

June 23, 2025

By email

Board of Zoning Adjustment for the District of Columbia
441 4th Street, N.W., Ste 201S
Washington, D.C. 20001

RE: BZA Case No. 19823A - Wisconsin Avenue Baptist Church, 3920 Alton Place, N.W. (Sq. 1779, Lot 14) Response in opposition to Applicant's Request for a Two-Year Time Extension of BZA Order No. 19823

Dear Members of the Board of Zoning Adjustment:

Tenleytown Neighbors Association (TNA) opposes the request of the Wisconsin Avenue Baptist Church (WABC) for a two-year extension of time of the Board of Zoning Adjustment (Board or BZA) Order No. 19823 (Order). WABC seeks the extension in order to find a new continuing care retirement community (CCRC) partner as its co-applicant for zoning relief. Sunrise Senior Living (Sunrise), has withdrawn from the project approved by the Board. The extension is not warranted under the zoning regulations governing extensions of time because 1) WABC did not file a timely request for the extension, 2) there are substantial changes in the material facts upon which the Board based its original approval, and 3) WABC has not demonstrated through substantial evidence that there is good cause for the extension.

Background

On June 14, 2018, WABC, owner of the property at 3920 Alton Place, NW, and Sunrise the contract purchaser of the property, filed an application for zoning relief to demolish the existing church building and replace it with a single building housing both an 86-unit CCRC and a 250-seat church. WABC was to contribute the land, and Sunrise was to supply the architects, financing, and construction of the project. The partners planned to create a condominium regime, with Sunrise owning and operating the CCRC and WABC owning and operating the small portion set aside for the church. The applicants sought special exceptions under 11 DCMR Subtitle U § 203.1(f) to allow for use as a CCRC and for a retaining wall greater than the four-foot limit of Subtitle C § 1401.3(c); as well as variances from the height limitations of Subtitle D § 303.1, from the lot occupancy requirements of Subtitle D § 304.1, and from the side yard requirements of Subtitle D § 307.1.

TNA, representing over 200 residents living near the property who signed a petition in opposition to the project, *see* BZA Case Record Ex. 19, was granted party status in opposition, as was the Yuma Street Requesters (YSR), a group of residents of the 3900 block of Yuma Street, NW, living within 200 feet of the property. On February 14, 2020, the Board issued Order No. 19823 approving all requested special exceptions and variances.

On March 13, 2020, TNA and Tom McDonald, a resident within 200 feet of the property, petitioned the DC Court of Appeals (Court) for review of the Board's decision, as was their right. The Court issued its decision affirming the Board's Order on April 6, 2023. Thus, April 6, 2023, is the Court's decision date from which the two-year period to file for a building permit started. The period to file for an extension expired on April 6, 2025.

According to the WABC Request at p.2, shortly after the issuance of the Court decision on April 6, 2023, WABC and Sunrise initiated plans and developed construction drawings and schedules. Subsequently, Sunrise determined that the project was no longer financially viable and withdrew. No application for a building permit was ever filed.¹ WABC is now seeking a new partner to finance and build the project.

I. WABC's Request for an extension of time should be denied because it was not filed within the time allowed.

The Zoning regulations provide that an applicant seeking permission to erect a structure must file for a building permit within two years of the date the special exception or variance was approved, Subtitle Y § 702.1. The Board may extend the time to file if good cause is shown, so long as the applicant requests the extension before the two-year time period expires. If an order is appealed to the DC Court of Appeals, Section 702.3 provides:

In the event a petition to review an order of the Board is filed in the District of Columbia Court of Appeals, all time limitations of Subtitle Y §§ 702.1 . . . shall commence to run from the decision date of the court's final determination of the appeal. Unless stayed by the Board or a court of competent jurisdiction, an applicant may proceed pursuant to the order of the Board prior to the court's final determination.

The Court of Appeals issued its decision on **April 6, 2023**. This is the date when the Court's Judgment was filed and the date printed on the first page of the opinion under the caption, *see Exhibit A* attached (stating that the consolidated cases were "Decided April 6, 2023"). Thus, the two-year period to apply for permits started on April 6, 2023, and **expired on April 6, 2025**.

WABC's initial Request for an extension was dated April 28, 2025, and submitted to the BZA on April 29, 2025. It was refiled on June 3, 2025. Even the first Request was submitted three weeks after the time to apply for an extension had expired.²

Instead of the decision date, WABC relies on the date the Court issued its "mandate" in this case: May 1, 2023. The date of the mandate is not controlling. The issuance of the mandate is merely an administrative action of the Court of Appeals giving notice that all matters pertaining to the case are closed and that the Court of Appeals no longer has jurisdiction. Section 702.3 does not state that the time period for requesting an extension begins to run from "the mandate date"; it states that the time period begins to run from "the decision date."

¹ In BZA Case No. 19823A, WABC's application form, Ex. 1, does not indicate that an application for a building permit has been filed. The Department of Buildings (DOB) database lists no permit applications for this property.

