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December 17, 2018

Via IZIZ

Board of Zoning Adjustment for the
District of Columbia
441 4th Street, N.W., Suite 200S Washington, D.C. 20001

Re: BZA Application No. 19823 – WABC – Sunrise, 3920 Alton Place, N.W.
Post-Hearing Submission of Opposing Party TNA

Dear Members of the Board:

On behalf of the Tenleytown Neighbors Association (TNA), one of the opposing parties in the above-referenced case, we hereby submit the following materials requested by the Board of Zoning Adjustment (“Board” or “BZA”) at the hearing on November 14, 2018.

1. Additional Perspectives of the Proposed Building as Compared to Nearby Homes. In contrast to the renderings submitted by Applicant, the detailed presentation attached graphically shows the building, 52 feet tall and 70 feet tall at the steeple, compared to the actual heights of the single family two-story homes located on Alton Place, 39th Street, Yuma Street and Grant Road. All of these homes are within 200 feet of the proposed project. **(See Attachment A).** The proposed Sunrise building, which is proposed as having four-stories plus a penthouse plus a steeple, see last page of Attachment A, would be discordant in the residential neighborhood. The current building at 28 feet in height is three stories, with the first story being partially below ground. By comparison the proposed building is 52 feet in height with FOUR stories plus penthouse - all above ground - next to 2-story single family detached homes. For Applicant’s version see Exhibit 135A.

2. Tree Buffer. We have not provided an attachment on this subject but suffice it to say that the tree box is only 8 feet wide between the 39th Street houses and the truck. Due to the narrow width, it can only accommodate ONE row of trees. This means that as a sound buffer, any mitigation is quite limited. Given such a narrow strip of land it is impossible to provide a “lush landscape buffer and greater air circulation” or a “dense landscaping ... (that) will provide an immediate green buffer to neighboring properties that will fill in more as it grows.” There is not enough space to get lush or dense. In addition, at only 8 feet with a 13-foot wall on one side, the roots will be exposed to heat in the summer and cold in the winter on that side. Trying to make these trees sustainable will be an intense challenge. In addition, their growth may be slower due to the temperature exposure on the wall side. The building, including the truck ramp needs to be further from those homes that share a property line with the church. For Applicant’s version see Exhibit 135B and 135C.

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District of Columbia
CASE NO.19823
EXHIBIT NO.136

3. Matter-of-Right Option. (Attachment B) As requested by the Board, and specifically Board Member John:

MEMBER JOHN: Yes, I'm interested in the matter-of-right option without the variances. Just so we could see what that would look like. (Page 541, November 14, 2018 BZA Transcript)

MEMBER JOHN: For the folks who testified, how many of you would be okay with a smaller facility on the same lot, a smaller -- yes, within the zoning parameters? Okay. So, everybody else objects to any kind of development on the site. Let's say the Applicant reduced the number of rooms and the facility would then -- you know, the zoning regulations and developed it as a matter of right, how many people would be okay with that? Because they could -- right, okay. No, I just wanted to know. (Transcript, pages 459-460)

Attachment B is a plan showing a matter-of-right ("MOR") option that does not require any zoning relief. This MOR option depicts the Sunrise building occupying only 40% of the lot. The variances would not be required. The 8-foot setback on the National Park Service has been restored. The lot occupancy is 40% as allowed in the zone, which is R-1-B, single family detached. The number of stories would be 3 stories as allowed in the zone.

Matter of Right: Sunrise as a **non-church**, occupying more than 87% of the proposed building, would have a **lot occupancy limitation of 40%**.

- **The existing WABC building** is only 7,392.6 SF or 20.86 percent of the lot currently. For the source of these measurements, see Exhibit 39, surveyor's measurements of existing building.
- **The proposed Sunrise building** would be an increase to 20,389 SF lot occupancy (57.5 percent lot occupancy), which is almost THREE TIMES the size of the existing structure. See Exhibit 6A1.

Sunrise in their December 10 filing, provided a depiction of 60% lot occupancy which applies to a church. Not Sunrise. For Applicant's version of MOR see Exhibit 135D.

With 40% lot occupancy, Sunrise would still need to request a special exception for a continuing care retirement community to locate in a residential zone. In addition, if the retaining wall remained 13 feet, a special exception would still be required because the maximum for a retaining wall in a residential zone is 4 feet.

As to the steeple/architectural embellishment pursuant to 11-D DCMR § 207.2, spires, domes, minarets and other similar architectural embellishments are exempt from the height limitations, we can only say that because you can, does not mean you should. Honor thy neighbor. Matthew 22 verse 39: "...Thou shalt love thy neighbor as thyself." And Leviticus 19 verse 9: "When you reap the harvest of your land, you shall not reap your field right up to its edge, neither shall you gather the gleanings after your harvest."

