COZEN O'CONNOR

September 25, 2018

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Frederick L. Hill, Chairperson
Board of Zoning Adjustment
441 4th Street, NW, Suite 200S
Washington, DC 20010

Re: BZA Case No. 19751
Applicant's Opposition to Motion to Dismiss or Postpone

Chairperson Hill and Honorable Members of the Board:

On behalf of Applicant MED Developers, LLC, please find enclosed an opposition to the "Motion to Dismiss, or in the Alternative, to Postpone" filed by the Massachusetts Avenue Heights Citizens' Association ("MAHCA"). MAHCA has requested party status in the subject case. As set forth in the attached, there is no basis to dismiss or postpone the application and MAHCA's motion should be denied. Accordingly, the Applicant respectfully requests that the Board of Zoning Adjustment hold a hearing on the application on September 26, 2018.

Thank you for your attention to this matter.

Sincerely,

COZEN O'CONNOR

BY: Meridith H. Moldenhauer

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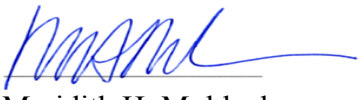
CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 2018, a copy of the foregoing Opposition to Motion to Dismiss or Postpone was served, via electronic mail, on the following:

District of Columbia Office of Planning
c/o Brandice Elliott
1100 4th Street SW, Suite E650
Washington, DC 20024
Brandice.Elliott@dc.gov

Advisory Neighborhood Commission 3C
c/o Nancy MacWood, Chairperson
nmacwood@gmail.com

Massachusetts Avenue Heights Citizens' Association
c/o Andrea Ferster
aferster@railstotrails.org



Meridith H. Moldenhauer

BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPLICATION OF **BZA CASE NO. 19751**
MED DEVELOPERS, LLC **HEARING DATE: SEPTEMBER 26, 2018**

APPLICANT'S OPPOSITION TO MOTION TO DISMISS OR POSTPONE

I. INTRODUCTION

The Applicant MED Developers, LLC (the "Applicant") hereby opposes both the "Motion to Dismiss or, in the Alternative, Postpone" filed by a prospective party, the Massachusetts Avenue Heights Citizens' Association ("MAHCA"). MAHCA seeks to strategically delay the hearing of the subject application, which was filed six months ago by the Applicant in **March 2018**. MAHCA's unfortunate and wasteful tactics should be denied for the following reasons:

A. There is no basis to dismiss the Application because the Applicant and the Board complied with the notice requirements for "200-footers" under Subtitle Y §§ 300.8(g) and 402.1(d);

B. The community had actual and constructive knowledge and notice of the Application through other means of notice;

C. The Board is authorized to waive the requirements of Subtitle Y §§ 300.8(g) and 402.1(d); and

D. There is no basis to postpone the hearing due to a unsupported claim of "substantial" change to the application because the Applicant's Prehearing Statement was filed 21 days prior to the hearing on September 26, 2018 in accordance with Subtitle Y § 300.15.

Accordingly, MAHCA's Motion(s) should be denied as there is no basis to dismiss or postpone the Board's hearing on the subject application.

II. ARGUMENT REGARDING MOTION TO DISMISS

A. The Applicant and the Board complied with the notice requirements for "200-footers" under Subtitle Y §§ 300.8(g) and 402.1(d)

The Applicant and the Board complied with the notice requirements under Subtitle Y §§ 300.8(g) and 402.1(d) because notice was sent to all owners within 200 feet of the "subject property" as drawn from 2623 Wisconsin Avenue NW. Contrary to MAHCA's assertion, the plain language of Subtitle Y §§ 300.8(g) and 402.1(d) do not require the Applicant to file a list of owners within 200 feet of each lot that comprises the Application. As such, MAHCA has provided no basis for dismissing or postponing the Application.

