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TESTIMONY OF DAVID W. BROWN
ON BEHALF OF
THE GREATER SOUTH GLEN NEIGHBORHOOD ASSOCIATION
ON ZTA 20-08

(JANUARY 19, 2021)

[WRITTEN VERSION OF CONDENSED ORAL TESTIMONY]

Good afternoon, President Hucker and Members of Council. I am David W. Brown of Knopf & Brown. I appreciate the opportunity to testify on behalf of the Greater South Glen Neighborhood Association in opposition to ZTA 20-08. The ZTA should not be approved in its present form for three principal reasons. **First**, there is no demonstrated need for this amendment; the Zoning Ordinance is working fine to provide a welcome mix of senior living options in the County. **Second**, where senior independent living units have been combined with assisted living units, they are almost invariably combined in a single facility with meaningful sharing, a true group living arrangement. This includes Montgomery County. By contrast, the ZTA would allow an inappropriate mishmash blurring the distinction drawn in the Ordinance between the two types of residential living: Household Living and Group Living. **Third**, the ZTA would in some cases permit creation of a conditional use where the holder of the regulatory entitlement would not be a single owner or operator of the use accountable for compliance with the terms and conditions of approval, but rather possibly dozens of such persons or entities, creating a wholly unnecessary complexity of conditional use regulation, enforcement and transfer.

I. THE ZONING ORDINANCE DOES NOT NEED THIS “FIX”

Residential Uses are set forth in Division 3.3 of the Ordinance. Apart from accessory uses, there are only two main categories: Residential Living (3.3.1.) and Group Living (3.3.2.). Residential Living has four subcategories: Single-Unit Living (3.3.1.B.), Two-Unit Living (3.3.1.C.), Townhouse Living (3.3.1.D.) and Multi-Unit Living (3.3.1.E.). Group Living also has four subcategories: Dormitory (3.3.2.B.), Independent Living Facility for Seniors or Persons with Disabilities (3.3.2.C.), Personal Living Quarters (3.3.2.D.), and Residential Care Facility (3.3.2.E.). Each of these Group Living subcategories is different from the other three. Excluding Dormitory (a use permitted only in the LSC zone), each of the other three has its own set of Use Standards that must be met to be allowed as a conditional use in the Residential Detached Zones. In addition, with minor exceptions not relevant here, these Group Living conditional uses cannot be located in any of these building types: duplex, townhome or apartment building. (4.1.3, 4.1.4).

ZTA 20-08 runs roughshod over this straightforward categorization and regulatory process.¹ It would introduce a new use defined as “Senior Care

¹In this testimony, I am referring to the ZTA as the Planning Board, after its initial public hearing on the ZTA, proposed that it be amended. Since the ZTA was introduced at the request of the Board, it does not make sense to discuss a version of

Community,” which would not be a fifth distinct Group Living use, but rather a subcategory lumped in within the existing Residential Care Facility use. Currently there are several types of Residential Care Facility, including nursing home, assisted living facility, continuing care retirement community, hospice and group home. (3.3.2.E.1.). Expressly excluded and distinguished is the separately defined “Senior Independent Living Facility for Seniors or Persons with Disabilities.” *Id.* But what “Senior Care Community” in ZTA 20-08 would add to this list is an undefined amalgam of “assisted living” and “residential independent dwelling units.” Whether these “residential independent dwelling units” are intended to be something other than the currently defined and regulated “Senior Independent Living Facility for Seniors or Persons with Disabilities” is not made clear. It certainly should be different if the integrity of the definition of “Residential Care Facility” is to be maintained. Currently, all of the types of such facilities within that definition must be “for the care of persons in need of personal services, supervision or assistance essential for sustaining the activities of daily living, or the protection of the individual.” *Id.* These limitations are not contained in the “Senior Independent Living Facility for Seniors or Persons with Disabilities” use, which can be a Group Living arrangement that does not mandate the provision of the kind of personal service care that is the hallmark of the Residential Care Facility; it merely has to provide one or more undefined “services for senior adults.” If the term “residential independent dwelling units,” proposed by the ZTA as a subcategory of “Senior Care Community” is added to the list, much greater clarity is needed to bring it within the overarching definition of “Residential Care Facility” and distinguish it from “Senior Independent Living Facility for Seniors or Persons with Disabilities.”

