BOARD OF ZONING ADJUSTMENT

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN BZA CASE NO. 19823 OF NINE ABUTTING NEIGHBORS

Wisconsin Avenue Baptist Church and Sunrise Senior Living
3920 Alton Place, NW, Washington, DC 20016
Square 1779, Lot 14

HEARING DATE: November 14, 2018

DECISION DATE: January 16, 2019

DECISION AND ORDER

The Board of Zoning Adjustment (the "Board" or "BZA") held a hearing, following proper notice, on the application of Wisconsin Avenue Baptist Church and Sunrise Senior Living for a development at 3920 Alton Place NW pursuant to the Board's jurisdiction to grant special exception relief pursuant to 11-X DCMR § 901.2 and 11-Y DCMR § 100.3 and to grant variance relief pursuant to 11-X DCMR § 1000.1 and 11-Y DCMR § 100.3. The BZA is responsible for applying the law and regulations to the facts of the case by analyzing the governing provisions of the DC Zoning Regulations of 2016 ("Zoning regulations or Code") and the adverse impact of this project on the immediate and nearby neighbors. 11-X DCMR § 901.3.

FINDINGS OF FACT

Description of Parties

1. The applicant, Wisconsin Avenue Baptist Church ("WABC") and Sunrise Senior Living ("Sunrise") seeks two special exceptions and three variances to construct a Continuing Care Retirement Community ("CCRC") in an R-1-B zone.

2. The application lists WABC as the only owner of 3920 Alton Place NW. Exhibit 1. Sunrise does not own or have any ownership rights in the property at 3920 Alton Place NW. Exhibit 4; Exhibit 73.

3. WABC has authorized and Sunrise and the law firm of Donohue & Stearns, PLC, to represent WABC before the BZA in pursuing special exceptions and variances. Exhibit 9.

4. WABC and Sunrise have proffered no documents describing their legal relationship, if any. There is no contract to purchase between the parties in the record. There is no document showing ownership by Sunrise in the record. The Applicant various describes Sunrise as a "potential buyer" and a "contract purchaser." Exhibit 69-1, Exhibit 117, Transcript of November 14, 2018 BZA hearing (hereinafter "Transcript"), at 502. According to WABC and Sunrise, at some time in the future, they will share the

building at 3920 Place, NW as separate entities in a "condominium regime." Transcript at 502.

1. WABC is a "small" church that has been experiencing financial problems as a result of a dwindling congregation and increasing expenses of mainlining its aging Church building. Transcript, 328. WABCs trustees professed not to know the number of members of WABC's congregation, including how many reside in Tenleytown. Transcript at 399. However, unrebutted evidence in the record indicates that WABC's congregation is "approximately 80 current participants including children and adults." Exhibit 83A, at 16. Only 18 congregants in attendance on a typical Sunday. *Id.* This is confirmed by the Applicants' parking study, which shows that the church occupies a maximum demand of 23 parking spaces on Sunday. Transcript, at 414.

2. The Board granted party-in-opposition status to Tenleytown Neighbors Association, Inc. ("TNA") at the BZA hearing on September 12, 2018 and to Nine Requestors living within 200 feet represented by Andrea Ferster at the BZA hearing on November 14, 2018.

Agency Reports

3. On November 13, 2018, applicant entered into a Memorandum of Understanding with ANC 3E. This MOU was officially adopted by the ANC and submitted for the record on November 13, 2018. Exhibit 119 and 119A. Residents were not permitted to testify before the ANC when it took this action. Transcript, at 480.

4. The Department of Transportation ("DDOT") submitted their report on this proposal on October 10, 2018 and submitted a response to a letter from Councilmember Cheh (Exhibit 101) on December 18, 2018. Exhibits 53 and 137.

5. The Office of Planning ("OP") submitted their report on this proposal on October 31, 2018. Exhibit 90.

Description of Property

6. The 3920 Alton Place NW lot is zoned single family detached, R-1-B, and is in a neighborhood conservation area. The surrounding neighborhood has this same existing zoning and is composed of two-story single family detached homes, some of those within the 200-foot radius are part of the Grant Road Historic District, another was built in 1890, and most are approximately 100 years old. Only the five houses facing 39th Street that share the property line with the proposed site were built more recently, 1942. Exhibit 37; Exhibit 124A, Slides 6-23.

7. The WABC lot at 3920 Alton Place, NW is not narrow, shallow, or non-conforming. To the contrary, with a land area of 35,443 square feet, is seven times the minimum lot area applicable to the R-1-B zone. Exhibit 90.

