BOARD OF ZONING ADJUSTMENT

TENLEYTOWN NEIGHBORS ASSOCIATION
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
IN BZA CASE NO. 19823

Wisconsin Avenue Baptist Church and Sunrise Senior Living
3920 Alton Place, NW, Washington, DC 20016
Square 1779, Lot 14

The Board of Zoning Adjustment (the "Board" or "BZA") held a hearing, following proper notice, on the application of Wisconsin Avenue Baptist Church and Sunrise Senior Living for a development at 3920 Alton Place NW pursuant to the Board's jurisdiction to grant special exception relief pursuant to 11-X DCMR § 901.2 and 11-Y DCMR § 100.3 and 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.

Preliminary Matters

The applicant, Wisconsin Avenue Baptist Church (WABC) and Sunrise Senior Living (Sunrise) seek two special exceptions and three variances.

On November 13, 2018, applicant entered into a Memorandum of Understanding with ANC 3E. This MOU was officially adopted by the ANC and submitted for the record on November 13, 2018. Exhibit 119 and 119A.

The Department of Transportation (DDOT) submitted their report on this proposal on October 10, 2018 and submitted a response to a letter from Councilmember Cheh (Exhibit 101) on December 18, 2018. Exhibits 53 and 137.

The Office of Planning (OP) submitted their report on this proposal on October 31, 2018. Exhibit 90.

The Board granted party-in-opposition status to Tenleytown Neighbors Association, Inc. (TNA) at the BZA hearing on September 12, 2018 and to Nine Requestors living within 200 feet represented by Andrea Ferster at the BZA hearing on November 14, 2018.

The November 14, 2018 BZA hearing began at 9:30 am. Consideration of the instant case began at 5:30 pm, Transcript, 301, and concluded at 11:30 pm. Transcript, 548.

Description of Proposal

The applicant is seeking to construct, at 3920 Alton Place NW, a building that is to include 86 assisted living and memory care units housing 121 residents served by an estimated 163 staff, plus a church seating 250 people that would occupy 13% of the building (16% if underground uses are included).

The zoning requests are extensive: two special exceptions and three variances to current zoning. These requests in the aggregate double the size of the project when compared to existing zoning in a residential zone. Exhibits 69E1, 69E2.

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. The lot occupancy requested is specifically 57.53 percent in that the applicant requests 20,389 SF occupancy and the lot is 35,449 SF.

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 to eliminate the 8-foot side yard requirement on the west property line that is shared with the National Park Service (NPS), pursuant to 11-D DCMR § 307.1;

4. Special exception relief to establish a Continuing Care Retirement Community (CCRC) use in the R-1-B District, pursuant to 11-U DCMR § 203.1(f); and

5. 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).

FINDINGS OF FACT

Description of Property

The 3920 Alton Place NW lot is zoned single family detached, R-1-B, and is in a neighborhood conservation area. The surrounding neighborhood has this same existing zoning and is composed of two-story single family detached homes, some of those within the 200-foot radius are part of the Grant Road Historic District, another was built in 1890, and most are approximately 100 years old. Only the five houses facing 39th Street that share the property line with the proposed site were built more recently, 1942. Exhibit 37. These five houses are on short lots resulting in some of the homes being less than 10 feet from the property line shared with the proposed WABC-Sunrise development.

Despite its name, Wisconsin Avenue Baptist Church (WABC), the church is not on Wisconsin Avenue. It is on Alton Place. Exhibit 39.

As proposed, the 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 NPS; 10 feet from the Alton Place property line where the drop-off and pick-up and entrance to the truck ramp will be; and on the fourth side, where they would share the property line with the 5 single family homes facing 39th Street, there would be a truck ramp dropping 13 feet where loading would take place. The twenty large trucks expected each week would not be entering the garage and all loading and unloading would take place in the ramp area. The ramp would allow cars to enter the underground garage, which would provide 66 spaces. Exhibits 69E1, 69E2.

Owner

WABC is the only owner of 3920 Alton Place NW. Exhibit 1. Sunrise does not own or have any ownership rights in the property at 3920 Alton Place NW. Exhibit 4.

WABC has authorized Sunrise and the law firm of Donohue & Stearns, PLC, to represent WABC before the BZA for special exceptions and variances. Exhibit 9.

WABC and Sunrise are not in a joint venture and WABC and Sunrise have no legal relationship. According to WABC and Sunrise, at some time in the future, they will share the building at 3920 Place, NW as separate entities in a condominium “regime.” Exhibit 73.

The applicants have proffered no documents describing their legal relationship, if any. There is no contract to purchase between the parties in the record. There is no document showing ownership by Sunrise in the record. In the Applicant’s Prehearing submission (Exhibit 69A1), Sunrise is described as a “potential buyer.” Subsequently, in the Applicant’s Opposition to Exclude Expert Testimony (Exhibit 117) and at the November 14, 2018 BZA hearing, (Transcript, 502) Ms. Mary Carolyn Brown, Sunrise attorney, stated that Sunrise is a "contract purchaser," but she did not elaborate as to when Sunrise may have achieved that status or any other details regarding Sunrise's relationship with WABC or the property at 3920 Alton Place, NW. She later stated that she was not a witness and therefore could not be asked any questions. Transcript, 520.

VARIANCES

Exceptional condition

Physical attributes or topographical conditions

The WABC lot at 3920 Alton Place, NW is not narrow or shallow or non-conforming. The lot is 7 times the size required in an R-1-B zone, which requires 5,000 SF.

Although the lot has five sides, it is close to rectangular. The lot is 35,449 SF and is 220 feet on the east side, a total of 226 feet on the west side, 180 feet on the south side, and 126 feet on the north side. There are other large lots in the neighborhood.

The lot borders on and is a through lot only to Alton Place and Yuma Street, tree-lined single family (R-1-B) residential streets. On one side of the lot is Alton Place, which is 30 feet wide and on the other side of the lot is Yuma Street, which is 34 feet wide. The lot's western border is adjacent to NPS land.

The NPS land separates the lot from Tenley Circle and Wisconsin Avenue. The NPS land is 8,392 SF next to the lot in question and there is an additional 17,503 SF of park service land separating Nebraska Avenue from Wisconsin Avenue.

The 3920 Alton Place lot was originally 7 individual single family lots in the R-1-B neighborhood before WABC bought the lots and combined them to build the existing church. It is ideal for subdividing into individual lots. Transcript, at 440-442 and Exhibit 130. Exhibit 83A, page 15, where it says: In 1954, WABC bought 7 single family lots and combined them to create the church lot. Church Bulletin of September 24, 2017.

The applicants have cited no exceptional topographical conditions.

The lot is quite flat and there are no physical obstacles or impediments.

Contrary to applicant's contentions, the lot is not "uniquely exposed" to or "along" Wisconsin Avenue or Tenley Circle. The WABC lot is surrounded by single family homes and NPS land and is **not** on Wisconsin Avenue or Tenley Circle.

Other extraordinary or exceptional situation of the property

The applicants cite a "confluence of factors" and invoke the public service organization doctrine to support their claim that there is an "other extraordinary or exceptional situation or condition of a specific piece of the property." Exhibit 69 at 24-25.

WABC does not request the three area variances of 58% instead of 40% lot occupancy, a fourth floor instead of three floors, or elimination of the side yard setback for its own needs or use. WABC is downsizing, not expanding. Exhibit 69.

The new church will occupy less than 13% of the above-ground building and is significantly reducing the size of its sanctuary and administrative and office space. Exhibits 69E1, 69E2.

WABC states that "[a]though 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." Exhibit 69 at 25. WABC has not

adequately demonstrated or documented the costs of repairs or its financial inability to refurbish its facilities. Exhibit 69 at 25.

The applicants state that WABC will sell the property to Sunrise who will then construction a new church and senior living facility and provide the new church with an endowment.

Confluence of factors and public service organization doctrine

The applicants, in their attempt to demonstrate an "other extraordinary and exceptional situation or condition of a specific piece of property," contend that there is a "confluence of factors" or "confluence of needs" by WABC and Sunrise and invoke the "public service organization doctrine" to be afforded greater flexibility in the application of the standard for finding exceptional conditions and in recognizing the applicants' need for a particular site as an exceptional condition regarding that site (uniqueness). Applicants' pre-hearing statement, Exhibit 69 at 21-25.

Sunrise, Exhibit 69 at page 24, argues that the lot has exceptionally uncommon physical characteristics, and is "burdened" by the "particular situation of its current non-profit, public service organization." Applicant further stated that the WABC building suffers from functional obsolescence, including failing mechanical systems, roof issues, lighting and acoustics, inadequate the electric grid, kitchen facilities, no security or sprinkler system and deteriorating asbestos tile. Exhibit 69, page 24.

WABC failed to quantify or document the costs of any improvements, and failed to disclose whether these cited improvements were actually necessary to continue to use the building. TNA introduced unrebutted evidence that the D.C. Office of the State Superintendent of Education (OSSE) found that the building is ADA compliant and that the facility is "heated, cooled and ventilated to maintain the required temperatures, and air exchange…' Exhibit 77, at 2 **(**CommuniKids Certificate of Occupancy Report."). See below under Condition of Existing Building.

WABC failed to identify, quantify, or document its ongoing operational expenses, and existing financial resources. WABC also failed disclose the size of the endowment to be provided by Sunrise, and whether this endowment would be sufficient to defray the Church's ongoing operational expenses in the space to be provided by Sunrise, Exhibit 69 at 25.

Sunrise argues that, "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." Sunrise says that WABC will gain new facilities and financial solvency. Sunrise goes on to say that the new construction will also meet the needs of an aging population by building a CCRC. "Upon completion, the building will be comprised of two condominium lots, with WABC owning the church portion and Sunrise owning the CCRC portion." Exhibit 69, page 25.

Sunrise states that "*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, … The specific design of the building is an institutional necessity in order for the church to leverage its property with a mission-compatible use. …[T]he design features of the building require the specific variance relief sought."* Exhibit 69, page 25

Sunrise in support of its claim of having "a confluence of needs" with WABC cites its construction and operating costs as a senior living facility and its need to generate enough income as a corporation and to provide the church with a sizable permanent endowment.

