GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 14568 of the Ward 5 Coalition, pursuant to Section 8102 and 8206 of the Zoning Regulations, (11 DCMR 3200.2 and 3105.1), from a decision of the Zoning Administrator dated December 23, 1986, in construing Certificate of Occupancy B-26019, dated November 8, 1960, to authorize use as a convent for terminally ill patients, in violation of Section 8104 (11 DCMR 3203.7 and 3203.8), in an R-1-B District at premises 2800 Otis Street, N.E., (Parcels 167/64, 167/65, 167/67, and 167/68,).

HEARING DATE: June 10, 1987
DECISION DATE: July 30, 1987

FINDINGS OF FACT:

1. The site is located on Parcels 167/64 167/65, 167/67, and 167/68, in an R-1-B District, and is identified as premises 2800 Otis Street, N.E. ("the premises").

2. In the application and the public hearing notice, the site was correctly identified by address, but incorrectly as to Lot and Square. No party objected to the public hearing proceeding, and the error would not reasonably have been prejudicial to any party or potential party.

3. In 1960, Certificate of Occupancy ("C.O.") Number B-26019 was issued to the Archbishop of Washington to allow use of all floors of a structure located on Parcel 167/68 as a home for dependent boys, in the then existing use category of eleemosynary institution.

4. In 1970, C.O. B-66991 was issued to the Board of Trustees of Saint Joseph's Home and School to use part of the first floor of the premises for a day nursery and affiliated welfare services. In 1979, C.O. B-114374, which duplicated C.O. B-66991, was issued.

5. On December 23, 1986, in a letter to Advisory Neighborhood Commissioner Deirdre W. Spaulding, the Deputy Zoning Administrator, Joseph F. Bottner, determined that the current use of the premises is as an eleemosynary institution as authorized by C.O. Number B-26019. Although this determination is not explicitly stated in the letter, such a determination is reasonably implied by the discussion in the

letter. The testimony of Mr. Bottner at the hearing confirms this reading.

6. Neither the owner nor any agent of the owner has applied for a C.O. for the premises in connection with the establishment of the current use at the premises.

7. The current use of the premises is to provide lodging and meals for up to thirty terminally ill people with Acquired Immune Deficiency Syndrome, cancer, and other terminal illnesses.

8. Residents may either be ambulatory or not so. Residents may either be able to care for themselves or need assistance in bathing, feeding, dressing, or taking medicines. The number who are terminally ill, or not ambulatory, or who need assistance in daily activities is not restricted to two or less.

9. The Administrator, Service Facility Regulation Administration, Department of Consumer and Regulatory Affairs, has determined that the current use of the premises does not constitute a health care facility as defined by current health care regulations of the District of Columbia.

10. The conclusion of the Service Facility Regulation Administrator is based upon the Administrator's analysis that: the facility is not a nursing home or community residence facility under D.C. Law 5-48, the Health-Care and Community Residence Facility Hospice and Home Care Licensure Act of 1983; and that, while the facility may be a hospice, hospice is a new category of licensure for which final rules have not been promulgated, and hospices therefore, do not yet require a health care facility license.

11. The facility is supported by donations of funds and materials.

12. Testimony at the hearing and exhibits in the record evidence a number of other concerns about the present use of the premises: inadequate notice to the community of the establishment of the current use; lack of a public hearing and other opportunities for effective community participation; the need for a Certificate of Need for a health care facility; the need for zoning regulations about facilities for persons who are terminally ill; the effect on the value of nearby real property; and concerns about the public health. For the reasons noted in Conclusion of Law numbered 14, the Board makes no findings of fact on these concerns.

CONCLUSIONS OF LAW:

1. The issue before the Board is whether the current use of the premises is permitted within C.O. B-26019. The uses permitted by C.O. B-66991 and C.O. B-114374 are not at issue before the Board. Nor is there anything before the Board which challenges the validity of C.O. B-26019, B-66991, or B-114374.

2. Zoning Commission Order No. 347, issued July 9, 1981, in Zoning Commission Case No. 78-12 (32 DCMR 3482 and 3547) deleted the following definitions: (1) "Institution, philanthropic or eleemosynary" (hereinafter, "philanthropic or eleemosynary institution"); and (2) "Convalescent or nursing home."