8. The WABC lot is surrounded by single family homes, many of which share a property line with WABC. Exhibit 124A, Slides 6-23. The lot's western border is adjacent a 8,392 SF parcel owned by the National Park Service ("NPS"). Exhibit 90.

9. There are 16 assisted living facilities nearby, including three other Sunrise facilities – one 8 blocks down Nebraska and one in Friendship Heights in the other direction. Exhibit 124A, Slide 62, TNA power point. Exhibit 83A at p.112

Description of Proposal

10. Sunrise is seeking to construct, at 3920 Alton Place NW, a building that is to include 86 assisted living and memory care units housing 121 residents served by an estimated 70 Full Time Equivalent ("FTE") staff, plus a church seating 250 people that would occupy 13% of the building (16% if underground uses are included). Exhibit 90.

11. The proposed CCRC building would be located 4.8 inches from the property line on the Yuma Street side; right on the property line of the NPS property; 10 feet from the Alton Place property line where the drop-off and pick-up and entrance to the truck ramp will be. On the 39th Street side, which abuts the rear property line on the 5 single family homes fronting on 39th Street, there would be a truck ramp dropping 13 feet where loading would take place. Exhibit 124A, Slides 6-23. The twenty large trucks expected each week would not be entering the garage and all loading and unloading would take place in the ramp area. *Id.* Slides 70-79. The ramp would allow cars to enter the underground garage, which would provide 66 spaces.

12. WABC will sell the property to Sunrise who will then construction a new church and senior living facility and provide the new church with an endowment of an undisclosed amount. Transcript, at 327. The new church will occupy less than 13% of the above-ground building, including a 250-foot sanctuary. Exhibits 69E1, 69E2. Transcript at 349

13. WABC has cited no need for expansion to accommodate its programmatic, institutional, or religious needs. Instead, WABC asserts that Sunrise is needed because WABC does not presently have "the liquid assets needed to make necessary repairs and renovations, and to continue to operate in its present location." Exhibit 69 at 25.

14. As proposed by the Applicant, the new church will no longer identify as Baptist and the space allocated to WABC in the new building will also serve as Sunrise's non-denominational chapel. Exhibit 83A, at 17; Transcript, at 470-71. The new church will not have a playground or daycare center and will not rent space for ongoing local activities. Transcript at 330; Exhibit 119A. The income provided by Sunrise to WABC will be used as a permanent endowment to offset WABC's ongoing operational expenses and its ministries throughout the greater D.C. area. Transcript at 327, 330.

15. Applicant seeks the following variances and special exceptions:

(a) Variance relief to increase lot occupancy to 58 percent from the 40 percent allowed for all uses (other than a church), pursuant to 11-D DCMR § 304.1..

(b) Variance relief to increase the maximum number of stories of the CCRC from 3 to 4 stories pursuant to 11-D DCMR § 303.1;

(c) Variance relief to eliminate the 8-foot side yard requirement on the west property line that is shared with the NPS, pursuant to 11-D DCMR § 307.1;

(d) Special exception relief to establish a Continuing Care Retirement Community (CCRC) use in the R-1-B District, pursuant to 11-U DCMR § 203.1(f); and

(e) Special exception relief to allow a retaining wall of 13 feet rather than the 48-inch retaining wall allowed pursuant to 11-C DCMR § 1401.3 (c).

November 14, 2018 Public Hearing

16. The November 14, 2018 BZA hearing began at 9:30 am. Consideration of the instant case began at 5:30 pm, Transcript, 301, and concluded at 11:30 pm. Transcript, 548.

17. WABC representatives, trustees Patricia Dueholm and Janet Brooks testified as to their current concerns and future plans regarding the congregation. These plans include increasing "the church's ability to give to international missions, as well as, do more ministry work throughout the Washington, D.C. area. We want to eliminate the need to rent out our church to outside groups, including preschools, just to cover our operating cost." Transcript, 330.

18. WABC's trustee testified that WABC's current building needs a "new roof, new outside steps, window replacement, landscape, boiler renovation, sprinkler system, air condition units, rewiring, fire alarm, asbestos abatement, and ADA accessible bathrooms, a lift, ramps and then in the end we still have an old building: Transcript at 327. WABC expressed its interest in having a "right sized low maintenance church" and an endowment fund for these costs. *Id.*.-++

19. WABC did not disclose or quantify the estimated costs of these renovations, and failed to disclose whether the cited improvements were actually necessary to continue to use the building TNA introduced unrebutted evidence that the D.C. Office of the State Superintendent of Education (OSSE) found that the building is ADA compliant and that the facility is properly "heated, cooled and ventilated to maintain the required temperatures, and air exchange…' Exhibit 77**, at 2 (**CommuniKids Certificate of Occupancy Report.")