Sunrise states that it "has an equitable interest in the WABC property as a contract purchaser of the land and therefore the needs of a continuing care retirement community ("CCRC") on this property are appropriate considerations of this Board. Moreover, Sunrise is not proceeding in this application alone. It is jointly being processed with WABC, the current owner of the site. If the application is approved, a condominium regime will be created for the project, with WABC owning the church and Sunrise owning the CCRC portion of the building. Consequently, the confluence of needs flowing from the church and the proposed CCRC use are properly before the Board, including the economic feasibility of a CCRC." Ex 117, page 1

Contrary to the applicant's contentions, there are no unique physical characteristics or topographical conditions of the property.

Sunrise does not own or have any ownership rights in the property at 3920 Alton Place NW. Exhibit 4. If Sunrise is a contract purchaser, nonetheless, a contract purchaser is not an owner.

The increased size and occupancy design serve the institutional needs of Sunrise who is operating a for-profit business.

Sunrise is not a public service organization. All three area variances requested are to accommodate Sunrise's ongoing for-profit business.

WABC is not expanding, and WABC has no institutional, programmatic or religious needs for the requested variances. WABC has cited no need for expansion to accommodate its programmatic, institutional, or religious needs.

WABC admits that it has not explored any alternatives involving relocation of the Church as a means of addressing its financial problems. Transcript 399-400.

At the November 14 hearing before the BZA, the WABC representatives, trustees Patricia Dueholm and Janet Brooks testified as to their current concerns and future plans regarding the congregation. "We want to eliminate the need to rent out our

church to outside groups, including preschools, just to cover our operating cost." Transcript, 330.

WABC states that they do not want to move. Transcript, 330. Evidence in the record reflects that WABC has conceded, "In today's world there is little to no correlation between a church and its immediate neighborhood ... in terms of congregational strength or growth…" Exhibit 83A, page 49.

WABC has also conceded that they did not explore sharing space with another church. Transcript 399-400.

Condition of the existing building

TNA in their pre-hearing statement, Exhibit 83A at page 17, stated 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."

At the November 14, 2018, BZA hearing, Sunrise's attorney asked Ms. Dueholm about that certificate of occupancy. Ms. Dueholm said that "They got their Certificate of Occupancy or need. Their inspection was in July, when we didn't have any boiler problems. So, I don't know how the inspection was done. I know that it involved the health and welfare of the children, but I don't have any knowledge of the inspection itself. Ms. Dueholm also said, "…CommuniKids is on the second floor. They have two classrooms, dedicated classrooms and office space. Those two classrooms have new flooring. They don't have access to most of the building. Transcript, 510.

At the November 14 BZA hearing in the instant case, applicants submitted slides Exhibit 121A, slides 6 and 7 showing a need for wooden molding replacement, that exterior railings needed to be repaired or replaced and some interior areas need paint. There were also photos of pipes in need of plumbing repairs and asbestos tile that presumably WABC wishes to remove. In addition, the boiler, according to Ms. Dueholm's testimony, needs renovation or replacement. Although the building has been discussed as needing some repairs and updates, the most significant one appears to be replacing the boiler, which Ms. Dueholm on the June 20, 2018 Tenley-Friendship Forum estimated would cost $50,000. Although churches are not required to be ADA compliant, WABC would like to be compliant. With the exception of the dollar figure for the boiler, no other dollar estimates were provided. No structural problems regarding the building were claimed by WABC. The items in need of repair fall into the regular maintenance category that all buildings require.

Practical Difficulties

Sunrise has alternative options

Sunrise states that it needs the three requested area variances in order to provide financial viability to the Sunrise facility and a new church. The 3920 Alton Place lot is .81 acres. Sunrise states that as a senior living facility it needs a 1.5-acre lot. Specifically, Sunrise states that they need 86 units to accommodate 121 residents in order to be financially viable. Sunrise Senior Vice President Kroskin, Transcript, 337-338 and Exhibit 8 at page 6 and Exhibit 69 at page 28.

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

Staffing costs

Sunrise proposes 86 units with 121 residents and 65-75 FTEs. They have never released the number of employees.

As to staffing needs for an assisted living and memory care facility, Sunrise's expert, Alice Katz, Vinca Group, when she testified, Transcript, 353-354, and citing corrected slides later submitted (Exhibit 131A, slide 4) said the staffing average was: 1 FTE per 1.3 residents (121 residents at Sunrise). Under that scenario, 93 FTEs are needed by Sunrise but Sunrise says they are providing 65-75 FTEs. This is confusing.

The slides used at the hearing, Exhibit 121A, slide 53, gave numbers that indicate Sunrise could have *fewer* staff than they project:

a. 1 FTE per 2.5 residents for assisted (86 at Sunrise) = 34.4 FTEs plus
   1 FTE per 2.0 residents for memory care (35 residents at Sunrise) = 17.5 FTEs.
   Therefore 52 FTEs are needed by Sunrise under this scenario.

b. Direct care staff average -
   1 FTE per 3-5 residents for assisted (86 at Sunrise) = 21.5 FTE plus
   1 FTE per 2.5 residents for dementia (35 residents at Sunrise) = 14 FTEs.
   Therefore 35.5 FTEs are needed by Sunrise under this scenario.

Sunrise staffing needs are driven by the number of residents. The bigger the building, the more variances, the more residents, the more staff, the larger the payroll.

Ms. Katz gave another way of viewing the data. Ms. Katz at Transcript, 355-356, said: "I have pulled data on all buildings that were constructed, since 2015, … and the memory care average size for newly developed projects -- was 53 units." Average would mean some had fewer units than 53. So, this data demonstrates that there are alternatives involving *fewer* than 86 units.

The Applicant's own expert agreed that the same construction-related considerations, like safety, fire code, elevators, bathrooms, laundry facilities that increase the costs of

the proposed Sunrise facility would also apply to a facility that was exclusively a memory care facility. Transcript, 355-56.

Construction costs

As to construction, Mr. Heath, Sunrise's architect, in comparing the smaller building for 34 residents, proposed in BZA Case No. 19751 before the BZA on the same day, and Sunrise proposal in the instant case for 121 residents said:

> *"The two buildings should be built very similarly. They both have very high levels of acuity and they both need to have very safe and secure buildings of both the I1 and I2, they both have very sophisticated life safety systems and they'll be very well monitored. So, the cost in construction shouldn't be that much different,* ***except in a matter of scale. This building's more expensive, because it has a garage. They're not building a garage. That's a huge, huge cost difference****… So, when you start looking at what it costs to build this, I meant, this building has everything that, as an architect, practically everything I can think of, as an architect, to make it more expensive.* ***It's got a garage, you're building right up to the property lines, you're … you got two levels of garage, actually, you're building an I2 facility. I mean, it's all concrete construction, because you have limited floor-floor heights.*** *Everything about this building is going to be as expensive."* BZA November 14, 2018. Transcript, 395.

This Board can take notice of the fact that the MED facility, which Mr. Heath is using for comparison, has since changed in response to neighbor concerns about parking, and will now include an underground parking garage. *See* BZA Case No. 17951, Applicants' Supplemental Information, Exhibit 483A.

Sunrise is presenting a circular argument. They say they need a larger building to support their financial needs but the larger building, building right up to the property lines, the need for an underground garage because the building is occupying all the surface space and, finally, the need to squeeze 4 stories into the 40-foot height limit are driving up the costs of construction.

The requested variances themselves are driving up the cost of construction.

To buttress Sunrise's expert analysis provided by Mr. Heath, as to the cost of "floor to floor" issues, the norm for standard steel beam construction is: 8 feet floor to ceiling; 2-3 feet above ceiling for utilities and duct work; 2 feet for steel beams and concrete deck for the next floor; so total floor to floor is normally 12-14 feet. Thus, four stories normally need 48-56 feet not the 40 feet that Sunrise says they are using. Sunrise can design the concrete to be shorter by including the next floors concrete deck with reinforcing tied into the concrete beams below. Steel beam construction has become the least expensive for more than 2 stories. If they are limited to 40 feet by code, concrete structural construction is one way to get more usable space in less

height. Note their approach also makes the HVAC more expensive because they have to limit the room for the duct work.

Sunrise is arguing that they need the variances – 4 stories, 58% lot occupancy, no 8-foot setback - to provide a greater profit because the variances themselves are driving up the costs that they want the greater profit to cover.

Sunrise alternative options regarding other residential zones

There are other residential zones that are more suitable to accommodate Sunrise's business model of 86 units and that would not include a request to the BZA to in essence amend the regulations providing a special exception for a CCRC. There are other residential zones that allow greater lot occupancy and height.

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 Avenue, is being developed by Roadside and they have said they would like to include something for seniors. Mr. Kroskin has stated that he will not discuss options with Roadside regarding their site. Exhibit 83A. Sunrise should explore options in commercial zones if they cannot or will not build a facility on a much smaller scale.

WABC has alternative options that conform with zoning

The variances are for the use of Sunrise, not for the use of WABC, a dwindling congregation.

The burden is on the applicant to show that they have explored alternative options that would conform with existing zoning and therefore require no requests for zoning relief.

WABC states that they do not want to move. WABC has also stated that they do not want to share space with another church. Transcript, 399-400.

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 79 and 80.

Size of the Congregation and whether any members live in the neighborhood

At the November 14 hearing before the BZA, the WABC representatives, trustees Patricia Dueholm and Janet Brooks testified as to their current concerns and future plans regarding the congregation. When asked the size of the congregation, Ms. Dueholm, WABC Trustee, responded, "I don't have the exact number for that." Transcript 399. When asked how many reside in Tenleytown, Ms. Dueholm, responded, "I don't know the answer to that." Transcript, 400. Ms. Dueholm emphasized that they were a "small" church many times. Ms. Brooks, another WABC trustee, Transcript, 328, said, "We believe in the power of a great, healthy, small

church." Sunrise's attorney said to Ms. Dueholm, "and you spoke about some modest increase, you want to keep it a small church."

WABC only has 18 congregants. 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 on the Tenley-Friendship Forum, 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…" Exhibit 83A at page 49.

