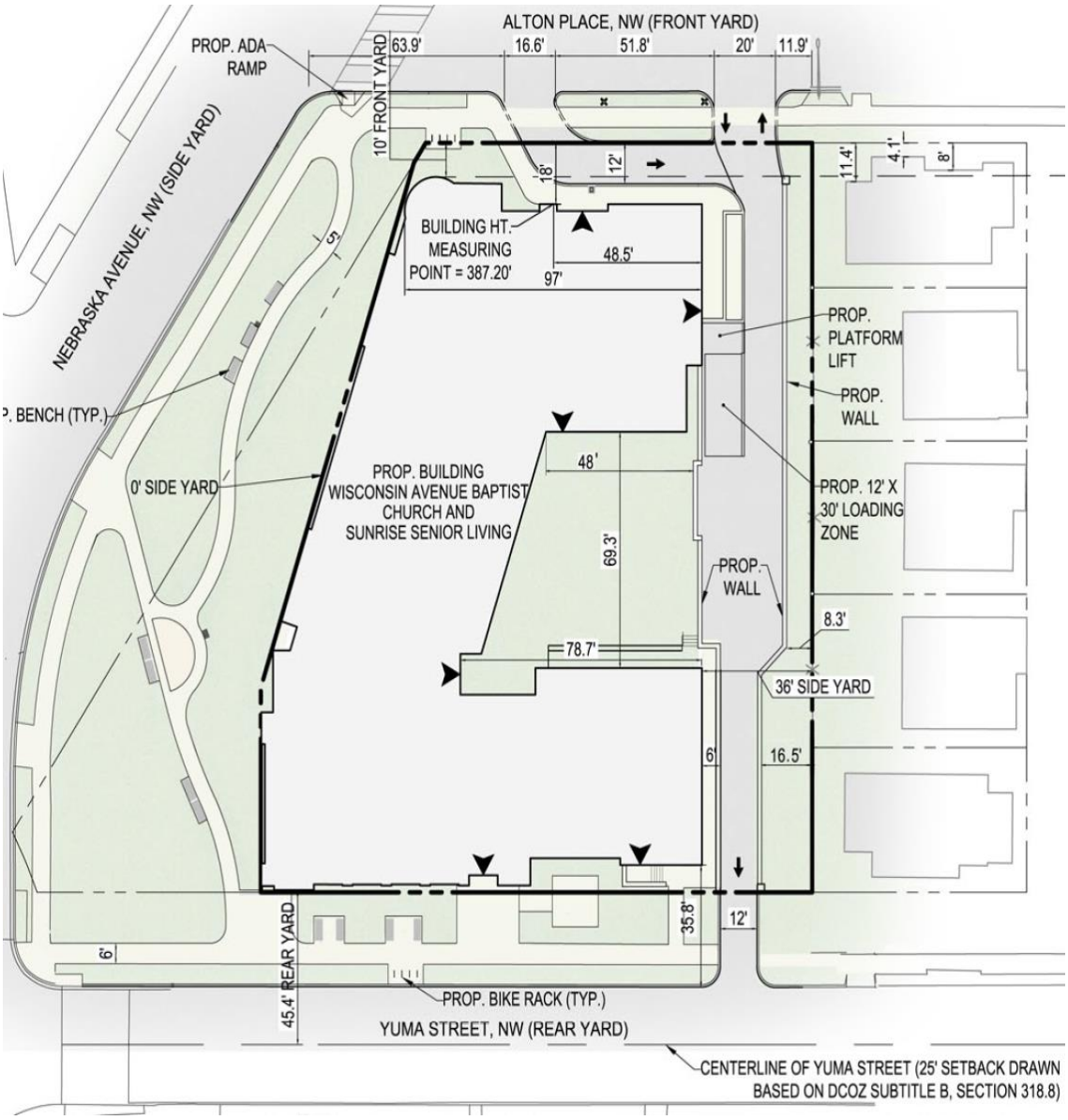

Exhibit 69E1, page 2 (excerpt). To the right are the 5 houses facing 39th Street that share the property line with Sunrise - this diagram shows a 36-foot set back, from the property line to the Sunrise building, but these 36 feet are filled with many unattractive uses. There would be a 6-foot board replacement fence next to the homes. On the Sunrise side, the replacement fence would be softened by a single line of trees in a "tree box" ranging from 8-16 feet wide. The anchor for the wall presumably is in the 8-foot setback.

The truck ramp is 12- 20 feet wide and drops 13 feet below grade. There is a loading berth of 12 feet X 30 feet and a lift. Loading and unloading of large trucks would take place here daily. There are arrows on the truck ramp diagram for traffic in both directions on the Alton side. Large trash containers would be at the bottom of the ramps next to the retaining wall or within the loading berth – See Exhibit 69E2, p. 3.0.

DOES "NEED" QUALIFY AS GROUNDS TO CHANGE ZONING?

Should "need" be determined and then considered by the BZA when granting a special exception to allow a Continuing Care Retirement Community in a Residential Zone? Does "need" include the asserted need for more senior facilities in Ward 3? Does "need" include the financial "needs" of a for-profit multi-national commercial entity? Should numerous zoning variances and special exceptions be approved to "preserve" a dwindling congregation?

The following issues should not have bearing on this decision: (1) Sunrise's argument that the profitability of their proposed facility necessitates 58 percent lot occupancy and four stories, plus the granting of two special exceptions and multiple variances; and (2) an argument that there should be a societal priority given to build another senior living facility in residential Tenleytown as opposed to locating this in a commercial area.

The population of America is getting older as is the population of the District of Columbia, which presumably was a policy reason for the Zoning Commission, in 2016, to add a special exception to allow Continuing Care Retirement Communities (CCRC) in residential areas. They did not specify that this should prioritize Ward 3 or even whether they envisioned any more CCRCs being built in Ward 3.

The first goal for the District of Columbia is to assist seniors to age in place, in their own homes, with a vibrant network of senior villages that has been created by wonderful volunteers, and we encourage and support growth of these networks. The Comprehensive Plan Glossary defines **Age in place** as: "The ability to **grow old in one's own residence, rather than moving to an assisted living** or nursing facility, often accomplished by retrofitting the residence to respond to decreased mobility." The Assisted Living Residence Regulatory Act states that "**Residents should be supported to age in place by minimizing the need to move through reasonable accommodation and, when necessary, through coordination and use of home health agencies, hospice, rehabilitation agencies, and other licensed healthcare providers.**" D.C. Law 13-127. Assisted Living Residence Regulatory Act of 2000 as amended by § 44–101.01 (4).

There are existing CCRCs in residential zones that have provided and continue to provide extremely valuable services to seniors. Such existing facilities located in residential zones include, among others, (1) Ingleside, (2) Friendship Terrace, (3) Lisner Home, (4) Forest Hills Home, and (5) Grand Oaks - - all in Northwest DC either in Ward 3 or touching the border of Ward 3. There is also Joye Assisted Living in Southeast DC. And in a commercial zone, we have Sunrise on Connecticut Avenue. And Sunrise has a large facility, Brighton Gardens just across Western Avenue, whose catchment area includes Ward 3. Sunrise also has a mega-facility at Fox Hill just off River Road but within 4 miles of Tenleytown. By comparison, most Wards are dramatically underserved while Ward 3 has by far and away the most CCRCs and there are vacancies in those facilities. Already located in Ward 3 in the nearby neighborhood are more senior living facilities than any other area of the city combined. Sunrise itself has a senior facility on Connecticut Avenue a few doors up from Nebraska Avenue.

These facilities have operated in their residential neighborhoods in harmony with their surroundings because they have buildings on appropriately sized lots surrounded by landscaping and grown trees on all sides facing the nearby homes. See Exhibit 72, which includes photos of each of the Ward 3 facilities. These facilities have been welcome members of their residential communities because ALL of them have substantial buffers – buffers that are green with trees, bushes and grass as opposed to truck ramps. Sunrise on Alton Place does not.

To compare how far other senior facilities in Ward 3 are from homes near their buildings: Friendship Terrace is 90 ft to closest home; Lisner is 107 feet from nearest lot line; Ingleside is 322 feet to nearest lot line where nearest private home is located; and Forest Hills is 50 feet from the nearest lot line and 105 feet to the nearest home. These measurements are from the building to the lot line since many of these facilities did not have BZA Orders that are relevant. When Forest Hills proposed an addition to their facility they proposed to set the building "45 feet and 8 inches from the eastern property line for a total set back of 95 feet at the one-story enclosed building link, and 102 feet at the two-story healthcare addition. The Home noted that all parties, including the opponents, agreed upon the alternate plans". BZA Case No. 15831 (1993)

Any additional facilities granted a special exception to locate in residential zoning should be required by the BZA to follow the example set by those who came before them by honoring residential zoning, such as height, number of stories and lot occupancy requirements and, according to the regulations for CCRCs, sufficient parking for employees, residents and guests, as well as wide tree adorned buffer zones between the facilities and their residential neighbors. Many lots in residential areas are of limited size, which necessitates that any facility must accommodate scale in order to fit harmoniously in the neighborhood. There are successful and long serving senior living facilities ranging in size from the 14-acre Ingleside facility to small group homes.

GENTRIFICATION OF SENIOR RESOURCES BY CONCENTRATION IN WARD 3

Rather than dramatically abrogate protections provided by single-family zoning in Ward 3 to push more CCRCs into that Ward, the BZA should strongly support the principle of CCRCs in every Ward because all DC residents need "(q)uality, affordable assisted living residence care (that is) accessible to all individuals residing in the District regardless of income." D.C. Law 13-127. Assisted Living Residence Regulatory Act of 2000 as amended by § 44–101.01 (5)

SENIOR POPULATION FACTS AND FIGURES

Ward 3 is not the only Ward in need of senior facilities. An example of 5 random zip codes in DC and the percent of the population over 65 years old in those zip codes (source: most recent Census Data – American Community Survey 2016):

12.1% over 65 years of age in zip code 20019 – River Terrace, Deanwood, Fort Dupont

17.0% over 65 years of age in zip code 20016 – TENLEYTOWN, Cleveland Park, Spring Valley

17.3% over 65 years of age in zip code 20017 – Brookland, Eckington, Petworth, Bloomingdale

17.6% over 65 years of age in zip code 20018 – Gateway, Stronghold, Ivy City

18.0% over 65 years of age in zip code 20012 – Shepard Park, Barnaby Woods, Crestwood

19.6% over 65 years of age in zip code 20015 – Upper Connecticut Avenue, Forest Hills

The BZA should implement the new CCRC special exception to ensure that Continuing Care Retirement Communities are established in every Ward of the District and that such facilities become strong community members by preserving the character of the neighborhood in which they propose to locate, including maintaining number of stories and lot occupancy consistent with the neighborhood and situated so as to respect any surrounding homes.

Ward 3 has more assisted living facilities than any other Ward. If NEED is going to drive the location of senior living facilities, then Ward 3 would be last on the list.

Allowing any CCRC to waive so many zoning elements – 2 special exceptions and 3 variances in this case – just because Sunrise wants to put one more CCRC in Ward 3 when other Wards have a greater need would be a gentrification of resources. In addition, the BZA is not required to do so but it would be good public policy to require Continuing Care Retirement Communities to provide services for seniors of all income levels.

Sunrise has over 300 facilities and they should find a more appropriate lot for this facility - not a lot zoned single family detached, surrounded by single family homes. Nothing tethers Sunrise to this particular lot.

The population of the U.S. is aging. Senior housing is important. But this does not support the conclusion that the residential lot in question must be or is appropriate to be the next new site for Sunrise.

As stated above, the senior demographics issue does not enter into any decision whether this lot is appropriate for Sunrise, but we wish to respond to an oft repeated statement by Sunrise that Ward 3 is a senior assisted living desert. This is not true.

Ward 3 is *not* a senior assisted housing desert, since Ward 3 is the home of Lisner, Friendship Terrace, Forest Hills, Ingleside, and Grand Oaks, among others. Although not in residential zones, Sunrise operates two facilities that are a 5-minute drive to the lot in question: Sunrise on Connecticut Avenue and Brighton Gardens two blocks across the Maryland line in Bethesda. Sunrise also operates Sunrise at Fox Hill, a mega-facility within 4 miles of Tenleytown, just off River Road.

The Continuing Care Retirement Community (CCRC) special exception was added to the residential zoning regulations in 2016 and Sunrise says they cannot find a 1.5-acre lot in Ward 3 that allows them to build 86 units while honoring zoning. **Adding the CCRC special exception does not mean that the District of Columbia meant to waive all the residential zoning protections so that Sunrise could build it massive building on the 3920 Alton lot.** Nor did the drafters contemplate both a CCRC and a church on the same lot.

WILL SUNRISE PROVIDE HEALTHCARE AT 3920 ALTON PLACE? MUST THEY DO SO TO QUALIFY AS A CCRC?

Finally, because "health care" keeps being raised as an issue in the Sunrise discussion, it is important to keep in mind that Sunrise states that they provide no **health care** and therefore, if this is true and it is deemed as zoning compliant, then there is NO health care issue involved in this case – be it Medicare, Medicaid, long term care or private insurance. Sunrise specifically states that they do not accept Medicare, Medicaid, long term care or private insurance. They may accept Veterans benefits that provide income not health care coverage. See Exhibit 73, Sunrise-WABC website.

The availability and expense of health care in the country is of serious concern, but please remember that if Sunrise provides no health care, which includes no long-term care, and if a resident fails their frequently administered "wellness" test, the resident must find housing elsewhere. In other words, Sunrise says that they evict you if you need healthcare. There are many unresolved health care issues in this country, including access to health care. If Sunrise, as they state, does not offer health care, and if that is deemed zoning compliant, then Sunrise is not the answer to the health care question.

But having given the facts above as stated by Sunrise, there are outstanding questions:

1. If they provide no health care, why does **Sunrise website** say they are creating **65-70 new** "**healthcare jobs**" at this facility?

2. Is there any significance to the top floor being labeled "memory care"? Sunrise states that the average age of their 121 residents is 86 and many have dementia, including Alzheimer's disease. But no health care?

3. **To qualify as a CCRC, is it mandatory that you provide a "continuum of care" from independent living to skilled nursing?**

"Continuing Care Retirement Community" in 11-BDCMR§100.2 is defined as follows:

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

This definition could be clearer. So, we turn to the official federal government definition:

Centers for Medicare and Medicaid Services (CMS) Definition:

> **CONTINUING CARE RETIREMENT COMMUNITY (CCRC):** A housing community that provides different levels of care based on what each resident needs over time. This is sometimes called "life care" and can range from independent living in an apartment to assisted living to full-time care in a nursing home. Residents move from one setting to another based on their needs but continue to live as part of the community. Care in CCRCs is usually expensive. Generally, CCRCs require a large payment before you move in and charge monthly fees. [6]

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[6] **American Association of Retired People (AARP)**

About Continuing Care Retirement Communities
Learn what they are and how they work.
When your parent or loved one decides they're ready to move from the family home, Continuing Care Retirement Communities (CCRCs) may be worth considering. Offering a variety of services within one community, CCRCs guarantee lifetime housing, social activities and increased levels of care as needs change. These features, however, do come with a price. Learn more about CCRCs to decide whether they're right for your loved one.

What CCRCs Are: Part independent living, part assisted living and part skilled nursing home, CCRCs offer a tiered approach to the aging process, accommodating residents' changing needs. Upon entering, healthy adults can reside independently in single-family homes, apartments or condominiums. When assistance with everyday activities becomes necessary, they can move into assisted living or nursing care facilities. These communities give older adults the option to live in one location for the duration of their life, with much of their future care already figured out. This can provide a great level of comfort to both your parents and you and take much of the stress out of the caregiving relationship.

