

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 19751 of MED Developers, LLC, as amended, pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under Subtitle U § 203.1(f) to allow a continuing care retirement community use in the R-1-B Zone at premises 2619-2623 Wisconsin Avenue, N.W. (Square 1935, Lots 33, 34, and 44).^{1, 2}

HEARING DATES: May 23, June 6, June 27, September 26, November 14, and December 19, 2018³
DECISION DATE: January 30, 2019

DECISION AND ORDER

Pursuant to notice, the Board of Zoning Adjustment (the “**Board**”) considered a self-certified application, as amended (the “**Application**”), filed by MED Developers, LLC (the “**Applicant**”) requesting a special exception to allow a continuing care retirement community use under Subtitle U § 203.1(f) of Title 11 of the D.C. Municipal Regulations (Zoning Regulations of 2016, the “**Zoning Regulations**,” to which all references are made unless otherwise specified) for premises 2619-2623 Wisconsin Avenue, N.W. (Square 1935, Lots 33, 34, and 44) (the “**Property**”) in the R-1-B zone. The Board conducted the public hearing and considered the Application in accordance with the provisions of Subtitle Y. For the reasons explained below, at its January 30, 2019 public meeting, the Board voted to **APPROVE** the Application.

FINDINGS OF FACT

Notice of Application and Notice of Hearing

1. By memoranda dated April 3, 2018, the Office of Zoning (“**OZ**”) provided notice of the Application to:
 - the Office of Planning (“**OP**”);
 - the District Department of Transportation (“**DDOT**”);
 - the Department of Human Services (“**DHS**”);

¹ Lots 33 and 34 are also known as Lot 812 for tax and assessment purposes.

² The caption has been modified to reflect the relief granted. In its original application, the Applicant also requested relief pursuant to Subtitle C § 703.2 to permit a reduction in the number of required minimum number of parking spaces, but withdrew that request after it submitted a revised proposal that contained the required minimum number of off-street parking spaces.

³ ~~The hearing was originally scheduled for May 23, 2018, but postponed four times at the request of the parties.~~

- the Councilmember for Ward 3, as well as the Chairman and the four at-large members of the D.C. Council;
 - Advisory Neighborhood Commissions (“ANC”) 3C and 3B, which are both “affected ANCs” per Subtitle Y § 101.8; and
 - Single Member District Commissioner for ANC 3C08.
2. Pursuant to Subtitle Y § 402.1, on April 3, 2018 OZ mailed letters providing notice of the hearing to the Applicant, the Councilmember for Ward 3, ANC 3C, and the owners of all property within 200 feet of the Property. Notice was published in the *D.C. Register* on April 13, 2018 (65 DCR 3923) as well as through the calendar on OZ’s website.

Party Status

3. In addition to the Applicant, ANCs 3C and 3B were automatically parties in this proceeding pursuant to Subtitle Y § 403.5.
4. The Board granted a request for party status in opposition to the Application from Massachusetts Avenue Heights Citizens’ Association (“MAHCA”), an association representing a group of residents living near the Property.⁴ MAHCA was represented by its president, Paul Cunningham, and its authorized agent, Andrea Ferster.

MAHCA’s Motion to Dismiss

5. On September 24, 2018, MAHCA filed a Motion to Dismiss or, in the Alternative, to Postpone the hearing scheduled for September 26, 2018. (Ex. 155.) In the motion, MAHCA argued the Board should dismiss the case because the Applicant had not provided the names and addresses of all the property owners within 200 feet of the Property as required by Subtitle Y § 300.8(g). MAHCA argued that the Application concerned two parcels of property, Lot 44 and Lot 812 in Square 1935, but that the Applicant had only submitted a list of persons owning property within 200 feet of Lot 44.
6. The Board considered MAHCA’s motion at a public hearing held on September 26, 2018. The Board found that Lots 44 and Lot 812 adjoin each other, and notice to all property owners within 200 feet of Lot 44 would be adequate to provide notice to the broader community, given that the surrounding community had actual notice of the Application due to the high level of interest in the Application from the surrounding community, and from the other forms of public notice provided, which included publication of notice in the *D.C. Register* and the public hearing notice posted at the Property. The Board denied MAHCA’s Motion to Dismiss by a vote of 5-0-0.
7. At the September 26, 2018 public hearing, the Board also granted MAHCA’s request for a further postponement of the hearing, scheduled the further hearing for November 14, 2018, and suggested that the Applicant supplement its notice to include all properties within 200 feet of Lot 812 before the continued hearing. The Applicant submitted evidence that it

⁴ MAHCA’s party status request was untimely because it was filed after the deadline established by Subtitle Y § 404.4, but the Board waived this rule and granted the party status request.

provided an updated list of all property owners located within 200 feet of Lots 44 and 812 prior to the continued hearing. (Ex. 261.)

The Property

8. The Property consists of three lots of record – Lots 33, 34, and 44 – the first two of which have been consolidated for assessment and taxation purposes into a single tax lot 812.
9. The Property has a total land area of 19,113 square feet.
10. The Property is a corner lot with frontage on Wisconsin Avenue, N.W. to the west and frontage on Edmunds Street, N.W. to the north. The Property is bounded on the east by an alley that is 15 feet in width (the “Alley”), (Ex. 13,) and on the south by another lot with a residential building.⁵ The Alley can be accessed from Davis Street, N.W. or Edmunds Street, N.W.
11. The Property has no curb cut and is only accessible from the Alley.
12. The Property’s topography slopes downward from north to south.
13. Lots 33 and 34 are vacant and unimproved. Lot 44 is improved with a single-family detached principal dwelling that has an accessory garage to the rear.
14. There is a 15-foot-wide building restriction line along the Property’s western and northern lot lines. (Ex. 3.)
15. The Property is located in the Observatory Circle neighborhood of upper Wisconsin Avenue, N.W. The Russian Embassy complex is directly across Wisconsin Avenue from the Property. To the south of the Property, the Wisconsin Avenue corridor is comprised of commercial establishments, including a hotel, bars and restaurants. To the north of the Property on Wisconsin Avenue are several high-density apartment buildings. Farther north is the St. Albans School and Church, as well as the National Cathedral.
16. To the east and northeast of the Property between Wisconsin Avenue and Massachusetts Avenue are primarily low-density neighborhoods with detached, single-family homes.
17. The Property is not located in an historic district.
18. There is a bus stop directly in front of the Property at the corner of Wisconsin Avenue and Edmunds Street, N.W., which services bus lines 30N, 30S, 31, and 33. Additional bus lines can be accessed within 0.4 miles of the Property, including D1, D2, N2, N3, N4, and N6. There are two Capital Bikeshare stations located within 0.5 miles of the Property. There is ample access to car-sharing services near the Property as well.

⁵ MAHCA disputed the width of the Alley; however, the Baist Map filed with the Application reflects that the Alley is 15 feet in width.

19. There are three private parking garages within one-half-mile of the Property. (Ex. 107.)
20. The Property is located in the R-1-B zone.
21. The Zoning Regulations state that “[t]he Residential House (R) zones are residential zones, designed to provide for stable, low- to moderate-density residential areas for family life and supporting uses.” (Subtitle D § 100.1.)
22. Under the R-1-B regulations, the Property could be developed with three single-family detached principal dwellings, or with three clerical and religious group residences for up to 15 persons, as a matter of right. (Subtitle U § 201.1.) If developed with three single-family detached dwellings, each could contain an accessory apartment, (Subtitle U § 253,) and have an accessory garage. (Subtitle U § 250.)
23. Other matter-of-right uses for the R-1-B zone, subject to any applicable conditions, include institutional religious-based uses; local government uses; public education buildings and structures, public recreation and community centers, and public libraries; and child development or elderly development centers located in a D.C. public school or a public recreation center operated by the District government. (Subtitle U § 202.1.)

The Application

24. The Applicant, the contract purchaser of the Property,⁶ propose to subdivide Lots 44 and 812 into a single record lot and to raze the existing single-family home and accessory garage in order to construct a 34-room memory care facility (the “**Facility**,” Ex. 41.)