In the TNA pre-hearing statement, TNA stated that the church had 18 congregants, based on empirically counting those in attendance on a typical Sunday. Exhibit 83A, page 16. As noted at footnote 1 on page 16, Reverend Bergfalk at an ANC meeting, which is recorded.

Sale of lots to fund church renovations

WABC stated that they reject the idea of sharing a facility with another congregation (which could be at 3920 or elsewhere), Ms. Dueholm responded: "This is our home and we want to stay where we are…. And, no, we want to be our own church." Transcript, 399-400. This is rejecting an option not exploring alternatives.

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.

Ms. Dueholm also rejected this alternative option, saying, "Some neighbors suggest we could sale off two parcels of our property, along Yuma Street, for approximately $1.7 million total. We've considered this, it is just not feasible. Transcript, 327

The option suggested by neighbors conforms with all existing zoning and therefore can be done without requesting any zoning relief. The alternative option suggested by neighbors at Exhibit 80 includes 2 single family lots of 5,000 SF in compliance with the existing R-1-B zoning for the lot. Parking could be accommodated on the drive, which has 30 feet from side to side that would exit on to Yuma. Additional parking could be accommodated in the area between the existing church building and the NPS land.

Neighbors' attorney, at the hearing, Transcript, 411, asked Ms. Dueholm why she felt that "subdividing your very large site and building single-family homes …wasn't feasible and what sorts of subdivisions you did consider?" Transcript, 400. This was also asked of Ms. Dueholm by Sunrise's attorney when they said, "you heard the opponents testify about an alternative plan to sell two single-family lots that would generate $1.7 million for the church." Transcript, 509.

Sunrise's attorney said, "…you said that this was the -- the partnership with Sunrise was the only viable alternative. Could you explain that again?" To which Ms. Dueholm

responded, “Yes, so developers had come to us and they said, every single one of them said, to relocate. And Sunrise was the only developer who said, let us work with you. And immediately we thought, yes….” Transcript, 510.

Ms. Brooks said, Transcript, 330, that “We would like to increase the church’s ability to give to international missions, as well as, do more ministry work throughout the Washington, D.C. area. We want to eliminate the need to rent out our church to outside groups, including preschools, just to cover our operating cost.”

Sell multiple lots to finance a new church

Another alternative option that was presented would be to divide the lot into 5 single family zoning compliant-lots and use the funds to build a new church on one or several of the lots. See Exhibits 123 and 130. At 35,449 SF, the lot could accommodate 7 single family lots in the R-1-B single family zone where each lot must be a minimum of 5,000 SF.

Although WABC has said they want to stay on the 3920 Alton Place lot, given no evidence that their congregation draws from the neighborhood, this is a choice not a necessity. Thus, WABC could take any funds they generated from selling lots and build a church here or elsewhere.

Burden is on WABC to show that they have explored alternative options that conform with zoning

WABC says that developers have come to them and all developers wanted them to relocate. WABC has not established that they reached out to anyone seeking to structure a remedy to their financial constraints. Being passive does not meet the burden. At the November 14 BZA hearing, WABC, Exhibit 121A, slide 10, used a slide saying that the Neighbors’ option would be (1) temporary financial band-aid at best; (2) never regain land lost; (3) no room for parking or playground. Taking the last first, the Sunrise option itself eliminates the playground. As to the second objection, WABC will have 13% of the proposed development so, although details have not been made available, we assume they are losing almost all of their land in the Sunrise proposal.

Finally, they have a spectrum of options that conform with zoning. WABC can sell two lots and raise an estimated $1.7 million, which appear to be more than enough to do renovations. WABC could divide the 35,000 SF lot into 7 conforming lots (R-1-B requires a minimum of 5,000 SF), sell more than 2 lots and build a new church on those lots they choose to retain. See Exhibits 79, 80, 123 and130

Other Factors

Severity of variances

The severity of the three variances sought is very significant. The variances requested are 58% lot occupancy where 40% is allowed for a non-church; four stories where three stories are allowed; and elimination of an 8-foot side yard setback. These variances almost double the size of the project. Taken together these variances dramatically increase the mass of the structure and also increase the occupancy capacity by at least 73 people to live full time at the site. Plus, there would be a concomitant increase in staff, aides, and visitors and associated trash, truck deliveries, and noise.

Self-created hardship rule

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.

WABC must overcome the fact that they have a self-created hardship in that they lost over $230,000 through their own actions. Exhibit 74.

Harm to Public Good or Zone Plan

The 3920 Alton Place NW lot and neighborhood are zoned 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.

Adding hundreds of people, including 121 residents living on the site, plus staff, aides, and visitors, by granting three significant variances for the R-1-B lot will bring about a significant increase in traffic of persons and commercial vehicles to and from the premises, noise, and on-street parking. Granting the three variances would increase the mass of the structure and also increases the occupancy capacity by at least 73 people to live full time at the site plus staff, aides, and visitors**.**

Sunrise cannot show how a two-level underground garage, 4 stories, plus a penthouse, 20 trucks, and 534 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 Exhibits 36, 37 and 91. For a comparison of heights between the two-story homes and the proposed 52-foot Sunrise building, see Exhibit 136A.

The proposed building and paved driveways would use the entire lot at 3920 Alton Place, NW. The building will be 4.8 inches from the property line on the Yuma Street side; on the property line of the NPS; 10 feet from the Alton Place line, including the paved drop off and pick up entrance and truck ramp; and 20 feet from the 39th Street homes with shallow lots, including a 12-foot wide cement truck ramp with a 13-foot retaining wall. There would be virtually no green space on the 3920 Alton lot.

The three requested variances in the aggregate would double the size of the building and double the volume of use at the site.

Applicant has not provided how many residents a 47-unit building could accommodate but they are currently proposing 86 units with 121 residents and an undetermined number of staff ranging from 65-75 FTEs to 163 employees as Sunrise supports at a similar sized facility as that which they propose here. See Exhibit 76. Plus, a 250-seat church. For a total of 534 people on the lot. Thus, it is not unreasonable to assume that the variances in the aggregate would allow the volume of use at the site to be twice that resulting from a use that conformed with existing zoning.

Sunrise's proposal has negatively affected the neighboring properties, three of which have sold since Sunrise announced their proposal. This includes 2 of the 5 that share a property line with the site.

SPECIAL EXCEPTIONS

Special Exception Request for a Continuing Care Retirement Community (CCRC)

Sunrise requests a special exception to locate a senior living facility under the special exception allowing a Continuing Care Retirement Community (CCRC) in an R-1-B residential area. The question is whether a *specific* proposal meets the definition of a CCRC and whether as proposed it meets the six conditions required by the regulations.

The definition of a CCRC includes health care. Sunrise provides no health care.

At the November 14, 2018 hearing before the BZA, Sunrise attorney asked Philip Kroskin, Sunrise Senior Vice President, (mis-identified in the transcript as architect Heath), whether he agreed with opponents' contention that Sunrise does not provide health care and therefore is not in compliance with the CCRC definition. To which Mr. Kroskin replied, "We are not considered under the DC code, a health care facility as defined under the code." Sunrise attorney then said, "But you do provide some health care to your, to the residents of course?" To which Mr. Kroskin replied, "I don't qualify it as health care as much as I qualify it as activities of daily living and personal care. But

again, I don't, I think its hair-splitting, I don't, I think the health care definition specifically doesn't include our use." Transcript, 515.

The definition of a CCRC also includes Continuity of Care. "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 and have, in fact, stated that they are not.

Location of Sunrise's chosen lot and size of project

Sunrise expert testified that the lot was "a transitional site between Wisconsin, Tenley Circle and a residential neighborhood." Transcript, 362. No. The site is in a residential neighborhood. It is surrounded on three sides by single family detached homes.

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.

The existing church is **28** feet high from ground to roof on the other side of the driveway from the 5 homes. The current building is three stories, with the first story being partially below ground.

By comparison, the Sunrise proposal, 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. The proposed building is to be 52 feet in height with FOUR stories plus penthouse - all above ground - next to 2-story single family detached homes. For applicant's version see Exhibit 135A. The Sunrise building, which is proposed as having four-stories plus a penthouse plus a steeple at 70 feet, see last page of Exhibit 136A, does not fit harmoniously into the residential neighborhood.

For perspectives on the proposed building compared to nearby homes see Exhibit 136A. That comparison uses the actual heights of the single family two-story homes located on Alton Place, 39th Street, Yuma Street and Grant Road. All of these homes are within 200 feet of the proposed project.

Sunrise will be serviced by 20 trucks a week (4 per day), some trucks being 30 feet long and 28 tons, plus a 7-ton shuttle multiple times a day, housing 121 people serviced by 70 staff (FTEs), half of whom drive to work, using commercial lighting in a residential zone, beginning operations at 7:30 am, creating a dangerously steep truck ramp next to single family homes, loading and unloading next to those same homes, with all the attendant garbage, waste, refuse and trash associated with 200 people living or operating on the lot. According to Sunrise, the truck ramp is for the use of the

expected high volume of cars arriving at the site plus trucks delivering food and linens, generated by the 534 people. To name a few objectionable problems.

Truck traffic and traffic generally will be totally out of scale with low density R-1-B single family detached zoning.

30-foot trucks

No turn rotation studies have been done for the 30-foot trucks using the residential streets. 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 Place, 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. See Exhibit 136C. DDOT's report neglects to mention any of these facts.

It is unclear what type of 30-foot truck would be servicing the site. In response to the letter from Councilmember Cheh (Exhibit 101), DDOT merely said that there were lots of 30-foot trucks around Washington. Exhibit 137**.** Turn rotations for the 30-foot trucks on to 2-way narrow streets has not been analyzed by DDOT. 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.

The number of actual employees, visitors and aides that Sunrise, which already operates 325 facilities, is expecting at 3920 Alton Place has not been provided. See the Transcript, 523 – 524. How can we, including DDOT, ascertain whether the parking requirement for a CCRC has been met, when Sunrise has provided no numbers, only that approximately 70 FTE's that will be involved. This does not tell us how many actual employees. Sunrise at Connecticut, which is about the same size, has 163 employees, as included in the Health Department Inspection at Exhibit 76.