20. WABC failed to identify, quantify, or document its ongoing operational expenses and existing and anticipated revenue and financial resources. WANC also failed disclose the size of the endowment to be provided by Sunrise, and whether this endowment would be

sufficient to defray the Church's ongoing operational expenses in the space to be provided by Sunrise. Exhibit 69 at 25.

21. WABC admits that it has not explored any alternatives involving relocation of the iiChurch as a means of addressing its financial problems. Transcript 399-400.

22. WABC's trustees stated that WABC does not want to move from its Tenleytown location. Transcript, 330. However, WABC's pastor has acknowledged that "In today's world there is little to no correlation between a church and its immediate neighborhood ... in terms of congregational strength or growth - although a church should always be pleased to have neighbors as members!" Exhibit 83A, at 49.

23. WABC has also conceded that they did not explore sharing space with another church. Transcript 399-400.

24. Opposing parties introduced expert and other evidence that the lot could be profitably subdivided into up to five lots and developed with single-family homes as a means of addressing WABC's financial issues. Exhibits 123 and 130. Alternatively, to finance renovation of their building, WABC can subdivide sell two full size R-1-B zoning compliant lots and raise approximately $1.7 million. Exhibits 79 and 80; Exhibit 121A, slide 45. WABC's trustee stated that she believed that these options would involve costs such as "unrelated business taxable income" or undesirable parking impacts to the neighborhood," but again, failed to quantify or justify these costs. Transcript, 519-520. No expert testimony was offered substantiating her lay, conclusory beliefs.

25. Residents testified that the proposed facility would result in objectional impacts, including excessive lighting and light pollution, noise from ambulances, trucks and delivery vehicles, and construction; increased trash and rodents; loss of green space; and impacts to 100-year old homes from construction activities, including cracking basement walls, foundation damage and flooding. Transcript, at 461 – 495; Exhibit 124A, Slides 68-86. The Applicants have failed to use measures such as berms and dense plantings to screen their buildings, parking lots, and loading docks from the surrounding single-family homes. Transcript, at 491. The construction management agreement with the ANC is inadequate to address these impacts. Exhibits 136A through 136D

CONCLUSIONS OF LAW - VARIANCES

Three Prong Test for Variances

1. To receive the requested variances, WABC must demonstrate that, "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations, or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property, the strict application of any regulation . . . would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property, . . . provided such relief can be granted without substantial detriment to

the public good and without substantially impairing the intent, purpose, and integrity of the zone plan. . . ." D.C. Code § 6-641.07(g)(3) and 11-X DCMR § 1000.1.

2. The D.C. Court of Appeals has articulated the three-pronged test for granting an area variance in *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) as follows:

   "An area variance may be granted for improvement of a property if all of the following conditions are met:

   (1) the property suffers from 'exceptional narrowness, shallowness, or shape' or from 'exceptional topographical conditions or other extraordinary or exceptional situation or condition;'

   (2) these exceptional circumstances 'result in peculiar and exceptional practical difficulties' to the owner unless he or she can obtain a variance; and

   (3) variance relief will not create 'substantial detriment to the public good' or 'substantially impair […] the intent, purpose, and integrity of the zone plan as embodied in the zoning regulations and map."

3. To satisfy this standard, the Applicant must show that "(1) that the specific design it wants to build constitutes an institutional necessity, not merely the most desired of various options, and (2) precisely how the needed design features require the specific variance sought." *Draude v. District of Columbia Board of Zoning Adjustment,* 527 A.2d at 1256

4. The DC Court of Appeals, citing the zoning regulations, has held that an applicant for a variance "must show, first, that the property is unique because of some physical aspect or 'other extraordinary or exceptional situation or condition' inherent in the property…" *National Black Child Development Institute, Inc. v. District of Columbia Board of Zoning Adjustment*, 483 A.2d 687, 690 (D.C.1984); *Roumel v. District of Columbia Board of Zoning Adjustment*, 417 A.2d 405, 408 (D.C.1980); *Monaco v. District of Columbia Board of Zoning Adjustment*, 407 A.2d 1091, 1096 (D.C.1979). Secondly, the court's three-prong test for an area variance requires the applicant to show that practical difficulties to the owner will occur if the zoning regulations are strictly enforced.

5. While the OP Report (Exhibit 90) concludes that the regulatory test for a variance has been met, that report did not address the regulations and case law discussed herein requiring a variance applicant to (1) be an owner, (2) demonstrate that that the owner cannot make a reasonable disposition of the property for a permitted use; (3) addressing the "public service" or self-imposed hardship doctrines.. Therefore, no deference is due to the OP as to these issues.