² The April 28, 2025 Request signed by Rev. Dr. Lynn Bergfalk, pastor of WABC, was entered into the record for BZA Case No. 19823A as the "Letter of Authorization" (Ex. 4), "Statement Demonstrating Compliance" (Ex. 5), and "WABC Request to Extend BZA Order 19823" (Ex. 8). We note that the Letter of Authorization and Memorandum of Understanding (MOU) filed in the underlying proceeding, BZA Case No. 19823, were signed by a trustee of the church, *see* BZA Case Record 19823 Ex. 9 and Ex 119A, respectively, and that no letter of authorization from a trustee of the church has been filed in the present proceeding.

The BZA's own practice supports this point. Subtitle Y, § 604.7 specifies that the effective date of a BZA decision is the date on which it is entered into the record, and which is stated in the BZA Order:

For purposes of the subtitle, a final order shall become final upon its filing in the record and service upon the parties, the date of which shall be stated at the conclusion of each order.

Because the initial Request was submitted three weeks after the time to file it expired, the Request for an extension should be denied.

II. In any event, there has been a substantial change in a material fact on which the Board based its approval: Sunrise, co-applicant with WABC and the entity for which the Board granted the special exceptions and variances, has withdrawn from the project.

In order for an applicant to be granted an extension of time, Subtitle Y § 705.2(b) specifies that

there is no substantial change in any of the material facts upon which the Board based its original approval of the application that would undermine the Board's justification for approving the original application; ...

A fundamental and dispositive change in a material fact has occurred in this case: Sunrise, one of the two applicants, has ended its partnership with WABC and completely withdrawn from the project. See WABC April 28, 2025, Request for Extension at p. 2. Sunrise's participation was indispensable to the project and was the basis for the Board's approval of the special exceptions and variances. Sunrise was to build not only the new church, but also the CCRC for which a special exception was needed in this R-1B Zone.

The Board approved the CCRC use, *see BZA Order, Conclusions of Law (CL) No. 5 at pp. 16-17*, as well as the variances for the increase in number of stories, expansion in permissible lot occupancy, and reduction in the required side yards, so that Sunrise could build a facility with 86 units, the minimum number of units needed to spread construction costs. *Id.*, Findings of Fact (FF) No. 55 at p. 8. The Board concluded that "the requested variances from the regulations on the number of stories, lot occupancy, and side yard are required for the CCRC use, and therefore, the partnership between WABC and Sunrise, to be economically viable." *Id.*, CL No. 52 at p. 24. Likewise, it approved the special exception for the extended height of the retaining wall, which would be mostly below grade along the access route to the underground parking garage. *Id.*, CL No. 35 at p. 20.

In addition, the BZA Order required the applicants to abide by the Memorandum of Understanding (MOU) they entered into with ANC 3E, Sunrise and WABC. The Board incorporated the MOU into the Order with the exception of the section on the construction agreement. *Id.*, Condition No. 5 at p. 30, referring to BZA Case Record Ex. 119A.³

³ In the MOU, Sunrise agreed to pay for a study and reprogramming of the pedestrian crossing signal on Nebraska Avenue at Tenley Circle; funding and installation of curb extensions and traffic signage at intersections and streets surrounding the property; landscaping the National Park Service land west of the property; commitment to design the project to LEED standards; and adherence to green building requirements for stormwater management and pervious surfaces.

WABC states that it is now seeking a new partner to finance and construct the facility. According to WABC's April 28, 2025 Request, Sunrise withdrew from the project, after beginning construction drawings and coordinating with agencies and stakeholders, on the grounds that "the project was no longer financially viable, particularly in light of the extremely narrow cost margin to which the project was designed." WABC Request at p. 2.

This raises a red flag: if Sunrise, which is well-established in the local assisted living market and received the JD Powers award for "Highest in Customer Satisfaction," BZA Case Record Ex. 69 at p. 4, has concluded that the project is financially unviable, why would any other potential partner not reach the same conclusion? Indeed, multiple factors place constraints on financing and carrying out the project:

- The requirement to build not only a CCRC facility, but also a church, and to be willing to enter into a condominium regime with WABC;
- The design limitations of building a facility large enough to make a profit on a relatively small lot in an R-1B zone district;
- The higher costs of constructing and operating a CCRC facility over those of a typical multi-family building, as outlined in BZA Order, FF Nos. 55-57 at p. 8;
- The requirement that WMATA be reimbursed for measures that must be taken to prevent or remedy damage from the project's construction to the Red Line Metrorail tunnel that runs under the property (*see* BZA Order, FF No. 75 at p. 11);
- Willingness to build according to the plans specified in the Board's Order, as required by Subtitle Y, § 604.10; and
- Willingness and ability to agree to the terms of the MOU. BZA Case No. 19823, Ex. 119A.

To obtain an extension of time, WABC must provide both evidence that it will find a new CCRC partner and evidence that that partner will be able and willing to build and operate the facility in full compliance with the Board's Order. WABC has not done so. WABC has given no details about its purported search for a new partner, and it does not claim to have found one. This puts the Board at a disadvantage. If it approves the extension without knowing who any new partner may be, it will not have had the opportunity to decide whether such partner is qualified to assume Sunrise's role and adhere to the Board's Order.