Since Sunrise will not provide these numbers, we could make an estimate. The estimate is that the number or employees, residents and visitors will be: 163 employees, 121 residents, if each resident either has one visitor or one aide every week that would be an additional 121 people. Including the 250 that can be accommodated in the sanctuary, this would total to 534 people. But this stab at data is not a responsible approach.

Plus, the church and Sunrise would have many additional people if you include group activities, events organized by Sunrise, visitors to the residents, various service people

The DDOT report fails to address or mention the issue of whether the applicant met the CCRC regulatory standard to provide "sufficient off-street parking" for all employees, residents and visitors. 11-U DCMR § 203.1(f)(4).

A requirement for a special exception is to not create objectionable conditions, including noise. The BZA requested a more robust tree buffer as part of post-hearing submissions from applicant**.** Unfortunately, the tree box between the truck ramp and the homes facing 39th Street is only 8 feet wide. Due to the narrow width, it can only

accommodate ONE row of trees. Exhibit 135B and 135C. This means that as a sound buffer, any mitigation is quite limited.

As to light and air, the BZA asked for shadow studies for the existing church, the proposed facility, and a matter-of-right building without variances at 40 percent lot occupancy with three stories and no higher than 40 feet. For the Matter of Right option, Sunrise provided a 60 percent lot occupancy and 60 feet height. The current church is 28 feet high and the proposed Sunrise building is 52 feet high, and the current church is only 65 feet long where it is closest to the 39th Street houses as compared to the proposed Sunrise building goes across the entire 220-foot lot from Alton to Yuma. The shadow studies submitted by applicant are not as requested but those shadow studies do show a significant difference for the backyards of the 39th Street houses at the Yuma Street end. See Exhibit 135E. Meaning that some of the yards will be in shadow that currently see the sun.

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, plus the numerous care trips generated by residents, staff, contract aides and guests - that Sunrise expects every week.

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.

BZA will not defer to reports provided by Advisory Neighborhood Commission (ANC), Department of Transportation (DDOT) or Office of Planning (OP)

Advisory Neighborhood Commission 3E

a. Neighbors are not allowed to testify at the ANC: Transcript, 480, where it says: CHAIRPERSON HILL: Of the people that are here testifying in opposition, how many actually made it to the ANC meetings? (Show of hands) And you all testified at the ANC meetings in opposition? Okay. If you do respond, you have responded to them. PARTICIPANT (Lisa Bhansali): No, we're not allowed to testify (at the ANC).

b. ANC Member Jonathan McHugh asked Sunrise, a Developer who was before the ANC requesting official support for a project, to contribute $10,000 to a fund controlled by the ANC. BZA Hearing Transcript, November 14, 2108 excerpt of discussion regarding $10,000 provided by Developer to ANC. Transcript, 384.

> MS. CHESSER (neighbor): The ANC Sunrise Memorandum, also, has Mr. Kroskin, or Sunrise, giving the ANC $10,000, can you tell me, who's idea that was?

MR. CARRERA (Sunrise): That's easy. I got a call from Jonathan McHugh and asked, would we be willing to help out the community, on an annual basis, and discussed it, for a while, wasn't happy about it –
CHAIRPERSON HILL: Okay.
MR. CARRERA: -- and so yes --
CHAIRPERSON HILL: That's fine. Okay. Last question.

Excerpt from the **ANC MOU** submitted to the BZA on November 13, 2018, the day before the hearing on the Sunrise project at 3920 Alton Place, NW. (Exhibit 119, 119A in BZA Case No 19823. "6. Community Outreach Fund: Sunrise will create a community outreach fund in the amount of $10,000. The ANC will direct Sunrise to disburse funds in the amount of $2,000 per year, beginning on the date the certificate of occupancy is issued for the CCRC portion of the building, and every 12 months thereafter, to support various community events and projects as agreed upon by the ANC."

This payment of $10,000 imparts an appearance of impropriety.

ANC Resolution, Exhibit 119 and ANC Memorandum of Understanding, Exhibit 119A. First, the surrounding neighbors were not included in negotiating the MOU.

Although the ANC ultimately supported the project, the ANC Resolution does not conclude that the proposed CCRC will not create objectionable conditions or be in harmony with the zone map or zoning regulations. Rather the ANC Resolution says that the applicant *agrees* to ensure the project does not create objectionable conditions or be out of harmony. As to parking, the ANC says that applicant proposes to meet requirements and to limit the size of vehicles. The Resolution says that "applicant agrees to implement a detailed construction plan, including limits and monitoring construction vibrations." For more on vibrations, see Exhibit 73 and 136D1 and 136D2.

The ANC MOU says that "deliveries will be limited to a 30-foot truck or smaller." Comment: There are 30-foot trailer trucks, where the trailer alone is 30 feet, that service other nearby Sunrise facilities. Those trucks are not moving people in and out. Those trucks are bringing supplies, food, linens to the building. CCRCs are not like apartment buildings where the biggest thing that happens is a tenant moving in or out. CCRCs are feeding people 24/7 and doing laundry, including bed and dining linens, for 121 residents and 163 staff.

The ANC MOU says that terrace hours can be between 8AM and 10 PM and go until 11 PM on Friday and Saturday. Comment: There was no consultation with the surrounding neighbors to arrive at these hours. The hours exceed what should be allowed in a quiet residential neighborhood.

The ANC MOU states that lights can stay on in the main entry, foyer and front parlor on a 24-hour basis but shall be dimmed after 10 PM. Comment: Surrounding neighbors were not consulted about these hours.

The ANC MOU agreed to “no parking on Sundays” on the north side of Yuma Street for three to four car lengths along the site. Comment: No consultation took place with those who live on Yuma.

Regarding a **Construction Agreement,** the ANC MOU says that “Sunrise shall advise the ANC of construction plans...” That Sunrise “shall provide and fund a vibration monitoring plan for residents within 200 feet .. that shall monitor vibrations that affect surrounding buildings… establish a baseline for acceptable vibrations based on industry best practices” and “stop construction promptly if monitors indicate that vibrations are exceeding threshold levels.” The MOU says “Sunrise will not use pile drivers.” The MOU goes on to say that the Plan, which is to be shared with the ANC, will detail… “mitigations Sunrise will offer if the vibrations both exceed agreed upon limits and show demonstrable harm to resident’s (sic) homes.” The ANC agreed with Sunrise that construction hours could be 7 am to 7pm Monday through Friday and 8am to 8pm on Saturday. Comment: None of this was negotiated in consultation with surrounding neighbors and none of the ANC members live anywhere near the site.

The lack of neighborhood consultation at the ANC, does not serve the BZA well.

DDOT REPORT

While the DDOT Report, Exhibit 53, concludes that the proposed project meets all requirements. DDOT cannot due some of the required analysis because they do not have the number of employees, visitors or residents from Sunrise, they have done no turn analysis for the 30-foot trucks and have not ascertained which type of 30-foot truck is in play. The DDOT report also uses a day care center as a baseline that is only at WABC temporarily and it uses comparisons to other Sunrise facilities as to adequate parking in the garage where the Sunrise employees are not allowed to use the garage. For all these reasons, no deference is due the DDOT Report.

DDOT never cites the parking condition, imposed on a CCRC at 11-U DCMR § 203.1 (f), that a showing of adequate parking for “employees, residents, and visitors” on site. Thus, DDOT seems unaware regarding the standard for their analysis.

We know that DDOT cannot do this analysis because they have not made Sunrise provide any of the relevant numbers. They do have the number 121 residents but Sunrise has not divulged number of employees, only FTEs, and has not divulged the estimated number of guests or expected residents’ contract employees, although they must have estimates since Sunrise operates over 300 similar facilities in the US and Canada.

The DDOT Report never mentions the 30-foot trucks and provides no turn rotations to show how such large trucks can negotiate Alton Place, which is 30 feet wide, two-way traffic and has residential parking on both sides. This leaves 8 feet per traffic lane.

Councilmember Mary Cheh Letter, Exhibit 101, and DDOT's response to Cheh letter, Exhibit 137. The Cheh letter specifically asked how many visitors and guests are expected and how many people are expected at Sunrise events. The Cheh letter did specifically say that the conditions for a CCRC regarding parking for "employees, residents, and visitors" under 11-U DCMR § 203.1(f)(4) is to be an "independent analysis of whether they meet the residential parking required by 11-C DCMR § 701.5." The letter noted that the DDOT report concentrated their analysis on 39th Street, and said "(t)here does not appear to be adequate consider (sic) of traffic on Alton and Yuma." Finally, the Cheh letter asked for turn rotations for the 30-foot trucks that would be making a right turn on to the truck ramp from Alton.

DDOT's response (Exhibit 137) to the Cheh letter failed to do any analysis as required by the CCRC parking conditions contained at 11-U DCMR § 203.1 (f)(4). DDOT's reply said that "Thirty-foot trucks are very common in the District and usually are able to turn into driveways and alleys without any problems." DDOT then goes on to say that they are available "if at any point in the future the locations of street signs need to be adjusted along Alton Place or Yuma Street due to truck turns."

In response to the Cheh letter noting that DDOT concentrated on 39th Street – a street applicant said they would steer their traffic away from – DDOT cited the same numbers they did in their original report – numbers from Applicant's traffic report generated by Gorove Slade. DDOT refers to these numbers as "trip generation estimates the Applicant developed in close coordination with DDOT." See above regarding fewer trips than currently despite only 18 congregants now using the site.

Office of Planning Report

While the OP Report (Exhibit 90) concludes that the regulatory test for a variance has been met, that report did not address the regulations and case law discussed herein requiring a variance applicant to (1) be an owner, (2) demonstrate that that the owner cannot make a reasonable disposition of the property for a permitted use; (3) addressing the "public service organization" or self-imposed hardship doctrines. Therefore, no deference is due to the OP as to these issues.

The Office of Planning Report, Exhibit 90, did no detailed analysis of the 6 conditions that a CCRC special exception must meet. But OP's analytical failures are extensive. OP did not determine if the Sunrise proposal met the definition of a CCRC, which includes continuum of care and health care. OP in fact states that Sunrise would provide health care – see page 4 of Exhibit 90 – Sunrise does not provide health care. They also do not provide continuum of care.