Only an owner can ask for and receive variances

6. WABC does not request the three area variances of 58% instead of 40% lot occupancy, a fourth floor instead of three floors, or elimination of the side yard setback for its own needs or use. WABC is downsizing, not expanding. Exhibit 69. All three area variances requested are to accommodate Sunrise's for-profit business.

7. While authorized contract purchasers may request special exceptions, the zoning regulations and the case law make clear that to request a variance, the applicant for whom the variance is sought must be the owner of the property or the owner's authorized representative at the time of the request. *See* 11-X DCMR § 1000:

> ***1000.1 With respect to variances****, the Board of Zoning Adjustment has the power under ... peculiar and exceptional practical difficulties to or exceptional and undue hardship* ***upon the owner of the property,*** *to authorize, upon an appeal relating to the property, a variance…."*
>
> *1000.2* ***Only the owner of the property for which a variance is sought****, or an agent authorized by the property owner, may apply for variance relief. (emphasis added)*

8. By contrast, the regulations concerning a special exception do *not* contain any special provisions requiring that an applicant for a special exception be the owner of the property, but merely cross -reference the general rules of practice and procedure, Subtitle Y § 300. *See* 11-X DCMR § 902.1. This difference is important in interpreting the generalized rules of practice and procedure, which specify the general procedures by which owners including contract purchasers, apply for both variances and special exceptions, 11-Y DCMR §§ 300.4, 300.5. Generally, in the case of a conflict, the specific provisions of an enactment – in this case, the specific provisions governing who is entitled to apply for a variance set forth in 11-X DCMR § 902.1 -- predominate over provisions of general applicability, particular since the general rules are general rules of procedure rather than substance. *See United States v. Stokes*, 365 A.2d 615, 619 n. 16 (D.C. 1976). The omission of contract purchasers from Subtitle X 1000.2 must therefore be intentional and must be given effect. Sunrise, as a contract purchaser, cannot use the subterfuge of acting as WABC's "authorized representative" to evade this restriction.

9. Accordingly, the BZA may only consider the exceptional practical difficulties to the "owner" of the property. This is confirmed by the D.C. Court of Appeals, which specifically rejected the argument that "the applicants were acting as agents for the owner" and could secure a variance based on "a showing of hardship upon the owner as well as the tenant," stating: "The statute expresses in clear and unambiguous language that the showing, whether of "practical difficulties" or "undue hardship", must be upon the owner. . . . [I]in evaluating the Board's order we look only to evidence of hardship or difficulty befalling the owner., *Palmer v BZA*, 287 A.2d 535, 541 (1972), The financial or operational difficulties by any party other than the owner "are immaterial. *Id.* at 538.

10. The record is clear that WABC does not seek the significant area variances for its own use of the property but rather to address the needs of Sunrise, a contract purchaser, who apparently will not buy the property unless the variances are granted for its business. All three area variances requested are to accommodate Sunrise's ongoing for-profit business.

11. Therefore, as discussed in more detail below, Sunrise's arguments for why the variances are needed in order to construct a financially viable CCRC are legally irrelevant. The only relevant inquiry is whether WABC has demonstrated that the variances are the only way to address its own practical difficulties in maintaining its property.

Exceptional physical attributes or topographical conditions

12. The lot at 3920 Alton Place NW does not suffer from "exceptional narrowness, shallowness or shape" or "exceptional topographical conditions." 11-X DCMR §§1000.1 and 1002.1(a).

13. The WABC lot, with a lot area of more than 35,000 square feet, does not meet the definition of a substandard lot, which is defined as "A record lot existing prior to the effective date of this title that does not conform with the lot dimension and lot area requirements of the zone in which it is located." 11-C DCMR § 301.1. The lot is quite flat and there are no exceptional topographical conditions or other physical attributes that create any physical obstacles or impediments to the profitable use of this lot.

14. While the OP Report notes that the lot is an "irregular shape," OP does not assert that the lot's shape in any way creates "practical difficulties" to the owner. Exhibit 80, at 10.

15. Contrary to applicants' contentions, the lot is not "uniquely exposed" to Nebraska Avenue, Wisconsin Avenue or Tenley Circle. Rather, the lot borders on and is a through lot to Alton Place and Yuma Street, tree-lined single family (R-1-B) residential streets and is separated from Wisconsin Avenue and Tenley Circle by NPS land. Even with the NPS parcel, the lot has ample street frontage, with access to both Yuma and Alton Streets. Exhibit 124A, Slide 6.

16. More importantly, the large size of the lot results in no practical difficulties to the owner. Rather, the large size of the lot is beneficial, creating opportunities to subdivide and develop the lot for profitable matter of right uses. The opposing parties submitted unrebutted evidence that the lot could be successfully subdivided and developed with up to seven single family homes. Transcript, at 441-42.