What CCRCs Cost: The most expensive of all long-term-care options, CCRCs require a hefty entrance fee as well as monthly charges. Entrance fees can range from $100,000 to $1 million — an upfront sum to prepay for care as well as to provide the facility money to operate. Monthly charges can range from $3,000 to $5,000, but may increase as needs change. These fees are dependent on a variety of factors including the health of your loved one(s), the type of housing they choose, whether they rent or buy, the number of residents living in the facility and the type of service contract. Additional fees may be incurred for other options including housekeeping, meal service, transportation and social activities.

A Place for Mom

What is a continuing care? Continuing care retirement communities are retirement communities with accommodations for independent living, assisted living, and nursing home care, offering residents a continuum of care. A person can spend the rest of his life in a CCRC, moving between levels of care as needed. Continuing Care Retirement Communities CCRC – A Place for Mom https://www.aplaceformom.com/planning-and.../continuing-care-retirement-communitie.

In as much as Sunrise states that it would not provide health care at its Tenleytown project, such admission negates its claim of being a Continuing Care Retirement Community, which by definition provides a **"continuity of residential occupancy and health care for elderly persons."** 11-B DCMR § 100.2.

Although 11-U DCMR § 203.1(f) (1) is written with an "or" instead of "and" and therefore can be read to allow a developer to pick from the menu, that option is not consistent with the definition at 11-B DCMR § 100.2 and opens up many questions regarding what zoning relief should allow in an R-1-B zone.

If a developer can pick any option from the "independent living, assisted living and health care" definition of CCRC, then what is to stop a developer from picking "independent living" and merely building an apartment building in what is otherwise an R-1-B neighborhood and restricting it to those 60 years and older or one member of a couple is in that age bracket? There is nothing in the definition that mandates communal dining, for example, so a traditional apartment building, albeit limited to 8 units under 11-U DCMR § 203.1(f) (2), would meet the CCRC definition if an actual "continuum" of care is not required. 11-U DCMR § 203.1(f) states that if the CCRC "**does not include assisted living or skilled nursing facilities, the number of residents shall not exceed eight (8).**"

If a developer wants a larger "independent living" apartment building 11-U DCMR § 203.1(f) (1) provides many combinations. Sunrise has picked the "assisted living" option. But, if the BZA grants the special exception for the CCRC requested by Sunrise, can Sunrise later add as many independent living units as they want without communal dining so long as they continue to have a few assisted living units? 11-U DCMR § 203.1(f) (1) is written to limit the "independent living" option to 8 units only if there are <u>zero</u> assisted living or skilled nursing units. If Sunrise wants to use WABC's zoning when WABC occupies less than 13 percent of the building, can Sunrise build a <u>large</u> independent living apartment building under the CCRC special exception so long as it has at least one assisted living unit?

We therefore submit that it makes little sense for a CCRC special exception to be interpreted as a list of options.

4. DC law supports the philosophy that "assisted living" includes health care:

The Assisted Living Regulations for the District of Columbia (D.C. Law 13-127. Assisted Living Residence Regulatory Act of 2000 (ALR) as amended by § 44–101.01) state:

§ 44–101.01. Purpose.
The purpose of this chapter is to set uniform, minimum standards of licensure for community residence facilities currently regulated under Chapter 34 of Title 22 of the District of Columbia Municipal Regulations and other facilities when they provide services that assist residents with the activities of daily living. This chapter creates a new category of licensure called "assisted living residence."
(June 24, 2000, D.C. Law 13-127, § 101, 47 DCR 2647.) Section References. This section is referenced in § 7-701.01.

§ 44–101.02. Philosophy of care.
(a) The philosophy of assisted living emphasizes personal dignity, autonomy, independence, privacy, and freedom of choice. Further, the services and physical environment of an assisted living residence should enhance a person's ability to age in place in a homelike setting by increasing or decreasing the amount of assistance in accordance with the individual's changing needs.

(b) This chapter shall be interpreted in accordance with the following philosophy of care:
(1) An assisted living residence is a program which combines housing, health, and supportive services for the support of residents aging in place. The function of an assisted living residence is to provide or coordinate personalized assistance through activities of daily living, recreational activities, 24-hour supervision, and provision or coordination of health services and instrumental activities of daily living as needed.
(2) The design of services and environment should acknowledge that a significant number of residents may have some form of cognitive impairment. Services and environment should offer a balance between choice and safety in the least restrictive setting.
(3) Both the program and environment should support resident dignity, privacy, independence, individuality, freedom of choice, decision making, spirituality, and involvement of family and friends.
(4) Residents should be supported to age in place by minimizing the need to move through reasonable accommodation and, when necessary, through coordination and use of home health agencies, hospice, rehabilitation agencies, and other licensed healthcare providers.
(5) Quality, affordable assisted living residence care should be accessible to all individuals residing in the District regardless of income.

Sunrise on Connecticut Avenue is licensed under this Act by the Community Residence Facilities Branch, Child and Residential Care Facilities Division, **Health Regulation Administration** (CRF/CRCFD/HRA), which regulates the operation of the ALR.

5. If Sunrise provides health care, then they are in violation of the requirement that two health care facilities cannot be located within 1000 feet of each other and the Psychiatric Institute of Washington, an acute care psychiatric hospital, is located within that range on Wisconsin Avenue- unless the BZA makes certain findings.

   See Special Exceptions at 11-U DCMR § 203.1(i)(1) and 11-U DCMR § 203.1(i)(6) prohibiting health care facilities within less than 1000 feet of each other. This can only be waived if the BZA finds "that the cumulative effect of the facilities will not have an adverse impact on the neighborhood because of traffic, noise, or operations."

   In the Definitions section of the Zoning Regulations, 11-B DCMR § 100.2, a **Health Care Facility** is defined as: 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; Official Code §§ 32-1301 *et seq.*)

6. Sunrise alleges that they do not provide health care. But it is difficult to envision a facility with 121 people at an average age of 86 years old –and the majority will be admitted for dementia, including Alzheimer's disease – and yet Sunrise says there will be NO health care provided. Below is an excerpt of a D.C. government inspection by the agency that licenses Sunrise facilities. This report pertains to Sunrise on Connecticut since it is already in operation. Sunrise is described as having **NURSES, medical records, administering and monitoring the effect of medications.** See Exhibit 76 for the full Health Regulation & Licensing Administration inspection report.

   We include this inspection record here, not as a comment on the quality of health care being provided but rather to provide evidence that health care is being provided by Registered Nurses at an existing Sunrise 8 blocks away. That Sunrise is described as having "senior living" and "memory care" same as the proposed facility at 3920 Alton Place.

Health Regulation & Licensing Administration [District of Columbia governmental agency] [Excerpt]

06/23/2017 Survey of Sunrise Assisted Living on Connecticut, 6111 Connecticut Ave NW, Washington, DC 20008

*An annual survey was conducted from June 21, 2017 to June 23, 2017, to determine compliance with the Assisted Living Law "DC Code §44-101.01." The ALR provides care for one-hundred eleven (111) residents. …[A]bbreviations used throughout the body of this report: ALR - Assisted Living Residence …**RN - Registered Nurse.***

*Sec. 504.1 Accommodation Of Needs.(1) To receive adequate and appropriate services and **treatment** with reasonable accommodation of individual needs and preferences consistent with their health and physical and mental capabilities and the health or safety of other residents; Based on observation, record review, and interview, the facility failed to ensure that each resident received **treatment** and services consistent with their health capabilities, including maintenance of oxygen equipment….Plan of Correction: The Resident Care Director conducted retraining of the **wellness nurses** on protocols for maintaining oxygen equipment. The Resident Care Director completed an audit of resident's who are currently receiving oxygen therapy to identify others with the potential for the cited concern.*

*Sec. 903.2 On-Site Review. Assess the resident's **response to medication**; …. Based on interview and record review, the facility failed to ensure that the **RN** assessed each resident's response to their medication every 45 days for seven (7) of [the sample] (12) residents. The findings include: On June 22, 2017 through June 23, 2017, from 9:30 a.m. to 4:00 p.m., review of Residents' … **medical records** failed to evidence that the **facility's RN** assessed the residents' response to their prescribed medications. On June 22, 2017, at 2:46 p.m., interview with the facility's Resident Care Director revealed that the **RN** assessed the residents monthly. The Resident Care Director further stated that the response to medication was not a part of the assessment, however would be going forward.*

Final Observations

*Resident #9 - On June 22, 2017, … review of Resident #9's **medical record** revealed that he/she had sustained a fractured left forearm after a fall on August 13, 2016. The record further documented the resident was transported to the hospital and his/her arm was in a sling upon return to the facility. Review of the **daily nursing notes**, …failed to reveal that **the facility's nurses** assessed the appearance (including color, mobility, or capillary refill) of Resident #9's left arm or fingers, except for on August 20, 2016.*

*Resident #10 - On June 22, 2017, …review of Resident #10's **medical record** revealed that e/she had sustained a fractured left hand after a fall on April 5, 2017. The record further documented that the resident was transported to the hospital and his/her hand was splinted. Review of the **daily nursing notes**, following the resident's return, failed to reveal that **the facility's nurses** assessed the appearance (including color, mobility, or capillary refill) of Resident #10's left arm or fingers, except for on April 7, 2017. On June 22, 2017, at 2:40 p.m., interview with the Resident Care Director revealed that that the **nurses** may have done an assessment, but failed to document. Additionally, going forward, the **nurses** would document their complete assessments.*

*Plan of Correction: The Resident Care Director or designee is responsible for tracking and trending the results of any audits and monitoring. The results and trends are reviewed with the management team during the monthly Quality Assurance Performance Improvement meeting that the Executive Director manages. The **POC** is reviewed during this meeting and modified based on plan. [No definition was offered in the report for POC but Electronic medical record (EMR) point-of-care (**POC**) documentation in patients' rooms is a recent shift in technology use in hospitals. **POC** documentation reduces inefficiencies, decreases the probability of errors, promotes information transfer, and encourages the **nurse** to be at the bedside.]*

MUST SUNRISE PROVIDE HEALTH CARE TO MEET THE CCRC DEFINITION?

If the definition of "Continuing Care Retirement Community" at 11-B DCMR § 100.2 allows applicants to cherry pick all or individual types of care included, then once the BZA grants a CCRC the special exception is granted for all purposes. So, if Sunrise is currently a CCRC providing solely dementia care without health care, they could add or subtract at will over time. Also, should dementia care be licensed and deemed a form of health care, at least for zoning purposes?

The term CCRC as used by CMS requires provision of all three possibilities: independent, assisted, and skilled nursing. If Sunrise's application for a CCRC providing only assisted living, is granted as a special exception to locate on the 3920 Alton site, and later adds skilled nursing they would be in violation of the 1,000-foot prohibition, see number 4 above. In the alternative, under the "pick any option" under CCRC they can build a large "independent living" apartment building in R-1-B so long as they include at least one unit of assisted living.

This points out the underlying problems created unless CCRCs are required to offer all three – "independent living, assisted living and health care" - consistent with the definition.

CCRC SPECIAL EXCEPTION – BESIDES THE DEFINITION OF A CCRC, CONDITIONS SUNRISE MUST MEET

We will discuss in this order some of the conditions required to be granted a CCRC special exception:

(1) parking and traffic, [parking is also a separate special exception to be discussed later],

(2) noise and finally,

(3) "other objectionable conditions."

Parking and traffic related to the request for a special exception for a CCRC, including hours of operation, number of people working, residing and visiting the site, and the number of trips relating to the site. This issue is also discussed under variances at page 33.

The prescribed conditions and limitations for a CCRC special exception include the need for "sufficient off-street parking spaces for employees, residents, and visitors," and **"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."** 11-U DCMR § 203.1 (f)(4) and 11-U DCMR § 203.1 (f)(5). Finally, the applicant has "**the full burden to prove no undue adverse impact.**" 11-X DCMR § 901.3

PARKING AND TRAFFIC

The request for a special exception for a CCRC should be denied for many reasons, including that Sunrise and WABC have not demonstrated that there are **"sufficient parking spaces for employees, residents, and visitors,**" as well as parishioners.

Parking in the R-1-B neighborhood is already strained and the granting of the CCRC special exception to locate at 3920 Alton would greatly exacerbate the problem, particularly for families with small children, the elderly and neighbors with disabilities.

Although Sunrise alleges that they do not need a parking special exception, the BZA must examine whether they are meeting not only the parking space requirements at 11-C DCMR § 701.5 **but also** the CCRC requirement that they provide "**sufficient off-street parking spaces for employees, residents, and visitors**" at 11-U DCMR § 203.1 (f)(4).

If the CCRC requirement is no stricter than the parking requirements at 11-U DCMR § 203.1 (f)(4), then why give parking a special mention in the CCRC requirements? The "**sufficient parking**" inclusion in the CCRC conditions must be read as requiring a stricter test than what is referenced in § 701.5.

Looking first at the minimum parking requirements of 11-C DCMR § 701.5.

Title 11, Subtitle C, Chapter 7 – 701 MINIMUM VEHICLE PARKING REQUIREMENTS
701.1 The minimum parking requirements set forth in this section shall apply to the R.., zones; ...

701.2 Where required, the minimum parking requirements set forth in Subtitle C§ 701.5, in addition to any specific parking requirements of this title, shall be met when a new building is constructed.

701.3 Parking standards for uses in the residential use categories are calculated in the number of parking spaces per dwelling unit.

701.4 Parking standards for uses based on gross floor area are calculated in the number of parking spaces per one thousand square feet (1,000 sq. ft.) of gross floor area as described in Subtitle C§ 709. Subtitle C-33

701.5 Except as provided for in Subtitle C§ 702, parking requirements for all use categories are as follows (all references to "sq. ft." refers to square feet of gross floor area as calculated in Subtitle C§ 709): (excerpt from table)

TABLE C§ 701.5: PARKING REQUIREMENTS Use Category	Minimum number of vehicle parking spaces
Institutional, general	1.67 per 1,000 sq. ft. in excess of 5,000 sq. ft.
Institutional, religious	1 for each 10 seats of occupancy capacity in the main sanctuary; provided, that where the seats are not fixed, each 7 sq. ft. usable for seating or each 18 in. of bench if benches are provided shall be considered 1 seat.
Medical care	1 per 1,000 sq. ft. in excess of 3,000 sq. ft., with a minimum of 1 space required.
Residential, multiple dwelling unit	1 per 3 dwelling units in excess of 4 units, except: 1 per 2 dwelling units for any R or RF zone; …

According to a June 18, 2018 letter (Exhibit 18) from the Zoning Administrator to Carolyn Brown, Sunrise's lawyer, a *CCRC "was previously known as an assisted living facility under the 1958 Zoning Regulations and deemed a type of institutional use. The 2016 Zoning Regulations now classify assisted living facilities as a residential use, pursuant to 11-B DCMR § 200.2 (bb)."* That definition is*:*

(bb) Residential:

> (1) A use offering habitation on a continuous basis of at least thirty (30) days. The continuous basis is established by tenancy with a minimum term of one (1) month or property ownership;
> (2) This use category also includes residential facilities that provide housing and supervision for persons with disabilities, which may include twenty-four hour (24 hr.) on-site supervision, lodging, and meals for individuals who require supervision within a structured environment, and which may include specialized services such as medical, psychiatric, nursing, behavioral, vocational, social, or recreational services;
> (3) Examples include, but are not limited to: single dwelling unit, multiple dwelling units, community residence facilities, retirement homes, rooming units, substance abusers' home, youth residential care home, assisted living facility, floating homes, or other residential uses; and
> (4) Exceptions: This use category does not include uses which more typically would fall within the lodging, education, or community based institutional facility use categories;

Sunrise states that they only need to provide 66 spaces by adding the 41 required under the "residential, multiple dwelling unit" category and the 25 required under the "institutional, religious" category. But remember that a multiple dwelling unit would not be allowed in R-1-B as a Matter of Right and there is no special exception for a multi-family residential dwelling unit in R-1-B.

