BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPLICATION OF
MED DEVELOPERS, LLC

BZA CASE NO. 19751
HEARING DATE: NOVEMBER 14, 2018

PREPARED TESTIMONY OF ROBERT C. MCDIARMID IN OPPOSITION TO APPLICATION

I appear today as a neighbor of the proposed memory care facility proposed by the applicant, MED Developers, LLC. I reside at 3625 Fulton St., NW, slightly more than a block away from the proposed development. This is at least the third proposal by this applicant for a development on this two-lot site. Each of these proposals has been designed as a massive quasi-industrial or apartment facility which, from the viewpoint of the neighbors, is intended to break the R-1-B, low density zoning on which all of us depended when we purchased and improved our single family homes within what we have all found to be a desirable and vibrant housing area known as the Massachusetts Avenue Heights (and represented by the Massachusetts Avenue Heights Citizens Association ("MAHCA")).

While I am an attorney, I am here appearing as a neighbor. As a practicing attorney, I specialized in other areas of law, but as a citizen and resident of the District, I have for many years followed the development of zoning in the upper NW areas of the City. This included many years as the zoning chair of the Forest Hills Citizens Association (and one year as the President of that association) before moving to my current home thirty years ago. In that capacity I also was a member of the old Wisconsin Avenue Coordinating Committee, which was responsible for input into the zoning changes then being developed for this neighborhood and for the upper NW area of the District.

For many years, the District's Comprehensive Plan has included the MAHCA area as entirely within the R-1-B low density zoning category, including the edge of MAHCA along the East side of Wisconsin Avenue, NW. The other side (the West side) of Wisconsin Ave. is now and has for many years been zoned for much denser use. The Comprehensive Plan has been revised a number of times, and each time this difference in zoning and density between the East (low density) and West (higher density) side of Wisconsin Avenue in this area has consistently been maintained.

As the City's Zoning Handbook states,[1] "the purposes of the R-1-B zone are to:

> Protect quiet residential areas now developed with detached dwellings and adjoining vacant areas likely to be developed for those purposes; and

[1] http://handbook.dcoz.dc.gov/zones/residential/r-1-b/

Stabilize the residential areas and promote a suitable environment for family life.

The R-1-B zone is intended to provide areas predominantly developed with detached houses on moderately sized lots."

The basic zoning for a city is intended to be a covenant between the City and its citizens upon which citizens can rely in making their investment decisions and their life decisions. The District's Comprehensive Plan is a part of that covenant.

Of course, wherever there are zoning borders, there are those who believe that they could benefit from changes to those borders. At least one building cited by applicants, the Glover Park Hotel, was constructed entirely without zoning approval and is an acknowledged non-conforming use in the R-12 district (see attached settlement agreement). Its existence is now used by applicants as a precedent. The argument seems to be that since one violator of the law got away with it, others should as well. The Applicants themselves concede (at Prehearing Statement p. 7) that the large building they propose for this site is consistent with the Embassy of the Russian Federation, and the high-rise apartment houses on the West side of Wisconsin Avenue zoned R-5-D, and reflected in the Future Land Use Map[2] as a moderate-density residential district. The Applicants' reference to these buildings, and the Glover Park Hotel, is effectively a concession that a building like that proposed should be constructed in a much denser zoning area, not R-1-B as proposed. Even Applicants do not claim that this proposal is a low-density residential building; they refer to it as "harmonious" with "low- and moderate-density" (Prehearing statement, p. 7, and see "Land Use and Planning Summary", Tab B, p.1, which asserts that "The project conforms to the 'R' zone" and is in a "low- to moderate-density residential area"). But this is a low-density zoning area, not "low- and moderate-density." Applicants should not be allowed to avoid this important difference.

The proposed exceptions sought in this proceeding would not in any way conform to the future land use commitments made in the Comprehensive Plan and the Future Land Use Map. This proposed development is not low-density single family residential, although the applicants assert that it fits within the envelope given for single family housing. That envelope, however, is to give architects some flexibility; no single-family homeowner would design a single-family home that looked like this. It fits with buildings on the West side of Wisconsin Avenue, as is essentially conceded by the Applicant's filing.