Memory/Continuing Care Retirement Community Use

25. The country’s population is aging, and it is expected that there will be an increase of 10 million people with Alzheimer’s Disease over the next 22 years. (Transcript of November 14, 2018 Hearing [“**Nov. 14 Tr.**”] at 256; Ex. 162.) The District’s Comprehensive Plan reflects this need to serve senior citizens by providing more assisted living housing. (Nov. 14 Tr. at 73; Ex. 41B.)
26. Memory care is a subset of assisted living that provides specialized programming for seniors with forms of dementia, including Alzheimer’s Disease. (Ex. 41.) Memory care programs offer broader assistance with daily living activities, including dressing, bathing and grooming. (Nov. 14 Tr. at 54.) It is not the same as an assisted living facility that offers

⁶ At the time of the filing of the Application, the Property was owned by Mary Rubino and the Marital Trust U/Schaeffer Family Trust. The property owners submitted a written statement authorizing Glover Park Developers LLC, a contract purchaser of the Property, to be their agent in connection with this application. (Ex. 10.) Bruce Finland signed the application on behalf of Glover Park Developers LLC. (Ex. 1.) Glover Park Developers LLC submitted a letter authorizing Meredith Moldenhauer of the law firm of Cozen O’Connor to serve as its agent, and further authorized Ms. Moldenhauer to serve as the agent for MED Developers, LLC. (Ex. 9.) The written statement submitted with the Application identified MED Developers LLC as the Applicant, and stated that MED Developers, LLC was the contract purchaser of the Property. (Ex. 15.) A contract purchaser is often an authorized agent for the owner for an application for zoning relief.

- more generalized medical care. (Nov. 14 Tr. at 254.)
27. In addition to assistance with daily living activities, the memory care program will offer cognitive therapy activities, such as music therapy, sensory stimulation, virtual outings, exercise classes, and aroma therapy. (Nov. 14 Tr. at 54-55; Ex. 41.)
 28. There will be planned off-site activities approximately two to three times a week. (Ex. 41.) Residents would be transported to off-site activities by private community van. (Ex. 41.)
 29. There will be in-house staff that does housekeeping and laundry. (Ex. 41.) Laundry facilities are located on-site.
 30. Guest Services Senior Living (“GSSL”) will be the provider for the Facility. (Ex. 41.) As the provider, GSSL will be in charge of operating the memory care program, including hiring staff.
 31. John Gonzales, the President of GSSL, has worked in the senior services industry for over 30 years, concluding operating dozens of memory care facilities. (Ex. 41, 41C; Nov. 14 Tr. at 227.)
 32. GSSL will obtain a license from the D.C. Department of Health in order to operate the Facility. (Nov. 14 Tr. at 240.)
 33. The Facility will be staffed in accordance with District law. (Ex. 41.) It is expected that there will be a maximum of 18⁷ staff on-site at a given time. (Ex. 41, Nov. 14 Tr. at 85.) Staff will be comprised of direct care staff, including nurses, certified nursing assistants and certified medical assistants, as well as administrative staff. (Ex. 41.) The residents’ needs for personal aids will be reduced because the Facility will employ a “universal worker model” where staff members are expected to provide extensive services that may not be available in similar facilities. (Nov. 14 Tr. at 254.) Staffing schedules will be staggered throughout the day, so that not all staff would be leaving at the same time. (Ex. 41; Nov. 14 Tr. at 85, 273.)
 34. The Facility is designed to be self-contained, with a majority of programming occurring within the Facility. The Facility will offer residents access to a fitness center, a beauty salon, and recreational space. All meals will be prepared on-site in the commercial kitchen, and the Facility will have in-house laundry facilities. The Facility has also been designed to incorporate extensive safety measures for residents, including a front desk that will be staffed during much of the day. (Nov. 14 Tr. at 62, 230-231, 258-259.)

⁷ The Applicant stated that there will be a maximum number of 18 staff on-site at a time in its pre-hearing statement (Ex. 41), and its traffic expert testified 18 was the correct number at the hearing. (Nov. 14 Tr. at 285.) Mr. Gonzalez testified that the maximum number of staff on-site at a given time would be 17 at the hearing. (Nov. 14 Tr. at 272.) The Board finds the higher number of 18 is correct for purposes of this Order.

The Facility

35. The Facility will be three stories plus a cellar level and mechanical penthouse. (Ex. 483A.) The height of the Facility will be 40 feet. The maximum permitted building height, not including the penthouse, in the R-1-B zone is 40 feet and the maximum number of stories is three stories. (Subtitle D § 303.1.) The mechanical penthouse will be one story with a height of 12 feet. The maximum permitted height of a penthouse for this type of structure in the R-1-B zone is 12 feet and the maximum number of stories is one. (Subtitle D § 303.2.)
36. The main entrance to the Facility is from Wisconsin Avenue, N.W. (Ex. 483A.) The ground level will have eight dwelling units, as well as a reception area and a recreational/library space. (Ex. 483A.)
37. The second and third levels have the same floor layout and will feature 13 dwelling units, including a double occupancy unit on each floor. (Ex. 483A.) Each floor will also have common space and a staff nook. (Ex. 483A.)
38. The cellar level features common space, including a commercial kitchen, dining facilities, a fitness center, and a trash room. (Ex. 483A.) The cellar level offers direct access to a garden area to the rear of the Facility.
39. The garden area will be surrounded by a fence that is approximately 6 to 6.5 feet in height. (Ex. 483A; Transcript of December 19, 2018 Hearing [“**Dec. 19 Tr.**”] at 50.) The Facility will also feature a planted buffer between the garden area and the Alley. (Ex. 483A.)
40. The Facility will have a lot occupancy of 40%. The maximum lot occupancy for this type of structure in the R-1-B zone is 40%. (Subtitle D § 304.1.)
41. The Facility will provide a 27-foot, 10-inch rear yard. The required rear yard is 25 feet. (Subtitle D § 306.1.)
42. The Facility will provide a 10-foot, 8-inch southern side yard and a 15-foot northern side yard. Subtitle D § 206.2 requires a two eight-foot side yards.
43. The Facility will have side yards and a rear yard that exceed the minimum requirements in the R-1-B zone. (Ex. 483A.)
44. While residents will be able to utilize an outdoor garden area, the space will be circumscribed by a 6 to 6.5-foot tall fence. (Dec. 19 Tr. at 25.) There will also be a 14-foot-wide planted buffer between the garden area and the Alley. (Dec. 19 Tr. at 27.) The Alley itself provides an additional buffer for neighboring properties to the east. (Ex. 483A.)
45. With respect to the neighboring property directly to the south of the Property, the property will be buffered from the Facility as a result of the 10-foot, 8-inch southern side yard, and landscaping elements for that side yard. (Nov. 14 Tr. at 64; Ex. 483A, 483G.) The laundry

facilities will vent in the direction of Edmunds Street, N.W. as opposed to the neighboring property to the south.

46. In response to comments by opponents and Commissioner Miller's request at the November 14 hearing, the Applicant revised the architectural plans (the "**Revised Plans**") for the Facility to incorporate a below-grade garage with 19 parking spaces. (Dec. 19 Tr. At 25; Ex. 483A.)
47. The Revised Plans also moved the proposed 50-foot by 10-foot loading area for deliveries and trash removal to the northeastern corner of the Property perpendicular to the Alley. A service entrance is directly adjacent to the loading area. (Ex. 483A.)
48. The garage level and loading area are accessed from the Alley, which separates the garage entrance from the properties to the east. (Ex. 483A.)
49. The garage level will also have administrative offices, laundry facilities, mechanical equipment and a bicycle storage room. The Revised Plans include an internal trash room for storing trash and recyclables. (Ex. 483A.)

Relief Requested

50. On March 26, 2018, the Applicant submitted the self-certified Application seeking special exception relief for a Continuing Care Retirement Community ("**CCRC**") use (Subtitle U § 203.1(f)) and from the requirements for vehicular parking. (Subtitle C § 701.5.)
51. When the Applicant agreed to provide the required 19 parking spaces, as requested by opponents and Commissioner Miller at the November 14, 2019 public hearing, the Applicant submitted the Revised Plans including the 19 parking spaces and withdrew its request for relief from Subtitle C § 701.5 on November 26, 2018. (Ex. 483B.)
52. The Applicant provided the following expert witnesses:
 - John Gonzales, the President of GSSL, testified regarding operations and management of senior housing facilities; (Ex. 41A, Tab C)
 - Erwin Andres of Gorove/Slade Associates ("**Gorove/Slade**"), an expert in traffic and transportation, testified regarding traffic, parking, loading and related transportation issues; (Ex. 39, Tab B)
 - Stephen Varga, an expert in land use and planning, regarding the Facility's consistency with planning policies in the Comprehensive Plan and the R-1-B zone; (Ex. 41A, Tab B)
 - Claire Dickey, The Facility's architect, spoke in an expert capacity regarding design elements of the Facility. (Ex. 41A, Tab D.)
53. The Applicant provided two additional expert witnesses, based on issues addressed on rebuttal:
 - Dr. Jeffrey Keller testified as an expert in memory care facilities; (Ex. 399)

- Thomas Gale testified as an expert in financing memory care and senior living facilities. (Ex. 399.)