Thus, it is very important that the BZA look at the 66 spaces being suggested and compare to the 121 residents, more than 70 staff, visitors and parishioners that must be taken into consideration before any special exception is granted for a CCRC in an R-1-B zone. No plan for shared parking has been provided.[7] Note that the 65 – 75 staff are actually Full Time Equivalents (FTEs) so some shifts would include 2 staff filling a position going and coming, with overlapping use of parking and double the traffic.

Under the CCRC required condition at **11-U DCMR § 203.1 (f) (4),** the applicant must show that "**The use and related facilities shall provide sufficient off-street parking spaces for employees, residents, and visitors..."**

[7] **Q: Will this new facility impact parking in the neighborhood?**
A: No. There are 53 (neighbors note: this is out of date, since now 66) underground spaces in total. Considering the use of the Metro and other forms of public transportation, the number of parking spaces provided will be sufficient to serve the needs of the church and of Sunrise, **and we have not changed the parking for the smaller building. Sunrise website on October 14, 2018** [Note that at their September 17, 2018 ANC presentation, Sunrise indicated that there was no reduction resulting from the "smaller" building. Exhibit 73.
Q: Are employees allowed to park in the underground parking lot? A: Yes
Sunrise website on October 14, 2018 Exhibit 73.

DDOT could have helped the BZA by including such an analysis in their report, however, DDOT's Traffic Report, Exhibit 53, merely echoed the Zoning Administrator's analysis citing the charts for minimum parking requirements of 11-C DCMR § 701.5. That is an inadequate analysis.

How would sharing of the parking spaces be organized between WABC and Sunrise? For purposes of this discussion, we will use the 66-space number that WABC and Sunrise say they are providing. No plan has been provided for how WABC and Sunrise share any parking spaces.

Frequently a shared arrangement is proposed when one entity operates during the day and the other in the evening – like a bank and a restaurant - but that is not the case here. The Comprehensive Plan Glossary defines **Shared parking** as a "Parking facility which serves multiple uses with different peak demand times, such as a movie theater and an office building." (emphasis supplied)

First, the "employee" numbers are actually FTEs or Full Time Equivalency numbers. Meaning that some of these are split shifts where 2 employees may both be making trips in and out of the building. Plus, there would be overlapping use of parking besides double the traffic. Thus, all the "traffic" and "parking" numbers below are MINIMUM numbers not MAXIMUM numbers.

Also, although Sunrise on Connecticut Avenue staff indicated that most employees drive to work, we conservatively base this on Sunrise SVP Kroskin's statement that only 50 percent of Sunrise employees drive to work. So, an estimated 17 Sunrise employees will take 17 spaces each day, so in play are about 49 spaces. Will one of these spaces be devoted to the Sunrise 7-ton shuttle bus? Will the various delivery trucks, some 28 tons and 30 feet long, pull into the garage? Are some of these spaces dedicated to WABC? If WABC seats 250, what is the plan for those people to park? Can we assume that the various trash containers will take some of these spaces, as they seem to in other Sunrise facilities? How many visitors to the 121 residents are projected? Since WABC has a history of renting space to various groups, for example, a professional choir not affiliated with any church and a for-profit school, how many visitors to WABC are projected? Sunrise advertises, and views as a positive, organizing large events in their facilities that are open to the public. Where are these people going to park?

Sunrise put a chart in their pre-hearing statement that showed Sunrise parking dramatically dropping for no apparent reason on Sunday… in order to make room for the church. Exhibit 69, p.15. But no logic was articulated. The Traffic Report contained the same chart.

Employees at the Sunrise facility on Connecticut Avenue have stated that they are not allowed to park in the garage except those on the night shift, which has the smallest number of workers. The other employees park on the street and elsewhere, for example, in the Politics and Prose lot. Under the conditions for a CCRC, any CCRC must provide enough parking for their employees to park in the building. They are

required to let the employees use the garage under the regulations. 11-U DCMR § 203.1 (f)(4), the applicant must show that "The use and related facilities shall provide sufficient off-street parking spaces for employees, residents, and visitors;"

How much Traffic would the CCRC/WABC generate?

(source: Sunrise, Inc.):

a. Trucks - 20 box trucks per week. 4 trucks/ day M- F = 8 trips.[8]

1.Sunrise is expected to have 6-7 deliveries per week plus USPS/FedEx/UPS.
- (a) **Sysco food (2)**
- (b) **Trash (3)**
- (c) **Other supplies, uniforms, laundry (1-2)**

2. USPS/FedEx/UPS – 10-12 stops at the building per week.

b. Many trips per daily by the 7-ton shuttle bus. This is in addition to the box trucks above.

c. Ambulances – All of these statistics are DC ambulances only. Note that many ambulances both public and private come to Sunrise facilities. So, this is only the public (DC) ambulances, not the total number of, ambulances expected at the site.

Sunrise on Connecticut Ave had 10.2 per month with 76 percent (7.75 trips) per month between 7am and 7pm and 25 percent would arrive after 7pm and before 7am. This translates to between 2 and 3 ambulances each week. At 10/12/17 ANC SVP Kroskin said 3-4 ambulances each week.[9]

d. Fire Trucks – Fire Trucks frequently come as part of the ambulance response so assume 3 fire trucks per week, using the DC-only statistics above.

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[8] ***From Sunrise Website. Q: How many large vehicles will be on residential streets due to deliveries?*** *A: Based on operations at other Sunrise communities, we anticipate 6 - 7 new deliveries and trash pickup per week (Sysco food 2x, trash 3x and other suppliers 1-2x). Additionally, the FedEx, Amazon, UPS, and USPS trucks will make a new stop at the community while on their existing route. To comply with DDOT restrictions and to help keep disruption to a minimum, drivers will be instructed to drive only on Wisconsin and Nebraska Avenues, limiting the time they spend on Alton Place and Yuma Street as much as possible. Sunrise and the church will agree that no trucks with trailers (including 18 wheelers) will be used for deliveries once the project has been completed. Deliveries will be limited to box trucks.* **Sunrise website on October 14, 2018 Neighbors NOTE: some of the trucks are 28 tons, some 30 feet long, in other words huge.** Exhibit 73.

[9] **From Sunrise Website. Q: Are there a lot of ambulance visits to the Sunrise?** A: No. As Sunrise is not a nursing home, it does not receive many ambulance visits. For example, according to the DC Fire department, from January 2016 to August 2017, the Sunrise of Connecticut mean number of trips was 10.2 per month with 76 percent (7.75 trips) of those trips occurring between 7am and 7pm. **The number of ambulance visits will reduce slightly for the smaller building. Sunrise website on June 15, 2018 Sunrise website on October 14, 2018.** [Note that at their September 17, 2018 ANC presentation, Sunrise indicated that there was no reduction resulting from the "smaller" building.] Exhibit 73.

e. Sunrise Employees work in three shifts (SVP Kroskin on the record at 10/12/17 ANC estimated 50 percent of the employees drive cars to commute*).

- **35 employees from 6:30am-2:30pm**
- **20-25 employees from 2:30pm-11:30pm**
- **6 employees (overnight) from 11:30pm – 6:30am**

Daily Hours: By 6:30 am, an estimated 17 employees arrive by car while 2 are leaving by car and at 11:30pm an estimated 12 employees leave by car while 3 employees arrive by car.

Total Employee trips 62 round trips per day to get employees on and off the site. 124 single trips if you count arriving as one trip and departing hours later as a second trip.

Remember: The "employee" numbers are actually FTEs or Full Time Equivalency numbers. Meaning that some of these are split shifts where 2 employees may both be making trips in and out of the building. Thus, all the "traffic" and "parking" numbers above are MINIMUM numbers not MAXIMUM numbers.

Plus, Visitors to Sunrise to see the 121 residents and/or attend "events."

f. Traffic for WABC, which seats 250 and all other WABC staff plus other activities at the WABC.

There are arrows on the truck ramp diagram for traffic in both directions on the Alton side. See Exhibit 69E1, page 2 and included in this document at page

Is this much traffic added to a residential neighborhood "objectionable"? Absolutely. This is one of many reasons the CCRC special exception should be denied.

ROUTES THAT WILL EXPERIENCE INCREASE TRAFFIC

Wisconsin Avenue and Nebraska Avenue are main thoroughfares. DC is organized to keep most traffic on the avenues and out of the residential streets. Wisconsin is a main thoroughfare with 6 lanes of traffic during rush hour. Wisconsin cuts straight through Tenley Circle so most cars never leave Wisconsin unless they wish to use Nebraska Avenue, which is not zoned commercial and has no commercial establishments.

Will the CCRC/WABC add traffic to those Avenues – yes. But traffic and congestion will increase on Alton, Yuma or 39th Street. 39th street is a one-way street with bike lanes, which dovetails into Wisconsin Avenue, several blocks away, where 14 bollards have been installed by DDOT to discourage vehicles from using 39th Street as a short cut. DDOT chose 39th Street for a bike lane from Wisconsin Avenue to Nebraska Avenue because today it has far less traffic than either of those Avenues.

Sunrise states they will instruct their contract drivers to approach from Wisconsin and Nebraska Avenues (per DDOT truck routing map). DDOT Route Map, Exhibit 55. But

the building is not going to be on Wisconsin or Nebraska. The entrance to the truck ramp will be on Alton Place and the exit on Yuma Street.

The neighbors find objectionable and unacceptable the inevitable increased in traffic that granting of a CCRC special exception would bring to Alton, Yuma and the truck ramp behind the homes that share a property line with the CCRC.

The *POLICY* and *SPIRIT* behind "No Through Trucks"

Through trucks are prohibited on Alton, Yuma and 39th Street, plus Alton and Yuma specifically say no trucks over 1 ¼ tons. 39th Street, as it dovetails into Wisconsin several blocks away, has bollards installed by DDOT to prevent, as best they can, vehicles from using 39th Street and its bike lane, as a short cut. Sunrise states the 7-ton shuttle bus, ambulances, and fire trucks would be told to use Alton and to use the curb cut to pull in and idle. This result is traffic and air quality concerns for neighbors.

> *Section 18-2505.6 of the DCMR states that: "Whenever authorized signs are erected indicating a truck restriction, no person shall operate the type of truck prohibited on the street, except that the prohibited truck may be operated on the street or portions of the street for the sole purpose of making a delivery or pickup and then only by entering the street at the intersection nearest to the destination of the truck and proceeding on the street no further than the next intersection after the delivery or pickup has been completed."*

We acknowledge that Section 18-2505.6 says that so long as a truck stops in the middle of the block and then proceeds, it is not prohibited. Isn't the *policy* behind this to keep residential streets from being overrun with trucks? Wouldn't 20 trucks per week, including 28-ton trucks be in violation of the spirit of the statute and signs?

There must be some limit on number of trucks beyond which this public policy is not being honored. Hypothetically, if 100 trucks came on to Alton, down the ramp next to the houses that share the property line, up the ramp and on to Yuma, and stopped to idle at the bottom of the ramp, that should be seen as a violation of the policy of keeping trucks out of residential neighborhoods. The BZA should not allow a facility where we know in advance there will be many trucks on Alton, Yuma and next to the 39th Street houses that would violate the policy of keeping trucks out of a residential neighborhood. The signs saying "No Through Trucks and No Trucks over 1 ¼ tons" are to safeguard and protect the neighbors. The trucks and vans in question are 7 tons and 28 tons.

If 20 trucks, plus ambulances, plus fire trucks, plus a 7-ton shuttle bus many times a day are allowed on the streets with those signs at both ends, DDOT's prohibition becomes meaningless. The "no through trucks" standard allows law enforcement to observe whether the trucks stop and, alternatively, signs that said "no more than a few trucks" would be very difficult to enforce unless law enforcement observed for 24 hours. But the policy is clearly dishonored by the proposed project and the BZA, given the opportunity before the situation is created, should uphold the policy of keeping trucks out of residential neighborhoods.

Neither Sunrise/WABC's Traffic Expert's Report or DDOT's Report even mention the 30-foot or 28-ton trucks and analyze how they will make a right turn on to the truck ramp from Alton, which is only 30 feet wide with 2-way traffic and parking on both sides. Yuma is only 4 feet wider so it presents the same challenge. DDOT's report shows concern for the turning radius of the 7-ton shuttle. Exhibit 53.

Objectionable: The Truck Ramp would run parallel to the retaining wall of 13 feet and the 6-foot replacement fence, which is a mere 9 ½ feet from the closest house – 9 ½ feet from a baby's bedroom window. Traffic on this ramp will be to accommodate 450 people in the building: 20 large trucks per week, some 28 tons, some 30 feet long, a 7-ton shuttle bus multiple times a day, 75 staff where they estimate that 50 percent drive to work and some do split shifts which means more cars and parking needed, visitors to the 121 residents, traffic generated by the 250-seat church, plus any activities or events relating to Sunrise or WABC.

The large diesel trucks will be pulled up past the loading berth and loading platform at the bottom of the truck ramp and will then back into the loading berth. Exhibit 53A at p.6. These trucks will be idling, including the refrigerated trucks that need to idle to provide cooling, producing noise and harmful emissions/fumes next to the retaining wall of 13 feet placed 8 feet from the houses. There will be noise including that from large rumbling trash receptacles being emptied and from the trucks backing up.

From Sunrise Website (Exhibit 73).

Q: How much will traffic increase on the residential streets?

A: Very little. Comparable communities generate minimal traffic during peak weekday commute times (8:00 a.m. – 9:00 a.m. and 5:15 p.m. – 6:15 p.m.). The AM Peak Hour is expected to have 16 total vehicle movements (10 on Alton and 6 on Yuma) and the PM Peak Hour is expected to have 23 total movements (10 on Alton and 13 on Yuma). The highest hour of Sunrise traffic is expected to be 2:30 p.m. to 3:30 p.m., with 37 total trips. …. **The trip count will reduce slightly for the smaller building now being planned. Sunrise website on October 14, 2018. Neighbors Note: No facts have been included in the record that the "smaller building" has resulted in fewer people.** [Also Note that at their September 17, 2018 ANC presentation, Sunrise indicated that there was no reduction resulting from the "smaller" building.]

Sunrise Employees Shift Schedules

Sunrise has provided the "employee" numbers, which they stated are FTEs or Full Time Equivalency numbers. Meaning that some of these are split shifts where 2 employees may both be making trips in and out of the building. Plus, there would be overlapping use of parking for these split shifts meaning more spaces needed. Thus, all the "traffic" and "parking" numbers below are MINIMUM numbers not MAXIMUM numbers.

The number of employees has varied in Sunrise statements but usually is around 65-70 employees. **Sunrise estimates 50 percent drive cars to commute**.

Sunrise Employees work in three shifts:

- 35 employees from 6:30am-2:30pm
- 20-25 employees from 2:30pm-11:30pm
- 6 employees (overnight) from 11:30pm – 6:30am

Hours: An estimated 20 trips (17 employees arrive by car and 3 leave by car) between 6AM – 7AM daily and 12 leave and 2 arrive (total 14) by car between 11PM - Midnight. Between 2 PM and 3PM there are 62 employees changing shifts, so if assume half come/leave by car that would be 30 Sunrise employees creating trips 2-3 PM.

Total trips 62 trips per day to get employees to and off the site, 122 single trips if counting one as arriving for working and a second when departing work hours later

COMPARING SHIFT TIMES TO METRO SCHEDULE
Metro is 4 blocks away – 975 feet to walk.