17. WABC therefore has failed to demonstrate that the variance is warranted "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations." 11-X DCMR § 1001.1. *See Russell v. D.C. Bd. of Zoning Adjustment*, 402 A.2d 1231, 1236 (D.C. 1979) (granting variance "[w]here substandard lots (*those having a smaller size or lesser frontage than the minimum*) are involved, and as a result, "the owner could never sell the unimproved lot for a residential

use absent a variance.") (emphasis added, citations omitted). Rather, its large size creates more not fewer opportunities for WABC to make a more profitable use of its property.

WABC Has Failed to Demonstrate Exceptional Practical Difficulties

18. The zoning regulations provide that "(a)n applicant for an area variance must prove that as a result of the attributes of a piece of property… the strict application of a zoning regulation would result in peculiar and exceptional practical difficulties to the owner of the property." 11-X DCMR § 1002.1(a).

19. As noted above, Sunrise is not the owner of the property and any claimed practical difficulties by Sunrise are irrelevant.

20. While the OP Report makes the conclusory assertion that providing an 8-foot buffer between the CCRC and abutting NPS parcel creates "practical difficulties" given the size of the building (Exhibit 90, at 10), that argument merely begs the question of whether an exceptional physical or topographical attribute that creates physical obstacles or impediments to the Applicants' ability to profitably use the lot.

21. WABC asserts that its financial problems and difficulties in maintaining its current church building, which is aging and needs various improvements and repairs, constitutes "practical difficulties" within the meaning of 11-X DCMR §§ 1000.1 and 1002.1(a). Transcript, at 324-26. However, struggling churches faced with costly building upkeep is a commonplace not an exceptional condition. *See* https://www.washingtonian.com/2015/03/31/the-latest-dc-real-estate-trend-converted-churches/ (developers in DC are taking advantage of distressed churches). WABC's financial exigency argument is therefore no more exception from that of the difficulties faced by historic churches in *Dupont Circle Citizens Ass'n v. D.C. Bd. of Zoning Adjustment*, 182 A.3d 138, 144 (D.C. 2018) (holding that the church could not demonstrate an exceptional condition affecting its property due to the mere presence of historic structures, which are commonplace)

22. WABC has not argued that it needs the variance to expand or to accommodate unique or expanded programmatic, institutional, or religious needs. To the contrary, the new church's portion of the building -- limited to a small portion of the first floor and a single room on the second floor -- will be much smaller than WABC's existing church. Moreover, WABC states its intention to reduce not expand neighborhood-focused services such as daycare, and focus on its ministries to the greater Washington area, and thus these needs are not in any way tied to the Tenleytown property. Transcript at 330.

23. Accordingly, WABC's need to "leverage its land value" to produce revenue to address the financial difficulties of maintaining an aging building with a dwindling congregation without a concomitant need to expand or to accommodate unique programmatic, institutional, or religious needs does not create an adequate basis to establish an exceptional condition or situation of the property.

WABC has failed to explore alternative options that conform with zoning

24. A "necessary element" in proving that variance relief is warranted is demonstrating that there are no alternatives will produce a reasonable income to the owner without variance relief. *See Clerics of St. Viator, Inc. v. D. C. Bd. of Zoning Adjust.*, 320 A.2d 291, 294, 296 (D.C., 1974) (noting Applicants' burden of demonstrating "the inability of the applicant to make a reasonable disposition of the property for a permitted use."); *Palmer v. Board of Zoning Adjustment*, 287 A.2d 535, 542 (DC 1972) ("[I]t is certain that a variance cannot be granted where property conforming to the regulations will produce a reasonable income but, if not put to another use, will yield a greater return). *See also* Gilmartin v. District of Columbia Bd. of Zoning Adjustment, 579 A. 2d 1164, 1168 (D.C. 1990) (inability to make a reasonable disposition of the property for a conforming use). The record makes clear that WABC has not seriously explored any other options for leveraging their valuable property to address their alleged financial constraints except for the Sunrise proposal.

WABC has failed to demonstrate a need to stay in their current location

25. WABC's trustee explained that WABC was flatly unwilling to consider relocating or sharing space with a "mega-church" because it did not want lose its "identity, independence, and family-like feel." Transcript, at 326. However, this explanation is not credible given that WABC will no longer be identified as Baptist and the space allocated to WABC in the new building will also serve as Sunrise's non-denominational chapel. Exhibit 83A, at 17; Transcript, at 470-71.

