

BZA Case No. 19823 - Wisconsin Avenue Baptist Church - Sunrise Senior Living Inc
3920 Alton Place NW.

TO: Hon. Frederick L. Hill, Chairperson, Board of Zoning Adjustment

RE: MOTION TO EXCLUDE EXPERT TESTIMONY OF PROPOSED WITNESS ALICE
KATZ REGARDING FINANCES AND MARKETS

Pursuant to subtitle Y section 407.1 the BZA may entertain motions (here, motion to exclude proposed testimony of Ms. Katz). Title 11 Subtitle Y, section 407.1 (11-Y DCMR §407.1.) Specifically, pursuant to section 11-Y DCMR § 408.1 (e), the presiding officer may "exclude unduly repetitious, immaterial, or irrelevant testimony..." And at section 407.5, the presiding officer is given authority to rule on such a motion without a hearing.

We, Tenleytown Neighbors Association (TNA), a party to this case, do hereby make a motion asking the Board to exclude testimony of proposed witness Alice Katz, President, The Vinca Group, who has been listed as an "Expert in Financial and Market Analysis for Assisted Living Facilities." See Exhibit 89. We also ask that you not approve any substitute individual offered as an expert in financial and market analysis and that any such testimony should be excluded from the record.

The witness is offered to address "market demand for assisted living facilities in the DC-MD region, financial demands of assisted living facilities, data analysis and operational requirements, lender/financial requirements, and minimum number of units required for financial viability.

The hearing on this case is about zoning, the comprehensive plan and the zoning maps and to consider zoning principles that control density and volume of use in a given area.

Any testimony submitted by this proposed witness is immaterial or irrelevant for several reasons.

First, this testimony is presented in support of the alleged needs of a Continuing Care Retirement Community (CCRC) to be financially viable. The testimony goes to the question of the alleged difficulty of any CCRC, including here, to build and thrive under the current regulations covering CCRCs. This is an attempt, thinly veiled at best, to amend the CCRC special exception for R-1-B zones and the Board if Zoning Adjustment (BZA) has no authority to do so.

Second, Sunrise is attempting to proffer evidence that is excludable on materiality and relevancy grounds because: Sunrise is not the owner; under Prongs I and II of the variance test, Sunrise's financial requirements may not be considered as part of Wisconsin Avenue Baptist Church's "needs" to constitute an exceptional condition. The confluence of factors/public service organization doctrine may not be invoked appropriately to consider Sunrise's requirements as part of WABC's "needs."

As explained in much greater detail in TNA's prehearing statement (Exhibit 83A), Sunrise is not a public service organization, Sunrise is a multinational for-profit business, WABC may monetize its land by selling off R-1-B lots to modernize its facility in conformance with zoning regulations, there is no practical difficulty to the owner of the property, WABC, and any consideration of Sunrise's claimed needs as needs of WABC is an impermissible expansion of the public service doctrine.

Third, this is a zoning hearing. It is not a presentation to potential investors trying to get them to buy stock. That is not what this hearing is about. It is about zoning. Period. If applicants now and in the future are allowed to expand the Board of Zoning Adjustment's jurisdiction to include financial viability of businesses applying for zoning relief, then the BZA must be given authority to open the accounting and financial books of all applicants. And those books must be available to all parties in the relevant BZA hearing.

This hearing is not the venue for such presentations or for a fair and accurate analysis of the testimony presented. Does the BZA have access to experts in market analysis or the financial needs of senior living facilities or businesses generally?

Fourth, the BZA previously has taken the position that the BZA cannot require financials citing the lack of mention of financials or market arguments in the relevant zoning regulations. If this testimony is allowed into the record, will the BZA require Sunrise to release its financials and market studies? Sunrise sells its properties to Welltower REIT. Are the finances and stock price of Welltower, traded on the NYSE as WELL, also relevant?

If this expert's testimony is admitted what standard would be applied to judge this person's testimony? There is no way to cross examine this witness effectively.

Finally, introducing financial and market analysis into zoning hearings would be a bad precedent.

For all these reasons, this expert's testimony should not be accepted in the record because their testimony is immaterial in that it would not inform any part of regulations and there is no standard of review. We respectfully request that the Board of Zoning Adjustment exclude expert testimony of proposed witness Alice Katz regarding finances and markets.

Thank you for your consideration.

Judy Chesser
President, Tenleytown Neighbors Association

11-Y DCMR §407 MOTIONS PROCEDURE

407.1 A motion is a request by parties for the Board to take an action.

407.2 Unless made during a hearing, all motions shall be in writing. The first page of every motion shall contain: the parties' names, the case number, and the name of the presiding officer, if known. Every motion shall state the legal and factual reasons for the motion and the requested action of the Board.

407.3 At the time of filing any motion, a party must serve all other parties.

407.4 Unless otherwise provided by these rules or ordered by the presiding officer, all parties opposing a motion shall have seven (7) days from the service of the motion to file and serve a response.

407.5 The presiding officer may decide any procedural motion including motions to continue without holding a hearing.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Tenleytown Neighbors Association's motion to exclude testimony was served November 5, 2018, via email, on the following:

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