As a brief background, on March 26, 2018, the Applicant filed the subject application (the "Application") seeking special exception relief to construct a Continuing Care Retirement Community for 36 residents at 2619-2623 Wisconsin Avenue NW (the "Property"). As set forth in the Application, the Property is comprised of two lots in Square 1935: Lot 44 and Lot 812. In accordance with Subtitle Y § 300.8(g), the Applicant filed a "List of Names and Mailing Addresses of Property Owners within 200 feet" (the "200-Footer List") and self-stick labels with the Application. *See* BZA Ex. No. 8. The Applicant obtained the 200-Footer List from the District's Office of Tax and Revenue, which compiled the 200-Footer List based on Lot 44 in Square 1935, but not Lot 812. *See* BZA Ex. No. 8. On April 3, 2018, in accordance with Subtitle Y § 402.1(d), the Office of Zoning mailed notice of the public hearing to all addresses appearing in the 200-Footer List. *See* BZA Ex. No. 29.

Simply put, the 200-Footer List filed with the Application, and the notice sent by the Office of Zoning, comply with the relevant requirements of the Zoning Regulations. Pursuant to Subtitle Y § 300.8(g), an application to the Board must include:

> The name and addresses of the owners of all property located within two hundred feet (200 ft.) of **the subject property** and two (2) copies of self-stick labels printed with their names and addresses. (emphasis added).

The plain language of the regulation is clear that the Applicant need only file the 200-Footer List for "the subject property."[1] To that end, when the words of a statute are "clear and unambiguous" a judicial body "must give effect to its plain meaning." *See James Parreco & Son v. D.C. Rental Housing Com.*, 567 A.2d 43, 45 (1989). "The words used, even in their literal sense, are the primary and ordinarily the most reliable source of interpreting the meaning of any writing." *See id.* at 46.

Notably, the plain language of Subtitle Y § 300.8(g) does not reference any requirement for an applicant to obtain a "200-footer list" for multiple properties that are part of a single zoning application. If the Zoning Regulations had intended for an applicant to file a "200-footer list" for each parcel or lot that comprises "the subject property," then the regulation would have expressly stated as is done in other section.[2]

In this regard, it should be noted that the Board has a long-standing tradition of accepting the Office of Tax and Revenue's 200-footer maps. Here, four individuals have alleged that they may have received notice had the 200-foot map been taken from Lot 812: John Barbarino (2716 36th Pl NW), David Huebner (2715 36th Pl NW), Steven and Joan Danzansky (3609 Edmunds Street NW), and Tiffany Prather (3620 Edmunds Street NW). Based on Office of Tax and Revenue's method for 200-footer maps, none of these four individuals live within 200 feet as drawn from Lot 812. Regardless, the Board can affirm that notice was issued in accordance with the Board's practices and is fully compliant.

[1] The word "property" is defined as "something owned or possess; a piece of real estate." The plural of property is "properties" which is not used here. *See* Mirriam-Webster Dictionary, a version of Webster's Unabridged Dictionary.

[2] The "posting" requirement under Subtitle Y § 402.3 requires that the "property" be posted. That regulation also makes special reference to "each" street frontage and "each" existing building in Y § 402.4, such language does not appear in the 200-footer notice. Here, the Applicant posted the Property with three signs that have been maintained since the posting on September 11, 2018.

MAHCA's interpretation is not consistent with the plain language of Subtitle Y § 300.8(g) and thus, the Applicant complied with Subtitle Y § 300.8(g). *See* BZA Ex. No. 8. Based on the 200-Footer List filed by the Applicant, the Office of Zoning sent public notices to each owner within 200 feet of "the subject property" as required by Subtitle Y § 402.1(d). Accordingly, MAHCA has failed to provide a basis to dismiss the Application and the Applicant requests that the Board deny MAHCA's Motion to Dismiss.

B. The community had actual knowledge and notice of the Application through other means of notice

In addition to the notice sent in compliance with Subtitle Y §§ 300.8(g) and 402.1(d), the surrounding community had actual and constructive knowledge and notice, or reasonably should have had knowledge and notice, as a result of other forms of notice of the Application as well as four public meetings. In multiple prior cases, the Board has consistently found that alternative forms of notice, including the "notice of hearing" sign and community meetings, can constitute sufficient notice of a zoning application even if a nearby property owner does not receive the notice required under Subtitle Y §§ 300.8(g) and 402.1(d).