26. WABC has failed to demonstrate that there are no reasonable alternatives to the Sunrise proposal. For example, WABC failed to consider options of sharing a facility with a similarly-sized congregation (which could be at 3920 or elsewhere) or relocating. As the D.C. Court of Appeals has held, "The bare and unexplained sentence in the Board's decision stating that 'the church has a 120–year history at the present location and requires new and expanded facilities to accomplish its mission" is not sufficient to show "(1) that the specific design it wants to build constitutes an institutional necessity, not merely the most desired of various options, and (2) precisely how the needed design features require the specific variance sought." *Dupont Circle Citizens Ass'n v. BZA*, , 182 A.3d at 143. WABC's bare insistence on staying in its current location without any explanation whatsoever is even weaker

27. By contrast, the court cases finding practical difficulties on the part of churches have involved expanding congregations and physical space necessities to practice aspects of their religion as well as specific reasons why the religious entity needed to stay in the neighborhood. *St. Mary's Episcopal v. BZA and Hillel at GWU*,, 174 A 3d 260 (D.C> 2017) (Hillel demonstrated a need to stay in their location, no alternative option, because they served the students on the GWU campus).

28. Unlike the situation in *St. Mary's Episcopal v. BZA and Hillel at GWU, supra*, WABC has not demonstrated a need to stay in their current location. To the contrary, WABC has a small dwindling congregation of only 80 members and its failed to state how many of its congregants even reside in the Tenleytown neighborhood. Transcript at 399. WABC further has testified that if the Sunrise project is approved, the new church will not have a playground or daycare center and will not rent space for ongoing local activities, but instead, will focus on its "international missions, as well as, do more ministry work throughout the Washington, D.C. area." Transcript at 330. Therefore, WABC has failed to show that the proposed arrangement with Sunrise "constitutes an institutional necessity, not merely the most desired of various options." *Dupont Circle Citizens Ass'n v. BZA,* 182 A.3d at 143

WABC Has Failed to Explore Subdivision Options

29. As the opposing parties demonstrated, due to the large size of the WABC's lot, WABC can subdivide the lot, sell two lots and raise an estimated $1.7 million to finance renovations on its existing property. Alternatively, WABC could divide the 35,000 SF lot into 5 conforming lots (R-1-B requires a minimum of 5,000 SF), sell four of the lots and build a new church on one lot. *See* Exhibits 79, 80, 123 and 130. These options would allow the Church to stay in their current location while leveraging their property.

30. WABC's trustee dismissed this option in a conclusory fashion on the grounds that it would be a "temporary financial band-aid at best," and would not raise sufficient funds for the needed repairs, would require approval for curb cuts, and would not produce a sufficient endowment to support the Church's ongoing operations. Transcript at 327, 509-510; Exhibit 121A, slide 10. However, WABC has not disclosed any details about the extent of their financial difficulties, such as its ongoing operational budget, revenue and expenses and has failed to quantify what their financial needs are for necessary capital improvements and operations.

31. WABC also asserted that the Neighbors' options would result in the loss of its land, would leave no room for parking or playground and would involve costs, such as the payment of "unrelated business income tax. Exhibit 121A, slide 10; Transcript 510. However, there is no evidence in the record to support any of these conclusory assertions.

32. As to the first objection, WABC will only retain a condominium interest to occupy 13 % of the space within the proposed building, so the Sunrise proposal would also result in the loss of its land. The Sunrise option itself eliminates the playground. Transcript at 330. The IRS regulations governing "unrelated business income" make clear that a one-time sale of property by a tax-exempt organization is not an activity that is regulatory carried on and does not give rise to unrelated business income tax. 26 U.S.C. § 512.

33. Accordingly, WABC has not met their burden to prove that exceptional practical difficulties require the requested zoning variances.

Sunrise cannot rely on the "public service organization doctrine

34. The applicant, in its attempt to demonstrate "exceptional practical difficulties," contends that cites its construction and operation costs of providing a senior living facility allow it to invoke the "public service organization doctrine" to be afforded greater flexibility in the application of the standard for finding exceptional practical difficulties. Applicant's pre-hearing statement, Exhibit 69 at 21-25.

35. However, Sunrise cannot substitute its "needs," including financial viability of a multi-national corporation, for the "needs" of WABC to constitute an "exceptional condition." *See Foxhall v BZA*, 524 A.2d 759, 764 n. 6 (D.C. 1986) (holding that Church that sought the variance could not avail itself of the public service doctrine since it "did not seek the variance to alter its own use of the property [but rather] in order to sell the church to a contract purchaser who would not buy it unless the way was clear for him to use it for another purpose.") And all the variances are for Sunrise's CCRC.