Thus, OP's conclusion that Sunrise qualifies as a CCRC is based on a very significant factual error. No health care is being provided as required by the definition of a CCRC.

As to parking, 11-U DCMR § 203.1(f)(4) requires "The use and related facilities shall provide sufficient off-street parking spaces for employees, residents, and visitors." It is

impossible to do this analysis without any numbers except 121 residents. Sunrise has refused to provide the actual number of staff. Sunrise says they will have 65-75 FTEs, which we can estimate is 163 staff since the Alton proposal and the Sunrise are approximately the same size and the Connecticut Avenue facility has 163. Exhibit 76. OP relies on DDOT's very flawed report, see above, to assume that the 66 spaces required under 11-C DCMR § 701.5 equates to meeting 11-U DCMR § 203.1 (f), which lists the conditions that must be met to receive a CCRC special exception.

Bottom line regarding the OP Report, OP based its support of Sunrise request for a CCRC special exception on OP's erroneous information. Sunrise does not provide health care and does not meet the definition of a CCRC. Even if Sunrise did meet the CCRC definition, OP cannot conclude that sufficient parking is being provided, a mandatory condition, because Sunrise has not provided the necessary numbers, data. Since OP then bases their acceptance of all the variances on the fact that they assume the CCRC as proposed gets a special exception, the entire report fails to provide a respectable, responsible analysis of the project and its impact on zoning and the neighborhood.

In summary, none of the Reports above – Advisory Neighborhood Commission, Department of Transportation or Office of Planning deserve great weight when the BZA makes its decision in Case No 19823 – WABC-Sunrise. The reports do not provide professional analysis and are not based in fact or legal standards. The BZA should not rely on the misinformation the reports provide.

Conclusions of Law

Only an owner can ask for and receive variances

Only an **owner** may request a variance for its own purposes. To request a variance, the applicant for whom the variance is sought must be the owner 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.

> ***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.*

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)*

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

11-X DCMR § 1002

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…*

The terms **"agent"** and "authorized representative" are not defined by the regulations, but 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:

> § 8.12 "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."

While authorized contract purchasers may request special exceptions, the zoning regulations and the case law make clear that to request a variance, the applicant for whom the variance is sought must be the owner of the property or the owner's authorized representative at the time of the request. *See* 11-X DCMR § 1000.

By contrast, the regulations concerning a special exception do *not* contain any special provisions requiring that an applicant for a special exception be the owner of the property, but merely cross -reference the general rules of practice and procedure, Subtitle Y § 300. *See* 11-X DCMR § 902.1. This difference is important in interpreting the generalized rules of practice and procedure, which specify the general procedures by which owners including contract purchasers, apply for both variances and special exceptions, 11-Y DCMR §§ 300.4, 300.5. Generally, in the case of a conflict, the specific provisions of an enactment – in this case, the specific provisions governing who is entitled to apply for a variance set forth in 11-X DCMR § 902.1 - predominate over provisions of general applicability, particular since the general rules are general rules of procedure rather than substance. *See United States v. Stokes*, 365 A.2d 615, 619 n. 16 (D.C. 1976). The omission of contract purchasers from Subtitle X 1000.2 must therefore be intentional and must be given effect.

Further, the regulations specify that the BZA may only consider the exceptional practical difficulties to the “owner” of the property. Even if Sunrise is a party to a contract to a purchase, that is not the same as a current owner at the time the request for a variance is made as required by the regulations. Sunrise, not the owner of the property, cannot request a variance for itself.

This is confirmed by the D.C. Court of Appeals, which specifically rejected the argument that “the applicants were acting as agents for the owner” and could secure a variance based on “a showing of hardship upon the owner as well as the tenant,” stating: “The statute expresses in clear and unambiguous language that the showing, whether of "practical difficulties" or "undue hardship", must be upon the owner. . . . [I]in evaluating the Board's order we look only to evidence of hardship or difficulty befalling the owner. *Palmer v. District of Columbia Bd. of Zoning Adjustment*, 287 A.2d 535, 541 (1972). See *Capitol Hill Restoration Society v. D.C. Bd. of Zoning Adjustment*, 534 A.2d 939, 941-942 (1987). The financial or operational difficulties by any party other than the owner “are immaterial. *Id.* at 538. *See also French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1035 (D.C. 1995).

The record is clear that WABC does not seek the significant area variances for its own use of the property but rather in order to sell the property to Sunrise, a contract purchaser, who apparently will not buy the property unless the variances are granted for its business. All three area variances requested are to accommodate Sunrise’s ongoing for-profit business.

WABC’s letter authorizing Sunrise and the law firm of Donohue & Stearns to represent WABC before the BZA did not transfer any ownership rights or status to that representative or attorney. Exhibit 9.

A “contract purchaser” is not an owner of property. In addition, Sunrise has not adequately documented that it is a contract purchaser of the property at 3920 Alton Place NW.

The clear and unambiguous language of the variance regulations at 11-X DCMR §§ 1000.1, 1000.2, and 1002.1(a), provide that only an “owner” of the property for which a variance is sought may apply for a variance and that practical difficulties, a prerequisite for an area variance, must be to the “owner” of the property. Ownership must exist at the time of the request for a variance.

Sunrise is not an owner of 3920 Alton Place NW and, thus, may not apply for or receive the three area variances requested (lot occupancy, number of stories, and elimination of side yard setback) for itself on the basis of practical difficulties pursuant to the clear and unambiguous language of the governing regulations and the controlling and well-established DC case law. 11-X DCMR §§ 1000.1, 1000.2, and 1002.1(a). *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023,

1035 (D.C. 1995); *Palmer v. District of Columbia Bd. of Zoning Adjustment*, 287 A.2d 535, 541-542 (D.C. 1972).

WABC and Sunrise have cited no authority for its argument that Sunrise, a for-profit assisted living and memory care facility, may apply for and receive variances for itself in conjunction with WABC, or that it may attempt to demonstrate practical difficulties to itself as a business whose attorney is claiming they are a contract purchaser.

Therefore, as discussed in more detail below, Sunrise's arguments for why the variances are needed in order to construct a financially viable CCRC are legally irrelevant. The only relevant inquiry is whether WABC has demonstrated that the variances are the only way to address its own practical difficulties in maintaining its property.

VARIANCES

Three Prong Test for Area Variances

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) (*Draude* I) 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 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.

While the OP Report (Exhibit 90) concludes that the regulatory test for a variance has been met, that report did not address the regulations and case law discussed herein requiring a variance applicant to (1) be an owner, (2) demonstrate that that the owner cannot make a reasonable disposition of the property for a permitted use; (3) addressing the "public service organization" or self-imposed hardship doctrines. Therefore, no deference is due to the OP as to these issues.

Exceptional physical characteristics or exceptional topographical conditions

WABC has also failed to demonstrate that "the property suffers from 'exceptional narrowness, shallowness, or shape' or from 'exceptional topographical conditions or other extraordinary or exceptional situation or condition;" 11-X DCMR § 1000.1.

The lot is not uniquely sized, shaped, configured, or located, and is similar to other lots in the area. *St. Mary's Episcopal Church v. DC Zoning Commission and Hillel at GWU, Intervenor, 174 A.3d 260 (2017)*, *Ait–Ghezala*, 148 A.3d at 1211, 1216 (2016); Gilmartin v. District of Columbia Bd. of Zoning Adjustment, 579 A. 2d 1164, 1168 (D.C. 1990).

The size of the lot is not unique and is ideal for subdividing in conformity with zoning or sale to another place of worship.

The WABC lot, with a lot area of more than 35,000 square feet, does not meet the definition of a substandard lot, which is defined as "A record lot existing prior to the effective date of this title that does not conform with the lot dimension and lot area requirements of the zone in which it is located." 11-C DCMR § 301.1, The lot is not uniquely sized, shaped, configured, or located, and is similar to other lots in the area. *St. Mary's Episcopal Church v. DC Zoning Commission and Hillel at GWU, Intervenor,* 174 A.3d 260 (DC 2017), *Ait–Ghezala*, 148 A.3d at 1211, 1216 (DC 2016).

WABC cannot and does not argue that the variance is warranted "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations." 11-X DCMR § 1001.1. *See Russell v. D.C. Bd. of Zoning Adjustment*, 402 A.2d 1231, 1236 (D.C. 1979) (granting variance "[w]here substandard lots (*those having a smaller size or lesser frontage than the minimum*) are involved, and as a result, "the owner could never sell the unimproved lot for a residential use absent a variance.") (emphasis added, citations omitted). Rather, its size large size creates more not fewer opportunities for making a profitable use of the lot.

The adjacent NPS parcel is not an exceptional physical or topographical attribute that creates physical obstacles or impediments to the Applicants' ability to profitably use the

lot. Even with the NPS parcel, the lot has ample street frontage, with access to both Yuma Street and Alton Place.

The 3920 Alton Place lot was originally 7 individual single family lots in the R-1-B neighborhood before WABC bought the lots and combined them to build the existing church. Exhibit 130. See also Exhibit 83A, page 15, where it says: In 1954, WABC bought 7 single family lots and combined them to create the church lot. Church Bulletin of September 24, 2017.

More importantly, the large size of the lot results in no practical difficulties to the owner. Rather, the large size of the lot is beneficial, creating opportunities to subdivide and develop the lot for profitable matter of right uses. The opposing parties submitted unrebutted evidence that the lot could be successfully subdivided and developed with up to seven single family homes. Exhibit 130. Transcript 440-442.

Other extraordinary or exceptional situation of the property

Confluence of Factors and Public Service Organization

The property does not suffer "from 'exceptional narrowness, shallowness, or shape' or from 'exceptional topographical conditions or other extraordinary or exceptional situation or condition;" 11-X DCMR § 1000.1.