Importantly, it should be noted that the community's involvement with the Property and the Project pre-dates the filing of the Application. As far back as October 2016, the Applicant contacted nearby owners, including Mr. Cunningham, Ms. Crabtree, Mr. Aloi and Ms. LaPere,[3] regarding the Project.[4] A copy of the email exchanges are attached at **Tab A**. On December 16, 2016, the Applicant met with the group of neighbors to discuss the Project. *See* **Tab A**.

[3] All four neighbors are members of MAHCA and requested party status as part of BZA Case No. 19285 for the property, as described below. Mr. Cunningham represented the group in that case.

[4] It must also be noted that the community's involvement in the zoning of the Property dates back to 2016. The Property was originally designated by the D.C. Council as the proposed location for the Ward 3 short-term emergency shelter. As such, in May 2016, a zoning application for an emergency shelter use was filed for the Property as BZA Case No. 19285. A group of residents within 200 feet of the Property filed for party status in that case, which was eventually withdrawn by the applicant. The location for the emergency shelter was then changed by D.C. Council. This prior case demonstrates that the community has extensive history with the Property.

Thereafter, communications between the Applicant and the group of neighbors continued through September 2017. *See* **Tab A**. The Applicant again corresponded with the group of neighbors in February 2018. A copy of the February 2018 email exchange is attached at **Tab B**. During this exchange, Mr. Cunningham stated that "**many neighbors** are reporting that something is afoot" at the Property. (emphasis added) *See* Tab B.

In addition to this extensive discussion, since filing the Application over six months ago, the community has received multiple forms of notice, as follows:

-On March 26, 2018, the Applicant mailed a copy of the Application to ANC 3C, including Chair Nancy MacWood and SMD Commissioner Malia Brink. *See* BZA Ex. No. 15, pg. 11.

-On April 3, 2018, a Notice of Public Hearing was sent to ANC 3C. *See* BZA Ex. No. 17-18.

-On May 7, 2018, the Applicant presented to ANC 3C's Planning and Zoning Subcommittee and engaged in discussion with Ms. Crabtree, a representative MAHCA.

-July – August 2018, the Applicant corresponds with ANC 3C, Ms. Crabtree, and Mr. Cunningham to schedule a community meeting in August. A copy of the correspondence is attached at **Tab C**.

-On August 29, 2018, the Applicant held a community meeting with many neighbors in attendance. This meeting was notice by paper flyer hand delivered to a three block radius. Additional neighbors logged in to view the meeting via online video feed.

-On September 4, 2018, the Applicant presented to ANC 3C's Planning and Zoning Subcommittee.

-On September 11, 2018, the Applicant posted three public notices at the Property in accordance with Subtitle Y § 402.3. *See* BZA Ex. No. 42.

-On September 17, 2018, the Applicant presented to the full ANC 3C.

These facts are important because the Board has repeatedly found that alternative forms of notice and knowledge of a zoning application can supplant the "200-footer" requirements of Subtitle Y §§ 300.8(g) and 402.1(d).

In BZA Case No. 18866A, an adjacent owner alleged that she/he had not received a "200-footer" notice. A copy of the Order entered in BZA Case No. 18866A is attached at **Tab D**. Notably, the Board found that the "200-footer" notice was sufficient but "**even if notice had not been properly mailed**, [the neighbor] was given adequate notice through the other means provided under §§ 3113.13 through 3113.15, including **posting notice** on the subject property. . . and **mailing notice** to Advisory Neighborhood Commission 2B." *See* **Tab D**, pg. 3.[5] Similarly, in BZA Case No. 18732A, the Board rejected a neighbor's complaints of inadequate notice, stating that even if the 200-footer notice had not been sent "adequate notice of the public hearing was provided through other means." A copy of the Order entered in BZA Case No. 18732A is attached at **Tab E**. The Board cited the "posting of the notice on the subject property and public of the notice in the D.C. Register" as adequate forms of notice. *See* **Tab E**, pg. 2.