Parking, Loading, and Traffic Impacts

54. Residents of the Facility will not have personal vehicles. (Ex. 107; Nov. 14 Tr. at 66.)
55. Residents would be transported to off-site activities by private community van. (Ex. 41.)
56. Mr. Gonzales testified that, based on his experience in the field, the number of visitors on a given day is equivalent to 10% or less of the total number of units. (Nov. 14 Tr. at 245). Based on this projection, it is expected that the Facility would have approximately two to four visitors per day. (Nov. 14 Tr. at 225, 245.)
57. Pursuant to Subtitle C § 701.5, the Facility is required to have one parking space per two dwelling units, which would be a total of 17 vehicular parking spaces.
58. It is expected that there will be a maximum of 18 staff on-site at a given time. (Ex. 41, Nov. 14 Tr. at 85.)
59. Approximately 45% of staff will use non-auto transit to commute to the Facility based on industry standard and census tract data. (Ex. 107.)
60. The staggering of staff schedules will limit the occasions where multiple staff are exiting or entering the Facility at the same time. (Nov. 14 Tr. at 85-86.)
61. The Applicant submitted two parking studies, conducted on four different days of the week. (Ex. 39, 399A.) The parking studies determined that there are over 100 on-street parking spaces available during the study period. (Ex. 39, 399A; Nov. 14 Tr. at 67-68.)
62. The Applicant proposed a Transportation Demand Management (“TDM”) Plan to limit the impact of the Facility on parking and traffic in the surrounding area. The elements of the plan have been incorporated as conditions of this Order. They are:
 - a. Applicant will offer full-time and shift employees a transit subsidy of no less than \$10 per week, which equates to 50% of the weekly cost of a standard Metrobus or Capital Bikeshare commute.
 - b. Applicant will identify a TDM leader to work with employees to distribute and market transportation alternatives.
 - c. Applicant will work with DDOT and goDCgo to implement TDM measures.
 - d. Applicant will share the full contact information of the TDM leader with DDOT and goDCgo.
 - e. Applicant will provide staff who wish to carpool with detailed carpooling information and will be referred to other carpool matching services sponsored by the Metropolitan Washington Council of Governments.
 - f. Applicant will install a Transportation Information Center Display within the lobby of the Facility that contains information related to local transportation alternatives.

- g. Applicant will identify nearby parking garage facilities that can provide additional parking for guests and staff.
63. The Applicant submitted AutoTURN™ diagrams illustrating the turning radii necessary for vehicles accessing the Property via the Alley. One shows that a 30-foot truck can access the loading area by entering the Alley via Davis Street, N.W., turn into the loading area, and exit the Alley to Edmunds Street, N.W. (Ex. 483C.) A second diagram shows there is enough room for vehicles to enter and exit the parking garage from the Alley. (Ex. 483C.)
64. DDOT required the Applicant to provide loading access, if any, via the Alley. (Nov. 14 Tr. at 233, 264). DDOT's Design and Engineering Manual dictates that if a property abuts an alley, loading access should be provided through that alley. (Nov. 14 Tr. at 233.)
65. The Board expects the use of the loading area will be comprised of food deliveries, waste and recycling removal, mail, routine incidental deliveries of the same type that are made to nearby residences, and ambulances as needed for the medical treatment of the residents. (Nov. 14 Tr. at 55, 232-237; Ex. 41.)
66. Ambulance visits will not be limited to using the loading area at the rear but will also occur from the front facing Wisconsin Avenue, which is a principal arterial street, the most intensive, non-freeway designation. (Nov. 14 Tr. at 70, 242.)
67. The Applicant proposed a loading management plan to limit the loading impact of the Facility. The elements of the plan have been incorporated as conditions of this Order. They are:
- a. A loading manager will be designated by the Facility's management. The manager will schedule deliveries and will be on duty during delivery hours.
 - b. The loading manager will coordinate with trash service to help the loading of trash move expeditiously between the service area inside the Facility and the loading area.
 - c. Trucks using the loading area will not be allowed to idle and must follow all District guidelines for heavy vehicle operation including, but not limited to, DCMR Title 20, Chapter 9, Section 900, the regulations set forth in DDOT's Freight Management and Commercial Vehicle Operations document, and the primary access routes listed in the DDOT Truck and Bus Route System.
 - d. The loading manager will be responsible for disseminating DDOT's Freight Management and Commercial Vehicle Operations document to drivers as needed in order to encourage compliance with District laws and DDOT's truck routes. The loading manager will also post these documents in a prominent location within the service area.

Impacts on Light and Air

68. There are existing accessory buildings and mature trees on other properties abutting the Alley. (Dec. 19 Tr. at 31.)
69. The Applicant submitted a sun study that shows that the Facility will create shadowing on

neighboring properties only during the late-afternoon hours and that for a majority of the day, the Facility projects a shadow on the Wisconsin Avenue, N.W. right-of-way. (Ex. 483F.)

OP Reports

70. OP submitted two reports in this case.
71. OP's first report, dated September 14, 2018, (the "**First OP Report**") recommended approval of the Application, which at that time included a request for a reduction in the number of required parking spaces for the Facility. (Ex. 50.) The First OP Report recommended that the approval include a condition requiring that any change in use, including to a different form of Continuing Care Retirement Community, would require a new application to the Board of Zoning Adjustment for re-evaluation against the relevant regulations. At the November 14, 2018 public hearing, OP recommended approval of the Application. (Nov. 14 Tr. at 168.)
72. OP's second report, dated December 14, 2018, (the "**Second OP Report**") analyzed the revised Facility design submitted by the Applicant that included 19 underground parking spaces. (Ex. 486.) The Second OP Report also recommended approval of the Application.
73. OP recommended approval of the Application at the continued hearing on December 19, 2018. (Dec. 19 Tr. at 68.)

DDOT Reports

74. DDOT submitted three reports.
75. The first DDOT Report, dated September 14, 2018 (the "**First DDOT Report**,"") stated that DDOT analyzed the Applicant's proposed site design, travel assumptions, transportation analysis, and proposed transportation mitigations. (Ex. 45.) The First DDOT Report also stated that it anticipated the Facility would lead to a "minor increase" in the number of vehicle, transit, pedestrian, and bicycle trips, and that the Application would also have the potential to generate "minor impacts to on street parking conditions in the area, including a slight increase in vehicular parking demand, and higher level of parking utilization in the immediate area." Nonetheless, DDOT concluded in the report that it had "no objection to the approval of the requested relief on the condition that the Applicant" enhance its proffered TDM plan by offering full-time and shift employees a transit subsidy of no less than \$10 a week and either satisfy the bicycle parking requirements or request relief from them (and stated that DDOT would support such a waiver under the circumstances).
76. The second DDOT report, dated November 26, 2018, was submitted after the first full hearing (the "**Second DDOT Report**"). (Ex. 481.) The Second DDOT Report stated that DDOT reviewed the additional TDM measures the Applicant offered after DDOT submitted its first report, and that DDOT is "in concurrence with it so long as it is included as a condition in addition to the original transit subsidy." The Second DDOT Report also

attached a copy of the letter DDOT sent to Councilmember Mary Cheh responding to the issues she raised to DDOT about the Facility and providing further information to support its recommendation of “no objection,” based on DDOT’s review of potential impacts on “on-street parking, traffic operations, and usage of the public alley.”

77. The third DDOT report, dated December 18, 2018, was submitted just before the second full hearing (the “**Third DDOT Report**”). (Ex. 488.) The Third DDOT Report stated that DDOT understood that the Applicant had removed the vehicular parking relief from their Application and that DDOT had reviewed the Applicant’s revised plans showing 19 vehicular parking spaces on-site. The Third DDOT Report concluded that the new design met DDOT standards and best practices, including for loading, trash storage, and parking entrances, and that as a result DDOT had no objection to the relief, provided that the Applicant met the conditions recited in DDOT’s previous reports.

ANC Reports

78. ANC 3B did not submit a written report for this Application.
79. ANC 3C submitted a written report, dated September 17, 2018 (the “**ANC 3C Report**,” Ex. 146), asserting that the Applicant had not sustained its burden of proof, and listed the following issues and concerns about the Facility:
- the loading dock is insufficiently buffered relative to nearby residences;
 - the restriction or removal of on-street parking spaces to facilitate access to the Alley for trucks serving the Facility;
 - light and noise from the Facility affecting use and enjoyment of nearby properties;
 - the lack of a landscape or buffering plan for directly adjacent properties;
 - the design and mass of the Facility is similar to the apartment buildings across Wisconsin Avenue rather than the single-family neighborhood that surrounds it;
 - the Application requires additional parking relief in addition to the special exception to permit the CCRC use, and the special exception standards for the CCRC use include a finding that there will be sufficient off-street parking spaces for employees, residents and visitors; and
 - the Applicant and the First DDOT Report did not sufficiently analyze the number of visitors and staff that will drive to the site and that there will be greater demand for the parking spaces on the street than are available.⁸
80. The ANC 3C Report authorized the Chair, Commissioner Nancy MacWood, to represent the ANC on this matter. Commissioner MacWood participated in the public hearing on November 14, 2018 on behalf of the ANC.