Adding further to the disruption of the current regulatory scheme, the “Senior Care Community” definition is inconsistent with the “Group Living” categorization of the use as well as the restrictions on building type. This is seen in the specification that the Senior Care Community can be “in one or more buildings of any structure type.” This is a *sub silentio* amendment of the building type restrictions in 4.1.4 for Residential Detached Zones, and in direct conflict with the definition of Group Living, which effectively excludes living in single units, two-unit homes and townhomes, in that Group Living is the “residential occupancy of a structure by a group of people that does not meet the definition of any Household Living use under Section 3.3.1.” (3.3.2.A.).

the ZTA the Board has already abandoned. This change, taking place even before the Council public hearing, just underscores how deficient the underlying staff development process has been in this instance, as detailed more fully below.

The careless, haphazard way in which this ZTA has conflated a defined independent senior living use in 3.3.2.C. with an undefined “residential independent dwelling units” use is reflected in the fact that the Planning Board has not provided the Council even a hastily researched justification for the need to create a new category of Group Living use. The Board’s ostensible motivation is to provide a greater degree of flexibility by allowing the combination of an “assisted living facility” and “residential independent dwelling units” in one conditional use location. But there is no demonstration from the Board that the existing definition of Residential Care Facility would prohibit such a combination.

In fact, one need go no further afield than the special exception approved for the Fox Hill senior living community at 8300 Burdette Road in Bethesda, to see the feasibility under the Ordinance of just this kind of arrangement. Fox Hill consists of a large number of senior independent living units held in condominium ownership by the occupants, and, integrated into the building, a substantial assisted living facility operated by Sunrise. The Fox Hill facility, located in the R-200 zone, consists of one large building with multiple wings.² The Planning Board staff has not done the homework necessary to validate its mere assertion that some new “Senior Care Community” definition is needed to allow additional projects such as Fox Hill in the County.

Moreover, if a facility such as Fox Hill, featuring condominium ownership of the independent living units, is approvable under the Ordinance, then *a fortiori*, the more common type of combined facility is approvable, i.e., one where senior independent living is based on a contractual payment for use and occupancy of the group living premises and the senior services made available. In such arrangements, the transition from independent living to assisted living is a more seamless process because, unlike at Fox Hill, the senior makes the move to a higher level of care without having to dispose of a real property ownership interest. Indeed, national owners and operators of such combined facilities, including Spectrum Retirement Communities, which is well on its way to obtaining approval of its first East Coast retirement community in Potomac, has multiple properties in the Midwest and West

² While Fox Hill obtained its special exception under the pre-2014 Zoning Ordinance and continues to be regulated as a special exception under that Ordinance, i.e., S-2504, the Planning Board has not made any showing that the 2014 Ordinance would preclude another such use in the Residential Detached Zones such as R-200. Indeed, it is counterintuitive to think that such a substantive change was intended, given that the comprehensive Zoning Rewrite project was primarily about reorganization and simplification, not substantive change.

that combine senior independent living and assisted living in the same project, where marketing to seniors is invariably directed at those who are contemplating leaving behind the burdens of continued home ownership for a new group living lifestyle where there are no utility bills, property taxes, mortgages, or repair burdens to worry about.