In BZA Case No. 18477, the Board also found that "even if the mailed notice was not sent," the neighbor was given notice of the hearing through "posting of the notice on the subject property . . . publication of the notice in the District of Columbia Register, and the mailing of the notice to Advisory Neighborhood Commission 2F, which hosted multiple meetings involving presentations by the Applicant." A copy of the Order entered in BZA Case No. 18477 is attached at **Tab F**. In that case, the Board also noted that "the absence of mailed notice does not warrant the continuation of a hearing when the other forms of notice were given." *See* **Tab F**, pg. 3 (citing concurring opinions in BZA Case Nos. 16412 and 15825).

In this case, the facts are clear that there has been a lengthy time frame from the filing of the Application, which has provided ample opportunity for the community to have notice and knowledge of the Application. This notice and knowledge has come in multiple forms, including

[5] BZA Case Nos. 18866A, 18732A, and 18477 were decided when the Zoning Regulations of 1958 were in effect. §§ 3113.13 through 3113.15 now appear in substantially the same form as Subtitle Y §§ 402.1-402.4.

communications between the Applicant and nearby neighbors, correspondence with the ANC, presentations at public meetings in May 2018, August 2018 and September 2018, publication in the D.C. Register, and the posting of the public notice sign at the Property.

As in BZA Case Nos. 18866A, 18732A, 18477, 16412 and 15825, the Board should find that adequate notice of the Application and the Project has been provided to surrounding neighbors of the Property.[6] Even if the 200-Footer List did not include all owners within 200 feet of Lot 812, which the Applicant maintains is not required, the alternative forms of notice placed all neighbors on actual notice of the pending Application in satisfaction of the requirements under the Zoning Regulations.

C. The Board is authorized to waive the requirements of Subtitle Y §§ 300.8(g) and 402.1(d)

Pursuant to Subtitle Y § 101.9, "for good cause shown," the Board is authorized to "waive any of the provisions of this subtitle if, in the judgment of the Board, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law."[7] Here, the Applicant complied with the plain language of Subtitle Y §§ 300.8(g) and 402.1(d) and filed the 200-Footer List for Lot 44. Notwithstanding, if the Board finds that these rules have not been complied with, there is good cause shown to waive Subtitle Y §§ 300.8(g) and 402.1(d). This good cause arises from the numerous other adequate forms of notice described above. As a result of these adequate forms of notice, such a waiver would not prejudice any "party" to the Application because it is clear that the surrounding neighborhood has actual notice of the Application.

[6] Ironically, four neighbors have filed letters in the record alleging notice deficiencies. Yet, the filing of a letter in the record demonstrates that these individuals had *actual* notice of the Application and the hearing. *See* BZA Ex. Nos. 47, 57, 130 and 136.

[7] The Board cannot waive Subtitle Y §§ 100-105, 604.6, 700.3 and 1602.5. If the Board deems it necessary, the Applicant seeks a waiver of Subtitle Y §§ 300.8(g) and 402.1(d), which is permitted. The Applicant perverse its assentation that the Applicant complied with the notice requirement but if out of an abundance of caution the Board, could find compliance or grant waiver of the 200 footer notice in flue of actual and constructive notice, as explained in the next section.

Accordingly, if necessary, the Applicant seeks a waiver from Subtitle Y §§ 300.8(g) and 402.1(d).

III. ARGUMENTS REGARDING MOTION TO POSTPONE

MAHCA fails to provide any basis to postpone the hearing scheduled for September 26, 2018. Instead, the Applicant has fully complied with the requirements of the Zoning Regulations. In particular, the Applicant filed its Prehearing Statement 21 days before the scheduled hearing, as required by Subtitle Y § 300.15. *See* BZA Ex No. 41-41A. The Prehearing Statement extensively details the operator for the proposed memory care facility and provides additional information on the project's architectural plans. *See* BZA Ex No. 41-41A. This is the exact information that MAHCA claims warrants additional time to review. MAHCA cites absolutely no regulatory or case authority that would warrant a postponement of the hearing.