Party in Opposition

81. MAHCA argued that the Applicant had not sustained its burden of proof for several reasons:
- the Applicant’s proposed use did not meet the definition of a CCRC facility;

⁸ The Board condensed the issues and concerns stated in the ANC’s report here for the sake of brevity and clarity.

- the Applicant was not qualified to operate such a facility, and the facility would be “inviably;”
 - the Applicant had not met all the elements of the applicable specific and general special exception tests; and
 - the OP and DDOT reports, as well as the Applicant’s case, were not credible.
82. MAHCA submitted a sun study, which did not include surrounding buildings or vegetation. (Ex. 484; Dec. 19 Tr. at 32-35.)
83. MAHCA submitted expert statements and expert testimony from:
- Joe Mehra regarding traffic, parking and loading (Ex. 472);
 - Dr. Nathan Billig, an expert in geriatric psychiatry, regarding design and staffing of a memory care facility (Ex. 473),⁹ and
 - John Cunningham, an expert in financing memory care facilities, regarding the financial viability of the Facility.¹⁰ (Ex. 470.)
84. MAHCA also provided testimony from witnesses, Anita Crabtree and Robert McDiarmid. (Nov. 14 Tr. at 130-133, 147-149.)

Persons in Support

85. The Board received letters of support for the Application. (Ex. 48, 162, 165, 462.) GSSL, the proposed operator of the Facility, submitted a letter regarding its support for the Facility. (Ex. 48.) Dr. Jeffrey Keller submitted a letter of support regarding the growing need for memory care facilities across the country, and the viability of a small community similar to the Facility. (Ex. 162.) Other letters noted general support for the Facility and that the design would have a limited impact on the neighborhood. (Ex. 165, 462.)

Persons in Opposition

86. The Board received numerous letters and testimony from persons in opposition to the Application. A majority of the letters are identical form letters with the same objections to the Facility. Persons in opposition objected to the proposed off-street parking plan, the negative impacts the Facility would have on noise, light, the environment, and privacy. The letters also asserted that the Applicant and GSSL did not have experience running a memory care program. Other persons in opposition noted increases to traffic from the Facility and negative effects to the on-street parking supply.

⁹ The Applicant objected to MAHCA’s request to qualify Dr. Billig as an expert in “the operational characteristics of the memory care facility from a patient care perspective.” (Nov. 14 Tr. at 113-116.) The Applicant and MAHCA agreed to qualify Dr. Billig as an expert in geriatric psychiatry, which the Board accepted. (Nov. 14 Tr. at 116.)

¹⁰ The Applicant objected to MAHCA’s request to qualify Mr. Cunningham as an expert witness based on relevancy of the proposed testimony and Mr. Cunningham’s qualifications. (Nov. 14 Tr. at 134-137.) The Board accepted Mr. Cunningham as an expert witness in financing memory care facilities. (Nov. 14 Tr. at 145.) However, the Board determined that Mr. Cunningham’s testimony was not relevant to the special exception standard or the Application before the Board.

87. At the hearing on November 14, 2018, 10 individuals testified in opposition and expressed their concern that the proposed facility would produce the following objectionable conditions and adverse impacts:
- hazards to pedestrians, including children, in the Alley;
 - significant increase in vehicular traffic including delivery trucks and emergency vehicles such as ambulances and fire trucks;
 - increased vehicular noise and exhaust fumes that could be funneled into neighbors' backyards and remain trapped in the Alley;
 - loss of privacy and natural light;
 - excessive lighting at night, needed in order to secure the perimeter of the property, which would shine on neighboring homes;
 - change in neighborhood character that is not in keeping with the R-1-B zone; and
 - increased trash and rodents from the operation.
- (Nov. 14 Tr. at 186-206, 209-217.)

Public Hearings

88. The public hearing, originally scheduled for May 23, 2018, was postponed several times. The first postponement was requested by the ANC, (Ex. 31,) and the hearing was postponed to June 6, 2018. The Applicant then requested two postponements, (Ex. 35, 37,) and the hearing was postponed to September 26, 2018.
89. On September 26, 2018, as discussed above, the Board convened the hearing, granted party status to MAHCA, denied MAHCA's motion to dismiss the case, and granted MAHCA's request to further postpone the hearing.
90. On November 14, 2018, the Board held a full public hearing on the Application.¹¹ At the end of the hearing, the Board requested additional information¹² and continued the hearing to December 19, 2018.
91. At the close of the Board's hearing on November 14, 2018, the Board scheduled a continued hearing on the Application for December 19, 2018. The Board explicitly stated that the December 19th hearing would be "a continued hearing date," which was acknowledged by the parties. (Nov. 14 Tr. at 294-295.) The Board requested that the Applicant provide additional information prior to the hearing, including a revised building plan that included on-site parking for 17 vehicles.

¹¹ The Board permitted MAHCA to cross-examine all the witnesses who were present. At times, the Board's presiding officer did not permit continued cross-examination pursuant to his authority under Subtitle Y § 408.5, which provides the presiding officer may place "reasonable restrictions on cross-examination, including limitation on the scope of cross-examination," and Subtitle Y § 408.6, which provides that the "presiding officer may rule a question out of order when it is irrelevant, immaterial, or unduly repetitious, or otherwise outside the scope of cross-examination."

¹² Among the items the Board requested was a revised plan that included on-site parking for 17 vehicles. The reason for this request was, in part, because one of the Board members indicated that he did not believe the Applicant had met its burden of showing the original design had sufficient off-street parking spaces. (Nov. 14 Tr. at 287.)

92. On November 26, 2018, the Applicant submitted the additional information requested by the Board, including revised plans for the Facility with below grade parking for 19 vehicles, as well as sun and shadow studies. The Applicant revised its request for relief to remove the request for parking relief. (Ex. 483.)
93. On December 3, 2018, MAHCA submitted a response to the Applicant's submission, requesting:
- (1) that DDOT evaluate the new plan and provide a new report;
 - (2) that OP evaluate the new plan and provide a new report;
 - (3) that MAHCA be given time for its traffic expert to review and opine on the new plan and testify at the December 19, 2018 hearing;
 - (4) that MAHCA be given time for an architect to review the new plans and either testify about them at the December 19 hearing or submit a written report; and
 - (5) that MAHCA have the opportunity to cross-examine any witnesses testifying about the new plan at the December 19 hearing. (Ex. 485.)
94. The Board found that all of the procedural requests listed in MAHCA's December 3 response were satisfied as follows:
- (1) OP filed the Second OP Report prior to the continued hearing; (Ex. 486)
 - (2) DDOT filed the Third DDOT Report prior to the continued hearing; (Ex. 488)
 - (3), (4) the Board found at the beginning of the December 19, 2018 hearing that MAHCA had already had sufficient time for its traffic expert and architect to each review the revised plans, and that they would be given an opportunity to testify about the revised plans and to cross-examine the Applicant's witnesses at the continued hearing; (Dec. 19 Tr. at 17-18); and
 - (5) the Board granted MAHCA the opportunity to cross-examine the Applicant's witnesses at the continued hearing.
95. At the December 19, 2018 continued hearing, MAHCA made two oral Motions to Strike.
96. The first Motion to Strike concerned the Third DDOT Report. (Dec. 19 Tr. at 20.) MAHCA argued that "DDOT is not present for the hearing," and that MAHCA did not have sufficient time to review the Third DDOT Report prior to the hearing. (Dec. 19 Tr. at 20.) The Board denied the Motion, noting that MAHCA's traffic expert, Mr. Mehra, was not present at the December 19th hearing; (Dec. 19 Tr. at 23-24;); that the Second OP Report had referenced DDOT's concerns regarding the revised plans; and that MAHCA had an opportunity to cross-examine the Applicant regarding the revised plans with the parking garage. (Dec. 19 Tr. at 20-21, 23-24.)
97. MAHCA's second Motion to Strike "the testimony" argued that the Applicant's response to MAHCA's sun study testimony was not filed in the record and was "untimely and prejudicial." (Dec. 19 Tr. at 39.) The Board denied the Motion to Strike and allowed the evidence because the Board had continued the hearing for the purpose of accepting evidence and testimony, including testimony regarding the sun studies, and MAHCA had

the opportunity to cross-examine the Applicant and to present its own witnesses during the continued hearing. (Dec. 19 Tr. at 41-42.)