Metro Schedule as of July 4, 2018:
Monday through Thursday: 5 am – 11:30 pm
Friday: 5 am – 1 am
Saturday: 7 am – 1 am
Sunday: 8 am – 11 pm

Source: https://wmata.com/schedules/timetables/index.cfm

Sunrise Employees work in three shifts:

- 35 employees from 6:30am-2:30pm – cannot take Metro **Saturday or Sunday** because it does not open until 7 am (Sat) or 8 am (Sun).

- 20-25 employees from 2:30pm-11:30pm – cannot take Metro **Monday through Thursday** because Metro closes at 11:30 pm, which is same time they are getting off their shift. Also, cannot take Metro on **Sunday** because Metro closes at 11 pm, which is before their shift ends.

- 6 employees (overnight) from 11:30pm – 6:30am – If they don't mind waiting half an hour, they could depart on Metro on Saturday, which opens at 7am. On Sunday, however, they would have to wait an hour and a half to depart on Metro, which does not open on Sunday until 8 am.

Sunrise SVP Kroskin has said that 50 percent of the staff drive. Although staff at Sunrise on Connecticut indicate it is substantially *more* than 50 percent. The above chart shows that Metro does not easily accommodate the shift changes. Buses may and are available at many locations in DC. To conclude, all indicators are at least 50 percent will drive.

HOURS OF OPERATION

Sunrise shift changes are 6:30 am for early shift and 11:30 pm for late shift. This means staff need to arrive before their shift starts and will depart after their shift ends.

Resulting in hours of operation for staff changes 7 days per week would be:
6 AM – MIDNIGHT DAILY. And this does not count ambulances and firetrucks weekly.

In the Order issued in 2009 regarding the same lot, the BZA limited the hours of operation at 3920 Alton Place to:

7:30 AM and 9:00 PM Mon-Friday. Hours ended at **5:00 PM on Saturday.** *BZA Final Order in Case No.17726* (2009), (Exhibit 38 herein, pages 9-11 and 21), regarding the same lot.

TRAFFIC ON ALTON AND YUMA

The main entrance to Sunrise would be on Alton Place, N.W., which includes a drop-off driveway to the front door. The drop-off entrance on the Alton Place side is approximately 65 feet from Nebraska Avenue. The intersection of Alton Place and Nebraska Avenue is not perpendicular but rather at a pronounced angle – an estimated 60-degree angle traveling northeast and an estimated 120-degree angle traveling northwest - thus creating a traffic and pedestrian hazard.

Alton is only 30 feet wide and the Sunrise driveway is immediately after the turn. Parking is allowed on both sides of Alton blocking the view further. This will create a safety hazard if Sunrise is allowed to create a situation where many trucks and ambulances, accompanied by fire trucks come to Alton Place NW. The many curb cuts that Sunrise requests will interfere with pedestrian use of the sidewalk on that side of Alton Place.

The trucks, employees and visitors will be entering the truck ramp from Alton Place. In addition, some vehicles, presumably including the 7-ton shuttle bus, will be both entering and exiting on Alton Place, a narrow street – 30-foot wide two-way street with

parking on both sides that is shared with single-family homes. Yuma is only slightly wider at 34-feet wide and also is a two-way street with parking on both sides that is shared with single-family homes. No provision has been made in applicant's plan for drop-off/pick up traffic associated with the main entrance of the church on Yuma Street.

TRUCK TURN ROTATIONS

Will the 28-ton trucks or the 30-foot box trucks referenced in Applicant's Gorove Slade Traffic Report (Exhibit 52) have enough room to make the 90 degree turn onto or off the truck ramp? Alton Place, designated as a "local" street, is supposed to have 7 feet on each side for parking and 8 feet for each lane of the two-way street. This totals to the 30 feet width of the street. How are the 28-ton trucks going to drive down this two-way street and make a right turn on the truck ramp? How are the 30-foot box trucks going to make a right angle turn on a two-way street that is 30 feet wide itself with parking on both sides? Yuma Street presents the same situation being a mere 4 feet wider than Alton. There is not enough room. Whether the trucks stop in the middle of the block or not, there is a reason the signs say no through trucks over 1 and 1/4 tons.

The many Sunrise uses of Alton Place, only 3 homes long on one side and one house on the other, will render the street practically useless for parking or pedestrian traffic for the neighbors who live there.

On the Yuma Street side, the trucks and all other vehicles will be exiting the truck ramp and making the acceleration noises necessary to go from complete stop to climbing the 12-foot grade. And the headlights from anyone leaving after dark or before dawn – which includes the staff and visitors – will shine directly into the home at the end of the truck ramp on Yuma. And will almost certainly not be enough room for the 28-ton trucks to make the ninety-degree turn as they enter Yuma Street from the truck ramp?

DDOT's Traffic Report, Exhibit 53, speaks to the difficulty of the 7-ton shuttle turning on to Alton but does not mention the much more dramatic problem of the large trucks – some 28 tons, some 30-foot box trucks making a right turn from the 30-foot-wide Alton Place, which is two-way and has parking on both sides.

NOISE FROM EVENTS AND TRAFFIC

Sunrise has stated that they like to organize large events and concerts and invite the residents and their visitors to attend, but this is not properly factored into how many parking spaces they provide? In 2009, the proposed music school committed to hold no recitals or concerts on the site as a means of reducing noise and traffic. *BZA Final Order in Case No.17726* (2009), (Exhibit 38 herein, page 17), regarding the same lot.

Sunrise is providing a courtyard for its residence that looks out at the back of the houses facing 39th Street. This courtyard is to be used by the 121 residents and 70 staff, plus it is likely to be used for the events Sunrise states they organize for residence

and visitors. These porches will also be the source of outdoor conversations that can carry to the nearby homes.

TRUCK NOISE

Ongoing and Permanent Truck Noise Relating to the Operation of the Facility

Applicant states
:

> "The plantings will consist of tall arborvitae to protect the privacy of adjacent homes and provide a **visual and sound barrier between the adjacent uses**." Exhibit 69, p. 19.
>
> The building design [includes] …. the placement of all parking, loading, and trash in below grade locations to **limit** noise and additional activity at grade. Exhibit 69, p. 18.

Large diesel trucks, including garbage trucks will come to the site almost every day if the BZA approves this project. A typical truck is listed at 90dB and an ambulance siren is 120dB.

Will babies, young children or adult neighbors sleep through the ambulances and fire trucks during the night? The noise will be disruptive to all neighbors of any age 24/7.

The truck ramp, located 8 feet from the replacement fence on the neighbors' property line, will be the scene of many trucks arriving, departing, unloading and loading daily. According to the DDOT Report, "Trucks will …pull past the loading area in the driveway and back-in …" to the loading berth. Exhibit 53 at p.6. The 20 trucks each week and 7-ton shuttle bus multiple times a day will be a source of constant noise. To experience what neighbors will experience from truck noise, including trucks backing up, go to:

Garbage Truck Warning Sound - YouTube - https://www.youtube.com/watch?v=xlwSRklu-gU -

Backing Sounds | Most recent - Soundsnap.com - https://www.soundsnap.com/tags/backing

Garbage truck backing up - YouTube - https://www.youtube.com/watch?v=pw6vDXGGvgQ

TRASH

Although the website says 9am-5pm M-F; Applicant's Traffic Study say 8am-6pm with no limit on which days. See Exhibit 52 at page 11.

From Sunrise website:
Q: How will trash storage and pickup be handled?
A: All trash will be contained inside the proposed building in a conditioned room. Sunrise will employ a private trash pickup company that will only pick up trash during specified hours (typically M-F 9am to 5pm). **Sunrise website on October 14, 2018. Exhibit 73.**

Trash pick-up for the trash generated by 200 Sunrise related people and 250 WABC related people – for a total of 450 people creating waste – will be a volume business. Trash trucks are noisy. The average trash truck creates 90 decibels – more if backing up and that does not include the clanging of the large trash containers as they are manipulated by the garbage trucks. See Noise web links above.

Sunrise has stated that the trucks will use the garage. This is not the case at Sunrise on Connecticut Avenue nor at the Brighton Gardens Sunrise in Bethesda. A truck backing up emits more than 90 decibels. If the trash is picked up inside the garage, then the trucks will have to back up. It seems unlikely that the trucks will be able use their hydraulic lifts to hoist the big bins and dump them into the truck within the confines of the garage. If the large garbage containers will be rolled out to the truck ramp, then all the noise and odor will occur next to the houses with whom Sunrise shares the property line next to the truck ramp. Sunrise has stated that all trash will be kept in a conditioned trash room inside the building. No room on the floor plans is labeled "trash room." See Exhibit 69E2, page 3.4.

> Applicant states: All trash receptacles for the facility will be located inside a conditioned trash room, which will be part of the mechanical/utility area on the lower level. [fn while the interior partitions and lay out of this lower level may change, the Applicant commits to placing the trash receptacles inside a conditioned trash room.] Receptacles will be wheeled to the loading dock area on trash collection days. Because Sunrise will contract with private companies, the collection times will be controlled and will occur after 8:00 AM in the morning, three times a week, so as not to create any objectionable noise and odors to adjacent properties. All deliveries will be limited to occur between the hours of 8:00 AM and 6:00 PM. Exhibit 69, page 17. Neighbors' note: There is no "conditioned trash room" designated on the floor plans included at Exhibit 69E2.

There will be ambulances and fire trucks – 3 to 4 per week, some during the night originating from DC EMS but there will be additional ambulances from other sources. Sunrise estimates regarding DC Ambulances are: 10.2 per month with 76 percent (7.75 trips) per month between 7am and 7pm and 25 percent would arrive after 7pm and before 7am.

The 70 staff will inevitably create noise as they come and go and take breaks. Note it is actually 65-70 FTEs so more people than those numbers might indicate.

From Sunrise website:
Q: Will employees be permitted to take smoking breaks near neighboring homes?
A: Sunrise discourages employees from smoking as we promote a healthy working and living environment; however, for those that do smoke they will be asked to take walking breaks away from the neighborhood or adjacent to the community. **Sunrise website on October 14, 2018.** Exhibit 73

The 7-ton shuttle bus will come and go on the Alton Place curb cut multiple times a day. The residents and staff entering and exiting the shuttle bus will inevitably hold conversations and call to each other.

Any facility housing 121 people, 70 staff, 250 seats at WABC, plus events and all the trucks for garbage, food, uniforms, and the like, coming to the site will produce a great deal of noise in this quiet residential neighborhood. This is objectionable.

EXPECTATION OF PRIVACY – Use and enjoyment of property

See especially 11-U DCMR § 203.1(f)(5) (provided in full above at p. 93-94);

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

The proposed building will have roof top amenities and a rooftop garden accessible by all visitors to the WABC. No sightline studies have been provided to show that visitors on the roof cannot look into the yards or windows of homes on Yuma Street.

Open porches will allow residents to sit for hours looking at the neighbors' single-family homes and yards. Sunrise floor plans include a porch on the first floor looking across Alton Place at the homes across the street and an open terrace on the fourth floor looks down at the backs of the 5 houses that face 39th Street, plus the open courtyard on the first floor opens to the back of the 39th Street houses.

In addition, how is the penthouse to be used? Sunrise is allowed a penthouse, which they include in their plans, and the penthouse does not count as a story. The penthouse is, however, 12 feet in height (1 story) and 3,400 square feet (SF). Sunrise has not provided information as to how this penthouse will be used. Perhaps it is only used for mechanical equipment? The BZA should ask Sunrise to provide their plans for use of the penthouse.

…OTHER OBJECTIONABLE CONDITIONS

Over 200 immediate neighbors have signed a petition opposing the Sunrise project at 3920 Alton Place. Many of those neighbors have been attending and speaking at ANC meetings. There are only 3 households that support the project. As discussed below in greater detail, it is evidence that this project is *per se* objectionable that 3 of the families on the 200-foot list have sold their homes since learning of the project last fall.

Since Sunrise announced their plans in September 2017, THREE homes within 200 feet have been put on the market. In a very stable neighborhood, this is evidence that granting a special exception for a CCRC on this lot, particularly with the requested 5 variances and other special exceptions, is *per se* objectionable.

Shortly after announcing his plans for 3920 Alton, SVP Kroskin, in conversation with the families in the 5 houses facing 39th Street, suggested that maybe he could buy their homes after his project was complete. The offer was neither immediate nor legally binding, but it is evidence that he too thought neighbors would find the facility he was proposing to be so "objectionable" that they would not want to live next to it. Two of those houses were put on the market.

BURDEN APPLICANT MUST MEET

Title 11-U DCMR § 203.1 (f) states that applicant must show 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 further 11-X DCMR § 901.2 states that they must show that the project "...Will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps; Will not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps; and Will meet such special conditions as may be specified in this title..."

WHAT QUALIFIES AS OBJECTIONABLE?

First, let us review various places in the DC Zoning Code where "objectionable" is used and, in the interest of brevity, aggregate the definitions. Given that R-1-B is very low density and most restricted use, including what is considered objectionable even in more densely zoned areas is justified.

A compilation of what is defined as **"Objectionable,"** as used throughout the zoning code: noise, sounds, odors, trash, waste collection, loading, lighting, hours of operation, parking, number of employees, number of attendees, create no dangerous or otherwise objectionable traffic conditions or other operational characteristics that are not customarily associated with residential use. See 11-U DCMR §§ 513, 518, 601,802 and 11-X DCMR § 101.

The lot is zoned R-1-B. The Comprehensive Plan Glossary of Terms defines **Neighborhood context** as: "The overall atmosphere and setting associated with a particular neighborhood, defined by the scale and design of its buildings, the appearance of open spaces and vegetation, and the character of its uses."

Clearly applicable Comprehensive Plan provisions provided here:

Policy RCW-1.1.1: Neighborhood Conservation
Protect the low density, stable residential neighborhoods west of Rock Creek Park and recognize the contribution they make to the character, economy, and fiscal stability of the District of Columbia. Future development in both residential and commercial areas must be carefully managed to address infrastructure constraints and **protect and enhance the existing scale, function, and character of these neighborhoods**. (2308.2)

Policy LU-2.1.5: Conservation of Single Family Neighborhoods
Protect and conserve the District's stable, low density neighborhoods and ensure that their zoning reflects their established low density character. Carefully manage the development of vacant land and the alteration of existing structures in and adjacent to single family neighborhoods in order to protect low density character, preserve open space, and maintain neighborhood scale. 309.10

Policy LU-2.2.1: Code Enforcement as a Tool for Neighborhood Conservation
Recognize the importance of consistent, effective, and comprehensive code enforcement to the protection of residential neighborhoods. Housing, building, and zoning regulations must be strictly applied and enforced in all neighborhoods of the city to prevent deteriorated, unsafe, and unhealthy conditions; reduce illegal activities; maintain the general level of residential uses, densities, and height; and ensure that health and safety hazards are promptly corrected. 310.2

Policy LU-2.3.1: Managing Non-Residential Uses in Residential Areas
Maintain zoning regulations and development review procedures that: **(a) prevent the encroachment of inappropriate commercial uses in residential areas; and (b) limit the scale and extent of non-residential uses that are generally compatible with residential uses, but present the potential for conflicts when they are excessively concentrated or out of scale with the neighborhood.** 311.3

Policy LU-2.3.5: Institutional Uses
Recognize the importance of institutional uses, such as private schools, child care facilities, and similar uses, to the economy, character, history, and future of the District of Columbia. **Ensure that when such uses are permitted in residential neighborhoods, they are designed and operated in a manner that is sensitive to neighborhood issues and that maintains quality of life. Encourage institutions and neighborhoods to work proactively to address issues such as traffic and parking, hours of operation, outside use of facilities, and facility expansion.** 311.7

Policy LU-2.3.7: Non-Conforming Institutional Uses
Carefully control and monitor institutional uses that do not conform to the underlying zoning to ensure their long-term compatibility. In the event such uses are sold or cease to operate as institutions, encourage conformance with existing zoning and continued compatibility with the neighborhood. 311.9

In addition, there are the Zoning Maps.
On the **Future Land Use Map (FLUM),** the lot in question – 3920 Alton Place – is designated as low density residential. R-1-B, single family detached. (2) On the **Generalized Policy Map**, 3920 Alton Place is located in a Neighborhood Conservation Area. (3) Finally, 3920 Alton Place is **NOT** in any Transit Zone.