While the developer asserts that most of the building design would fit as of right if anyone buying the land would want to live in a single-family home with that design, this is an artificial construct enabled only by the proposal to assemble two lots into a single unusually large lot. The proposed building does not resemble a single-family home in scale and certainly

[2] Sometimes known as the FLUM, https://plandc.dc.gov/sites/default/files/dc/sites/op/publication/attachments/FutureLandUse3.pdf

not in its appearance nor its impacts. Instead it is an institutional building designed to house some 36 patients with varying stages of dementia, a large staff and constant visitors. While the Applicants have from time suggested that there is some advantage to the neighborhood from the project, there are (as this is written) some 451 Exhibits on file with the Board in this docket, and almost all are from neighbors in opposition who find only detriment to the neighborhood in this application. ANC 3-C has also opposed this application. The position taken by the developer is essentially that the operation would be not inconsistent with the buildings on the West side of Wisconsin Ave. and therefore it should be approved here. That assumes that the long-standing distinction in the Comprehensive Plan between the West side of Wisconsin, shown as High and Moderate Density Residential and the Embassy of the Russian Federation (zoned R-5-D, RA-4) and the East side, shown as Low Density Residential (zoned R-1-B) was somehow an oversight. It was not an oversight, and most of the residents on the East side made their commitment to the District and purchased their homes in reliance on the difference.

I note that there are a few houses on the East side of Wisconsin between Davis and Garfield Streets that are owned by absentee landlords and rented, largely to students and similar residents. Some of these houses are owned by those who appear to be betting that the District will break the Comprehensive Plan and allow them to profit by using their land for a higher density usage. There are, however, a number of other houses on the East side of Wisconsin in this area which are owner occupied, well maintained, and proudly stand with the rest of the neighborhood, including a number which have been substantially improved within the recent past. The zoning plan for this area would be significantly undermined by the precedent set if this application were to be approved.

The obvious objectionable impacts to the neighbors and the neighborhood from the grant of the application include the loss of light and air caused by the building's scale, the vast increase in traffic (and its associated pollution) through the narrow alley (where children now play) and cars which will inevitably try to find parking in the nine allowed parking spaces before they deploy onto the nearby streets (almost all of which are time limited for non-residents). Trucks, EMS vehicles and ambulances will also need to use that alley if the facility is constructed. The design guarantees conflict and danger. Another obvious detriment is the increase in water runoff problems that already exist in heavy rain conditions which will result from the reduction of pervious surfaces to almost nothing.[3] Flooding out neighbors is hardly what the Comprehensive Plan envisions.

[3] The application on file, which is based on an earlier-proposed use, shows 59% pervious area. This appears to not take account of the parking, access ramps and loading areas which are required by the current design, but which were not in the previous design. I have not been able to find a claim for the pervious area in the updated papers filed by applicant for its current proposal.

Two special exceptions are sought by the developer, and there is no reason for either to be granted:

Subtitle C sec. 703.2. The application concedes that 17 parking spaces are required by code for the 36 resident operation now planned, and only 9 spaces are provided, leaving the neighborhood burdened by at least 8 additional cars.

The Applicant's Traffic Report asserts at p. 1 that:

> At any time during a typical weekday or weekend day, there are at least 103 parking spaces within two (2) blocks of the subject site.

For those who live or park within the two-block area studied (like the undersigned) this is totally inconsistent with our experience. While there are short periods when there might well be 10 or so spaces available (in particular immediately after the parking restrictions are lifted on Wisconsin Avenue), it is certainly not true that there are always more than a hundred, and there are many times when residents now must drive for several blocks to find an open space. This is particularly true on religious holidays, since there are many churches and synagogues in the area. The only times on which there a significant number of parking spaces are reliably available are in the middle of long weekend holidays.

More significantly, the traffic study as originally submitted is irrelevant; almost all of the parking in the area studied is limited to two hours for non-residents, so it cannot legally be used for the staff parking or that of visitors and service providers who need more than two hours at the facility. MAHCA residents who have workmen or guests in their houses make heavy use of the Visitor Parking Pass program which the District makes available for heavily impacted areas such as this one, but such parking passes are not (and should not be) available for staff in such a facility, as we understand it. Since everyone who intends to visit or work at the facility will first try to use the 9 spaces, everyone will use the alley access first and then try to find a space on the street. The resulting situation is not likely to be acceptable for those providing services to residents, and will lead to dangerous traffic in the alley, as well as significantly increasing the traffic on the local streets as visitors or service providers are cruising looking for an open parking space. Such parking is illegal for the 18 staff members envisioned. I suggest that no exception can be granted here based on the assumption that the extra employees and all those providing services or visitors requiring more than two hours at the building and in walking to and from their parked car will park illegally.

The special exception regulations also make clear that there must be a DDOT approved Transportation Demand Management (TDM) plan to get a special exception, the implementation of which shall be a condition of BZA's approval. Subtitle C, sec. 703.4. The single paragraph in the Gorove/Slade supplemental report is not a "robust" TDM plan, and in fact is not a plan at all – it is a vague and unenforceable promise to do a plan in the future. Among other unenforceable statements made, Gorove/Slade states that "The Applicant will identify nearby parking garage

facilities that can provide additional parking for guests and employees.: However, as the Applicant's land use witness has conceded (Tab B, p.2), there are no parking garages within 600 feet. Also, Prehearing Statement, p.16.