98. MAHCA elected not to present any witnesses or make a presentation at the December 19, 2018 hearing. (Dec. 19 Tr. at 67-68.) In lieu of a presentation, counsel for MAHCA stated that it would make a closing statement. (Dec. 19 Tr. at 16-17, 68.) Under Subtitle Y § 409.1, the Board is not required to allow a Party in Opposition to make a closing statement; however, the Board authorized MAHCA to make a closing statement to ensure that the Board would spend “sufficient time to be able to go through the material that has been submitted.” (Dec. 19 Tr. at 16.) The Board provided MAHCA 15 minutes for its closing statement, which is the same length of time provided for the Applicant to make its presentation. (Dec. 19 Tr. at 19-20, 72-73.)
99. MAHCA requested at the December 19, 2018, hearing that the parties be able to submit proposed findings of fact and conclusions of law. (Dec. 19 Tr. at 14.) Over the objection of the Applicant, which called it “unnecessary,” the Board requested that the parties submit proposed findings of fact and conclusions of law.
100. After the continued hearing on December 19, 2018, the Board closed the record and scheduled the Application for a decision meeting on January 30, 2019.

CONCLUSIONS OF LAW AND OPINION

1. The Applicant seeks a special exception under Subtitle U § 203.1(f), to allow a Continuing Care Retirement Community use in the R-1-B zone at premises 2619-2623 Wisconsin Avenue N.W. (Square 1935, Lots 33, 34, and 44).
2. Section 8 of the Zoning Act of 1938 (D.C. Official Code § 6-641.07(g)(2) (2018 Repl.); *see also* Subtitle X § 901.2) authorizes the Board to grant special exceptions, as provided in the Zoning Regulations, where, in the judgement of the Board, the special exception:
 - i. will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map,
 - ii. will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Map, and
 - iii. complies with the special conditions specified in the Zoning Regulations.
3. For the relief requested by the Application, the “specific conditions” are those of Subtitle U § 203.1(f), as quoted below.¹³

¹³ Pursuant to Subtitle U § 203.1(f), the Applicant must prove that the use includes one or more of the following services: (A) Dwelling units for independent living; (B) Assisted living facilities; or (C) A licensed skilled nursing care facility (Subtitle U § 203.1(f)(1)); if the use does not include assisted living or skilled nursing facilities, the number of residents shall not exceed eight (8) (Subtitle U § 203.1(f)(2)); the use may include ancillary uses for the further enjoyment, service, or care of the residents (Subtitle U § 203.1(f)(3)); the use and related facilities shall provide sufficient off-street parking spaces for employees, residents, and visitors (Subtitle U § 203.1(f)(4)); the use, including

4. Relief granted by the Board through a special exception is presumed appropriate, reasonable, and compatible with other uses in the same zoning classification, provided the specific regulatory requirements for the relief requested are met. In reviewing an application for special exception relief, the Board's discretion is limited to determining whether the proposed exception satisfies the requirements of the regulations and "if the applicant meets its burden, the Board ordinarily must grant the application." *First Washington Baptist Church v. D.C. Bd. of Zoning Adjustment*, 423 A.2d 695, 701 (D.C. 1981) (quoting *Stewart v. D.C. Bd. of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973)).
5. For the reasons discussed below, the Board concludes that the Applicant has met these special conditions and is therefore entitled to relief for the CCRC use in the R-1-B zone.
6. The Board will address MAHCA's argument that the proposed use is not a CCRC first, then the specific special exception criteria of Subtitle U § 203.1(f), followed by the general criteria of Subtitle X § 901.2, and lastly, MAHCA's argument that the Application should be denied because the business is not viable.

Definition of Continuing Care Retirement Community Use

7. MAHCA claimed that the Application did not meet the definition of a CCRC and therefore was not entitled to the relief. In support of this contention, MAHCA relied on statements made at the hearing by the Applicant's counsel that there will be no "medical directors in our facility" and the Applicant's expert witness that the Applicant will not be providing "medical care" at the facility.
8. A CCRC is defined in the Zoning Regulations as:
A building or group of buildings providing a continuity of residential occupancy **and health care** for elderly persons. This facility includes dwelling units for independent living, assisted living facilities, or a skilled nursing care facility of a suitable size to provide treatment or care of the residents; it may also include ancillary facilities for the further enjoyment, service, or care of the residents. The facility is restricted to persons sixty (60) years of age or older or married couples or domestic partners where either the spouse or domestic partner is sixty (60) years of age or older.
Subtitle B § 100.2 ("Continuing Care Retirement Community") (bold underline added).
9. The Board does not find MAHCA's argument persuasive because the record contains ample evidence that the Applicant is proposing a residential memory care facility providing assisted living and services to seniors with various forms of dementia. These services will include assistance with daily living activities, as well as cognitive therapy activities, such

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 (Subtitle U § 203.1(f)(5)); and "[t]he 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." (Subtitle U § 203.1(f).)

as music therapy, sensory stimulation, virtual outings, exercise classes, and aroma therapy. The Board concludes that these services meet the requirement in the definition of CCRC for “health care.”

Subtitle U § 203.1(f) – Relief to Establish a Continuing Care Retirement Community Use

10. To qualify for a special exception under Subtitle U § 203.1(f), to allow a CCRC in the R-1-B zone, the Applicant must demonstrate that the Application satisfies the following conditions of Subtitle U § 203.1(f):

Subtitle U § 203.1(f)(1): *The use includes one or more of the following services:*

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

11. The Board concludes the Applicant has met this requirement because the Facility will include “assisted living facilities.”

11. The term “assisted living facilities” is not defined in the Zoning Regulations. Therefore, the words have the meanings given in Webster's Unabridged Dictionary. (Subtitle B § 100.1(g).)

12. Webster’s Unabridged Dictionary Defines “assisted living” in relevant part as “a system of housing and limited care that is designed for senior citizens who need some assistance with daily activities but do not require care in a nursing home;” and “facility” in relevant part as, “something (such as a hospital) that is built, installed, or established to serve a particular purpose.”

13. The Facility will be comprised of a residential building in which it will provide a memory care program to all of the residents, who will be seniors with various forms of dementia, including Alzheimer’s Disease. The program will include assistance with daily living activities and cognitive therapy activities. The Board concludes that this meets the definition of “assisted living facilities,” and therefore meets the criterion of Subtitle U § 203.1(f)(1).

Subtitle U § 203.1(f)(2): *If the use does not include assisted living or skilled nursing facilities, the number of residents shall not exceed eight (8);*

14. The Board concludes this requirement is not applicable because the Board finds the use will include assisted living facilities, as described above.

Subtitle U § 203.1(f)(3): *The use may include ancillary uses for the further enjoyment, service, or care of the residents;*

15. This section states that the use “may” include ancillary uses. The Board therefore concludes this section is permissive, allowing ancillary uses, not requiring them. Thus, providing “ancillary uses” is not required for approval.
16. The Facility will include ancillary uses, namely recreation space, dining facilities, a fitness center, and barber/beauty salon, and these ancillary uses are permitted.

Subtitle U § 203.1(f)(4): *The use and related facilities shall provide sufficient off-street parking spaces for employees, residents, and visitors;*

17. The Board concludes that the Applicant has met this requirement because the Facility will provide 19 parking spaces, exceeding its zoning requirements of 17 parking spaces. The parking schedule set forth in Subtitle C § 701.5 is instructive of the amount of parking spaces that is “sufficient” because the schedule is designed to guide the appropriate amount of parking needed for a particular use. The proposed use for the Facility is a “residential” use, as that term is defined in Subtitle B § 200.2(bb), and, therefore, the Facility is subject to the parking requirements for a residential use.
18. This is not dispositive, however, because the special exception standard requires the Board to separately analyze whether this Application provides “sufficient” off-street parking for employees, residents and visitors, rather than merely relying on the off-street parking requirements elsewhere in the Zoning Regulations.
19. The term “sufficient” is not defined in the Zoning Regulations, therefore the word has the meaning given in Webster's Unabridged Dictionary. (Subtitle B § 100.1(g).) Webster's Unabridged Dictionary Defines “sufficient” in relevant part as, “enough to meet the needs of a situation or a proposed end.” The Board interprets this to mean that a “sufficient” amount of parking for purposes of applying this regulation is enough off-street parking for employees, residents and guests to meet the anticipated day-to-day needs of the use without causing an adverse impact on neighbors. This is a flexible, subjective standard. It does not require that the Applicant provide an off-street parking space for all employees, residents, and visitors who may choose to park at the site at any particular time.
20. The Board applied that standard to consider the evidence presented about the anticipated day-to-day parking needs of the Facility and concludes that the Applicant has met its burden of proof.
21. In doing so, the Board assessed the anticipated day-to-day parking demands of employees. The Board found the Applicant's testimony credible that there will be a maximum of 18 employees on site at any given time during the first and second shifts and that number will drop down to three employees on site for the third shift (from 11:00 PM to 7:00 AM). MAHCA asserts that this total number of employees does not include additional

vendors/contractors who are likely to come to the facility on a regular basis. The Applicant testified that because of its staffing method, the maximum number of workers on the site is indeed likely to be 18. The Board therefore concludes the Applicant's estimate of a maximum of 18 employees at any given time to be a credible estimate for purposes of calculating parking demand.