MANY OTHER OBJECTIONABLE CONDITIONS CREATED BY THE PROPOSAL

The proposed development would generate far more objectionable conditions than this residential neighborhood could safely and reasonably accommodate.

The neighbors would be adversely impacted by unsafe traffic conditions, overcrowded and illegal parking, noise, and other objectionable conditions resulting from the group activities in the building, and the need to provide 24/7 services, including dining and sanitation for 450 people (121 residents and 70 staff, 250 people related to WABC, visitors and attendees at the events). The neighbors would be subjected to 28-ton trucks and 30-foot box trucks plus a 7-ton shuttle bus using Alton Place, which is too narrow to be designated a street. The same trucks rumbling down Alton would also be rumbling down Yuma, a residential street not an arterial. Pedestrian use of the Alton side next to the proposed Sunrise would be lost to neighbors and the general public.

Applicant's proposal would dramatically increase usage of the site, would entail new construction of a large steel and concrete building for multiple uses, would dramatically increase lot occupancy on 3920 Alton Place NW, and would entail a new curb cut on Yuma Street as well as several curb cuts on Alton. Construction would last at least 2 years, according to the developer.

Objectionable Traffic: Traffic on this ramp: 20 large trucks per week, including 28-ton trucks and 30-foot box trucks, a 7-ton shuttle bus multiple times a day, 75 staff where they estimate that 50 percent drive to work, visitors to the over 100 residents, traffic generated by the 250-seat church. And the staff are actually FTE numbers so for some of those positions there would be two people coming and going and parking.

> Applicant states:
>
> The building design [includes] …. the placement of all parking, loading, and trash in below grade locations to **limit** noise and additional activity at grade. Exhibit 69, pages 18. They also speak of the trees as providing a "sound barrier "of evergreen - "The plantings will consist of tall arborvitae to protect the privacy of adjacent homes and provide a **visual and sound barrier between the adjacent uses**." Exhibit 69, page 19.

Objectionable Smells, loitering, trash, open containers next to homes: SVP Kroskin said he sympathized and "understood" Sunrise residents who complained of employee loitering, trash smell and permanent open containers next to other Sunrise facilities.

Neighbors' note: **There is no "conditioned trash room" designated on the floor plans** included at Exhibit 69E2.

Nonetheless applicant states:

> All trash receptacles for the facility will be located inside a conditioned trash room, which will

> be part of the mechanical/utility area on the lower level. [fn while the interior partitions and lay out of this lower level may change, the Applicant commits to placing the trash receptacles inside a conditioned trash room.] Receptacles will be wheeled to the loading dock area on trash collection days. Because Sunrise will contract with private companies, the collection times will be controlled and will occur after 8:00 AM in the morning, three times a week, so as not to create any objectionable noise and odors to adjacent properties. All deliveries will be limited to occur between the hours of 8:00 AM and 6:00 PM. Exhibit 69, page 17.

Objectionable Fumes and Odors, including Trash: In 2009, the BZA was concerned about vehicle idling on Alton Place, with its attendant fumes. The BZA at that time was trying to improve the traffic patterns for pick up and drop off of children. *BZA Final Order in Case No.17726* (2009), (Exhibit 38 herein, page 14), regarding the same lot.

The Sunrise shuttle will be operating multiple times a day. Sunrise states the 7-ton shuttle bus, ambulances, and fire trucks would be told to use Alton and to use the curb cut to pull in and idle. This result is traffic and air quality concerns for neighbors.

The refrigerated trucks bringing food for the many staff and residents at the site will idle in order to keep the food refrigerated. In addition, fumes from the 20 trucks per week (7-ton shuttle, 28-ton trucks and 30-foot box trucks), as well as fumes from both the dry and wet garbage generated by 121 residents, over 70 staff and a 250-seat church, should be of grave concern to the BZA because it is 8 feet from nearby neighbors. In 2009, the BZA wanted the "trash enclosure … close to the street, obviating the need for trash trucks to drive into the parking lot or up the drive aisle any significant distance ..." *BZA Final Order in Case No. 17726* (2009), (Exhibit 38 herein, p. 14), regarding the same lot. Now, Applicant would bring the trash trucks down the ramp at Alton, past the loading berth, back into the loading berth and then back up the ramp to Yuma. See Exhibit 52A at p. 11 and Exhibit 53 at p. 6. Factor in that 121 full time residents, over 70 staff daily and visitors generate a lot of trash and waste – both wet and dry.

> From Sunrise website
> TRASH: **Q: How will trash storage and pickup be handled?**
> A: All trash will be contained inside the proposed building in a conditioned room. Sunrise will employ a private trash pickup company that will only pick up trash during specified hours (typically M-F 9am to 5pm). **Sunrise website on October 14, 2018. Exhibit 73.**

Objectionable "loading." It is very unlikely that commercial garbage trucks can operate their hydraulic lifts within the garage due to ceiling heights. It is questionable whether such trucks can get into the garage in the first place, unless the door is far higher than the norm or the trucks are far shorter than a normal commercial garbage truck.

The loading berth **(12 X 30 feet)** plus the Lift will be in the truck ramp. The ramp is a less than 8 feet from the neighbors with whom Sunrise shares a property line. All smells, noises and sight perspective will be outdoors on the truck ramp.

Objectionable waste collection. Every Sunrise – see Sunrise on Connecticut Avenue and Brighton Gardens a few blocks across Western Avenue – has large roll-off trash containers permanently stationed outside next to their buildings, where dry trash – paper, furniture, mattresses, and more – are piled up**.**

Objectionable waste – medical waste. There will be residents/patients needing injections for diabetes and other conditions. This means used needles and other medical waste that must be safely removed from the site.

Objectionable total number of employees, residents and visitors. The total is 75 employees, over 200 people daily, more on Sunday, on a lot zoned for single family homes, next to single family homes.

"Objectionable," as used in the DC zoning code includes: lighting, hours of operation, parking, number of employees, number of attendees, creating no dangerous or otherwise objectionable traffic conditions or other operational characteristics that are not customarily associated with residential use. See 11-U DCMR §§ 513, 518, 601,802 and 11-X DCMR § 101.

"Objectionable" Lighting.

Applicant states:

> "*…the CCRC use will not create any objectionable conditions with respect to lighting. First, exterior lighting is not proposed for the Tenleytown CCRC, except* ***at the entrance*** *and* ***along the garage ramp and entrance.*** *All lighting will be directed downward so as not interfere with adjacent properties. Limited exterior lighting will also be provided in the* ***loading dock area*** *during the early evening hours (approximately 4:00 PM to 6:00 PM).* ***After 11:00 PM****, any exterior illumination at the entrance and any required* ***interior lighting*** *will be* ***dimmed*** *to the* ***greatest extent possible****.* ***Interior shades will also be installed*** *to further reduce any* ***lightwash from the building to adjacent properties****. Modest* ***path lighting and decorative wall sconces will also be installed at the church entrance,*** *which will be residential in quality. Consequently, no adverse effects from lighting will result from the project." Exhibit 69, page 17.*

Applicant states the church will residential lighting so we have to assume Sunrise will use commercial grade lighting at entrances, including the truck ramp abutting the 39th Street neighbors. For safety and liability purposes, Sunrise will use commercial lighting. These types of lights create "light pollution" that is particularly objectionable in a residential neighborhood of single family homes. The lights along the truck ramp face the backs of the 39th Street homes 9 feet away, including their bedroom windows. The entrance lights would directly face the homes on Alton and Yuma. Sunrise's claims regarding their attempts to decrease the ill effects of commercial level lighting in the midst of single family homes are not persuasive.

The Sunrise project is likely to become objectionable to the neighboring properties because of volume of use that includes 121 residents, 75 employees at a minimum, plus noise, traffic, lighting, odors, including truck fumes, and unappealing appearance of the rear of the building. Specifically, the five abutting homes are less than 9 ½ feet from the Sunrise's replacement fence and truck ramp overlooking a retaining wall of 13 feet and a driveway that features a loading berth, lift and trash bins for a facility where containing over 450 people. This is a R-1-B zone, meant for single family detached homes that should not be mandated to look directly at the rear of a commercial facility's service entrance with its attendant noise, lights, trash, rodent attraction, smells, and off/on loading. Sunrise has said they will install a row of trees on top of the retaining wall which would only "soften" the view from the Sunrise side because the neighbors will be looking at the back side of the 6-foot replacement fence. Diagram of Garage Plan at page 147. See also lot layout at page 110.

***PER SE OBJECTIONABLE* – irrefutable evidence that the value of homes next to the proposed project have already diminished**

Since Sunrise announced it plans for the site last fall, three of the houses on the 200-foot list have been put on the market. This is a dramatic turnover for a neighborhood known for stability with few houses put on the market over many years.

Of the 5 homes that share a property line with the proposed Sunrise project, 2 have been put on the market. These homes have sold well below market due to the announced project. The middle home of the 5, was placed on the market at $895,000 although it was assessed for tax purposes at $903,260 – and assessments traditionally are below market value. The other house that is at the end of the 5 that share a property line was listed at $1.095 and went under contract but eventually sold for $1.05 million.

This area of Tenleytown is a very stable neighborhood. This neighborhood is not on Wisconsin Avenue. 121 residents, over 70 staff and a 250-seat church inevitably will have an impact on the character of the neighborhood. 20 trucks per week, a 7-ton shuttle bus with multiple trips per day sitting on the Alton curb cut, emergencies that bring ambulances and firetrucks, major shift changes at 6:30 am every day of the week next to single family homes, and events where they invite the families of the 121 residents. There is no possibility that all of these commercial activities generated by the landlord of a for-profit facility will do anything but "affect adversely, the use of neighboring property." See the *BZA Order in Case No.17726* (2009), (Exhibit 38 herein) where the BZA discussed the traffic and parking issues created by the use of the lot – and that was far fewer people on the lot than is contemplated herein

Sunrise has suggested the possibility of buying out the homeowners of the five abutting properties <u>after</u> the completion of the project, when the value of the properties has been significantly diminished. This action, as well as the fact that 2 out of 5 of those have

gone on the market since the project was announced last fall, directly speaks to the possible destruction of the R-1-B housing in a Neighborhood Conservation Area.

Sunrise's suggestion to the contrary, houses near the perimeter of the R-1-B zone deserve the same zoning protection as all other houses in the zone. There is no support in the regulations for Sunrise's contention. To agree with Sunrise would dramatically undermine the expectations of homeowners who rely on zoning laws to protect their neighborhood and property interests.

This proposed project should be rejected for failure to meet the regulatory requirements for a CCRC special exception, particularly for insufficient parking, the existence of a dangerous retaining wall, and the "likelihood of becoming objectionable to the immediate neighbors."

IF THE BZA GRANTS A SPECIAL EXCEPTION FOR A CCRC, SUNRISE SHOULD INDEMNIFY ALL WHOSE PROPERTY IS HARMED.

If the BZA finds that applicant has met the burden on the record that they meet the conditions to be granted a special exception to build a CCRC, then -

"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 it deems necessary to protect adjacent or nearby properties"** (See 11-U DCMR § 203.1 (f) (6)); and

"The Board of Zoning Adjustment **may impose 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."** See 11-X DCMR § 901.4.

This ability of the BZA is particularly relevant regarding the proximity of the truck ramp to neighbors sharing the property line and especially regarding vibrations during construction that are described by the applicant as likely to cause damage to our homes and may also create problems for WMATA's tunnel under the lot.

WMATA

The Washington Metropolitan Area Transit Authority (WMATA) tunnel, carrying the subway between Tenley-AU and Van Ness stops, goes diagonally under the site.

The tunnel is approximately 100 feet down from the surface but closer, of course, to the floor of the two-story underground parking and to the construction pile driving that is

foreseen as necessary to build this large a building. WMATA has said that if this project goes forward, Sunrise has to indemnify them for any harm done to the subway.

WMATA General Manager and CEO Paul Weidefeld quoted below. For full letter, see Exhibit 75.

WMATA General Manager and CEO Paul J. Weidefeld in his letter of January 26, 2018

Subject: Proposed Sunrise Facility at 3920 Alton Place NW, Washington, DC

> *…Sunrise representatives have been working with WMATA's Joint Development and Adjacent Construction (JDAC) staff who are tasked with reviewing and approving projects that affect WMATA's right of way. JDAC's initial review has found that this project has potential impacts on WMATA's facilities, which will require further analysis to determine specific measures by the project to address our concerns. Staff will review information about potential water intrusion. Further, WMATA requires developers of all projects adjacent to Metrorail facilities to indemnify WMATA against any complaints owing to vibrations from trains and compensate WMATA for any possible damage to WMATA facilities. … I hope this answers your questions regarding WMATA's role.*

What is the risk of making the tunnel leak in light of leaking water having caused electrical shorts in WMATA tunnels in the past? Even Sunrise was concerned when on November 1, 2017, they said they might explore "spread footings" rather than pile driving footings because of the WMATA Tunnel. On November 1, 2017 at a meeting at WABC, Sunrise SVP Kroskin stated that Sunrise must do a vibration analysis for WMATA. The BZA should require Sunrise to place their vibration analysis in the BZA record for this case.

DDOT's Transportation Report did not include any mention of the WMATA Tunnel or any risk analysis regarding the tunnel. See Exhibit 53.

SLOPE OF TRUCK RAMP, LOADING PLATFORM AND SERVICE DELIVERY SPACE REQUIREMENTS

No special exception is requested for the grade of the truck ramp but it is questionable whether applicant meets the requirement that the slope be no more than 12% grade (12-foot drop over 100 feet).

No special exceptions are allowed regarding regulatory requirements for Loading Berth, Loading Platform and Service Delivery Space. They have not shown that they are in compliance and it appears they are not in compliance.
First, none of the special exceptions provided in 11-C DCMR § 909 would grant the Board jurisdiction to grant an exception regarding the issues raised below because the issues do not involve a curb cut, issues addressed in §§ 904.2 or 904.3 or screening.

No special exception is available to remedy the issues raised below, therefore applicant must demonstrate that they are in compliance with the requirements for a loading berth, loading platform and service delivery space. They have not done so.

The relevant regulatory sections: 11-C DCMR §§ 904, 905 and 909

11-C DCMR § 904 ACCESS REQUIREMENTS

904.1 All loading berths and service/delivery spaces shall be accessible at all times from a driveway meeting the requirements of Subtitle C §§ 904.2 and 904.3.

904.2 A driveway or access aisle leading to a loading berth or service/delivery space shall have a minimum width of twelve feet (12 ft.), a maximum width of twenty-four (24) feet, and a maximum slope of twelve percent (12%).

904.3 No driveway providing access to a loading berth or service/delivery space shall be located in such a way that a vehicle entering or exiting from the loading berth blocks any street intersection.

904.4 A loading berth or service/delivery space shall be designed so that it is usable and accessible by the vehicles that it is intended to serve.

904.5 All loading berth or service/delivery space shall be located to be accessed from a public alley, where an open and improved alley of fifteen feet (15 ft.) width exists.

SOURCE: Final Rulemaking & Order No. 08-06A published at 63 DCR 2447 (March 4, 2016 – Part 2).

11-C DCMR § 905 SIZE AND LAYOUT REQUIREMENTS

905.1 The intent of this section is to ensure that loading facilities are adequately sized and capable of performing their intended functions.

