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**Testimony of Randy Speck, Chair, ANC 3/4G,
Before the Committee on Health
July 9, 2018**

Thank you, Chair Gray and other members of the Committee on Health, for keeping the record open so that you could continue gathering information on Bill B22-0689, the “Omnibus Assisted Living Residence Improvement and Quality Long Term Care Act of 2018.” I am Randy Speck, Chair of ANC 3/G, and our Commission adopted this testimony at its July 9, 2018 meeting by a vote of 4 to 0 (a quorum being 4). Rather than repeating points made in the extensive testimony before the Committee at its June 22, 2018 hearing, we will synthesize the most important flaws in Bill 22-0689 and suggest specific actions that the Council can take to promote quality of life and effective care for the District’s assisted living residents.

The rules governing assisted living residences greatly impact our ANC. The five licensed assisted living residences within our ANC’s boundaries in Chevy Chase — Knollwood, Ingleside, Forest Side Memory Care, Sunrise, and Chevy Chase House —

are home to about 379 of our constituents, which is more than half of the 721 assisted living residents reported in the District's twelve licensed facilities. See the Department of Health's "Assisted Living Residence Facilities Business Directory 2018," https://dchealth.dc.gov/sites/default/files/dc/sites/doh/publication/attachments/Website%20Posting_2018%20Assisted%20Living%20Res%20Business%20Directory_04272018.pdf (revised April 17, 2018). Many of these residents testified eloquently at the Committee's June 22 hearing in opposition to Bill 22-0689.

We share the Committee's frustration that the Department of Health has not implemented operating regulations in the 18 years since the Assisted Living Residents Regulatory Act of 2000 (DC Code Section 44-101.01 *et seq.*) became law. While DOH did implement criteria for licensing and conducted regular inspections, it did not establish standards for operations that could guide administrators or codify residents' rights. These are the normal, expected functions of regulations to implement the Council's legislative directives. DOH's negligence should be corrected.

Our Commission is concerned, however, that the proposed 76-page Bill seeks to substitute statutory directives for the details normally contained in administrative regulations. This approach, while an understandable reaction to DOH's delay, has three pitfalls.

First, the Council lacks the necessary specialized expertise to address the minutiae required to implement best practices for assisted living residences. These facilities provide a hybrid of health and social services in a home-like environment where the level of care can be tailored to each individual's needs. Experienced senior care specialists

have developed protocols and standards for assisted living based on proven methods. Councilmembers could not be expected to master this field sufficiently to develop exacting requirements that could have unintended negative consequences. That role is more appropriate for specialized regulators.

Second, the regulatory process should be collaborative where all affected stakeholders can make contributions. While the Council's hearings are certainly valuable, testimony in three-minute bursts is not a substitute for what can be achieved in well-structured working groups that include those most affected — current and prospective residents, their relatives, and the staff at assisted living facilities. The give-and-take of discussions among knowledgeable experts can produce realistic, practical rules that assisted living facilities can implement without adverse ramifications. The Council, with the press of multiple issues, cannot easily replicate that process to develop viable legislation.

Third, the regulatory process should be more nimble than legislation, with mechanisms to modify rules that prove to be ineffective or counterproductive. No set of standards is likely to get everything perfectly right, and experience in implementing rules may suggest desirable changes. Those will be much more difficult to effectuate if they are embodied in legislation that would require further Council action to correct. The Council should be wary of fixing unprecedented provisions in statutory stone when experience may prove them to be unavailing or even damaging.

Bill 22-0689 demonstrates the hazards of legislating detailed rules for assisted living residences without drawing on crucial expertise. Based on our meetings with

residents, staff, and experienced professionals, as well as the testimony at the Committee's June 22 hearing, the Bill's multiple flaws are apparent. Among the most significant are the following:

- (1) The 24-hour-a-day registered nurse on-site is not realistic or enforceable. Such a requirement would be more rigorous than nursing care and would convert assisted living from a social model with medical support to an "institution" based on a medical model with social support.
- (2) The Bill would deny assisted living care to those with moderate dementia and those in need of hospice care, since it prohibits both. There are no accepted standards for gradations of dementia, and some degree of dementia is common among assisted living residents. Many people with dementia can thrive in an assisted living setting but would rapidly deteriorate in a memory care nursing facility. Hospice can be appropriate in any setting, and should not be denied to assisted living residents.
- (3) The proposed Bill would preclude the facility from sending any resident to the emergency room unless she or he has a life-threatening, emergency condition. Thus, someone with a broken hip, for example, would have to stay in the assisted living facility until her or his family arranged for transport to the hospital. Such a rigid directive would harm, not help residents.
- (4) The proposed Bill would prohibit any commercial entities at the facility, thus depriving residents of the care of a contract physical or massage therapist or of important amenities, such as an on-site cosmetologist.
- (5) Under the proposed Bill a resident cannot use the facility's medical director as their attending physician even though she or he may be the most knowledgeable and appropriate. There is no overriding reason to preclude the resident's choice of physician.
- (6) The proposed Bill requires anyone with dementia who may be "at risk for elopement" to be obviously and publicly identified with a badge, creating a stigma and inviting potential discrimination.
- (7) The proposed Bill would let each resident use his or her pharmacy for medications that would be dispensed by the facility's staff. This would

make it more difficult for the facility's staff to ensure correct medications since the pills would come from a variety of sources, increasing the possibility of mistakes. Residents should only be able to use their own pharmacy for medications that they can dispense themselves.

Perhaps the most telling concern with Bill 22-0689 was raised at the June 22 hearing by developers who have "shovel-ready" projects for affordable assisted-living residences in Wards 7 and 8, which is currently an "assisted living desert." They testified that they will lose financing for these sorely needed facilities if the Council continues to consider this Bill, much less if it passes. The Bill's requirement for a registered nurse on site 24-hours a day is a poison pill for new affordable assisted-living residences. Under federal definitions for purposes of accessing low-income tax credits, that provision would transform the planned facilities from "housing" into "institutions," making them ineligible for the tax credits and dooming the planned projects. That point hit home with statistics provided by a representative from Capital Hill Village that the District has far fewer assisted living units per person over 65 than Maryland or Virginia. The District needs all the new assisted living residences that it can get, particularly for low-income residents. This Bill would do exactly the opposite.

These and other shortcomings in the Bill suggest that a different legislative approach may achieve its admirable objectives more quickly and more effectively. Our ANC has reviewed DOH's June 8, 2018 draft "emergency" regulations for Assisted Living Residences. We have been informed that those rules were fully vetted by stakeholders, represent industry-wide best practices, and can be issued imminently. Putting aside the fact that they should have been in place years ago, by far the quickest

way to improve oversight of assisted living residences is to expeditiously finalize and implement those regulations. The draft regulations address most, if not all, of the major topics in the proposed Bill, and they could be supplemented to the extent necessary during the required comment period.

The Bill may have forced DOH to move forward, but for whatever reason, the landscape is now different than when the Bill was first introduced in February 2018. Given the history, it may be wise for the Council to set a strict timetable for DOH to finalize the regulations and to take all steps necessary to implement them. Such legitimate oversight provisions could be enacted quickly in simple, non-controversial legislation.

ANC 3/4G urges the Council to act promptly to withdraw Bill 22-0689 because so long as it is being considered, it will cast a cloud on development of essential affordable assisted living residences. In its stead, the Council should pass legislation that will compel DOH to finalize, issue, and implement regulations by a date certain.