22. The Applicant anticipates that not all employees will drive to work and use an on-site parking space. The Applicant's traffic expert testified that he believed 55% of the of the staff will drive to work, with the remaining 45% traveling to and from the site by public transportation, bicycle, or walking. He arrived at this "mode split" based on census tract data and the Property's location. This approval is conditioned upon the Applicant complying with a transportation demand management plan that requires it to provide incentives to employees to use public transportation, bike or walk. The Board therefore finds the Applicant's estimate that 55% of its employees will be parking at the site on a day-to-day basis credible.
23. Applying this "mode split" to the anticipated number of employees on site during the first and second shifts, yields an expected employee parking demand of 10 spaces.
24. Next, the Board considered the parking demand of residents. The Facility's residents will not drive because of their dementia condition, so the anticipated demand for resident parking is zero. The record contains evidence that there will be a community van to provide transportation to residents.
25. Finally, the Board considered visitors. Anticipating the number of off-street parking spaces that is "sufficient" for visitors is quite speculative. The Board found the testimony of John Gonzales highly credible that the expected number of visitors is two to four per day, although not all visitors would be at the facility at the same time.
26. Considering the anticipated parking demands of the employees, residents, and visitors, the Board concludes the Facility provides sufficient off-street parking. The anticipated day-to-day demand for parking spaces is 12-14 spaces, plus a space for the community van¹⁴. The Facility includes 19 spaces. The Board concludes that this amount is sufficient.

Subtitle U § 203.1(f)(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;*

27. The Board interprets this to mean that the use shall be located in a place, and designed in such a way, that in the Board's view, a reasonable person would not find the noise, traffic, or other aspects of the use "objectionable." The term "objectionable" is not defined in the

¹⁴ The Applicant's traffic expert testified that based on the Institute of Transportation Engineers manual, the expected parking demand for the Project is seven spaces. (Nov. 14 Tr. at 85.) The Board did not find this to be a credible estimate of the parking demand of the Project given that it was so far below the Zoning Regulations parking standards.

Zoning Regulations, therefore the word has the meaning given in Webster's Unabridged Dictionary. (Subtitle B § 100.1(g).) Webster's Unabridged Dictionary Defines "objectionable" in relevant part as, "undesirable, offensive."

28. The Board concludes the Applicant has met this requirement. The Board credits the testimony and evidence from Ms. Dickey, the Facility architect, and Mr. Gonzales of GSSL that the Facility has been designed and will be programmed to minimize impacts on neighboring properties, such that a reasonable person would not find it objectionable.
29. The Facility is designed to be self-contained, with the majority of programming occurring within the Facility, including a fitness center, a beauty salon and recreational space. All meals will be prepared on-site in the commercial kitchen, and the Facility will have in-house laundry facilities. The Facility has also been designed to incorporate extensive safety measures for residents, including a front desk that will be staffed during much of the day. (Nov. 14 Tr. at 62, 230-231, 258-259).
30. The only programming planned to occur outside the Facility is the outdoor garden space and outings in a private community van. The Board concludes the Facility's outdoor garden space is adequately buffered from neighboring properties. The space will be circumscribed by a 6 to 6.5-foot tall fence. (Dec. 19 Tr. at 25.) There will also be a 14-foot-wide planted buffer between the garden area and the Alley. (Dec. 19 Tr. at 27.) The loading area for the van will be discussed below.
31. The Property is a corner lot that only directly abuts one residential property, located to the south of the Facility. The Board concludes that the neighboring property to the south will be adequately buffered from the Facility by the 10-foot, 8-inch southern side yard as well as the proposed landscaping elements for that side yard (Nov. 14 Tr. at 64; Ex. 483A, 483G,) such that any noise, traffic, or other conditions will not be objectionable.
32. The Board also notes that the Applicant revised its plans in several ways to reduce potential impacts on the neighboring property to the south that were discussed at the first full hearing when the Applicant presented an earlier iteration of the Facility. The Applicant moved the Facility's generator and laundry so that the generator will be inside the Facility, and so the laundry facility will vent in the direction of Edmunds Street, N.W. as opposed to the neighboring property to the south. The Applicant also moved the proposed loading area at the rear of the Property from the southeast corner to the northeast corner of the site in the Revised Plans. (Dec. 19 Tr. at 25.)
33. There were several potentially objectionable conditions identified by the Board, MAHCA, and other opponents.
34. First, concerns were raised about potential noise or other impacts from the outdoor garden space at the rear of the Facility. As discussed above, the Board concludes that outdoor garden space will not be objectionable to neighboring properties because of the fence surrounding it and planted buffer areas behind it.

35. Next, concerns were raised about the potential impacts of vehicles entering and exiting the garage entrance and loading area. These included an inability for vehicles, particularly trucks, to safely turn into and exit the Alley. MAHCA and other opponents cited increases in traffic in the Alley, potential conflicts between the new traffic and other users of the Alley, and potential conflicts between the Facility's traffic in the Alley and the hotel use across Davis Street as objectionable conditions. The Board concludes that these impacts will not rise to an "objectionable" level. The Applicant provided evidence in the form of AutoTURN™ diagrams in showing that personal vehicles will be able to enter and exit the parking garage through the Alley with a sufficient turning radius to do so safely. (Ex. 483C.) The AutoTURN™ diagrams also establish that a 30-foot truck can access the loading area from Davis Street, N.W. and exit via Edmunds Street, N.W. with a sufficient turning radius to do so safely. (Ex. 483C.) In reaching this conclusion, the Board inferred the likely number of vehicular trips and deliveries generated by the Facility from the testimony and evidence regarding parking demand generated by the Facility by employees, residents, and visitors, as well as the testimony regarding the expected use of the loading area. Potential conflicts between the vehicles utilizing the Alley to access the Facility and other users of the Alley are inevitable, and there will be an increase in traffic in the Alley; however, the Board concludes the conflicts and increase in traffic will not rise to an objectionable level, given the likely number of trips generated by the Facility. The Board also credits the reports and recommendations from DDOT, as DDOT reviewed the Application and concluded that the usage of the Alley is appropriate for the proposed use.
36. The Board recognizes that the Facility will likely generate a somewhat greater amount of vehicular traffic related to shift changes from employees, but the number of employees at the Property is low enough that the light and noise generated by employee shift changes will not be sufficient to create an adverse effect on neighboring properties.
37. MAHCA and other opponents alleged that noise and lights from emergency vehicles called to the Facility would create a potentially objectionable condition for neighboring properties. The Board concludes they will not. The Board considered the likely number of emergency vehicles trips that would be called to a memory care facility¹⁵ of this size relative to the number of trips that would likely to be called to the Property if it were developed to the maximum extent permitted as a matter of right. The Board recognizes that it is likely that there will be a higher number of ambulance visits to the facility given the nature of the residents' health circumstances and ages. However, the Board concludes that given the total number of residents at the facility, the number of ambulance visits will not be sufficient to create an adverse effect on neighboring properties. The Board also considered the testimony presented at the hearing that emergency vehicles would access the Facility both from the Alley at the rear of the Property, and by parking on Wisconsin Avenue, thereby splitting and diffusing the impact of these visits.

¹⁵ The Board notes that the Project is a memory care facility, not a traditional assisted living facility that offers more generalized medical care. Accordingly, its resident population is not likely to generate the same amount of ambulance traffic as one would expect at a traditional assisted living facility.