III. It is unrealistic to expect that WABC will be able to find a new partner and file for a building permit if given a two-year extension of time.

WABC offers four reasons why it should be granted an extension of time under the good cause provision of § 705.2 (c): "[t]he extraordinary time delays caused by the pandemic and the court proceedings, increased construction costs, and the extraordinary changes in financial markets." WABC Request at p. 3.

Both the pandemic and the Court proceedings occurred between the BZA's Order on February 14, 2020, and the Court's decision on April 6, 2023. During these three years, there was nothing to prevent WABC from taking measures to advance the project. In fact, § 702.3 explicitly provides that "an applicant may proceed pursuant to the order of the Board prior to the court's final determination." It appears that the applicants did not take advantage of this provision since

WABC and Sunrise did not start work on the project until “[s]hortly after issuance of the court decision.” WABC Request at p. 2.

As for increased construction costs, this project has always entailed higher costs because of the intrinsic cost of constructing a CCRC and the requirement that WMATA be reimbursed for costs to protect the Red Line tunnel that runs under the property. Over the next two years, these costs will continue to be required as part of the project.

Despite higher construction costs since the pandemic, many new assisted living beds and facilities have been built throughout the city and in nearby Maryland. Since 2021, 581 new licensed assisted living beds have opened, or are in the process of opening, in Wards 2, 3, 4, 7, and 8, for a total of 1,490 assisted living and memory care beds in the city. WABC’s assertion that the District is experiencing a critical shortage of assisted living facilities is simply not true. WABC Request at p. 3. In fact, with the expansion of two existing facilities and the opening of two new facilities in DC and Maryland, there will soon be 1,001 assisted living beds in ten facilities within a two-mile radius of the WABC property. *See Exhibit B* attached. The large number of nearby beds could limit WABC’s ability to obtain a partner and financing.

At the November 14, 2018, BZA hearing, the applicants’ financial expert, Alice Katz, President of the Vinca Group, testified that a typical market area for an assisted living facility is a 10-15-minute drive, which equates to a radius of three to five miles. She showed a chart of 11 facilities within five miles of WABC and stated that the need for assisted living beds in this service area would be “an excess of ” 2,000 beds in the next 5-10 years. 11/14/2018 Tr. at p. 354; Ex. 124A1 at p. 19. With new facilities opening, this projection has already been met. There soon will be 2,238 assisted living and memory care beds within a 5-mile radius.

The assisted living market can be volatile, too. Two of the facilities on Ms. Katz’ chart, Methodist Home Forest Side and Springvale Terrace Retirement Community, have closed since 2018 and been repurposed for other uses. The Washington Home, another assisted living facility that had been located 5 blocks south of WABC, closed in 2016 to focus on providing in-home care.

Implicit in Section 705 is the assurance to the Board that the applicant will be ready to file for permits if given two more years and then build and successfully operate the facility. WABC is not in a position to do so. This is not a situation in which a third-party issue beyond WABC’s control must be resolved before the project can apply for permits as enumerated in Section 705.2 (c). Sunrise left. It is not a problem of economic conditions, governmental agencies failing to approve requests, or any pending litigation.

Instead, WABC is facing major intrinsic impediments to going forward: no partner, no financing, and no expertise in building or operating a CCRC. There is no assurance that a potential partner, if found, would be willing and able to take over the project and build in compliance with the detailed plans specified in the Board’s Order. The project as approved is based on a unique design to accommodate the specific relationship and common mission shared by WABC and Sunrise. Each own part of the proposed building in a “condominium regime.” Parts of WABC’s condo, although separate, share[s] two floors with Sunrise’s

residential rooms. The two floors above WABC would be entirely Sunrise residential rooms. BZA Case Ex. 69E2, 3.0-3.3. This unique design and form of ownership pose challenges for finding a new assisted living partner.

It is as if WABC is starting from scratch, without any of the Sunrise resources available when this application was first filed in June 2018. The Board has no reason to believe that WABC could accomplish all that is needed if given two more years. With all the uncertainties, the request for an extension of time should be denied.

IV. Community concerns

Our community has grave concerns about the financial viability of the project if it is allowed to go forward. The long-term relationship between a CCRC and WABC presents many difficult questions. What if WABC, which says it lacks money to maintain its current building, cannot pay its condo fee or contribute to major repairs? Just as the BZA has no ability to consider or assess the financial stability and expertise of any new CCRC partner, the community is very concerned whether the project would be stable and successful.

It is unfair to continue to keep our community in a continuing state of uncertainty regarding this large project in our neighborhood. The situation should be resolved now so that people can plan their future living arrangements. After seven years, the community has a legitimate interest in finality and predictability and not having to live in a state of limbo for two more years.

V. Conclusion

Based on the foregoing, Tenleytown Neighbors Association urges that the Request for extension of time be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 23, 2025, we served a copy of the foregoing Response to Request for Extension of Time *via email* on the following:

Wisconsin Avenue Baptist Church
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By Judy Chesser

Please note that Judy Chesser's correct email address is chesser1@rcn.com. That is: "chesser" followed by the number "1", not the letter "L". All subsequent documents should be served at that address.