Subtitle U sec. 203.1(f). There is no way in which this proposed institutional/industrial use can fit within the usages intended for an R-1-B neighborhood. The applicant simply assumes that it might not be as detrimental as some other unspecified use might be. This is not a competent showing of anything, and the argument should be rejected.

As we read Section 203(f)(4), it allows the BZA to approve a continuing care retirement community (as applied for by the applicant) if and only if "(4) The use and related facilities shall provide sufficient off-street parking spaces for employees, residents and visitors." That requirement is admittedly not met here. As noted, the project's nine spaces are insufficient for the facility's staff members, much less visitors. Nor does the application meet the requirement that it show that "(5) The use, including any outdoor spaces provided, shall be located and designed so that it is not likely to become objectionable to neighboring properties because of noise, traffic, or other objectionable conditions." The applicant simply assumes that all conditions in the code can be waived.

As other witnesses will testify, the proposed use as a continuing care retirement community appears to us to be highly unlikely to be successful (either financially or in attracting residents who have any choice in the matter) and should not be granted for several reasons. First, of course, the proposed building is inconsistent with the low-density residential housing that otherwise exists in this successful, vibrant community, and will be detrimental to the neighborhood, simply because of its bulk, size, and institutional/industrial usage, as discussed above. Thus, it is inconsistent with the "broad framework intended to guide the future land use planning decisions for the District",[4] especially protection of existing residential use.

But there are also many characteristics of this proposal which suggest that no one involved really intends to maintain this building as a memory care facility, and that the real intent is to break the Comprehensive Plan with this proposal, and then to change the building, once constructed, into something else, such as a dorm facility for one of the universities in the area, or perhaps try again as a homeless shelter (for which it is also not properly designed).

The building is not well designed for its proposed (as currently claimed) use. For example, multistory memory care facilities are rare, in part because residents with dementia cannot be assumed to be self-guiding in an emergency (or any other occasions outside their

[4] *Durant v. District of Columbia Zoning Comm'n,* 139 A.3d 880, 881, quoting *Wisconsin-Newark Neighborhood Coal. v. District of Columbia Zoning Comm'n., 33 A.3d 382, 394 (D.C. 2011).*

routine).[5] Such residents, some of whom would be expected to use wheelchairs or mechanized scooters for mobility, need to establish settled routines if such a facility is to work. Yet there is only one elevator in this building. The developer has told the attendees at the one meeting it has had with neighbors that the two sets of stairs would accommodate all residents or be used as a holding area in case of a fire, which seems an unsatisfactory solution for seniors with dementia, although it might meet code for a college dorm. This presents high risk for the safety of residents in the event of any emergency. Even without an emergency, a single elevator will fail from time to time. When that happens, each resident will have to be brought down to the dining area in the cellar three times a day or more, and that is very difficult when no elevator is available, even for those who are relatively mobile and do not require wheelchairs.

There is little space for residents to congregate, and there appears to be inadequate dining space for a single sitting. There is no space for the assistants who will be needed to help feed those of the residents who have trouble feeding themselves.

Dementia progresses at rates which can be hard to predict, and memory care facilities should provide regular activities for residents who are still able to participate. Not all of them will function at the same level. It is not at all clear that there is space for those personalized functions. Simply slapping a title on a room as a gym does not work, nor does a minuscule "garden" the size of five parking spaces provide much calming influence or exercise space.

When challenged as to the ability of the design to accommodate end of life (hospice) care for its residents, the operator (according to our notes) simply asserted that residents passing into hospice care would be removed from the facility and given hospice care elsewhere. The DC Code[6] requires that hospice care capability be made available for residents in an ALR without having to be moved. Code sec. 44-105.04. That does not seem feasible in this design. As we are all aware, the announced closure of the Washington Home hospice facility removes the possibility of local hospice care in a separate facility in any event.

For the reasons stated above, I urge that the application rejected on its face. But if the Board does not agree with these reasons for rejection, or finds some reason to approve these burdensome exceptions, I ask that it consider conditioning any version of approval given with a requirement that the building be removed entirely if the proposed use as a memory care facility fails at any time. The concern that this proposal is intended as an unrealistic stalking horse to break the zoning and Comprehensive Plan protections for this neighborhood could at least be addressed in this fashion.

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[5] So far as we can tell, the proposed operator of this facility, Guest Services, Inc., claims to operate only two memory care facilities, each of which is a single-story facility. One of these facilities appears to not yet be in operation.