905.2 All loading berths shall be a minimum of twelve feet (12 ft.) wide, have a minimum depth of thirty feet (30 ft.) and have a minimum vertical clearance of fourteen feet (14 ft.).

905.3 All service/delivery spaces shall be a minimum of ten feet (10 ft.) wide, have a minimum depth of twenty feet (20 ft.), and have a minimum vertical clearance of ten feet (10 ft.).

905.4 All loading berths shall be accompanied by one (1) adjacent loading platform that meets the following requirements:

(a) A loading berth that is less than fifty-five feet (55 ft.) deep shall have a platform that is at least one hundred square feet (100 sq. ft.) and at least eight feet (8 ft.) wide;

(b) A loading berth that is fifty-five feet (55 ft.) deep or greater shall have a platform that is at least two hundred square feet (200 sq. ft.) and at least twelve feet (12 ft.) wide;

(c) Loading platforms shall have a minimum vertical clearance of ten feet (10 ft.); and

(d) A loading platform floor shall consist of one (1) horizontal level.

905.5 No loading platform need be provided for loading berths if the required loading berth is increased in depth for the full width thereof, such that the resulting enlarged loading berth is equal in area to the combined area of a required loading berth and a required loading platform.

905.6 The dimensions specified in this section for loading berths and service/delivery spaces are exclusive of access aisles, maneuvering space, and loading platforms.

SOURCE: Final Rulemaking & Order No. 08-06A published at 63 DCR 2447 (March 4, 2016 – Part 2).

[§ 906 – maintenance; § 907 – trash room; and § 908 – screening - are not relevant to this discussion.]

11-C DCMR § 909 SPECIAL EXCEPTIONS FROM LOADING REQUIREMENTS

909.1 This section provides flexibility from the loading requirements when providing the number of spaces required is impractical or contrary to other District regulations.

909.2 The Board of Zoning Adjustment may grant, as a special exception, a full or partial reduction of the number of loading berths or service/delivery spaces required by Subtitle C § 901.1 if, in addition to meeting the general requirements of Subtitle X, Chapter 9, the applicant demonstrates that:

(a) The only means by which a motor vehicle could access the lot is from a public street, and provision of a curb cut or driveway on the street would violate any regulation in this chapter, or in Chapters 6 or 11 of Title 24 DCMR; or

(b) historic resource –

909.3 The Board of Zoning Adjustment may grant, as a special exception, a waiver of the access requirements of Subtitle C §§ 904.2 and 904.3 if, in addition to meeting the general requirements of Subtitle X, the applicant demonstrates:

(a) The lot has unusual topography, grades, shape, size, or dimensions; or

(b) Alternate access arrangements would improve site design, landscaping, or traffic patterns or provide safer ingress or egress.

909.4 The Board of Zoning Adjustment may grant, as a special exception, modifications, or waivers of the screening requirements of Subtitle C § 908 if, in addition to meeting the general requirements of Subtitle X, the applicant demonstrates that:

(a) Existing protective and screening walls on the lot or on adjacent property are adequate to prevent adverse impacts on adjacent property; or

(b) Provision of protective screening walls would result in the removal of healthy trees or other landscaping, or architectural features determined by the Board of Zoning Adjustment to be worthy of protection or to provide equal screening benefits.

909.5 When granting a special exception under this section, the Board of Zoning Adjustment may impose conditions as to screening, lighting, coping, setbacks, fences, location of entrances and exits, widening of abutting alleys, loading management or transportation demand management practices, or any other requirement it deems necessary to protect adjacent or nearby property and promote the public health, safety, and welfare.

SOURCE: Final Rulemaking & Order No. 08-06A published at 63 DCR 2447 (March 4, 2016 – Part 2).

MAXIMUM SLOPE – MAY BE STEEPER THAN THE 12% ALLOWED.

Special exception relief from the requirement that a driveway ramp cannot exceed a 12% slope (drop of 12 feet over 100 feet). The slope maximum is included in 11-C DCMR §§ 904.2 is to ensure safety. A special exception can be granted to the slope requirement (11-C DCMR §909.3) but no special exception has been requested.

Should Sunrise be asking for a special exception from the maximum slope of 12 feet over 100 feet that is allowed under 11-C DCMR § 904.2?

The special exception can be granted by the BZA under 11-C DCMR § 909.3, however, only if Sunrise demonstrates that (a) The lot has unusual topography, grades, shape, size, or dimensions; or (b) Alternate access arrangements would improve site design, landscaping, or traffic patterns or provide safer ingress or egress.

Regarding the proposed slope, we know that the lot is 220 feet long on the relevant side, that the retaining wall is 13 feet and presumably they need a horizontal area at the bottom of the ramp to enter the garage door. Since the ramp needs to be symmetrical – the trucks must go both down and up the ramp, we can use 110 feet for purposes of discussing the slope angle. The maximum slope is 12 feet over 100 feet. Is Sunrise in compliance?

AND besides the need to comply on the exterior, they must also have indoor ramps of no more than 12 feet over 100 feet to access the service delivery space.

Even if they can meet the maximum slope of 12 feet over 100 feet on the external truck ramp, it seems extremely unlikely that they have stayed within the maximum on the internal ramps to the service delivery space. For this reason, the BZA should deny this application.

The lot on the side where the truck ramp will be located is 220 feet. The truck ramp is symmetrical with a down ramp and an up ramp. So, dividing the 220 feet equally for the up and down nature of the ramp, you get 110 feet maximum to work with but some of that would be for a flat area for the loading berth, loading platform, garage entrance door.

Large trucks need to be able to stop unexpectantly and in all weather. The slope maximum included in 11-C DCMR §§ 904.2 is to ensure safety. A special exception can be granted to the slope requirement (11-C DCMR §909.3) but no special exception has been requested. Whether a special exception is requested or not, DDOT must analyze whether the proposed slope complies and whether it is a safety hazard to the neighbors, including small children, who live less than 17 feet from the truck ramp.

LOADING BERTH, LOADING PLATFORM AND SERVICE DELIVERY SPACE REQUIREMENTS NOT MET

There is no evidence that applicant complying with the regulatory requirements for a Loading Platform and Service Delivery Space pursuant to 11-C DCMR §§ 900 - 909. There are no special exceptions available for the relevant issues. See Applicants' **Upper Level Garage Plans herein at page 147**. **See also diagram at page 110.**

The Applicant must address the following issues:

(1) Does the "lift" qualify as a "loading platform" where the "floor shall consist of one (1) horizontal level," is 100 SF and has a "minimum vertical clearance of ten feet (10ft.)?" 11-C DCMR §905.4

(2) Does the “service delivery space” have a “minimal vertical clearance of ten feet (10 ft)” as required by 11-C DCMR §§ 905.3?

(3) The “service delivery space shall be designed so that it is usable and accessible by the vehicles that it is intended to serve” and it must be “accessible at all times from the driveway” as required by 11-C DCMR §§ 904.1 and 904.5, respectively.

Does the Lift qualify as a “loading platform”?

1. 11-C DCMR §. 905.4 states: “Each loading berth shall be accompanied by one (1) adjacent loading platform.” Applicant has not labeled it as a “loading platform.” Is applicant counting it as a “loading platform?”

2. No measurements have been provided for the lift so a question is – if it is supposed to be a loading platform - does it meet the minimum requirement of 100 SF as required by § 905.4(a)?

3. Assume, although this is surmised from the name, that it is an elevator, does an elevator qualify as a “loading platform with a horizontal floor?”

4. The minimum vertical clearance has to be 10 feet. If it is an elevator, as it goes up and down, does it always have a 10-foot clearance?

The Service Delivery Space (vertical requirement):

1. In order for the service delivery area to have the 10-foot vertical clearance required, applicant must show that from the truck ramp through the door to the garage and down to the service delivery space there is never an area of less than 10 feet. Applicant has provided no information showing they are compliant.

The Service Delivery Space (10 feet X 20 feet) accessibility:

1. Is a service delivery space inside the garage usable and accessible at all times to the trucks it is intended to serve?

   At a minimum, trucks expected include: 20 box trucks per week - 4 trucks/ day M-F or 8 trips in or out. This includes 6-7 deliveries per week by the 28-ton Sysco food trucks (twice per week); Trash (three times per week), and other supply trucks, including the 28-ton Alsco trucks delivery uniforms and laundry (once or twice a week).

   Plus, USPS/FedEx/UPS are expected to make 10-12 stops at the building each week.

   In addition to the 20 trucks noted above, the 7-ton shuttle bus makes **multiple trips per day.** Finally, of course, at least 2-3 ambulances and fire trucks each week.

2. Will the 28-ton trucks delivering food and linens actually go inside the garage to use the “service delivery space?” Or the 30-foot box truck?

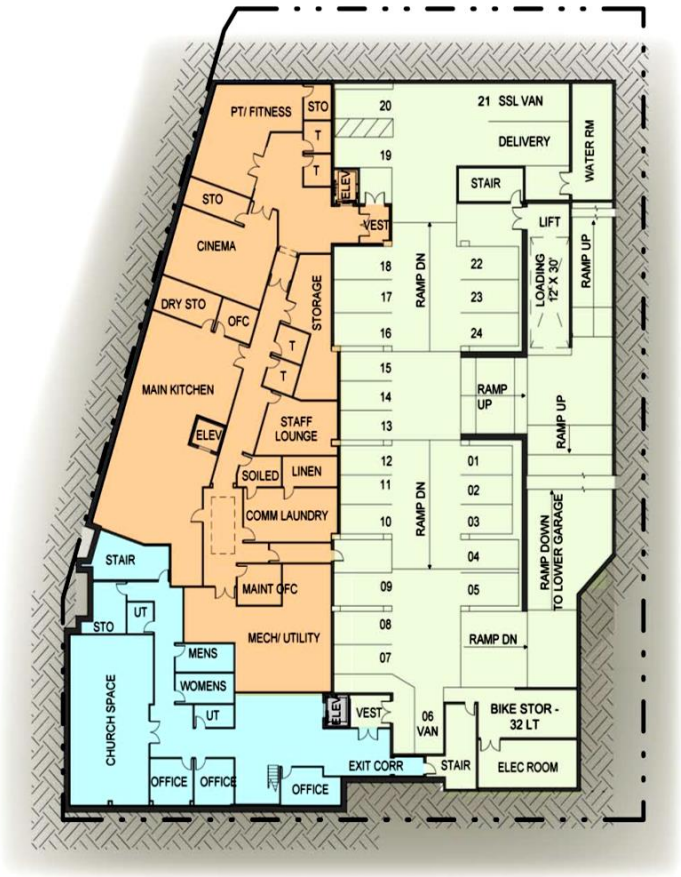
3. Is there enough room for these large trucks to go inside the garage and get back out?

4. The trucks are big – 28 tons and 30 feet long – and the service delivery space has its short end more accessible than its long side but even the short end is near the end of a ramp.

5. The service delivery space, besides being at the end of a ramp, is surrounded by areas designated for other uses. On the 20-foot side of the 10 X 20-foot service delivery space, the plans show that it is next to a stairway, the lift, and the access area for the water room, plus on the other side the plans show the intention to park the 7-ton shuttle bus.

To conclude, the “service delivery space” is not accessible to the trucks it is intended to serve and is in violation of 11-C DCMR §§ 904.1 and 904.5.

As background, the June 18, 2018 letter from the Zoning Administrator (Exhibit 18) stated that 11-B DCMR § 200.2 (bb)(1) defined residential to include “assisted living” for parking and loading requirements. The chart at 11-C DCMR § 901.1 lists “residential” as the minimum requirements for residential as: 1 loading berth and 1 delivery space. The Zoning Administrator made no other findings regarding loading requirements.



WISCONSIN AVENUE BAPTIST CHURCH SPACE

SUNRISE SENIOR LIVING SPACE

PARKING SPACE

TOTAL PARKING SPACES 24

LONG TERM BIKE RACK 32

UPPER LEVEL GARAGE

Wisconsin Avenue Baptist Church

WISCONSIN AVENUE BAPTIST CHURCH

SUNRISE SENIOR LIVING

SUNRISE SENIOR LIVING

Exhibit 69E2, page 3.4

PERVIOUS REQUIREMENT: SUNRISE MUST DEMONSTRATE THAT THEY HAVE MET THE 50 PRECENT PERVIOUS LOT REQUIREMENT

Sunrise has not given any details how they are meeting this requirement that half the lot has to be pervious. The applicant merely states that their proposal is 50 percent pervious (half the lot) without providing any detail. On a lot that is covered by the building and many curb cuts and ramps, more detail should be in the record to show that they have in fact met this requirement.

The minimum required pervious surface of a lot in the R-1-A or R-1-B zones shall be fifty percent (50%). 11-D DCMR § 308.1.

Pervious Defined at 11-B DCMR § 100.2:

- *Permeable Paving: A surface that facilitates water infiltration through paving material while providing a stable, load-bearing surface. Examples include pervious concrete, porous asphalt, perforated brick pavers; flexible porous paving (including porous rubber), mechanically reinforced grass; but do not include grass or gravel.*
- *Pervious Surface: A surface that allows the percolation of water into the underlying soil. Pervious surfaces are required to be contained so neither sediment nor the pervious surface discharges off the site. Pervious surfaces include grass; mulched groundcover; planted areas; vegetated roofs; permeable paving as well as porches and decks erected on pier foundations that maintain the covered lot surface's water permeability. Pervious surfaces do not include any structure or building, any porch or deck that limits the covered lot surface from absorbing water; or any outdoor stairs; on-grade surface sports court, swimming pool, artificial turf, sidewalk or patio constructed of concrete, asphalt, brick, compacted gravel or other material that impedes the infiltration of water directly into the subsurface of the lot.*

Pervious surface regulations are intended to provide a minimum amount of pervious area and limit the amount of impervious surface on a lot.

11-C DCMR § 500.1. The minimum pervious surface percentage shall be as required by the development standards for the R and RF zones. 501.1.

The minimum pervious surface percentage requirement shall be applicable only in conjunction with the following: (a) The construction of a new principal structure; ... 501.2

502.1 Only the following shall be considered pervious surfaces for the purposes of calculating the pervious surface area: (a) Grass, mulched groundcover, all areas of a vegetated roof planted with a growing medium, and other planted areas; (b) Permeable or pervious pavers or paving that facilitate the infiltration of water into the soil; and (c) Decks or porches constructed above the surface of the lot that are erected on pier foundations, and that maintain a permeable surface underneath that can facilitate the infiltration of water into the soil.

502.2 Pervious surfaces on a lot shall not include: (a) On-grade surface treatments used for purposes of recreation (e.g. patios), outdoor stairways, walking, driving and parking areas made of concrete, brick, asphalt, decorative pavers, compacted gravel or other material that does not facilitate the infiltration of water directly into the subsurface of the lot; (b) The building footprint based on its foundation perimeter, whether located below grade or at grade; (c) Where a building does not have a foundation, the area of the roof; and (d) The area dedicated to a below or above grade swimming pool.

502.3 The percent of pervious surface area shall be calculated by dividing the total area of pervious surfaces on the lot by the total area of the lot.

Source: *Final Rulemaking & Order No. 08-06A published at 63 DCR 2447* (Mar. 4, 2016 – Part 2).

CONCLUSION

Sunrise argues that the drafters of the Continuing Care Retirement Community (CCRC) special exception in a residential zone must have meant for it to be accompanied by many other variances and special exceptions but the drafters did not contemplate two high volume uses on the same lot – a CCRC and a church. The lot at 3920 Alton is not large enough to accommodate the massive CCRC and this problem is exacerbated by the fact that the building would also include a church.

Sunrise has not made a case that it meets the definition for a CCRC. They have not demonstrated that there is any "continuity of care," particularly in light of their eviction policy, and it is an open question whether they will provide any health care.