3. Zoning Commission Order No. 347 adopted definitions of a new term, that is, "Community based residential facility," and of seven sub-categories of that type of facility.

4. The former category "philanthropic or eleemosynary institution" was defined as: "a place of asylum, other than a convalescent or nursing home or hospital, supported wholly or substantially by endowment or contribution." (italics in original) This definition was in part more inclusive and in part less so than is the extant term "community based residential facility." The terms cannot be read as having essentially the same meaning.

5. Further, Zoning Commission Order No. 347 established a completely new scheme of regulating the types of facilities which it addressed.

6. Although the term "philanthropic or eleemosynary institution" has been deleted from the Zoning Regulations, the nonconforming use rights which apply to that class of use are reasonably determined only by examination and analysis of the former definition.

7. Although the Board would conclude that the facility at the premises is supported wholly or substantially by contribution, and is a place of asylum, the repealed definition of "philanthropic or eleemosynary institution" explicitly excluded from that category a "convalescent or nursing home."

8. a. Before it was deleted by Zoning Commission Order No. 347, the definition of "convalescent or nursing home, had read as follows:

> Convalescent or nursing home: a building, except a hospital, used for the care, treatment or lodging of three or more persons

> not related by blood or marriage within the third degree of blood consanguinity to the operator, or manager thereof, who are either infirm, senile, afflicted, or suffering from any chronic physical or mental disease, illness, or affliction, or who are drug or alcoholic addicts, or who are confined to bed or chair, or who require or receive special diet, individual feeding in special rooms, assistance in feeding, dressing, walking, or toileting, or assistance in any other ordinary daily activities of life. (italics in original)

b. By its terms, this definition was not limited in its application to a facility for residents who were receiving nursing care from licensed or registered nurses, or who received a certain level of health care. Nor did this definition reference the health care regulations.

c. By its terms, this definition would have included a facility for the lodging (even without nursing care or treatment) of three unrelated persons who were infirm, afflicted, or suffering from a chronic physical disease or illness, or who required or received assistance in feeding, dressing, walking, toileting, or in any other ordinary daily activities of life.

9. The current use of the premises provides lodging to persons, not limited to two or fewer, or to related persons, who fall within the description of the persons who lodge in a convalescent or nursing home, as set forth in Conclusion of Law numbered 8.

10. The current use of the premises is within the repealed classification of "convalescent or nursing home," and is therefore not within the repealed classification of "philanthropic or eleemosynary institution."

11. The current definitions in the health care regulations do not apply to or aid in the interpretation of the terms "philanthropic or eleemosynary institution" or "convalescent or nursing home."

12. The current use of the premises is not within the nonconforming use rights as controlled by C.O. B-26019.

13. The record before the Board does not support affirmance of the decision of the Deputy Zoning Administrator that the current use of the premises is within that allowed by C.O. B-26019.

14. The community concerns which are noted in Finding of Fact numbered 12 do not relate to the legal standards under which the Board must decide this appeal. For that reason, the decision of the Board is not based upon, and the Board has not made, any findings about those concerns.

15. As set forth in Conclusion of Law numbered 1, above, the validity of C.O. B-26019 is not before the Board. This Order therefore does not address the validity of that C.O. or any other C.O. for the premises.

Accordingly, it is ORDERED that the appeal is GRANTED, and the decision of the Deputy Zoning Administrator that the current use of the premises falls within that allowed by C.O. B-26019 is hereby REVERSED.

VOTE: 5-0 (Lindsley Williams, William F. McIntosh, Paula L. Jewell, Carrie L. Thornhill, and Charles R. Norris to grant).

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

ATTESTED BY: _____
EDWARD L. CURRY
Executive Director

FINAL DATE OF ORDER: APR 20 1988

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF SIX MONTHS AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

14568order/BJW28

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPLICATION No. 14568

As Executive Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that a copy of the Order of the Board in the above numbered case, said Order dated APR 20 1988, has been mailed postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

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EDWARD L. CURRY
Executive Director

DATE: APR 20 1988