[6] https://code.dccouncil.us/dc/council/code/titles/44/chapters/1/subchapters/V/.

Mass Ave Heights Citizens Assn

SETTLEMENT AGREEMENT

This Agreement made this ____ day of _____, 1972, by and between EMBASSY CORPORATION, a corporation organized under the laws of the District of Columbia and DR. CYRUS KATZEN, of Washington, D. C., as an individual, hereinafter called First Parties, and The MASSACHUSETTS AVENUE HEIGHTS CITIZENS ASSOCIATION, a District of Columbia non-profit corporation, BENJAMIN W. BOLEY, ESQ., of Washington, D. C., as an individual, and WILLIAM H. GREER, JR., Esquire, with offices in Washington, D.C., as attorney-in-fact and authorized representative for the individuals named as plaintiffs in H. Allen et al. v. Zoning Commission, Civil Action 1832-68, heretofore filed and decided in the United States District Court for the District of Columbia and affirmed on appeal by the United States Court of Appeals for the District of Columbia Circuit as reported in H. Allen et al. v. Zoning Commission, 449 F.2d, 1100, (CCA-DC, 1971), hereinafter called Second Parties.

W I T N E S S E T H:

WHEREAS, EMBASSY CORPORATION is the owner of the Wellington Apartment Hotel located at 2505 Wisconsin Avenue, N.W., Washington, D. C., which structure and appurtenances thereto is erected on Lot 45 in Square 1935 as shown in the land records of the Office of the Surveyor of the District of Columbia, said Lot 45 having been created on the 9th day of March 1970 by subdividing Lots 4 and 5 and the remainder of lots 2 and 3, (of subdivision by American Security and Trust Co. and Amos H. Plumb re-

as lots 804 and 805], of Square 1935, all as recorded in Book 156, page 125 of the Office of the Surveyor of the District of Columbia; and

WHEREAS, the predecessor or predecessors in interest to the Embassy Corporation had applied for a change in zoning of said lots 4, 5, 804 and 805 in Square 1935; the Zoning Commission Order of September 26, 1967 stated:

> "66-115 Change from R-1-B to R-5-C lots 4, 5, 804 and 805, Square 1935. East side of Wisconsin Avenue, N.W. between Calvert and Davis Street";

and

WHEREAS, H. Allen et al, in the aforesaid Civil Action 1832-68 filed in the United States District Court for the District of Columbia on July 22, 1968, sought:

> "(1) that the Court grant plaintiffs a mandatory injunction requiring the Zoning Commission of the District of Columbia and its members to vacate the order of the Commission entered September 26, 1967, in Zoning Commission file No. 66-115, and to restore R-1-B (single-family detached residential) zoning to lots 4, 5, 804 and 805 in Square 1935..."

and

WHEREAS, based on a stipulation of the parties in said Civil Action 1832-68 (after opening statements where the cause was called for trial) that the three members of the Zoning Commission who voted for the change of zoning from R-1-B to R-5-C were absent from the public hearing thereon, the then

District of Columbia on May 21, 1970, remanded the cause to the Zoning Commission for a re-hearing and, consonant with his opinion, entered a formal Order on May 25, 1970 restoring the zoning of the said property to R-1-B and remanding the cause to the Zoning Commission for a re-hearing "in accordance with the requirements of applicable law."; and

WHEREAS, on appeal of said cause to the United States Court of Appeals for the District of Columbia Circuit in H. Allen et al v. Zoning Commission, supra, that Court, after a hearing on July 9, 1971, affirmed the judgment of the District Court with rehearing denied on November 23, 1971; and

WHEREAS during the pendency of the foregoing litigation the Embassy Corporation and its predecessors in interest subsequent to the action of the Zoning Commission on September 26, 1967, had continued to have plans and specifications prepared for the construction of a high-rise multi-unit Apartment Hotel at said location; and

WHEREAS, on the 22nd day of January, 1970, Sylvia Katzen, a predecessor in interest to the Embassy Corporation filed an Application for Building Permit to construct an eight story Apartment Hotel on the aforesaid property and said Building Permit was granted (Permit No. 189110) on the 6th day of April, 1970; and

WHEREAS, on the 7th day of May, 1970, H. Allen and Anne Thurber Schultz filed a Complaint against the Embassy Corpora-

Court for the District of Columbia, seeking to enjoin the construction at said site until a final disposition of the zoning litigation; and

WHEREAS, Judge Barrington Parker of the United States District Court for the District of Columbia denied a Temporary Restraining Order on the same day, May 7, 1970; and