II. THE "SENIOR CARE COMMUNITY" SHOULD BE, BUT IN ZTA 20-08 IS NOT, LIMITED TO GROUP LIVING

The "Senior Care Community" definition would permit a Group Living arrangement, but is defective in that it does not preclude three different forms of Household Living: single-unit, two-unit and townhouse. These are the antithesis of Group Living, and a strong case would have to be made to create a mishmash of two distinct and distinctly regulated types of residential living in the same location. Again, Board staff has not done its homework, which would properly reflect the importance of group living in senior housing. Research on trends in senior living would have revealed that almost everywhere where senior independent living and assisted living are combined, although the living units for the two uses are typically in different wings or floors of the facility, the uses in fact share much of what is desirable and beneficial about the communal aspects of senior living, such as on-site health and wellness services; game, craft and music rooms; a main lounge area; book (and other common interest) clubs; outdoor gardens and walkways, and often much more. All this is skillfully arranged to promote both a rich communal environment and an easy transition from independent living to assisted living. Under the ZTA, the "Senior Care Community" definition neither requires nor promotes such communality and transitioning. In fact, there could be no connection at all between the two uses, which could be in separate buildings, including an array of single-family homes, duplexes, triplexes and townhome rows for independent seniors disconnected entirely from the Group Living provided for the assisted living component of the use.

This problem is avoided by not "fixing" what is not broken about the Ordinance, as explained above. But if for some reason it is determined that a new "Senior Care Community" use is to be added to the Ordinance, it should be strictly limited to a facility that falls fully and squarely within the definition of Group Living, as explained above. This would not preclude multiple buildings, but each building would have to exhibit the requisite communal Group Living characteristics. Consistent with 4.1.4., this would be a building type designed for Group Living in a conditional use, thereby excluding single-family homes, duplexes and townhomes.

III. THE “SENIOR CARE COMMUNITY” CANNOT PROPERLY FUNCTION AND BE REGULATED AS A CONDITIONAL USE WITH A MULTITUDE OF FEE SIMPLE PROPERTY OWNERS

Seniors ready to step into the senior living continuum are typically those who have enjoyed the benefits of home ownership and have decided that they are ready to leave property ownership burdens behind for a new way of life: acquiring a contractual right to use and occupancy in a communal facility. When such a facility is marketed to seniors, it should not be a platform for the fee simple sale of real estate. There needs to be but one owner and operator of the facility, answerable to the Board of Appeals, as the designated holder of the conditional use, for compliance with conditional use conditions and to make application, as necessary and appropriate, for modification or transfer of the conditional use under the established regulatory scheme in the Ordinance.

During the Council public hearing on the ZTA on January 19, 2021, Planning Board Chair Anderson suggested that zoning is not concerned with how property is owned. That is not always so, and the circumstances raised by the ZTA well illustrate why. As written, the “Senior Care Community” could conceivably consist of a 20-unit assisted living facility in one building and 20 triplexes elsewhere on the property devoted to “residential independent dwelling units,” with each third of a triplex, and the ground on which it sits, owned by the independent senior in fee simple. There would thus be 61 real property owners considered the holders of the conditional use: the owner/operator of the assisted living facility, and three owners in each of the 20 triplexes. Just like the assisted living facility owner, each of the other 60 owners would need Board of Appeals approval to modify their triplex unit or to transfer it. In Montgomery County, conditional uses, and their predecessor, special exceptions, have never been regulated in this cumbersome fashion, and no ZTA should be enacted that would create such a possibility, greatly complicating conditional use oversight and regulation.

Once again, this problem is avoided by not “fixing” what is not broken about the Ordinance. Strict adherence to the concept of Group Living, as defined in the Ordinance, should obviate the problem. For example, even in the Fox Hill model, where property ownership by the independent seniors is retained, they are living in a true Group Living arrangement, where condominium ownership, not fee simple ownership, is the order of the day. Under State law, the seniors do not own the common elements of the condominium building or any of the ground on which it sits; those are owned and operated by the condominium Board of Directors. That is

the entity answerable to the Board of Appeals under the Fox Hill special exception, and issues of modification or transfer of individual condominium units are not implicated in that regulatory process. But if for some reason it is determined that a new "Senior Care Community" use is to be added to the Ordinance, it should be made clear that to meet the Group Living standard, the facility cannot be structured to include the multitude of independently living senior fee simple property owners.

Thank you for taking into consideration the views on ZTA 20-08 I have expressed on behalf of the Greater South Glen Neighborhood Association