38. MAHCA and other opponents also alleged that noise and exhaust from vehicles and trucks accessing the Facility would cause objectionable noise, light, and air pollution. The Board concludes they will not. In reaching this conclusion, the Board considered the number and type of vehicular trips and deliveries likely to occur, and the number and type that would be generated by development of the Property with matter-of-right uses, as described in Findings of Fact 22 and 23. The Board expects the use of the loading area will be comprised of food deliveries, waste and recycling removal, mail, routine incidental deliveries of the same type that are made to nearby residences, and ambulances as needed for the medical treatment of the residents. The Board concludes that the number and type of vehicular trips and deliveries to the Facility will not be that much greater than what could potentially occur under a matter-of-right development that it rises to the level of a potentially objectionable condition. The Board also considered that this Order contains several conditions related to loading management to further reduce the impacts of the loading area on neighboring properties, namely, the loading plan requires a loading manager to be on site and to coordinate with trash service. Trucks will not be permitted to idle in the loading area.
39. The Board also considered whether the expected use of the loading area is likely to become objectionable to neighboring properties. The loading area is in the northeast corner of the Site, separated from adjacent properties to the east only by the Alley; however, there are several reasons that it is not likely to become objectionable to neighboring properties. First, the Board considered the number and type of deliveries likely to occur in the loading area, and the number and type that would be generated by development of the Site with matter-of-right uses, and concludes that the intensity of the Facility will not be that much greater than what could potentially occur under a matter-of-right development. Second, the Board concludes that the Facility has been designed to reduce the impact of these deliveries. A service entrance is directly adjacent to the loading area, allowing deliveries to be directly loaded into the Facility. The plans include an internal trash room for storing trash and recyclables. This Order contains several conditions related to loading management to further reduce the impacts of the loading area on neighboring properties, namely, the loading plan requires a loading manager to be on site and to coordinate with trash service. Trucks will not be permitted to idle in the loading area. Considering these elements together, the Board concludes the expected use of the loading area is not likely to become objectionable to neighboring properties.
40. MAHCA and other opponents alleged that lighting at the rear of the Facility needed to facilitate loading of people and deliveries in the rear loading area was another potentially objectionable condition. Matter-of-right development at the Property could also include this same type of lighting. The Board therefore concludes that this is not an objectionable condition of the zoning relief requested to allow the Facility.
41. Opponents of the Application also cited concerns about an increase in trash and rodents as potentially objectionable conditions. The Board notes that the Facility includes an internal trash and recycling room, and the loading plan requires a loading manager to be on site to coordinate with trash service. The Board concludes that the Applicant has taken

precautions to mitigate those concerns, and therefore, an increase in trash and rodents will not create objectionable conditions.

42. MAHCA and other opponents also cited the height of the Facility as a potentially objectionable condition. The Board notes that the mass and height of the Facility are permitted in the R-1-B zone by the Zoning Regulations and conclude that it does not constitute an objectionable condition.
43. MAHCA and other opponents raised issues pertaining to impacts on light and air, privacy, storm water management, and the “viability” of the Facility.
44. As to light and air, the Applicant submitted a sun study reflecting that the Facility will create a shadow on neighboring properties only during the late-afternoon hours. (Ex. 483F.) For most of the day, the Facility projects a shadow on the Wisconsin Avenue, N.W. right-of-way. This will not affect neighboring properties. There are existing two-story structures and thick vegetation along the Alley that already create shadows for neighboring properties to the east. Accordingly, the Board concludes that the Facility will have a limited impact on light and air for a relatively short portion of the year.
45. MAHCA also produced a sun study. (Ex. 484.) After review of MAHCA’s sun study, the Board does not find MAHCA’s sun study to be accurate or persuasive. The Board heard testimony from Ms. Dickey, the Facility’s architect, regarding the appropriate method for generating the sun studies. The Board credits Ms. Dickey’s testimony in finding that MAHCA rendered its sun study without including surrounding buildings or vegetation. (Dec. 19 Tr. at 32-35.) As such, the Board relies on the findings of the Applicant’s sun study over that of MAHCA’s sun study.
46. As to privacy impacts, the Board concludes that the Facility will not adversely affect the privacy of neighboring properties, as alleged by MAHCA. The Facility directly abuts only one adjacent property. The side yard separating the Facility from this property is larger than that required by the Zoning Regulations. The Board concludes the larger side yard is a sufficient buffer to ensure that the Facility will not cause a loss of privacy for this neighboring property. The Facility is separated from other adjacent properties by Wisconsin Avenue, Edmunds Street, and the Alley. The Board concludes that these public spaces ensure that the Facility will not cause an objectionable condition related to a loss of privacy for other surrounding properties.
47. As to stormwater management, the Board notes that in addition to the pervious surface requirement of Subtitle D § 308, the District Department of the Environment (“DOEE”) regulates stormwater management, with which requirements the Facility must comply. Therefore, the Board concludes that the pervious surface requirement and DOEE’s regulatory scheme are adequate to ensure that the Facility will not adversely affect the use of neighboring properties.

48. MAHCA and other opponents alleged that the Facility was not designed to be a memory care facility as a further potentially objectionable condition. The Board concludes that the Applicant presented sufficient evidence for it to conclude the Facility has been adequately designed to be a memory care facility, such that the design does not constitute an objectionable condition of the Facility. The Facility was designed to be self-contained, with a majority of programming occurring within the Facility, and to incorporate extensive safety measures for residents.
49. MAHCA maintains that the Facility is not “viable” because the Applicant did not provide evidence of its financial viability and because of the Applicant’s alleged lack of experience and preparation in running a memory care center. Further, MAHCA argues that this lack of financial viability is an undue adverse impact for neighboring properties because it believes that the contemplated project will fail, resulting in the repurposing of the Building.
50. The Board concludes that a particular project’s economic “viability” and an applicant’s business experience are not germane to the special exception standard. The Board’s inquiry is limited to a finding as to “whether the exception sought meets the requirements of the regulations.” *See First Baptist Church of Washington v. D.C. Bd. of Zoning Adjustment*, 432 A.2d 695, 701 (D.C. 1981). Neither the general special exception standard, nor the special conditions under Subtitle U § 203.1(f), require consideration of “viability” in order for the Board to find that the Application can be approved. Thus, the Board rejects MAHCA’s arguments concerning the viability of the Facility.
51. Notwithstanding this lack of relevance, and contrary to MAHCA’s assertions, the Board finds there is substantial evidence in the record as to GSSL’s lengthy experience operating memory care facilities, as well as extensive evidence and testimony from expert witnesses, including Dr. Keller and Mr. Gale, regarding the viability of the Facility from both a programmatic perspective and a financial perspective. Dr. Keller testified regarding the growing need for memory care facilities as a result of the increasing rate of dementia across the country. (Nov. 14 Tr. at 256.) As Dr. Keller concluded, the Facility “will have a waiting list before it’s opened.” (Nov. 14 Tr. at 253.) The Board found this testimony credible.
52. Based on these considerations, the Board concludes that the CCRC use will 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 thus Subtitle U § 203.1(f)(5) is met.

Subtitle U § 203.1(f)(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.*

53. As allowed by this provision, the Board has imposed several conditions to protect adjacent and nearby properties. The Board has adopted OP’s recommended condition that any change in use, including to a different type of CCRC, would require a new application to the Board for evaluation against the applicable criteria. The Board has also required

compliance with the TDM conditions recommended by DDOT and has required compliance with a loading management plan.

General Special Exception Relief – Subtitle X § 901

54. The Application, in addition to meeting the specific conditions of Subtitle U § 203.1(f), must also meet the general special exception standards in Subtitle X § 901.2 to be in harmony with the purpose and intent of the Zoning Regulations and Zoning Maps and to not adversely affect the surrounding properties.

Subtitle X § 901.2(a): *Will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps;*

55. The Board concludes that the proposed CCRC use is in harmony with the Zoning Regulations and Maps, as this use is allowed in the R-1-B zone and because the Facility complies with all the applicable development standards in the R-1-B zone.

56. The Zoning Regulations state that “[t]he Residential House (R) zones are residential zones, designed to provide for stable, low- to moderate-density residential areas for family life and supporting uses.” (Subtitle D § 100.1.)

57. MAHCA argued that the Facility will not be in keeping with the residential, single-family homes in the neighborhood because the Facility will be a commercial, institutional, and secured healthcare facility. MAHCA further asserted that the Facility would increase the density of the lots on which it will be located. Instead of the lots being developed with two to three single-family homes, they will be developed with one three story building with a cellar and penthouse, spanning two lots, and which will house 36 residents and accommodate employees, contractors, vendors and visitors.

58. The Board does not find MAHCA’s arguments persuasive because the CCRC use proposed by the Application is a use permitted by special exception in the R-1-B zone and is therefore one of the “few additional and compatibles uses” permitted by the Zoning Regulations in the R-1-B zone. Furthermore, Subtitle B § 200.2 lists “assisted living facility” as an example of a “residential” use. While the Board acknowledges MAHCA’s concerns regarding the density, mass, and height of the Facility, the Board concludes that the mass and height of the Facility are permitted in the R-1-B zone by the Zoning Regulations and therefore are not inconsistent with the zone plan.