The lot is not uniquely sized, shaped, configured, or located, and is similar to other lots in the area. *St. Mary's Episcopal Church v. DC Zoning Commission and Hillel at GWU, Intervenor, 174 A.3d 260 (2017)*, *Ait–Ghezala*, 148 A.3d at 1211, 1216 (2016); *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A. 2d 1164, 1168 (D.C. 1990).

A permanent endowment or a church's need for additional congregants is not appropriate criteria to find an exceptional condition or situation that warrants greater flexibility for obtaining multiple area variances in a R-1-B neighborhood.

WABC states that by "leveraging its land value" it "will gain new facilities and financial solvency." Exhibit 69 at 25. WABC's need to "leverage its land value" to produce revenue in itself without a concomitant need to expand or to accommodate unique programmatic, institutional, or religious needs does not create an adequate basis to establish an exceptional condition or situation of the property. See *St. Mary's.*

WABC and Sunrise state that the "confluence of needs flowing from the church and the proposed CCRC use are properly before the Board, including the economic feasibility of a CCRC. Although the needs of a public service organization may be considered under the court created "confluence of factors" and public service organization doctrine, the alleged needs of Sunrise, including its economic feasibility as a CCRC and as it relates to the funding of WABC, are not appropriate for consideration by the BZA in determining whether there is an extraordinary or exceptional condition affecting the property and

such consideration does not follow long-standing precedent. The confluence of factors and/or public service organization doctrine has not been extended to a for-profit business or a non-owner of the property for which the variances are being sought. See *Foxhall Community Citizens Association v. District of Columbia Board of Zoning Adjustment*, 524 A.2d 759, 764 n. 6 (D.C. 1987), *Dupont Circle Citizens Ass'n v. District of Columbia Bd of Zoning Adjustment, (St. Thomas*), 182 A. 3d. 138 (D.C. 2018), *Draude v. District of Columbia Bd. of Zoning Adjustment (Draude II), 582 A.2d 949, 955 (D.C. 1990) (Draude II), Draude I, St. Mary's, Nat'l Black Child Development Institute, Monaco.*

Contrary to the applicants' argument, Sunrise's claimed status as a "contract purchaser" does not make its claimed "needs" as a CCRC relevant or appropriate for consideration by the BZA because these claimed "needs" are not unique to the property but rather pertain to its for-profit business. 11-X DCMR §§1000.1, 1002.1(a). *St. Mary's Episcopal Church v. DC Zoning Commission and Hillel at GWU, Intervenor, 174 A.3d 260 (2017)*, *Ait–Ghezala*, 148 A.3d at 1211, 1216 (2016); *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A. 2d 1164, 1168 (D.C. 1990). Further, a contract purchaser is not an owner and Sunrise is not a public service organization.

Sunrise is a multinational for-profit corporation that sells its properties to Welltower, a real estate investment trust traded on the NYSE, and owned by Revera, Inc. Sunrise is a for-profit landlord business that does not provide affordable units or low-income housing and evicts its assisted living and memory care month-to-month tenants for behavioral problems, lack of income, or need for medical care. Exhibit 83A at pages 19,56,67,114,149. This business model is legal but it is not compatible with a claim of being a public service organization or "mission-compatible" with WABC as claimed.

Sunrise is not akin to a public service organization. *St. Thomas'*. Sunrise cannot paint itself as a public service organization by providing an endowment to the church, or "partnering" with the church, or by providing "senior housing." Sunrise is a for profit landlord business.

Sunrise is a for-profit corporation and granting Sunrise and/or derivatively WABC, the additional flexibility for variance relief accorded to public service organizations would be an impermissible expansion of that doctrine.

WABC does not seek the significant area variances for its own use of the property but rather in order to sell the church to Sunrise, a contract purchaser, who apparently will not buy the property unless the variances are granted for its business. The variances do not serve WABC's own end. The public service organization doctrine does not apply when a church that sought the variances seeks the variances not for its own use of the property but rather in order to sell the church to a contract purchaser who will not buy the property unless the way is clear to use it for another purpose. *Foxhall*, 524 A.2d at 764 n. 6. See *St. Thomas'*.

The new church's income will be a permanent endowment provided by the for-profit Sunrise company. Because there is no contract to purchase in the record no details are available regarding the specific relationship, responsibilities or constraints between the parties.

There are no unique circumstances peculiar to WABC's property, including uniqueness arising from a "confluence of factors." *St. Mary's Episcopal Church v. DC Zoning Commission and Hillel at GWU, Intervenor, Ait-Ghezala v. District of Columbia Bd. of Zoning Adjustment,* 148 A.3d 1211,1216 (D.C. 2016); *Gilmartin v. District of Columbia Bd. of Zoning Adjustment,* 579 A.2d 1164, 1168 (D.C. 1990). Sunrise cannot substitute its "needs," including financial viability of a multi-national corporation, for the "needs" of WABC to constitute an "exceptional condition."

This project does not meet the criteria for flexibility that might be applied if there was a "public service organization" because any public service organization status of WABC may not be extended to include Sunrise. And all the variances are for Sunrise.

Sunrise's claim that there is a need for senior housing and that it provides such does not make it a public service organization. If there is a need for senior housing the greatest need is not in Ward 3 where there are 16 facilities nearby, including three other Sunrise facilities – one 8 blocks down Nebraska and one in Friendship Heights in the other direction. Exhibit 124A, Slide 62, TNA power point. See "Gentrification" at p.112 of Exhibit 83A. If Sunrise is addressing a "need" then they should be providing affordable units and not be part of a concentration of senior facilities in Ward 3.

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.

In Dupont Circle Citizens v. 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*. 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. 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 by an amendment to the zoning regulations adopted by the Zoning Commission) and St. Thomas' sole request was to increase lot occupancy from 80 percent to 86.7 percent. This, by comparison with the instant case, was a de minimis request for zoning relief. Exhibit 83A, page 160.

Sunrise attempts to conflate their desire to build an oversized facility in a residential area with a social need to care for the elderly. And donning the cloak of a church. This is referred to by Ms. Baum, Sunrise's attorney, Transcript 532-533, after mentioning Sunrise argument that 86 units are mandatory for any CCRC, says, "you have to have

this relief in order to make it work. And in order for this church to survive. So, it's a very clear chain."

The applicants have not sustained their burden of showing that there is an "other extraordinary or exceptional situation or condition of a specific piece of property" at 3920 Alton Place NW. 11-X DCMR § 1000.1.

***Draude* design requirements**

The public service organization doctrine is qualified by the design requirements of *Draude*. *St. Thomas'; St. Mary's; Draude I and II*. WABC has not made the design showings required by *Draude I* in order to receive the additional flexibility for variance relief accorded to public service organizations. Specifically, WABC has not sufficiently 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 specific variance sought." *Draude I*, 527 A.2d at 1256.

WABC, the only applicant having an arguable claim to public service organization status, has not demonstrated that the specific design of the project constitutes an institutional necessity rather than the most desired of various options or that any needed design features require the three area variances sought.

WABC has not shown or cited any unique institutional, programmatic, or religious needs that require expansion. The three area variances solely facilitate greater size and occupancy; 50% increase in lot occupancy, additional story, and elimination of side yard setback. The new church by their own description is downsizing.

The new church will occupy less than 13% of the proposed building, and will be limited to a small portion of the first floor and a single room on the second floor. The new church's portion of the building will be much smaller than WABC's existing church.

Sunrise's claimed needs concerning the building's design for its assisted living facility are not appropriate for consideration by the BZA because Sunrise is not a public service organization and is not entitled to greater flexibility in finding an exceptional condition as part of the variance relief analysis.

The design of the building serves the needs of Sunrise in increasing its occupancy capacity to produce greater income for Sunrise.

Sunrise's claims of there being an exceptional condition or situation, including having a "confluence of needs" with WABC are inappropriate for consideration by the BZA because its claims pertain to operating a for-profit business seeking a sizable profit rather than to a unique or exceptional condition of the property or other exceptional situation. See *Palmer*. Sunrise cannot substitute its "needs," including financial

viability of a multi-national corporation, for the “needs” of WABC to constitute an “exceptional condition.”

The applicants have failed to satisfy their burden of proving the exceptional or unique condition requirement for obtaining area variance relief. 11-X DCMR §§ 1000.1, 1000.2, 1002.1(a), 1002.2.

Practical Difficulties

The zoning regulations provide that “(a)n applicant for an area variance must prove that as a result of the attributes of a piece of property… the strict application of a zoning regulation would result in peculiar and exceptional practical difficulties to the owner of the property.” 11-X DCMR § 1002.1(a).

Sunrise is not an owner of 3920 Alton Place NW and, thus, may not apply for or receive the three area variances requested (lot occupancy, number of stories, and elimination of side yard setback) for itself on the basis of practical difficulties pursuant to the clear and unambiguous language of the governing regulations and the controlling and well-established DC case law. 11-X DCMR §§ 1000.1, 1000.2, and 1002.1(a). *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1035 (D.C. 1995); *Palmer v. District of Columbia Bd. of Zoning Adjustment*, 287 A.2d 535, 541-542 (D.C. 1972). Sunrise is not the owner of the property and any claimed practical difficulties by Sunrise are irrelevant.

If we assume in the alternative that an entity that owns no property can nonetheless requests variances for the lot it does not own then it still must demonstrate practical difficulties.

D.C. case law does not establish a precise definition of what constitutes practical difficulties. The general standard is that the “applicant must show that strict compliance would be ‘unnecessarily burdensome,’ leaving specific questions regarding the nature and extent of the burden to a case-by-case analysis.” *Gilmartin* citing *Palmer* at 540-42. In addition to make a finding that the area restriction is unnecessarily burdensome, the applicant must show that the practical difficulties are unique to the particular property. *Association for Preservation of 1700 Block of N Street, NW and Vicinity* v. *District of Columbia Board of Zoning Adjustment*, 384 A. 2d 674, 678 (D.C. 1978); *Barbour v. District of Columbia Board of Zoning Adjustment*, 358 A.2d 326, 327 (D.C. 1976).