36. The payment of an endowment by Sunrise to the new church does not make Sunrise a public service organization. Sunrise is a multinational for-profit corporation not a public service organization. The new church will occupy less than 13% of the proposed building. The increased size and occupancy design serve the institutional needs of Sunrise's for-profit business.

37. Sunrise's claim that there is a need for senior housing and that it provides such likewise does not make it a public service organization. Sunrise failed to introduce any evidence that it would provide affordable units or low-income housing. If there is a need for senior housing the greatest need is not in Ward 3 where there are numerous assisted living facilities. Exhibit 124A, Slide 62; Transcript, at 490. Thus, BZA's cases relating to church properties that involve the creation of affordable housing are not applicable here. See Emory United Methodist, BZA No. 17964 decided February 23, 2010, which created 99 units of affordable housing.

Any "practical difficulty" created by the size or configuration of the lot is a self-created hardship for Sunrise

38. Sunrise has tried to make a case that its CCRC cannot be financially sustainable unless the CCRC has a minimum of 86 units. Sunrise argues that the size of the lot creates these difficulties because it is too small. The 3920 Alton Place lot is .81 acres. Sunrise states that as a senior living facility it needs a 1.5-acre lot to accommodate 86 units in order to be financially viable. Sunrise Senior Vice President Kroskin, Transcript, 337-338.

39. However, this is a self-created hardship, inasmuch as Sunrise knew the profit formula (business model) of approximately 86 minimum units at 900 SF each long before they started planning this project in 2014. Slides So, if this formula required a 1.5-acre lot to comply with zoning, Sunrise knew it would need *many* variances and special exceptions to locate in a single-family neighborhood on the lot at 3920 Alton, which is 0.81 acre.

Sunrise should have sought a larger lot, perhaps in a commercial zone, as it did on Connecticut Avenue eight blocks from this site. *See*, *Foxhall v BZA*, 524 A.2d 759 (D.C. 1986); *Salsbery v. D.C. Bd. of Zoning Adjustment*, 357 A.2d 402 404-05 (D.C. 1976) (applicant contracted to purchase existing property for non-conforming use without conditioning contract upon obtaining use variance)

Sunrise as failed to demonstrate that it meets the test for a variance even in its own right

40. Assuming, solely for purposes of argument, that Sunrise's alleged financial difficulties or hardship is relevant here, Sunrise has failed to meet its burden of proof there are no alternative options that conform to existing zoning and do not require any variance relief.

Sunrise has failed to demonstrate that reducing the size of the CCRC is not feasible.

41. Sunrise testified at the BZA hearing of November 14 that there were two major drivers of this conclusion that they needed 86 units. Those two issues were (1) staff needs and (2) costs of construction. Alice Katz, expert witness for Sunrise, Transcript, 393.

42. As to staffing needs for an assisted living and memory care facility, Sunrise's expert, Alice Katz, Vinca Group, when she testified, Transcript, 353-354, and citing corrected slides later submitted (Exhibit 131A, slide 4) said the staffing average was: 1 FTE per 1.3 residents (121 residents at Sunrise). Under that scenario, 93 FTEs are needed by Sunrise but Sunrise says they are providing 65-75 FTEs. Accordingly, this argument is completely circular, since if staffing needs are driven by the number of residents, a smaller building with fewer than 86 units would need fewer staff.

43. The Applicant's own expert agreed that the same construction-related considerations, like safety, fire code, elevators, bathrooms, laundry facilities that increase the costs of the proposed Sunrise facility would also apply to a facility that was exclusively a memory care facility. Transcript, 355-56.

44. Mr. Heath, Sunrise's architect, also agreed that the smaller building for 34 residents, which was proposed in BZA Case No. 19751 before the BZA on the same day, and Sunrise proposal in the instant case for 121 residents *"should be built very similarly. They both have very high levels of acuity and they both need to have very safe and secure buildings of both the l1 and l2, they both have very sophisticated life safety systems and they'll be very well monitored. So, the cost in construction shouldn't be that much different,* ***except in a matter of scale. This building's more expensive, because it has a garage. They're not building a garage. That's a huge, huge cost difference****... "* Transcript, 395. However, this Board can take notice of the fact that the MED facility has since changed, in response to neighbor concerns about parking, and will now include an underground parking garage. *See* BZA Case No. 17951, Applicants' Supplemental Information, filed 11/26/18 (https://app.dcoz.dc.gov/Content/Search/ViewExhibits.aspx)

45. Accordingly, Sunrise has failed to demonstrate that a smaller facility that does not require all the variances would be financially viable.