Subtitle X § 901.2(b): *Will not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps;*

59. The Board concludes that the proposed use will not affect adversely the use of neighboring property for the same reasons that the Board concludes that the Application satisfied Subtitle U § 203.1(f)(5)’s requirement that the Facility be designed to not likely to become objectionable to neighboring properties, as discussed above (Conclusions of Law [“CL”] 27-48.)

60. For the reasons articulated above the Board concludes that approval of the requested special exception relief will be in harmony with the general purpose and intent of the Zoning Regulations and Maps and will not tend to affect adversely the use of neighboring property.
61. Therefore, the Board concludes that the Applicant has met the general special exception standard under Subtitle X § 901.2 and the special conditions pursuant to Subtitle U § 203.1(f) for a Continuing Care Retirement Community use in the R-1-B zone.

“Great Weight” to the Recommendations of OP

62. The Board is required to give “great weight” to the recommendation of the Office of Planning. (D.C. Official Code § 6-623.04 (2018 Repl.) and Subtitle Y § 405.8.)
63. The Board concludes that the OP Reports, which provided an in-depth analysis of how the Application met each of the requirements for the requested special exception relief, and OP’s testimony at the public hearing are persuasive and concurs with OP’s recommendation that the Application be approved.

“Great Weight” to the Written Report of the ANC

64. The Board is also required to give “great weight” to the issues and concerns raised by the affected ANC. Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)(3)(A) (2012 Repl.)) To satisfy this great weight requirement, District agencies must articulate with particularity and precision the reasons why an affected ANC does or does not offer persuasive advice under the circumstances. The District of Columbia Court of Appeals has interpreted the phrase “issues and concerns” to “encompass only legally relevant issues and concerns.” *Wheeler v. District of Columbia Board of Zoning Adjustment*, 395 A.2d 85, 91 n.10 (1978).
65. The ANC 3C Report (Ex. 146) asserted that the Applicant had not sustained its burden of proof, and listed a number of issues and concerns about the Facility. The Board does not find the specific concerns raised by the ANC 3C Report persuasive for the following reasons:

Concern that the loading dock is insufficiently buffered relative to nearby residences.

The Board does not find this concern persuasive for the reasons discussed above (CL 35) that led the Board to conclude that the loading area would not create an objectionable condition.

Concern about restriction or removal of on-street parking spaces to facilitate access to the Alley for trucks serving the Facility.

The ANC 3C Report was submitted before the Applicant redesigned the Facility to include 19 on-site parking spaces and withdrew its request for parking relief. For the reasons discussed above (CL 17-26), the Board concludes that the Facility, as revised to include the additional spaces on-site, contains a sufficient number of parking spaces that it will not

create a significant additional demand for on-street spaces, and therefore the impact of removing two on-street spaces to facilitate access to the Alley will not adversely affect the use of neighboring properties.

Concern about light and noise from the Facility affecting use and enjoyment of nearby properties.

The Board does not find this concern persuasive for the reasons discussed above (CL 30-40) because the Board believes that the light and noise from the Facility will be similar to that of neighboring properties in most respects.

Concern about the lack of a landscape or buffering plan for directly adjacent properties.

The Board also is not persuaded by the ANC 3C Report's concerns regarding the lack of a landscape plan or its adequacy. As discussed above (CL 30-31), based on the Applicant's plans and renderings that reflect the expected plantings at the Property, the Board concludes that the Facility will have an adequately planted buffer along the Alley, as well as fencing around the garden area. (Ex. 41A, 483E, 483G, Nov. 14 Tr. at 64, Dec. 19 Tr. at 25, 27). These design features, in addition to the rear and side yards, will offer a sufficient buffer for neighboring uses.

Concern that the design and mass of the Facility is similar to the apartment buildings across Wisconsin Avenue rather than the single-family neighborhood that surrounds it.

The Board does not find the ANC 3C Report's concerns with the mass and design of the Facility persuasive. The Facility conforms with matter-of-right zoning limits pertaining to its building envelope that limit the structure's mass, including height, lot occupancy, and yard setbacks. The Board finds that Facility's design is appropriate for the site.

Concern that the application requires additional parking relief in addition to the special exception to permit the CCRC use, and the special exception standards for the CCRC use include a finding that there will be sufficient off-street parking spaces for employees, residents and visitors.

The Board does not find this concern persuasive for the same reasons discussed above (CL 17-26) because the Applicant amended its Application and revised the design of the Facility to provide the required number of parking spaces on the Property, such that the Applicant withdrew its request for the parking relief. As a result of this change, the Board finds that there will be a sufficient number of off-street parking spaces for employees, residents, and visitors.

Concern that the Applicant and the First DDOT report (Ex. 45) did not sufficiently analyze the number of visitors and staff that will drive to the site and that there will be greater demand for the parking spaces on the street than are available.

As discussed above (CL 17-26), the Board concludes the Applicant and DDOT (in its three reports) provided sufficient analysis of the number of visitors and staff and demand for parking at the site, including additional analysis in the Second and Third DDOT Reports submitted after the submission of the ANC 3C Report. In light of the Applicant's modification of the plans to include 19 parking spaces and withdrawal of the request for

parking relief, the Board concludes that the Facility will not have an adverse impact on the availability of parking in the area.

DECISION

Based on the case record, the testimony at the hearing, and the Findings of Fact and Conclusions of Law, the Board concludes that the Applicant has satisfied the burden of proof and therefore **APPROVES** the Application for a special exception to allow a continuing care retirement community use in the R-1-B Zone at 2619-2623 Wisconsin Avenue, N.W. (Square 1935, Lots 33, 34, and 44), subject to the following **CONDITIONS**:

1. Pursuant to Subtitle Y § 604.10, the Facility shall be built only in accordance with the approved plans¹⁶ at Exhibit 483A and consistent with the fencing and landscaping shown in Exhibits 483E and 483G.
2. Any change in use, including to a different form of Continuing Care Retirement Community, shall require a new application to the Board of Zoning Adjustment for re-evaluation against the relevant regulations.
3. The Applicant shall offer full-time and shift employees a transit subsidy of no less than \$10 per week, which equates to 50% of the weekly cost of a standard Metrobus or Capital Bikeshare commute.
4. The Applicant shall identify a TDM leader to work with employees to distribute and market transportation alternatives.
5. The Applicant shall work with DDOT and goDCgo to implement TDM measures.
6. The Applicant shall share the full contact information of the TDM leader with DDOT and goDCgo.
7. The Applicant shall provide staff who wish to carpool with detailed carpooling information and will be referred to other carpool matching services sponsored by the Metropolitan Washington Council of Governments.
8. The Applicant shall install a Transportation Information Center Display within the lobby of the Facility that contains information related to local transportation alternatives.

¹⁶ Self-Certification. The zoning relief requested in this case was self-certified, pursuant to Subtitle Y § 300.6. (Ex. 483B.) In granting the requested self-certified relief subject to the plans submitted with the Application, the Board made no finding that the requested relief is either necessary or sufficient to authorize the proposed construction project described in the Application and depicted on the approved plans. Instead, the Board expects the Zoning Administrator to undertake a thorough and independent review of the building permit and certificate of occupancy applications filed for this project and to deny any application that would require additional or different zoning relief from that is granted by this Order.

9. The Applicant shall identify nearby parking garage facilities that can provide additional parking for guests and staff.
10. A loading manager shall be designated by Facility's management. The manager shall schedule deliveries and shall be on duty during delivery hours.
11. The loading manager shall coordinate with trash service to help the loading of trash move expeditiously between the service area inside the Facility and the loading area.
12. Trucks using the loading area shall not be allowed to idle and must follow all District guidelines for heavy vehicle operation including, but not limited to, DCMR Title 20, Chapter 9, Section 900; the regulations set forth in DDOT's Freight Management and Commercial Vehicle Operations document; and the primary access routes listed in the DDOT Truck and Bus Route System.
13. The loading manager shall be responsible for disseminating DDOT's Freight Management and Commercial Vehicle Operations document to drivers as needed in order to encourage compliance with District laws and DDOT's truck routes. The loading manager shall also post these documents in a prominent location within the service area.

VOTE: 4-0-1 (Carlton E. Hart, Lorna L. John, Robert E. Miller, and Lesylleé M. White to Approve; Frederick L. Hill not participating.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

A majority of Board members approved the issuance of this order.

ATTESTED BY:



SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: October 9, 2019

PURSUANT TO SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

PURSUANT TO SUBTITLE Y § 702.1, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO SUBTITLE Y § 705 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED.

PURSUANT TO SUBTITLE Y § 703.14, NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO SUBTITLE Y §§ 703 OR 704, SHALL TOLL OR EXTEND THE TIME PERIOD.

PURSUANT TO SUBTITLE Y § 604, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

PURSUANT TO SUBTITLE A § 303, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.