There are no affordable housing units in this proposal.

This CCRC special exception use is located and designed so that it is "likely to become objectionable to neighboring properties because of noise, traffic, or other objectionable conditions." There is not sufficient off-street parking for employees, residents, and visitors. The Sunrise building would have a dangerous retaining wall of 13 feet abutting single family homes. The applicant has not sustained their burden to prove no adverse impact.

Sunrise seeks multiple area variances for property it does not own. Only an owner can request variances. Sunrise and WABC are separate legal entities. There is no joint venture. WABC occupies 13% of the building and does not need the variances. The special exceptions and area variances are being requested to accommodate Sunrise, which wants the variances and special exception to have a big enough facility to produce their desired level of profit.

The WABC property has no exceptional narrowness, shallowness, shape, or topographical conditions or other extraordinary or exceptional situation or condition that

would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property. Neither Sunrise or the church made a showing that they are public service organizations. This project does not meet the criteria for flexibility that might be applied if there was a “public service” being provided. There are zero affordable units. Sunrise is a for-profit multinational corporation.

The requested variance relief for 58% lot occupancy (instead of 40%), 4 stories (instead of 3 stories) and elimination of an 8-foot side yard are all to increase the volume of the use of the building and are not in keeping with a low density zone. The variances cannot be granted without substantial detriment to the public good, which is defined as the impact on the neighbors. Sunrise is a for-profit multi-national corporation.

The Sunrise project would be a serious overuse of the site, which shares a boundary with 5 single family detached homes and has single family homes on all sides of the site, with the 4th side being federal park land on both sides of Nebraska, which is not a commercial street, with the Grant Road Historic District located within 200 feet next to the park land. The proposed building would be 4.8 inches from one property line, 10 feet from another property line where the drop-off/pick-up and shuttle bus parking is located, directly on the third property line and the fourth property line has a truck ramp for use by 20 trucks per week including 28-ton trucks and 30-foot box trucks, as well as a retaining wall of 13 feet. This is per se objectionable on a single-family lot in a single-family neighborhood.

There are other options for both WABC and Sunrise

- To finance renovation of their building, WABC can sell two full size R-1-B zoning compliant lots and raise approximately $1.7 million. See Exhibits 80 and 79.

- Sunrise has been asked repeatedly to consider other options on the commercial avenues. For example, the Federal National Mortgage Association, a few blocks down Wisconsin, is being developed by Roadside and they have said they would like to include something for seniors. Sunrise should explore commercial options if they cannot build a facility on a much smaller scale.

For the foregoing reasons, we strongly urge the BZA to disapprove the proposed Sunrise/WABC project. Sunrise’s failure to adhere to the zoning regulations is unfair to the tax paying homeowners whose family homes and primary investments are jeopardized by this out-of-scale project.

APPENDIX

St. Mary's Episcopal Church v. District of Columbia Zoning Commission, Respondent, Hillel at George Washington University District of Columbia Court of Appeals No. 16-AA-491, Dec 7, 2017

***St. Mary's Episcopal Church v. District of Columbia Zoning Comm'n*, 174 A.3d 260 (D.C. 2017)**

We are taking the time to distinguish *Hillel* here because Sunrise has frequently cited the case as support for their many requests. So, what is the applicability of the St. *Mary's Episcopal* v. *Hillel* decision issued by the DC Court of Appeals?

The *St. Mary's Episcopal Church* decision cited by Sunrise in support of its arguments is readily distinguishable from the Sunrise/WABC project. In *St. Mary's Episcopal Church, et al., Petitioners ("St. Mary's")* v. *District of Columbia Zoning Commission ("Commission"), Respondent, and Hillel at George Washington University, Intervenor ("Hillel")* (District of Columbia Court of Appeals) ("court") (2017), the petitioners sought court review of the Commission's approval of an application for zoning relief filed by Hillel. In particular, St. Mary's objected to the Zoning Commission's granting of lot occupancy and rear yard variances.

In summary, some of the differences between the St. Mary's case and the Sunrise/WABC proposed project include the following:

Hillel was the owner and had been the owner of the property for 30 years for which it was seeking area variances and a special exception for the roof structures. Hillel's lot is "located in a high height and medium-high density residential zone" and is "on a narrow rectangular corner lot-75 feet along H Street and 61 feet along 23rd Street" with no rear alley access.

The core issue in *St. Mary's* v. *Hillel* is that Hillel needs to accommodate its religious practices – two kosher kitchens, wide stairs, large sanctuary and assembly hall, roof access. GWU is renting the top two floors – but remember there is no request for a height increase here since Hillel is in a zone that allows 90 feet. Also, GWU is foregoing construction on another site they own in the neighborhood in an agreement to reduce density in the neighborhood that, if granted, the zoning requests in the Hillel case would bring. The Commission approved the use of the 3rd and 4th floors "for student life and academic uses only."

> *To meet its current institutional and religious needs, Hillel's new facility must have a sanctuary, with a vestibule, that is large enough to accommodate worship services; a dining space large enough for regular religious services as well as holiday meals; two kitchens to allow kosher food preparation and kosher services; a rooftop that can hold a sukkah (a booth-like structure, or a hut) for the celebration of Sukkot, a festival commemorating the period in which the children of Israel wandered in the desert and*

> *lived in temporary shelters; space for student counseling, ministry, and education; and informal gathering space for socialization. As envisioned, the new facility will contain a basement, second floor, and two leased floors. The lower level of the new facility will contain a sanctuary, dining hall, and two kosher kitchens –separating meat and dairy. The second floor will be dedicated to staff offices, a student lounge, gathering space, a study area, and a library. The third and fourth floors will be leased to GWU. St. Mary's Episcopal Church v. District of Columbia Zoning Comm'n, 174 A.3d 260, 264 (D.C. 2017)*

Sunrise does not own 3920 Alton but merely picked the site for its business when they could pick other sites that are more appropriate. Hillel, by comparison, already owns the site at 23rd and H Streets and in order to function as part of the student religious services on campus needs to stay on campus. Hillel's student participation is increasing from 45 to 100 with an expectation of having 140 students in the near future, and they are seeking to accommodate their demonstrated and predicted growth.

WABC by comparison currently has 18 congregants and no indication of growth. Sunrise wants to come to the lot at 3920 Alton to build a new facility where they currently have nothing. There is no claim that the building must be a certain size to accommodate religious practices. The requests for zoning changes are all driven by the arrival of Sunrise and its desire to have a for-profit facility of a certain size in a residential neighborhood. No argument has been put forward by applicants that the proposed building is being structured to accommodate current religious practices as is the case in *Hillel*.

The zoning relief granted by the Commission was subject to certain conditions, including a construction management agreement between St. Mary's and Hillel and required GWU to forgo development on another of its sites covered by the Campus Plan.

The area variances and special exceptions were requested by Hillel to accommodate the religious practices of Hillel and its institutional needs - the need for a sanctuary and two Kosher kitchens.

> *[In Hillel], ...the Commission concluded that Hillel 'is affected by an exceptional condition arising from a confluence of factors,' including (1) the size, shape, and configuration of its lot – the lot is smaller in size than that of neighboring religious institutions, and synagogues in the District of Columbia; and (2) its demonstrated need to improve and expand its facility and maintain its location near the GWU campus where it can best serve its primary constituency – students. It further found that Hillel 'is an organization with unique institutional and religious needs that are not related to general conditions in the neighborhood' but 'uniquely tied to' GWU and its 4,500 Jewish students; and the existing facility cannot 'accommodate existing demand for certain events' and anticipated future growth. Due to limited space, Hillel has not been able to accommodate those desiring access to the existing facility 'not only for holidays but also for regular Friday Shabbat services and dinner.' These findings are based on substantial evidence, as shown in the factual summary of this opinion. The findings also are supported by our case law. See Ait-Ghezala, supra, 148 A.3d at 1217*

(property's 'irregular shape' and 'narrow width' constituted 'part of a confluence of features that justify the grant of an area variance'); Fleischman v. District of Columbia Bd. of Zoning Adjustment, 27 A.3d 554, 561 (D.C. 2011) (uniqueness found due to 'site's irregular shape' and 'physical configuration'); Monaco v. District of Columbia Bd. of Zoning Adjustment, 407 A.2d 1091, 1097 (D.C. 1979) (need to expand an existing building may be an exceptional condition; the Commission 'may be more flexible when it assesses a non-profit organization'); Draude v. District of Columbia Bd. of Zoning Adjustment (Draude II), 582 A.2d 949, 955 (D.C. 1990) ('institutional necessity for GWU to expand its ambulatory health care facilities [to] be physically linked and interconnected with' an adjacent building consisting of GWU faculty offices). St. Mary's Episcopal Church v. District of Columbia Zoning Comm'n, 174 A.3d 260, 269-270 (D.C. 2017).

The court did not disturb the Commission's granting of area variance relief based on the Commission's findings that in the *Hillel* situation:

1) there was an extraordinary or exceptional condition affecting the property;

2) there was substantial evidence in the record to support the Commission's conclusion of institutional necessity; and

3) the requested variance relief could be granted without substantial impact to the public good.

The Commission has stated that it "may be more flexible when it assesses a non-profit organization." Id at 269-270.

In the instant matter, Sunrise, not an owner, seeks a CCRC special exception in a R-1-B zone that would allow the construction of a massive four-story structure with 58 percent lot occupancy in the midst of a neighborhood of single family homes.

Discounting that this case should be dismissed because Sunrise is not an owner and cannot request any variances, but if they did have standing, the CCRC special exception use is not located and designed so that it is "not likely to become objectionable to neighboring properties because of noise, traffic, or other objectionable conditions." There is not sufficient off-street parking for employees, residents, and visitors. Even in 2009, the BZA said that "The applicant shall direct all individuals who drive to the subject property to, if possible, park in the parking lot, and not on surrounding streets." *BZA Final Order in Case No.17726* (2009), (Exhibit 38 herein, page 21), regarding the same lot.

The Sunrise building has a dangerous retaining wall of 13 feet abutting single family homes that requires the granting of a special exception.

Sunrise seeks multiple area variances for property it does not own. Sunrise and WABC are separate legal entities and there is no joint venture.

The WABC property has no exceptional narrowness, shallowness, shape, or topographical conditions or other extraordinary or exceptional situation or condition that would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property.

There is no evidence of institutional necessity.

The requested variance relief cannot be granted without substantial impact to the public good. Sunrise is a for-profit multi-national corporation. The special exceptions and area variances are being requested to accommodate an entity, Sunrise, that states that they need the variances and special exception to have a big enough facility to produce the profit margin they seek.

Sunrise arguing that *St. Mary's Episcopal* v. *Hillel* should control is another example of Sunrise cloaking its commercial project in the mantle of the church. There are religious institutions involved in both but that is where the similarities end. Sunrise, which would occupy more than 87 percent of the proposed facility and has no religious function.

Distinguishing Hillel from the Sunrise situation

1. In *Hillel*, Hillel is the **owner** of the property and Hillel is requesting the zoning relief for its own religious institutional needs.
2. In WABC/Sunrise, the owner of the property is WABC but the relief is all to accommodate Sunrise. WABC and Sunrise have stated that this project is not a joint venture and they are not in business together. **WABC authorizing Sunrise to speak for them makes Sunrise an agent for WABC. But the accommodations are not for WABC – and an agent cannot make a request for themselves. An agent (Sunrise) has no standing as a non-owner to request variances that are for Sunrise.**

3. In *Hillel*, both Hillel and GWU are non-profits, which according to the court are judged under a standard that is "more flexible when it assesses a non-profit organization. [GWU's role was primarily because this lot was located on the campus plan and the plan was amended to state that GWU was giving up development of a lot to minimize the density in the neighborhood.]
4. In Sunrise/WABC, the zoning variances and special exceptions are being requested to accommodate a for-profit business who, a few years after they build their facilities, sells their facilities to Welltower Real Estate Investment Trust (REIT), which is traded on the stock exchange.

5. In *Hillel*, the zoning variances being requested were to accommodate the religious practices of Hillel – their need for a sanctuary and two kosher kitchens and the need to stay on campus to serve the students, which is their mission.
6. In Sunrise/WABC, the zoning variances and special exceptions are being requested to accommodate an entity, Sunrise, which states they need the variances to have a big enough facility to make a sufficient profit – although there are many senior facilities with fewer than 121 residents and more than 70 staff.

7. In *Hillel*, the zoning variances are being requested by a religious entity that serves students attending GWU and it therefore needs to stay in its current location on the campus.
8. In Sunrise/WABC, Sunrise has over 300 facilities and wants to locate one of the new ones on the residential lot at 3920 Alton. There is no core reason why it must be this lot as opposed to a more appropriate lot in a commercial zone or elsewhere.

9. In *Hillel*, the lot is located in an RA-4 zone that is zoned medium density, allowing 90-foot heights. There are no single family detached homes nearby.
10. In Sunrise/WABC, the lot is in an R-1-B zone and zoned for and is surrounded by single family detached homes, some within 9 1/2 feet from Sunrise's proposed truck ramp.

11. In *Hillel*, the lot is only **4,575 SF** and is very narrow. A fact repeatedly cited when variances were granted.
12. In Sunrise/WABC, the lot is much larger at **35,443 SF** and presents no topographic challenges. It is a large rectangular, almost flat, lot. So flat it is where Tenleytown' s men's baseball team played many decades ago. The fact that the lot is a through lot, i.e. a street on each side is not an "impediment." But in 2009, the BZA viewed the through nature of the lot as a **positive** attribute for use of the lot. *BZA Final Order in Case No. 17726* (2009), (Exhibit 38 herein, pages 15-16), regarding the same lot.

The church is not requesting the variances, and Sunrise is legally barred from requesting the variances, but another comparison is:

1. In *Hillel*, the religious entity is growing and needs more room to accommodate the growing number of students they are serving on the campus.
2. In Sunrise/WABC, the church has 18 congregants and it has been stated by WABC and by Sunrise that the church is leaving the Baptists to become non-denominational. Although more recently, October 10, 2018, WABC said they were no longer identifying as Baptist by removing the name from the church. Are there other examples where an 18-member church that is transforming to another religious entity was viewed for zoning purposes as an "exceptional and extraordinary condition" allowing many variances and special exceptions to remain on the same lot.

Two different zones (R-1-B versus RA-4)

- **3920 Alton** is **R-1-B**: Low density. Single family detached – height of 40 feet limited to 3 stories – 40 percent lot occupancy unless a church, which gets 60 ft, 3 stories and 60 percent lot occupancy, rear yard 25 ft setback – 50 percent pervious surface.

- ***Hillel*** (corner of 23rd and H Streets) is **RA-4**: Medium to high density. Residential apartments – height of 90 ft* + penthouse up to 20 ft – lot occupancy of 75 percent - rear yard 15 ft setback or 4" for every 1ft of principal building height – 3.5 FAR – Green Area Ratio of 0.30. A church is allowed 60 ft in height but still only 3 stories. RA-4 is described as "permitting the construction of those institutional and semi-public buildings that would be compatible with adjoining residential uses and that are excluded from the more restrictive residential zones."

Who is asking for special exceptions, variances – who is the owner?

- In *Hillel*, Hillel owns the land and has for over 30 years. Hillel is the entity asking for the special exceptions and variances, and which needed them to accommodate religious practices.

- In Sunrise/WABC at 3920 Alton, WABC has owned the land since 1954. Sunrise, which is requesting all the special exceptions and variances, does not own the land.

Special Exceptions

- Hillel is **NOT** asking for a **special exception** to locate in the zone. They are already located at 23rd and H Streets and are trying to remain on that site to serve a growing Jewish student population.