WHEREAS, said cause was not appealed and was dismissed under Rule 13 on November 16, 1970 by the United States District Court for the District of Columbia for want of prosecution; and

WHEREAS, on the 26th day of May, 1970, The Massachusetts Avenue Heights Citizens Association, five days after the ruling and one day after the Order of Chief Judge Curran, as aforementioned, filed a Complaint for Injunction in the United States District Court for the District of Columbia against Embassy Corporation in Civil Action No. 1604-70 and also filed a Motion for a Temporary Restraining Order and Preliminary Injunction; and

WHEREAS, Judge Parker denied the Temporary Restraining Order on May 26, 1970 and advanced the cause for hearing on the Motion for Preliminary Injunction; and

WHEREAS, Judge Barrington Parker, after an evidentiary hearing on the Motion for Preliminary Injunction, entered Findings of Fact, Conclusions of Law and an Order on June 17, 1970 denying said Motion for Preliminary Injunction; and

WHEREAS, on an appeal seeking summary reversal of Judge Parker, or in the alternative injunctive relief pending appeal of Judge Parker's Order, the United States Court of Appeals for the District of Columbia Circuit on July 16, 1970, affirmed Judge Parker and refused to reverse his denial of the injunction sought (Massachusetts Avenue Heights Citizens' Association v. Embassy Corporation, 433 F.2d. 513, CCA-DC, 1970); and

WHEREAS, Embassy Corporation applied to the District of Columbia for Certificate of Occupancy when the building at 2505 Wisconsin Avenue, N.W. reached a stage of completion where it could be occupied and was advised by a letter from the District of Columbia dated October 19, 1971, that it would not issue such certificate in view of the holding of the United States Court of Appeals for the District of Columbia Circuit in H. Allen et al v. Zoning Commission. 449 F.2d. 1100, supra; and

WHEREAS, Embassy Corporation on October 29, 1971, filed Embassy Corporation v. District of Columbia, et al Civil Action No. 2184-71 in the United States District Court for the District of Columbia seeking to compel the issuance of a Certificate of Occupancy for the property in question; and

WHEREAS, Judge Parker of the United States District Court for the District of Columbia, after a hearing on November 10, 1971 ordered that "a Temporary Certificate of Occupancy issue for the subject building owned by the Plaintiffs [sic] located at 2505 Wisconsin Avenue, N.W., in the District of Columbia pending further hearing by the Zoning Commission and subject to

further order of this Court following such hearing by the Zoning Commission or by this Court if requested"; and

WHEREAS, thereafter a Certificate of Occupancy stating on its face "R-5-C Zoning" was issued by the Department of Economic Development of the District of Columbia on November 11, 1971 for said premises for operation as an Apartment Hotel; and

WHEREAS, on January 6, 1972 a Retailer's Class "C" License was issued for the premises by the Alcoholic Beverage Control Board, without any protest of the application for said license which was valid until January 31, 1972; and

WHEREAS Embassy Corporation applied for a renewal of its Retailer's Class "C" License from the Alcoholic Beverage Control Board for the period February 1, 1972 through January 31, 1973 and such application, at hearing, was protested by various residents in the vicinity of 2505 Wisconsin Avenue, including but not limited to Benjamin W. Boley; and

WHEREAS, The Alcoholic Beverage Control Board despite such protests, on January 31, 1972 re-issued said Retailer's Class "C" License to the Embassy Corporation for its restaurant and cocktail lounge at its Apartment Hotel at 2505 Wisconsin Avenue, N.W.; and

WHEREAS, Benjamin W. Boley, pro se, filed in the District of Columbia Court of Appeals a Petition to Review said order, alleging inter alia that the Board had violated its own rules and regulations in re-issuing the license to Embassy pursuant

to a Certificate of Occupancy which had not been issued under the authority of the Zoning Act as required by 3 DCRR/Section 2.1(a); and

WHEREAS, Embassy Corporation intervened in the proceedings on the Petition to Review as provided by Rule 15(g) of the Rules of the District of Columbia Court of Appeals; and

WHEREAS, the District of Columbia Court of Appeals on June 30, 1972, issued its decision vacating and reversing the order of the Alcoholic Beverage Control Board on the grounds that the Board had failed to adhere to its own Regulations because it relied upon a Certificate of Occupancy reflecting on its face R-5-C zoning for the premises, when pursuant to an order of the United States District Court for the District of Columbia, approved by the United States Court of Appeals for the District of Columbia Circuit (all as set forth in the H. Allen et al v. Zoning Commission case, supra) a previous order of to the Zoning Commission stating the premises to be R-5-C had been vacated, and the original R-1-B zoning had been restored; therefore, the Court concluded, the Certificate of Occupancy had not been issued under the zoning laws and regulations of the District of Columbia as required under the Alcoholic Beverage Control Board regulations as a pre-condition for a Retailer's Class "C" License; and