Factors that have been considered by the BZA in area variance analyses include easements on the property, *Gilmartin*; restrictive covenants, *Monaco*; economic use of the property, *Barbour*; reduced enjoyment of the property, *Barbour, 1700 Block of N Street*; different designs complying with the regulations, *1700 Block;* significant limitation on the utility of the structure, *1700 Block*; an owner knew or should have known of area restrictions, *A.L.W., Inc*. v. District of Columbia Board of Zoning Adjustment, 338 A. 2d 428, 431 (D.C. 1975); economic feasibility of preserving historic

buildings, *Tyler v. District of Columbia Board of Zoning Adjustment*, 606 A. 2d 1362 (D.C. 1992); whether the requested variance was de minimis in nature, *Gilmartin*; severity of the variances requested and the effect the variances would have on the overall zone plan, *Gilmartin*; inability to make a reasonable disposition of the property for a conforming use, *Clerics of St. Viator, Inc. v. District of Columbia Board of Zoning Adjustment*, 320 A. 2d 291, 296 (D.C. 1974).

Economic Feasibility

The applicants contend that the "economic feasibility" or "financial viability" of this project is both an exceptional condition or situation and a factor to be considered by the BZA in its practical difficulties analysis for area variance relief. Exhibit 8 at 5-7, Exhibit 69 at 25-30.

Although the BZA may consider economic factors in its practical difficulties analysis for an area variance, this factor must be unique to the property and is one of several factors to be considered in determining whether the area variance is justified. The BZA does not err in considering a "confluence of factors" that give rise to an exceptional condition needed for variance relief, including the factor of "economic viability" but such must be unique to the property. *Tyler, Gilmartin*. The economic factors cited by the applicants concerning the CCRC costs are not unique to the property at 3920 Alton Place NW.

"Economic use of property has been considered as a factor in deciding the question of what constitutes an unnecessary burden or practical difficulty in area variance cases that have used the *Palmer* analysis." *Gilmartin* at 1170.

Here Sunrise's claimed expenses for construction and operation of its assisted living facility are not unique to the property but rather pertain to the for-profit business of Sunrise, an alleged contract purchaser of a lot that they admit is too small for their business needs. Consideration of Sunrise's needs under the confluence of factors analysis, including economic viability, is an unacceptable and unreasonably strained expansion of what is sufficient to meet the practical difficulties requirement.

"The nature and extent of the burden which will warrant an area variance is best left to the facts and circumstances of each particular case. But it is certain 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 greater return." Palmer at 542.

Sunrise has not shown that it has to build 86 units versus fewer units in order to produce a reasonable income. Sunrise has failed to demonstrate that CCRC's, including Sunrise at 3920 Alton Place, need 86 units to be financially viable. Sunrise has not met its burden of proof, and the burden is on the applicant, that there are no alternative options that conform to zoning requirements or that the economic factors for the construction or operation of an assisted living facility are unique to the property.

Applicant argues that *all* CCRC's require more land than is available in residential zones and therefore, the BZA must grant variances to all CCRC's.

> *''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* but the regulations do not provide the necessary amount of lot coverage or number of stories to make them viable without variance relief." * footnote omitted*
>
> *Exhibit 8, page 6. Applicant's Preliminary Statement of Compliance with Burden of Proof.*
>
> *"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. …Any 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."*
>
> *Exhibit 69, page 28, Applicant's Pre-Hearing Statement*

If the BZA were to accept Sunrise's premise that all CCRCs seeking special exceptions in residential areas must be allowed to have a minimum of 86 units, the BZA would be amending the regulations. It is not within the jurisdiction of the BZA to amend the regulations.

The "economic feasibility" claimed by Sunrise is not unique to the property and any exceptional condition of the property claimed by WABC does not justify the three significant area variances requested for the sole benefit of Sunrise.

Sunrise has alternative options

Sunrise is arguing that the finances of a business are appropriate for consideration, which we do not concede, in making the case that the variances should be granted.

To be granted the variances they seek, Sunrise has the burden of showing that there are no alternative options that are matter of right, in other words, options that conform to existing zoning and do not require any request for zoning relief.

If Sunrise's financial argument is allowed to be considered, Sunrise has not shown that they must have 86 units to be "financially viable." Sunrise has tried to make a case that no CCRC can be financially sustainable unless the CCRC has a minimum of 86 units.

If we were to accept Sunrise's premise that *all* CCRCs seeking special exceptions in residential areas must be allowed to have a minimum of 86 units, we would be amending the regulations. It is not within the jurisdiction of the BZA to amend the regulations. See Exhibit 8, page 6, Applicant's Preliminary Statement of Compliance with Burden of Proof and Exhibit 69, page 28-29, Applicant's Pre-hearing Statement.

As noted by the Office of Planning, Exhibit 90, there are other CCRC applications before the BZA that have substantially fewer units – approximately 34 units. BZA Case No. 19751, Med Development. The BZA can take administrative notice of that fact. See Office of Planning (OP) Report, Exhibit 90 at page 9.

Sunrise has failed to demonstrate that CCRC's, including Sunrise at 3920 Alton Place, need 86 units to be financially viable. Sunrise has not met its burden of proof, and the burden is on the applicant, that there are no alternative options that conform to zoning requirements or that the economic factors for the construction or operation of an assisted living facility are unique to the property.

The testimony offered by the applicants reflects that Sunrise is seeking the most profitable use of WABC's land. Variances are not provided to maximize profit. See *Palmer.*

In fact the variances themselves increase the costs of construction and increase the payroll required as the number of staff must increase to accommodate a greater number of units and residents.

Sunrise has alternative options regarding other residential zones

If under Sunrise's business model they want to have 86 units, then there are other residential zones that might be more suitable and that would not include a request to the BZA to in essence amend the regulations providing a special exception for a CCRC. They could honor zoning by seeking a site in these other zones.

The variances being requested are all for Sunrise and their quest to locate a senior facility in a residential zone. 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 small 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: 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.

WABC has alternative options

Applicants cannot demonstrate that variance relief is required due to "practical difficulties" within the meaning of 11-X DCMR §§ 1000.1 and 1002.1(a). Alternatives exist that do not require variance relief -- "a necessary element" in proving that variance relief is warranted to address claimed hardship by the property owner. *See Clerics of St. Viator, Inc. v. D. C. Bd. of Zoning Adjust.*, 320 A.2d 291, 294, 296 (D.C., 1974) (noting Applicants' burden of demonstrating "the inability of the applicant to make a reasonable disposition of the property for a permitted use." *Palmer v. Board of Zoning Adjustment,* 287 A.2d 535, 542 (DC 1972) ("[I]t is certain that a variance cannot be granted where property conforming to the regulations will produce a reasonable income but, if not put to another use, will yield a greater return.").

The opposing parties have established by testimony and documentary evidence that WABC can sell at least two lots conforming to existing zoning to finance the refurbishment of their church or sell several conforming lots and rebuild/reconfigure their church.

Other Factors

Severity of variances

The three area variances sought for the 3920 Alton Place lot increase the occupancy capacity by at least 73 people, plus staff, aides, and visitors and violates the development standards in residential (R) zones that are intended to control the mass or volume of structures. The development standard for the number of floors goes to the

volume of use issue. The three variances in the aggregate double the size of the building over what would be allowed under current residential zoning. The severity of the requested variances is very significant and severity is a factor for consideration by the BZA in the practical difficulties determination. *Gilmartin* at 1171.

Self-created hardship rule

The self-created hardship rule applies 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).

In the instant case, Sunrise has selected a property that is .81 acres while knowing in advance that they needed 1.5 acres to conform to zoning. They claim to need the three variances for financial viability, which is a textbook example of self-created hardship. Sunrise states, "*Any* 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." Emphasis in original. Exhibit 8, page 6, Applicant's Preliminary Statement of Compliance with Burden of Proof.

Acquiring a permanent endowment but no longer Baptist

The court cases regarding zoning and churches have involved expanding congregations and physical space necessities to practice aspects of their religion as well as specific reasons why the religious entity needed to stay in the neighborhood. *St. Mary's Episcopal v. DC Board of Zoning Adjustment and Hillel at GWU, Intervenor,* 174 A 3d 260 (2017). In addition, Hillel demonstrated a need to stay in their location, no alternative option, because they served the students on the GWU campus.

The case before us is quite different from the *Hillel* situation in that WABC is a small congregation seeking a permanent endowment. WABC is leaving the Baptists and will no longer identify as Baptist.

"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." Exhibit 83A, page 17.

On the Tenley-Friendship Forum, January 18, 2018, Reverend Bergfalk wrote: “The bulk of the funds would be used for the ministry and mission of the church, probably functioning similar to an endowment fund with income used for those purposes…” On January 20, 2018, Rev. Bergfalk, stated, “In today's world there is little to no correlation between a church and its immediate neighborhood ... in terms of congregational strength or growth…” Exhibit 89A, page 49.

Harm to Public Good and Zone Plan

The three requested variances in the aggregate would double the size of the building and double the volume of use at the site. A building compliant with existing zoning, according to applicant, would allow Sunrise to build a 47 unit-building and the three variances requested would allow Sunrise to build an 86-unit building.

The requested variances cannot 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 is incongruous with the residential character of the neighborhood.

The Comprehensive Plan, adopted by the District Council, provides the guidance for zoning in the District of Columbia. The maps and the zoning regulations are relevant to this discussion.

Applicants do not meet the standard to be granted variances because they cannot show that they are doing no harm to nearby property. Three homes next to the site have sold since Sunrise announced their proposal. This includes 2 of the 5 that share a property line with the site. This is very rapid turnover in a very stable neighborhood.

Sunrise has not shown that a two-level underground garage, 4 stories, plus a penthouse, 20 trucks and 534 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 Exhibits 36 and 91. For a comparison of heights between the two-story homes and the proposed 52-foot Sunrise building, see Exhibit 136A.

The increase in density, in the building mass and in the use of an assisted living facility for 121 persons, on a R-1-B lot would adversely affect the neighborhood and would be incompatible with the residential (R-1-B) neighborhood.

The applicants have failed to satisfy their burden of proving that the variance 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. 11-X DCMR §§ 1000.1, 1000.2, 1002.1(a), 1002.2.