- Sunrise has no presence on the 3920 Alton site. Sunrise is **seeking a special exception to locate** in the residential neighborhood, where they currently own no land. To be granted, the special exception must not be likely to become objectionable to neighboring properties because of noise, traffic, or other objectionable conditions. 11-U DCMR § 203.1(f)(5**)**. **Plus, they require a retaining wall special exception and an assessment whether parking is adequate.**

Variance Relief – Zoning Code: For the Standard see text above at 11-X DCMR § 1001.1 and 1000.2

Hillel sought:

- Lot occupancy. An area variance for 100 percent lot occupancy in an area that allows 75 percent lot occupancy and where no rear yard would be possible. Even with lot occupancy and rear yard variances, the building core reduces the useable SF to about 2,500 SF on the ground floor and 2,300 on the upper floors. The rear yard elimination was granted but to lessen the impact GWU gave St. Mary's a permanent easement to gain access across GWU's Amsterdam Hall property. Hillel's lot was 4,575 SF and is very narrow.

- Relief from the Floor Area Ratio (FAR) of 3.5 so that certain areas – the sanctuary and dining hall - would not have to be split between two floors. Hillel sought 3.75 FAR. This change would add 1,150 SF to the useable building space. The OP stated that without these variances that smaller floor space allowed by the zoning "would impact the functionality of worship space and create less efficient layouts."

    - No parking would be provided. But this is in the context of the location being on a campus and Hillel is serving the students.

    - There was a special exception requested for setback of the penthouse.

In *Hillel*, the court said that Hillel met the standard (see above) for a variance because of the size, shape and configuration of its lot, smaller than other religious institutions lots, need to improve and maintain its facility and maintain its location near the GWU campus where it can best serve its constituents – the students. The court discussed at length the extraordinary and exceptional conditions of the narrow width and irregular shape of the lot, and that the court was "more flexible when it assesses a non-profit organization" citing *Monaco* v. *DC Bd. Of Zoning Adjustment*, 407 A. 2d 1091 (DC1979).

In addition, the *Hillel* court said that there would be "practical difficulties" if the zoning regulations were strictly enforced in that situation. The court stated that Hillel must show "that the specific design it wants to build constitutes an institutional necessity, not merely the most desired of various options, and Hillel must show precisely how the needed design features require the specific variance sought – the lot occupancy and rear yard. And the court found that they had met that standard.

The entity requesting the variance has to show that there is an unnecessary burden or practical difficulty. *Gilmartin v. D.C. Bd. of Zoning Adjustment*, 579 A. 2d 1164, 1168 (D.C. 1990) Hillel presented arguments regarding their "religious and programmatic needs." The court concluded that the Zoning Commission properly concluded that "if it strictly applied lot occupancy and rear yard requirements, it 'would result in an inefficient and uneconomical building' that 'would not yield enough useable space for the worship, dining, and program space required by Hillel." Religious accommodation.

The court did not disturb the Commission's granting of area variance relief based on the Commission's findings that in the *Hillel* situation: there was an extraordinary or exceptional condition affecting the property; there was substantial evidence in the record to support the Commission's conclusion of institutional necessity; and the requested variance relief could be granted without substantial impact to the public good.

TO SUMMARIZE REGARDING THE THREE VARIANCE REQUESTS: St Mary's

Even if you ignore the fact that Sunrise has no standing to request a variance because it is not the owner of the property, Sunrise fails the three-pronged test to be granted a variance.

In *Hillel*, the court stated that there is a three-pronged test for grant of an area variance: (1) there is an extraordinary or exceptional condition affecting the property; (2) practical difficulties will occur if the zoning regulations are strictly enforced; and (3) the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan." *Ait-Ghezala* v. *District of Columbia Board of Zoning Adjustment*, 148 A.3d 1211, 1216 (D.C. 2016) (citing *Washington Canoe Club* v. *District of Columbia Zoning Comm'n*, 8989 A.2d 995, 1000 (D.C. 2005).

Prong 1 requires there to be an "extraordinary or exceptional condition affecting the property." The *Hillel* court emphasized that this means the hardships must be due to unique circumstances *peculiar to the applicant's property*. In the *Hillel* case, the court and the Zoning Commission had identified some peculiar conditions regarding the property that interfered with Hillel's ability to build a facility that met its special institutional and religious needs. WABC has no such problems presented by the lot.

Nor did the *Hillel* court say that financial hardship was a basis for meeting the burden to be granted a variance under prong 1 or prong 2.

St. Mary's argued that the height of the building was due to a twenty-year lease of the top two floors by GWU and therefore did not constitute institutional necessity. In response, the court noted that the Zoning Commission found that Hillel could not secure financing for its project without the GWU lease, and that even without the top two floors, the building's footprint would have to remain the same due to the building code requirements and institutional needs. The court then discussed at great length the many needs of Hillel – kosher kitchen, sanctuary to accommodate a sukkah, multiple elevators, two kosher kitchens and concluded that there was "substantial evidence in the record to satisfy the second prong of the area variance test and to support the Commission's conclusion that 'Hillel satisfactorily proved that the specific design [of its new facility] is driven by institutional need for a single contiguous worship space and dining space of a certain size, and that such spaces could not be constructed in a facility that complies with the requirements of the Zoning Regulations."

The *Hillel* court based its conclusion that Hillel had met the "institutional necessity" prong of the area variance test on the needs of Hillel regarding the design of the building – not on any need for financing.

Prong 2 requires the applicant to show "practical difficulties" will result if the zoning regulations are strictly enforced. The court said this means showing that the specific design constitutes an institutional necessity, and a showing of precisely how the needed design features require the specific variance sought. Sunrise, if we arguendo say they have standing, says they need a building of a certain size (i.e., the excessive lot occupancy) to make their project economically viable. But *Sunrise*'s financing difficulty should not be considered the same as the property owner in Hillel articulating a practical inability to otherwise build a structure that meets their institutional need. The WABC doesn't have any particular institutional need for a large building here, given that they are accepting a deal that gives them less than 13 percent of the area of the

building. The zoning relief requested is solely for Sunrise's purposes and should not be granted just because WABC chose to strike a deal with this particular entity that says they can't finance their project unless they abrogate the existing zoning limitations and requirements.

Prong 3 requires a showing that the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zoning plan. In the Sunrise situation they are asking for multiple and dramatic variances which are the equivalent when taken together of a re-write of the zoning code and does not honor the zoning maps that label the neighborhood low-density R-1-B and a neighborhood conservation area. The substantial adverse impact of the proposed building on the neighbors, and the requested zoning relief allowing a sizable commercial enterprise in an R-1-B zone is not consistent with the intent, purpose and integrity of the existing zoning.

Sunrise repeatedly states that senior housing is consistent with the church's "mission" and in some vague way results in "synergies" between the two entities. But Sunrise is a for-profit multinational business entity that evicts its residents for 3 reasons - lack of funds, behavioral problems and predicted to require health care not available at Sunrise. Such conduct may serve Sunrise's business model very well but does not serve the "public good.' This is in contrast, for example, with the non-profit GWU Hospital that was the subject of the *Draude* court decision. Non-profit hospitals are obligated to take in and treat those who cannot pay if they come to their doors. Non-profit hospitals must honor this obligation as a function of being a tax-exempt organization.

***St. Mary's Episcopal* v. *Hillel* is not a precedent for approval of the Sunrise proposal**.

In essence, ***Hillel*** involved a religious organization seeking to carry forward its religious mission. In essence, the Sunrise case involves a commercial enterprise seeking to advance its commercial ambitions by cloaking itself in the mantle of a church.

Dupont Circle Citizens Ass'n v. District of Columbia Bd of Zoning Adjustment, (St. Thomas), 182 A. 3d. 138 (D.C. 2018) Distinguished

Another recent case was *Dupont Circle Citizens Ass'n v. District of Columbia Bd of Zoning Adjustment*, 182 A. 3d. 138 (D.C. 2018), where the court vacated the BZA's Order granting an area variance for lot occupancy and remanded the case to the BZA for further proceedings to determine whether the Parish had demonstrated an exceptional condition affecting its property, whether the Parish is entitled to additional flexibility as a public service organization as set forth in *Monaco* and its progeny. and whether the Parish made the showings required by *Draude* 1.

But note that the case subsequently was settled without adjudication of these questions.

One very dramatic difference between *St. Thomas* and the Sunrise situation is that the zoning relief requested in *St. Thomas* was far less than the relief requested by Sunrise. In *St. Thomas* there was one variance requested. In the Sunrise situation there are at least three variances and two special exceptions, including an exception to locate in a residential zone at all. The magnitude of the zoning relief is not comparable to the one variance requested in *St. Thomas*.

In addition, the one variance St. Thomas requested was to increase lot occupancy from 80 percent to 86.7 percent - a far smaller increase than the Sunrise request for 40 percent increasing to 58 percent. In addition, the church in *St. Thomas*, before they experienced a fire many years ago, occupied slightly over 87 percent of the lot. The lot in *St. Thomas* is not in an R-1-B zone. The lot is in a Special Purpose District where 80 percent lot occupancy was allowed.

The court in footnote 5 suggested that the church's allegations that the Parish Hall was too small for the church's needs, that it needed a costly modernization and expansion in order to continue its use and services, and that it needed the money from the residential development to rebuild, if proved by the church and approved by the BZA, might satisfy the *Draude I* requirements. The residential development in *St. Thomas (Dupont Circle Citizens)* is referred to throughout the case as the church's "residential program." The residential program included affordable units. The income eligibility for these affordable units was changed to reach a lower income population as part of the settlement agreement.

The settlement in St. Thomas case buttressed the church's qualifications for more flexibility under the public service doctrine as the new structure is now to include 4 affordable units, three at 60 percent AMI, as part of a settlement. See Northwest Current of July 11, 2018 article entitled *Pact Reached on Church Street Project*. In that same article, a representative of St. Thomas stated that the church had 110 congregants. 70 to 80 on any given Sunday and was growing. St. Thomas therefore could argue both that they needed to expand their space and that the zoning relief would provide the space necessary to "sustain" the church.

ADDENDUM

CONCERNS ABOUT DAMAGE TO HOMES FROM CONSTRUCTION

IF THE BZA GRANTS A SPECIAL EXCEPTION FOR A CCRC, SUNRISE SHOULD INDEMNIFY ALL WHOSE PROPERTY IS HARMED.

If the BZA finds that applicant has met the burden on the record that they meet the conditions to be granted a special exception to build a CCRC, then -

"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 it deems necessary to protect adjacent or nearby properties"** (See 11-U DCMR § 203.1 (f) (6)); and

"The Board of Zoning Adjustment **may impose 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."** See 11-X DCMR § 901.4.

This ability of the BZA is particularly relevant regarding the proximity of the truck ramp to neighbors sharing the property line and especially regarding vibrations during construction that are described by the applicant as likely to cause damage to our homes and may also create problems for WMATA's tunnel under the lot.

If the BZA grants the CCRC special exception requested by Sunrise, the Neighbors request the BZA to require a commercial liability insurance policy requirement as the Zoning Commission did in the *Hillel* case.

VIBRATIONS from Sunrise website on October 14, 2018

Q: How will the construction impact neighbors?
A: Sunrise and the church understand how disruptive construction can be to neighbors. During construction, Sunrise will work within all established DC noise standards. Work will only take place 7am - 5pm Monday through Friday and 8am - 5pm on Saturdays. Sunrise will also hire a private company to monitor and control the rodent population during construction. **Sunrise plans to hire a qualified structural engineer to evaluate surrounding homes to determine the maximum threshold of vibrations those homes can endure and establish construction standards accordingly. Each home will be pre-evaluated and photographed and in the unlikely event of construction related damage, Sunrise will repair that damage at its cost. (emphasis supplied).**

Construction Vibrations: At the ANC on December 14, 2017, Sunrise SVP Philip Kroskin said **each nearby house will get a vibration monitor and that Sunrise may offer a contract to each house nearby, which included houses "across the street."**

At a November 1, 2017 meeting at WABC, SVP Kroskin said that they might do "spread footings" so that they would be drilling down rather than pile driving for the steel and concrete construction.

Sunrise has said that they would establish a "vibration" threshold for nearby homes and would fix any harm they did when they dropped the current building and did pile driving for the two-levels of underground garage. But it is very important to consider the context - within **200 feet**, there are homes built before the Civil War located in the Grant Road Historic District and, also within 200 feet is the Curran House built in 1890. A **few feet beyond the 200-foot distance** is The Rest (Lyles-Magruder House), which is listed on the DC Inventory of Historic Places and first shows on maps starting in the late 1700s. See Exhibit 36.

The Sunrise offer is totally unacceptable. If Sunrise damages our homes, they will be legally liable to pay for the damages. The nearby homeowners, however, do not agree to Sunrise's proposal that Sunrise would assess the condition of our home before and after they do any damage and send their workers in to do the repairs in our homes.

$25 Million in Hillel for 1 church – more would be needed to indemnify an entire neighborhood

We strongly urge the BZA to disapprove the Sunrise proposal. If the BZA approves the request for a special exception to build a CCRC, along with the multiple other special exceptions and variances, then the BZA should require a liability policy similar to what was required in the ***Hillel*** case. But the dollar figure should be larger because in Hillel it was one church. Whereas the 3920 Alton lot is surrounded by many single-family homes of 100 years or more, plus the 5 houses that share the property line.

The commercial liability insurance policy should be in the amount of $50 million in the Sunrise-WABC case.

In *Hillel*, the court stated that "… *St. Mary's* structural engineer, John Matteo, … agreed that the best way to monitor the Hillel's demolition and construction to prevent future damage would be through 'a very good and strong construction management agreement'; the construction management plan which the (Zoning) Commission has required Hillel to follow has strong monitoring and surveying provisions, as well as mandates that Hillel's contractor have a commercial liability insurance policy in the amount of $25,000,000.00. *St. Mary's Episcopal Church v. DC Zoning Commission and Hillel at GWU, Intervenor, 174 A.3d 260,266 and 267 n. 4 (2017)*.

Contrast this arrangement to Sunrise's offer to have Sunrise assess any damage Sunrise has caused to nearby homes and have Sunrise workers do any repairs. Sunrise would have no incentive to objectively assess damage or an incentive to do good quality work to repair any damage to our homes.

Two Years, at least, of Heavy Construction Noise

Construction noise

Remember the walls and windows of the houses that share a boundary line are 9 feet from the lot line.

The construction disruption will affect all neighbors of all ages. The baby whose bedroom is 9 feet from the replacement fence is now 1 year old. Will the baby be 3 years old before the child can sleep during the day or after 8 am during the 2-years of construction? See WABC church bulletin of September 24, 2017 where it states that they expect construction to last 2 years.

Construction would entail 100-150 construction workers on the site at 3920 Alton. See Viewpoint by the Downtown Cluster of Congregations, NW Current on March 7, 2018.

Obviously, the noise and disruption created by the construction of this project will be very significant. And construction of a 7-story steel and concrete building (4 above ground plus penthouse and 2 below ground) over a 2-year period is not what is expected in an R-1-B single-family detached zone. Sunrise says that construction will begin at 7 am and will last until 5 pm Monday through Friday and but on Saturday construction will begin one hour later – 8 am.

Some typical noise levels found at construction sites are: pile driver 112 decibels (dB), bulldozer 85-117 dB depending on the model, crane 102 dB, backhoe 87 dB, welder 85-90 dB. COFA.co. As to "pile driver" see discussion of Vibrations.

The EPA in its seminal report entitled, **Information on Levels of Environmental Nosie Requisite to Protect Public Health and Welfare with an Adequate Margin of Safety, EPA Office of Noise Abatement,** March 1974, concluded that a goal for maximum level daily noise exposure was **45 dB for indoors and 55 dB for outdoors**.

At 85dB the sound level is considered harmful and for any prolonged or anticipated exposure at that level, hearing protection is recommended. COFA.co and many other authorities.