WHEREAS, the District of Columbia Court of Appeals refused to grant a re-hearing of the matter and on August 29, 1972 refused to grant a stay of its order and on August 30, 1972 issued its mandate to the Alcoholic Beverage Control Board in-

Re-issuance of a Retailer's Class "C" License "in accordance with the opinion filed herein this date ..."; and

WHEREAS, on August 30, 1972, the Embassy Corporation filed with the Department of Economic Development of the District of Columbia an Application for a Certificate of Occupancy for 2505 Wisconsin Avenue, N.W., for occupancy of said premises as an Apartment Hotel, as a non-conforming use based upon Title 5, Section 419, D. C. Code (1967 Ed.) and Article 71 of the Zoning Regulations of the District of Columbia, as amended; and

WHEREAS, the said Application was acted on favorably by said Department of the District of Columbia Government and Certificate of Occupancy No. B-53021 based on said Application was granted to the Embassy Corporation on August 30, 1972; and

WHEREAS, pursuant to the mandate of the District of Columbia Court of Appeals the Alcoholic Beverage Control Board of the District of Columbia did order the denial of the application of the Embassy Corporation's Retailer's Class "C" License on August 31, 1972; and

WHEREAS, Embassy Corporation then immediately moved the Alcoholic Beverage Control Board on August 31, 1972 to Reconsider, Rehear and Stay said Final Order in accordance with Section 20.18 of the Rules & Regulations of said Board on the grounds that Embassy corporation now had a Certificate of Occupancy issued in accordance with the Zoning Laws and Regulations of the District of Columbia on the basis of which the Board had

WHEREAS, after a hearing on said Motion the Board did stay the effective date of its Final Order until Friday, September 8, 1972, at 9 a.m. when it set down the Motion of Embassy Corporation for further hearing and consideration; and

WHEREAS, in a personal appearance by Benjamin W. Boley, Esquire, Pro Se, and by counsel for Embassy Corporation before the Board on Wednesday, September 6, 1972, said date for hearing was continued by agreement until 9 a.m. Friday, September 22, 1972 so that settlement possibilities among all the parties might be discussed and evaluated; and

WHEREAS, because of the settlement negotiations going on between the parties, counsel for the First Parties and Benjamin W. Boley, Esq. requested that the hearing date on the Motion for Rehearing, Reconsideration and Stay be continued until 9:00 A.M. Friday, September 29, 1972; and

WHEREAS, the First Parties and the Second Parties have evidenced a desire, through counsel, each to the other to settle and compromise all the differences between them and to terminate all the litigation between them in the Courts and administrative agencies and in consideration of the action to be taken by the Parties hereto as set forth hereinafter.

IT IS THEREFORE agreed between the First Parties and the Second Parties as follows:

1(a) The First Parties and the Second Parties agree that as soon as possible after execution of this Agreement by the

execution, they will enter into and file with the Court in the cause entitled Massachusetts Avenue Heights Citizens Association v. Embassy Corporation, Civil Action No. 1604-70, a joint stipulation of dismissal (in the form generally outlined in Exhibit A attached hereto) which shall provide that the Court shall dismiss said cause with prejudice if, at the same time, the Court in the cause entitled Embassy Corporation v. District of Columbia (Civil Action No. 2184-71) on the Motion of Plaintiff will enter a modified Order (in the form generally outlined in Exhibit B hereto) requiring the District of Columbia to issue a Certificate of Occupancy as a non-conforming use for use of the premises at 2505 Wisconsin Avenue, N.W., as an Apartment Hotel and appurtenant uses thereto, and in the aforesaid Motion the Court shall also be requested to attach a copy of this Agreement in said Order and incorporate it in said Order by reference.

(b) Benjamin W. Boley, Esq. agrees to file simultaneously with the aforesaid Motion a Motion for Leave to Withdraw as Amicus Curiae stating therein that he is aware of the Motion for an Order requiring the District of Columbia to issue a Certificate of Occupancy as a non-conforming use and that he has no objection thereto.

(c) The First Parties agree that, upon the entry of the aforesaid Order and the issuance, pursuant thereto, of a Certificate of Occupancy as a non-conforming use in accordance with paragraph 1(a) above, they will immediately withdraw the pending Petition before the Zoning Commission of the District of Columbia,

(d) Pending action by the Court on the Motion to Enter an Order Requiring the Issuance of a Certificate of Occupancy as set forth in 1(a) above, the Second Parties agree to join in seeking a further continuance of the Motion for Rehearing, Reconsideration and Stay presently pending before the Alcoholic Beverage Control Board of the District of Columbia so as to give the Court the time to consider said Motion to require issuance of said Certificate of Occupancy.