MAHCA's allegations concerning a "commercially reasonable" time to prepare are not only legally irrelevant, but also misleading. This request seems outlandish given the following four facts:

1. The neighbors and representative of MAHCA have been communicating with the Applicant since October 2016 (705 days)
2. The Applicant properly filed the Application with sufficient information that has not substantially changed, except to add detail and information requested by the community, since March 2018 (182 days);
3. The Zoning Regulations allow a minimum of 40 days between notice of a public hearing and the hearing date (Subtitle Y § 402.1);
4. MAHCA had sufficient time to file for party status on September 12, 2018, prepare a petition in opposition to the Application (*See* BZA Ex Nos. 60-106, 108-128, 133-135, 139-144, 147, 149-151), *and* amend its party status request (*See* BZA Ex. No. 156) but waited until 2 days before the hearing to request a postponement.

The statements in MAHCA's Motion obscure the facts, as detailed above, that MAHCA and its representatives have had direct knowledge of the Applicant's proposal for the Property dating back to October 2016. *See* **Tab A**. In addition to almost two years of good faith

correspondence regarding the Applicant's intention to have an assisted living facility at the Property, the Application has now been pending for over six months. Despite the complete Application having been filed over 182 days ago, MAHCA requests a postponement now. The Zoning Regulations are clear that an application may be heard as early as 41 days after filing. The Applicant also held a community meeting on August 29, 2018, which was attended by the operator, for the specific purpose of answering community questions. This community meeting was held 29 calendar days before the scheduled hearing on the Application.[8] Then, on September 5, 2018, the Applicant filed the Prehearing Statement, but MAHCA still waited 19 days to seek a postponment. *See* BZA Ex No. 41-41A. MAHCA filed a party status request in a timely fashion, but, again, waited until 2 days before the hearing to request a postponement.

Despite this extensive and fully compliant filing, MAHCA also attempts to inflate the nature of the "changes" to the Application, including as to the proposed use of the Property. Yet, the Applicant's proposed "use" of the Property has not changed. The Applicant still seeks a special exception for a continuing care retirement community ("CCRC") use. The Application originally cited an "assisted living facility" as the specific CCRC use that would be at the Property. Thereafter, the Applicant chose to build a memory care facility, which is a subset of assisted living. The proposed project remains for seniors, but will be specifically limited to those seniors with dementia.

The facts show that MAHCA has had knowledge of the Application and the Project for an exceptionally long period of time. The Applicant has fully complied with the requirements of the Zoning Regulations in terms of the information filed in support of the Application. MAHCA

[8] The Zoning Regulations are very clear that "in computing any period of time, days shall refer to calendar days, unless otherwise specified. *See* Subtitle Y § 204.1. Therefore, it is unclear why MAHCA cites "business days" as the standard for a "commercially reasonable" time.

has provided no basis to postpone the hearing. As such, MAHCA's Motion to Postpone should be denied.

IV. CONCLUSION

In sum, the Applicant respectfully requests that the Board deny MAHCA's Motion to Dismiss or Postpone. The Zoning Regulations authorize the Board to take any of the following actions:

Motion to Dismiss:

1. Deny the Motion to Dismiss because the Application complies with Subtitle Y §§ 300.8(g) and 402.1(d); or
2. Deny the Motion to Dismiss because MAHCA and any alleged "200-footer" had actual knowledge of the hearing and has participated by filing in the record; or
3. Deny the Motion to Dismiss and waive the notice requirements of Subtitle Y §§ 300.8(g) and 402.1(d).

Motion to Postpone:

1. Determine that notice has been given in accordance with Subtitle Y §§ 300.8(g) and 402.1(d); and
2. Deny Motion to Postpone and hold a hearing on the Application on September 26, 2018;

Respectfully submitted,
COZEN O'CONNOR

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