Sunrise alternative options regarding other residential zones

46. If under Sunrise's business model they want to have 86 units, then there are other residential zones that might be more suitable and that would not require variance relief. These zones include:
    - RA-2 (moderate to medium density rowhouses and apartments with 60% lot occupancy and 50 feet height);
    - RA-3 (moderate to medium density rowhouses and apartments with 75% lot occupancy and 50 feet height);
    - RA-4 (medium to high density apartments with 75% lot occupancy and 90 feet height).
    - Also, CCRC can locate in all Mixed Use (MU) zoned areas with the exception of MU Group A.

Harm to Public Good or Zone Plan

47. The requested variances cannot be granted without causing substantial detriment to the public good and without substantial impairment to the intent, purpose, and integrity of the zoning plan. The project is incongruous with the residential character of the neighborhood. Doing so would set a precedent for eroding the zoning requirements for every struggling church in the District of Columbia – and there are many -- that unreasonably refuses to consider alternatives that do not require extensive zoning variances.

Conclusions of Law - Special Exception

48. To be granted a CCRC special exception, applicant must meet the definition of a CCRC, 11-B DCMR § 100.2, which includes "providing a continuity of residential occupancy and health care."

49. To receive a special exception for a CCRC 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;" "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;" and the Board "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."

50. In addition, any special exception for any purpose is governed by 11-X DCMR § 901 special exception review standards, which include, among other requirements that the project "(a) Will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps; (b) Will not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps; and

(c) Will meet such special conditions as may be specified in this title." 11-X DCMR § 901.2

51. The applicant for a special exception shall have the full burden to prove no undue adverse impact and shall demonstrate such through evidence in the public record. If no evidence is presented in opposition to the case, the applicant shall not be relieved of this responsibility. *Id.* § 901.3.

52. The Board of Zoning Adjustment may impose requirements pertaining to design, appearance, size, signs, screening, landscaping, lighting, building materials, or other requirements it deems necessary to protect adjacent or nearby property, or to ensure compliance with the intent of the Zoning Regulations. (901.4)

53. In applying the standards, an applicant for a CCRC special exception must show that they are providing "sufficient off-street parking spaces for employees, residents, and visitors." 11-U DCMR § 203.1 (f)(4). Although the data has been requested Sunrise has not provided the number of employees or an estimate of how many visitors, which would include hired contract aides. Therefore, the Applicant has not satisfied its burden of providing that it has "sufficient off-street parking spaces for employees, residents, and visitors."

54. Applicant also has failed to satisfy its burden of showing that the proposed CCRC is "located and designed so that it is not likely to become objectionable to neighboring properties because of noise, traffic, or other objectionable conditions." 11-U DCMR § 203.1 (f)(4). Residents testified that the proposed facility would result in numerous objectional impacts that have not been adequately addressed by the Applicant. Transcript, at 461 – 495; Exhibit 136D1.

Based on the findings of fact and conclusions of law, the Board concludes that the Applicants have not satisfied the burden of proof to grant special exception relief pursuant to 11-X DCMR § 901.2 and 11-Y DCMR § 100.3 and to grant variance relief pursuant to 11-X DCMR § 1000.1 and 11-Y DCMR § 100.3, with respect to the property in the R-1-B District at 3920 Alton Place NW pursuant to the Board's jurisdiction Accordingly, it is therefore **ORDERED** that the application is DENIED.

VOTE:_____ _____ voting to deny the; no other Board member participating

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

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

INITAL DATE OF ORDER: _____, 2019

THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES., THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing proposed findings of fact and conclusions of law were served January 9, 2019, via email, on the following:

Mary Carolyn Brown
Donohue & Stearns
1750 K Street, N.W. • 12th Floor • Washington DC 20006
Via email: carolynbrown@donohuestearns.com

Judy ChesserPresident, Tenleytown Neighbors Association
3901 Alton Place, NW,
Washington, DC 20016
Via email: Chesser1@rcn.com

Advisory Neighborhood Commission 3E c/o Lisner Home
5425 Western Avenue, N.W., Suite 219 Washington, D.C. 20015
Via email: sherryacohen@gmail.com

Jonathan McHugh, ANC 3E-05
4524 Van Ness Street, N.W. Washington, D.C. 20016
Via email: jmchughdc@gmail.com

Jonathan Bender, Chair, ANC 3E
4411 Fessenden Street, N.W. Washington, D.C. 20016
Via email: jonbender@gmail.com

_/s Andrea Ferster_____
Andrea C. Ferster (D.C. Bar # 384648)
Attorney at Law
2121 Ward Court, NW, 5th Floor
Washington, DC 20037
(202) 974-5142 (phone)
(202) 233-9257 (fax)
aferster@railstotrails.org (e-mail)