(e) The First Parties and Second Parties agree that this Agreement and any Order issued, or other agreements entered into, pursuant to this Agreement may be lodged with any Courts or Administrative Agencies deemed appropriate by any of the Parties hereto.

(f) The First Parties and Second Parties agree that if, upon consideration of the Stipulation of Dismissal and the Motion to require issuance of a Certificate of Occupancy and Motion for Leave to Withdraw as Amicus Curiae, all as set forth in paragraph 1(a) above, the Court refuses to order issuance of the Certificate of Occupancy as a non-conforming use substantially as requested in said Motion then this Agreement shall be of no force and effect and shall be a nullity.

2. The First Parties agree that there will be no more than 126 units, of varying numbers of rooms, in the premises at 2505 Wisconsin Avenue, N.W. and that no less than 30, and no more than 84, of such units shall be available for transient occupancy. "Transient occupancy" as used herein means occupancy

3. The First Parties agree that any rental by Embassy Corporation of a permanent or transient unit will include in the price thereof free parking in the garage of the building for one vehicle, provided that such inclusion does not violate any existing or future federal or District of Columbia rule, regulation, law or ordinance.

4. The First Parties agree that Embassy Corporation will provide free parking in the garage of the building, or other non-public parking space, for patrons of the restaurant from outside the building whether or not Embassy Corporation itself is the operator of the restaurant.

5. To the extent consistent with availability of parking spaces due to occupancy of the building and patronage of the restaurant, Embassy Corporation will advise its employees working in the building at 2505 Wisconsin Avenue, N.W., that they may park at no cost in said building garage and should do so rather than park on nearby streets.

6. The First Parties agree that neither of them directly or indirectly will seek further rezoning of the property from the R-1-B zoning so long as they are permitted to continue occupancy and operations of the premises as an Apartment Hotel under a non-conforming use; provided, however, that if any property north of Davis Street on the east side of Wisconsin Avenue from Davis to Massachusetts Avenue is rezoned to a higher density and use classification, then either of the First Parties may seek

rezoning of the instant property to the same or lesser density and use classification, as that permitted by any rezoning of property north of Davis Street on the east side of Wisconsin Avenue from Davis to Massachusetts Avenue. In the event that First Parties are entitled to and do seek rezoning under this Paragraph 6, the Second Parties under this Agreement shall be free to oppose such rezoning application. However in this event, and this event only, the monies noted in Paragraph 8 hereof shall not apply to opposing rezoning by Embassy.

7. Except as provided otherwise herein, the First Parties agree not to seek directly or indirectly the rezoning of any property within the area bounded on the south by the northeast corner of Wisconsin Avenue and Calvert Streets, N.W., thence north on Wisconsin Avenue to the southeast corner of Wisconsin and Massachusetts Avenues, thence in the southeasterly direction along Massachusetts Avenue to Observatory Circle and thence along Observatory Circle to Calvert Street and along Calvert Street to the northeast corner of Wisconsin Avenue and Calvert Streets, N.W., from whence these boundary lines began.

8. The First Parties agree that from the date of execution of this agreement that for a period of the next twelve (12) years they will pay, upon written demand of the Massachusetts Avenue Heights Citizens Association, a total of Five Thousand Dollars ($5,000.00) for legal fees to counsel chosen by said Association to oppose any future rezoning applications within the perimeters of the area designated in paragraph seven (7) above.

9. The First Parties agree that they will not seek or support, directly or indirectly, without prior written approval of the Massachusetts Avenue Heights Citizens Association, any change in the present one-side-of-the-street-only permissible parking on any of the streets within the area prescribed in paragraph seven (7) hereof.

10. The First Parties agree that the alley immediately east of the building at 2505 Wisconsin Avenue, N.W., will not be used for vehicular entrance or egress.

11. The First Parties agree that any subsequent purchasers or lessees of all or any part of the property at 2505 Wisconsin Avenue will be given a copy of this Agreement and will agree to be bound thereby.

12. The First Parties agree to employ a qualified mechanical engineer to investigate and report in writing on the ability to change the venting on the east side of the building which the Second Parties claim is exhausting hot air into the building and property of H. Allen, 3628 Davis Street, N.W., and to give a copy of said report to the Second Parties. The First Parties agree that if a change in said venting may be legally effectuated at a cost of not more than One Thousand Dollars ($1,000.00) (and without doing possible damage to, or decreasing the efficiency, of the machinery the heat from which is being exhausted by said venting) they will make such change.