4. Shadow Studies.

The BZA asked for shadow studies for the existing church, the proposed facility, and a matter-of-right building at 40 percent lot occupancy with three stories and no higher than 40 feet. See discussion of Matter of Right in Item 3 above. For the Matter of Right option, Sunrise provided a 60 percent lot occupancy and 60 feet height – in essence a mega-church. Since the current church is 28 feet high and the proposed Sunrise building is 52 feet high. Plus, the current church is only 65 feet long where it is closest to the 39th Street houses as compared to the proposed Sunrise building goes across the entire 220-foot lot from Alton to Yuma.

Even in Sunrise shadow studies, there is a significant difference for the backyards of the 39th Street houses at the Yuma Street end. For Applicant's version see Exhibit 135E.

5. AutoTURN Diagrams. The attached Truck Rotation comparison are of several studies done by the applicants' traffic consultant, Gorove/Slade Associates. **(See Attachment C.)** The first issue that needs to be determined is what size truck Sunrise plans to use. At their other facilities, they use a truck with a 30-foot trailer. Gorove/Slade's model is using a box truck that is 30 feet bumper to bumper. There is a substantial difference.

The truck turn rotations provided by Sunrise on December 10, appear to depict a truck turn rotation that allows parking on both sides, but would not allow two-way traffic. Both Alton Place and Yuma Street are two-way streets. The truck turn rotation and the size of a 30-foot truck would not allow a car passing in the opposite direction and parking on both sides.

Alton Place is only 30 feet wide. Yuma is only 34 feet wide. The guidance is for 7 feet on each side devoted to parking and at least 8 feet for each lane – one in each direction. For Alton at 30 feet wide: that leaves 16 feet for traffic and 14 feet for parking.

Alton at 30 feet is approximately the same width as Edmonds Street at 28 feet, another graphic that Gorove Slade has provided. Edmonds only has parking on Sunday and only on one side. Having said that, the turn on to Edmonds Street for the same size truck, would not allow parking on both sides. So how can the turn rotation when applied to Alton Place allow parking on both sides and two-way traffic? Makes no logical sense. For Applicant's version see Exhibit 135F.

Let us also not lose sight of the fact that Alton, Yuma and 39th Street are posted at every intersection with NO THROUGH TRUCKS AND NO TRUCKS OVER 1 ¼ TONS.

Applicants', DDOT's, and OAG's documents not submitted on December 10 that remain unavailable. See Addendum for (1) Transcript excerpts where these were requested; and (2) Dec. 12 - 14 email exchange with Mr. Moy, BZA Staff Director.

6. Implementation of Construction Management Plan. Sunrise was to provide a clarification as to how they would implement, the ANC MOU. See Transcript at pages

537-538, at bottom here. Although this is unavailable, at **Attachment D**, we are providing both a critique of the ANC MOU and a substitute for the construction management portion. In addition, citing the St. Mary's v. Hillel at GWU case, we suggest that the Applicant should be required to purchase a \$50 million liability policy. GWU-Hillel was required to purchase a \$25 million liability policy. Both cases involve nearby churches, St. Mary's Episcopal in the Hillel case and St. Ann's Catholic Church in the instant case. In addition, in the instant case almost all of the surrounding single family homes are pre-civil war, built in 1890 or are 100 years old. Please see **Attachment D** for more details. **See also Attachment D addendum: WMATA released document regarding site testing.**

7. The number of actual employees, visitors and aides that Sunrise, which already operates 325 facilities, is expecting at 3920 Alton Place. See the Transcript at page 523.

To be granted a CCRC special exception under **11-U DCMR § 203.1 (f)**, applicant must show that: "...The use and related facilities shall provide sufficient off-street parking spaces for employees, residents, and visitors..." How can anyone, including DDOT, ascertain whether this requirement has been met, when Sunrise has provided no numbers, only that approximately 70 FTE's will be involved. This does not even tell us how many actual employees. Sunrise at Connecticut, which is about the same size, has 163 employees, as included in the Health Department Inspection at Exhibit 76.

Since Sunrise, after they have been asked repeatedly, how many employees, residents and visitors there would be, has refused to supply these numbers, we will make an estimate.

The estimate is that the number of employees, residents and visitors will be: 163 employees, 121 residents, if each resident either has one visitor or one aide every week that would be an additional 121 people. This would total to 405 people related to Sunrise commercial enterprise at 3920 Alton Place. Any individual on site related to the church would be in addition to these 405 people.

The church would have many additional people, including staff, groups activities, and events in a sanctuary to accommodate 250 people.