Special exceptions

Special Exception Request for a Continuing Care Retirement Community (CCRC)

Sunrise requests a special exception to locate a senior living facility under the special exception allowing a Continuing Care Retirement Community (CCRC) in an R-1-B residential area. The question is whether a *specific* proposal meets the definition of a CCRC and whether as proposed it meets the six conditions required by the regulations.

CCRC Definition

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 of the residents being 86 and people having dementia, including Alzheimer's disease. Exhibit 69, page 4.

Sunrise provides neither a continuum of care or health care and therefore does not meet the definition of a CCRC. Thus, they are ineligible for a special exception.

Sunrise has made no 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). A very expensive hotel for those over 60 cannot locate in a single family neighborhood because there are no zoning exceptions to allow it.

Conditions that must be met to be granted a CCRC special exception

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), see especially 4 – 6:

> "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;
>
> (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.

11-X DCMR § 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).

One condition that must be met to be granted a CCRC special exception is that an applicant must show that the proposal is honoring the zoning plan, the maps, and the zoning regulations. The plan, 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. Three variances and two special exceptions dishonor zoning law.

OP and DDOT

Neither the OP Report (Exhibit 90) nor the DDOT Report (Exhibit 53) should receive deference from the BZA.

OP concludes that the regulatory test for a variance has been met, but that report did not address the regulations and case law discussed herein requiring a variance applicant to (1) be an owner, (2) demonstrate that that the owner cannot make a reasonable disposition of the property for a permitted use; (3) addressing the "public service organization" or self-imposed hardship doctrines. Therefore, no deference is due to the OP as to these issues.

The DDOT Report concludes that the proposed project meets all requirements. DDOT does not cite the CCRC parking requirement in its Report. DDOT cannot due that required analysis because they do not have the number of employees, visitors or residents from Sunrise, they have done no turn analysis for the 30-foot trucks and have not ascertained which type of 30-foot truck is in play. The DDOT report also uses a day care center as a baseline that is only at WABC temporarily and it uses comparisons to other Sunrise facilities as to adequate parking in the garage where the Sunrise employees are not allowed to use the garage. For all these reasons, no deference is due the DDOT Report.

CCRC

Sunrise asks for a special exception to build a Continuing Care Retirement Community (CCRC) in a residential zone.

If we assume, in the alternative, that Sunrise meets the definition to qualify as a CCRC, then to be granted a special exception for a Continuing Care Retirement Community under 11-U DCMR § 203.1 (f), applicant must show that: 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."

In addition, any special exception for any purpose is governed by 11-X DCMR § 901 special exception review standards, which include, among other requirements that the project (901.2) (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.

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. (901.3)

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. (901.4)

In applying the standards, an applicant for a CCRC special exception must show that they are providing "sufficient off-street parking spaces for employees, residents, and visitors." 11-U DCMR § 203.1 (f)(4). Although the data has been requested Sunrise has not provided the number of employees or an estimate of how many visitors, which would include hired contract aides. Sunrise has said they will have a capacity of 121 residents. The BZA can estimate that there will be 163 staff. The BZA cannot estimate the number of visitors or contract aides and Sunrise, which operates over 300 facilities in the U.S. and Canada, has provided no guidance. The burden is on the applicant to show they have met this condition and they have failed this test.

Parking

Parking adequacy must be independently examined as a condition of a CCRC special exception. It is an open question whether they need special exceptions for parking. 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 at 11-C DCMR § 701.5 is not the equivalent of meeting the CCRC condition. The letter of the Zoning Administrator, Exhibit 18, did not address the need to separately assess parking under the CCRC conditions embodied in § 203.1(f) and offered no opinion whether Sunrise had met that standard. Applicant must demonstrate that the CCRC condition is met.

The analysis required by 11-U DCMR § 203.1(f)(4) "The use and related facilities shall provide sufficient off-street parking spaces for employees, residents, and visitors" must be done before any CCRC can be approved. The proposed number of spaces is 66 spaces, with 41 of those spaces for use by Sunrise.

The number of actual employees, visitors and aides that Sunrise, which already operates 325 facilities, is expecting at 3920 Alton Place has not been provided. See the Transcript, 523 – 524. How can we, including DDOT, ascertain whether this requirement has been met, when Sunrise has provided no numbers, only that approximately 70 FTE's will be involved. This does not tell us how many actual employees. Sunrise at Connecticut, which is about the same size, has 163 employees, as included in the Health Department Inspection at Exhibit 76.

Since Sunrise will not provide these numbers, we could make an estimate. The estimate is that the number or employees, residents and visitors will be: 163 employees, 121

residents, if each resident either has one visitor or one aide every week that would be an additional 121 people. Including the 250 that can be accommodated in the sanctuary, this would total to 534 people. But this stab at data is not a responsible approach.

Plus, the church and Sunrise would have many additional people if you include group activities, events organized by Sunrise, visitors to the residents, various service people.

Not likely to become objectionable

Applicant also has the burden of showing that the proposed CCRC is "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)(5).

This is also difficult to judge without all the numbers discussed above because volume of use is a significant element of whether a project is "not likely to become objectionable."

Applicant has proposed a building that is twice the size that current zoning would allow, and more than twice the height of the surrounding single family homes, the volume of use will bring 20 trucks a week to a "no through truck zone", and many visitors and staff to the residential neighborhood, some yards will be in the shadow cast by the 52 foot building, the proposed truck ramp will be 8 feet from the property line where 2-story detached family homes are less than 10 feet away, the NPS land is between the proposed building and Tenley Circle therefore it provides little amelioration in the way of light or air to the single family homes that are on the other three sides of the lot.

Sunrise's expert testified that the project was not likely to become objectionable and met the intent of zoning because a church could have a 60-foot building and 60% lot occupancy. Transcript 363. We do not find that persuasive. First, a church is limited to 3 stories, no matter what they may be allowed in the way of height for a sanctuary or steeple. The 3-story limit for a church is the same as the limit for the surrounding detached homes, most of whom have chosen to build two-story structures. Second, a church is not a residence where people live 24/7. This means that a church, with certain times of the day or week when people come to the building, is not continuous unbroken intense use of a lot, including feeding over one hundred people and caring for their laundry and sanitary needs. Plus, people move in and out of a senior residence fairly regularly, not something that happens at a church. Finally, a church would be unlikely to generate 20 trucks per week.

The BZA cannot make a finding that the proposal would not be likely to be objectionable to nearby properties.

General Conditions that a special exception must meet.

There are also general conditions that special exceptions must meet. They must be in harmony with the general purpose and intent of the Zoning Regulations and not tend to

affect adversely the use of neighboring property. 11-X DCMR § 901.2. In addition, to be granted a CCRC special exception under 11-U DCMR § 203.1 (f), applicant "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; …". A compilation of what is defined as an "objectionable condition," 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.

Sunrise expert witness, Andrew Altman, stated that the fact that there is a small parcel of open NPS land between the proposed development at 3920 Alton and Tenley Circle, put to bed any concerns regarding light and air. The site has four sides. All of the homes are on the three sides that do not have the NPS land, so the BZA has to look at whether the 4-story building across the 220-foot lot would impede access to light and air for the nearby homes, particularly the homes sharing the property line that face 39th Street. The homes are on the opposite side from the park land. We are concerned about the canyon effect of the building and the truck ramp. Taken together they present a 65-foot wall on one side of the truck ramp.

Sunrise makes 2 arguments relating to other nearby senior facilities – (1) they are "just like" the many nearby senior homes regarding buffers and use of their proposed lot and (2) that 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 facilities: **Friendship Terrace** is **90** ft to the closest home; **Lisner** is **107 ft** from nearest lot line; **Ingleside** is **322 ft** to nearest lot line where the nearest private home is located; and **Forest Hills** is **50 ft** from the nearest lot line and 105 ft to the nearest home. **Grand Oaks** next to Sibley Hospital is not next to any homes. Also, there are 2 Sunrise facilities: **Sunrise on Conn Avenue**, 8 blocks away, in a commercial zone, and **Brighton Gardens Sunrise** on Friendship Blvd, 2 blocks across Western Avenue. Sunrise also operates **Sunrise at Fox Hill**, a mega-facility within 4 miles of Tenleytown, just off River Rd. See also Exhibits 72,122 124A at slide 62, and 129.

So, Ward 3 is not a "desert" in light of these many senior facilities and Ward 3 could be said to be hoarding senior facilities in DC because almost all such facilities are in Ward 3 while other Wards go begging. See "Gentrification" at p.112 of Exhibit 83A.

Two of the five houses next to the site sold in the last 12 months. It is evident 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 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.

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, plus the numerous care trips generated by residents, staff, contract aides and guests - that Sunrise expects every week.

The retaining wall of 13 feet 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?

We are concerned about the canyon effect of the building and the 13-foot retaining wall to accommodate the truck ramp. Taken together the building at 52 feet, including the penthouse, present a 65-foot wall on one side of the truck ramp, which is on the side of the lot that shares a property line with the houses facing 39th Street. For some of the homes on Yuma and Alton, they always will be looking down the truck ramp and at the rear and front of the trucks and cars. This is objectionable.

The special exception request for a 13-foot retaining wall where a 4-foot wall is allowed is also denied. The wall is needed because the building itself fills most of the .81-acre lot when applicant itself states they need 1.5 acres. Loading and unloading would be done next to the single-family homes that share the property line because the building itself is taking the entire lot except for the corridor in the “back” of the lot near the homes. For the homes on Alton Place and Yuma Street that are at the ends of the truck ramp, which is made possible because of the 13-foot wall, they will be looking down the truck ramp and at the front and rear ends of vehicles, including 30-foot trucks for so long as they live there. This is objectionable. The proposal needs to be redesign so as to be in greater harmony with the neighborhood. 11-X DCMR § 901.

For all the reasons stated above, the BZA denies the request for three variances and two special exceptions.

Construction

The BZA as a condition of the approval instructs applicant to meet with surrounding neighbors with a goal of entering into the construction management plan proffered by neighbors at Exhibit 136D1 and we ask that all parties report back to us on this issue prior to commencement of any construction. We include this in our Order out of concern regarding the impact of construction on the nearby homes, including those that were built over 100 years ago, with particular focus on those built in the 1800’s.