13. The First Parties agree that all advertising of the apartment or hotel facilities at 2505 Wisconsin Avenue, N.W.,

will not use the word "Hotel" alone, but will instead use the words "Apartment Hotel", provided, however, that the premises may be listed in the Classified Section of the Telephone Directory and other regular directories of Hotels under the classification of Hotel, but any display advertising in any of said directories shall indicate that it is an "Apartment Hotel."

14. The Second Parties agree that they will not directly or indirectly oppose the non-conforming use of the property as an apartment hotel and will not directly or indirectly seek any change in such non-conforming use pursuant to the restrictions of this Agreement, and the Massachusetts Avenue Heights Citizens Association and Benjamin W. Boley agree to support the non-conforming use of the property as an apartment hotel in the event they are requested to do so by the First Parties.

15. The Second Parties agree to withdraw objection to the application before the Alcoholic Beverage Control Board of the District of Columbia for a Retailer's Class "C" License for the restaurant and cocktail lounge and room service at the premises of 2505 Wisconsin Avenue, N.W. The Massachusetts Avenue Heights Citizens Association and Benjamin W. Boley agree to join in the Motion for Rehearing, Reconsideration and Stay presently pending before said Board, if said Motion is granted Benjamin W. Boley and the Massachusetts Avenue Heights Citizens Association agree to actively support the granting of such license by informing the Board in writing of said support or by appearing in person or by counsel before the Board and stating such support. Should it be

agree to support a request by Embassy Corporation for Waiver of the one year rule for refiling applications before the Board and to support said new application before the Board and a stay of denial of the license pending such hearing and decision on a new application. If the Retailer's Class "C" License for the remaining period of time through January 31, 1973 is not granted to Embassy Corporation by the Board, either as a result of reconsideration of the denial resulting from the aforesaid mandate of the Court of Appeals of the District of Columbia, or as a result of a hearing on a new application filed after a Waiver of the one year rule for filing such new application, then this Agreement shall be of no further force and effect and shall be a nullity. Second Parties agree not to protest future annual renewals of such Retail Class "C" Alcoholic Beverage License, or other applicable classifications which may be established in the future, and Massachusetts Avenue Heights Citizens Association and Benjamin W. Boley agree upon written request of the First Parties to support such annual renewals before the Board in writing or by appearing in person or by counsel; provided, however, that if there is a change in the current manner of operation of the cocktail lounge and restaurant in said premises at 2505 Wisconsin Avenue, N.W. then the Second Parties or any of them shall have the right to protest renewals of any future applications for said alcoholic beverage license for said facilities on the ground of such change in the manner of operations.

16. The Second Parties agree that in addition to conventional Apartment Hotel leasing, the First Parties may either sell or lease units in 2505 Wisconsin Avenue, N.W., on a condo-

18. This Agreement shall be in effect for a period of twelve (12) years after its execution and shall be binding upon and inure to the benefit of the heirs, executors, administrators, assigns, representatives, successors, attorneys and agents of the First Parties and of the Second Parties. William C. Greer, Jr., Esquire, shall attach to the copies of this Agreement executed by him, a Power of Attorney in form and content satisfactory to counsel for the First Parties, (or such other document in form and content satisfactory to counsel for the First Parties) authorizing him to execute this Agreement on behalf of all of the named plaintiffs in Civil Action No. 1832-68 in the United States District Court for the District of Columbia. Certified copies of corporate resolutions of the Embassy Corporation and the Massachusetts Avenue Heights Citizens Association authorizing the execution of this Agreement by their respective Presidents and attested by their respective Secretaries, with corporate seals, affixed shall be attached to the copies executed by said Embassy Corporation and Massachusetts Avenue Heights Citizens Association.

IN WITNESS WHEREOF, the parties heretofore named have hereunto set their hands and seals the day and year hereinabove written.

ATTEST:

EMBASSY CORPORATION
a District of Columbia corporation

_____
Secretary

By: _____ [SEAL]
Cyrus Katzen, President

_____[SEAL]
Cyrus Katzen
as an individual

FIRST PARTIES

MASSACHUSETTS AVENUE HEIGHTS
CITIZENS ASSOCIATION
a non-profit District of Columbia
Corporation

ATTEST:

_____
Secretary

By: _____[SEAL]
George C. Denney, Jr.
President

(Corporate Seal)

_____[SEAL]
William H. Greer, Jr.
Attorney in Fact for Named
Plaintiffs in Civil Action
No. 1832-68 in the United
States District Court for
the District of Columbia

_____[SEAL]
Benjamin W. Boley,
as an individual

SECOND PARTIES