8. The Cheh Letter. Unavailable are DDOT answers to the questions posed in the November 7, 2018 letter from Councilmember Mary Cheh to Jeff Marootian, Director District Department of Transportation. Among other issues, this will include DDOT's analysis of how much traffic would be generated 24/7 by 121 individuals, 75 FTEs, guests, aides, plus a 250-seat church? This would include 20 trucks weekly and ambulances. (2) Turn rotations for the 30-foot trucks on to 2-way narrow streets with parking on both sides. Cheh Letter at Exhibit 101.

9. Only an OWNER can request a variance. The Office of the Attorney General (OAG) is to provide a legal memorandum on this issue. See transcript, bottom here.

After listing the many items due on December 10, 2018, including the request that was to be made to OAG for a memo on this issue, then, at page 542, CHAIRMAN HILL stated "... okay and then we'd get all that. And then the party in opposition would have an opportunity to respond to all that." See addendum, email exchange with Clifford Moy.

Only an OWNER can request a variance. The clear and unambiguous language of the regulations at 11-X DCMR §§1000.1, 1000.2, and 1002.1(a) provide that only an "owner" may apply for a variance and that practical difficulties, a prerequisite for an area variance, must be "to the owner." Sunrise is not the owner. DC case law affirms the regulatory requirement that only an owner may apply for and receive a variance. *French* (1995); *Palmer* (1972). No regulation or case law has been cited to the contrary. Cites to all court decisions provided at end of paragraph here. *

A contract purchaser is not an owner. When an owner authorizes a representative or attorney to represent that owner it does not transfer ownership status to that representative or attorney.

Sunrise cannot demonstrate practical difficulties through the application of the public service organization doctrine or by claiming to have special needs for its for-profit landlord business that also is seeking a special exception as a CCRC. *DuPont Circle Citizens Ass'n* (2018); *Monaco* (1979). WABC does not need the three requested variances "for its own ends" and its ability to sell conforming residential lots obviates any claimed practical difficulties. The applicant does not meet the *Draude* design requirements. *Draude* (1987). The self-created hardship doctrine precludes Sunrise or WABC from obtaining zoning relief based on its own business decisions. *Foxhall* (1987).

* *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1035 (D.C. 1995); *Palmer v. Board of Zoning Adjustment*, 287 A.2d 535, 541-42 (D.C. 1972); *Dupont Circle Citizens Ass'n v. District of Columbia Bd of Zoning Adjustment*, 182 A. 3d. 138 (D.C. 2018); *Monaco v. District of Columbia Board of Zoning Adjustment*, 407 A.2d 1091, 1099 (D.C.1979) (quoting D.C. Code § 5-424(g)(3) (1981)); *Draude v. District of Columbia Board of Zoning Adjustment*, 527 A.2d 1242 (D.C.1987) at 1254, citing D.C. Code 5-424(g)(3) (1981); *Foxhall Community Citizens Association v. District of Columbia Board of Zoning Adjustment*, 524 A.2d 759, 764 n. 6 (D.C. 1987).

Respectfully Submitted,

Judy Chesser

Judy Chesser on behalf of Tenleytown Neighbors Association.

ADDENDUM: (1) BZA Hearing Transcript, November 14, 2108

Excerpts for some of the discussions in the transcript regarding various missing items to be submitted.

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CHAIRMAN HILL: ...I am kind of curious because we haven't had a lot of time yet to go over the ANC resolution, as well as kind of like their **Memorandum of Understanding**. And I forget who said it or who asked, but the ANC can submit anything at any time. And so we had stuff from the ANC, like literally the day before the hearing, and they can show up and give us anything. So, we got what we got from them, when they gave it to us. So, if you can go ahead and -- oh those are -- so the Memorandum of Understanding, if you could kind of like, I don't know if you do kind of clarify a little bit more of not necessarily even the teeth, but how you think you might implement some of these things. Like what came up in testimony that I was again, kind of curious of was like the -- I'm trying to see if it's even **mitigated** in here -- the construction. Like there was like, there was something about, I thought there was something about construction. About the **jack hammering** of something. And then also there was testimony about like, you were going to give people, like **devices to measure. If things were going to happen and then it was also then -- I mean I guess I'd just like a little bit more, since we just kind of got this okay, a little bit more clarification** as to

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the meat. As to **how you plan actually not doing people always think somebody is going to do, which is give them, you know, something to measure. And then they'll determine whether or not they do anything about it. Like really like how you plan on mitigating some of these things that are in the Memorandum of Understanding?** And I can't, yes, I got the construction, because the construction is in here. So again, I'd just like something of all of the testimony that we had, that you've already agreed to do, just how you plan on actually doing it, okay? And **then after that, just write the findings of fact for me.** But then Mr. Miller you had some things. And then if we could just clarify them. And then the last thing again, **from an OP, you were going to speak to OAG about the whole owner definition issue, okay? And see if we can get something in the record from OAG** (regarding the owner issue).

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MS. CHESSER: **FTE's visitors, private aides, since you've owned 325 facilities, you must have estimates or numbers about how many people have private aids, how many people, more or less, how many visitors come and go? You have I know 75, 65 to 75 FTE's. But then how many people does that tend to represent? Because for us, if you have one job spread over every two people, to us that's two people coming and going, not one. Can you break down all those numbers and provide them for the record, or excuse me, to us?**

MR. KROSKIN: That's, you need to ask your question.

CHAIRMAN HILL: I think I understand your question, what's the answer?

MR. KROSKIN: Well, the answer is going to be, I'd prefer not to give a specific answer right now. I'd rather just get the details from one of my operators.

CHAIRMAN HILL: Okay.

MR. KROSKIN: Of exactly how we break up those numbers. And the various people, and how they come and go.

CHAIRMAN HILL: Okay.

MR. KROSKIN: For me to answer that question, I might give a wrong answer, and I'd rather just put it in the record.

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CHAIRMAN HILL: Okay, I'll let you put it on the record.

MR. KROSKIN: Okay.

(2) Email of December 12, 2018 and Response of December 14, 2018

From: chesser1@rcn.com <chesser1@rcn.com>

Sent: Wednesday, December 12, 2018 4:03 PM

To: 'Clifford (DCOZ)' <clifford.moy@dc.gov>

Cc: 'Myers, Allison E. (DCOZ)' <allison.myers@dc.gov>; 'Barbara Gunning' <barbaragunning@comcast.net>;

Subject: BZA Case No. 19823 WABC-Sunrise

Dear Mr. Moy: It was my understanding that all post-hearing submissions (except the Findings of Fact and Conclusions of Law) would be available by December 10, 2018. The parties in opposition were then given until December 17, next Monday, to reply. Many items are missing, however. It is not possible to comment on materials we do not have in the record. In addition, we need a reasonable amount of time to respond once they are available.

For what was to be submitted by December 10, see the November 14, 2018 BZA Transcript at pages 536-547. The missing items are:

- (1) a clarification by Sunrise as to how the applicant plans to implement the ANC MOU – particularly as to pile driving, vibration monitors and Sunrise making repairs.
- (2) The number of actual employees, visitors and aides that Sunrise, which already operates 325 facilities, is expecting at 3920 Alton Place. See the Transcript at page 523. To be granted a CCRC special exception under **11-U DCMR § 203.1 (f)**, applicant must show that: "...The use and related facilities shall provide sufficient off-street parking spaces for employees, residents, and visitors..." How can anyone, including DDOT, ascertain whether this requirement has been met, when Sunrise has provided no numbers, only that approximately 70 FTE's will be involved. This does not even tell us how many actual employees. Sunrise at Connecticut, which is about the same size, has 163 employees.
- (3) DDOT answers to the questions posed in the November 7, 2018 letter from Councilmember Mary Cheh to Jeff Marootian, Director District Department of Transportation.
- (4) The Office of Attorney General's interpretation of the Variance regulations that say only an owner may ask for a variance and the practical difficulties that must be shown, in order to be granted a variance, must be to the owner.

Please respond. Thank you.

From: Moy, Clifford (DCOZ) <clifford.moy@dc.gov>

Sent: Friday, December 14, 2018 1:24 PM

To: chesser1@rcn.com

Cc: Myers, Allison E. (DCOZ) <allison.myers@dc.gov>; 'Barbara Gunning' <barbaragunning@comcast.net>;

Subject: RE: BZA Case No. 19823 WABC-Sunrise -

Dear Ms. Chesser:

Thank you for your email correspondence. I'm sorry I wasn't able to reply to you sooner.

Essentially, you stated that you believe that the Applicant did not provide all of the specific supplemental information requested by the Board at its November 14, 2018 hearing (based on the 11.14.18 transcript and the Applicant's filings under Exhibits 135 through 135F). And to confirm, any responses from the Parties would be due by Monday, December 17th.

Although you did not ask me a direct question, I'm assuming you're asking me how you can respond without the "requested information" and if it is, indeed, filed at a later date, that you would not have sufficient time to review it. My suggestion is that you respond with what you have before you, as well as your contention that there is "missing" information from the Applicant. In the past, I've been advised by counsel that I'm not permitted to provide legal advice other than what I've already provided.

The Board will be making its judgment based on the Applicant's filings, Responses from all Parties, and the draft findings of fact and conclusions of law. The Board will then deliberate at its public meeting on January 16, 2018.

If you have other questions and wish to chat with me, then please reach me by telephone.

Thanks, Cliff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing letter and attachments were served December 17, 2018, via email, on the following:

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By *Judy L. Chesser*
Judy L. Chesser