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Mr. Geoffrey Griffis, Chairman
Board of Zoning Adjustment
441 4th Street, N.W.
Second Floor
Washington, DC 20001

Re: Motion to Dismiss BZA Appeal No. 17127
by Sunrise Assisted Living ("Property Owner")

Dear Chairman Griffis and Members of the Board:

We have received numerous lengthy and duplicative documents that have been filed by the Appellant, the Nebraska Avenue Neighborhood Association ("NANA"), arguing the existence of a basis for a fourth appeal of the Sunrise facility at 5111 Connecticut Avenue, NW (the "Sunrise Facility" or the "facility"). The purpose of this letter is to move to dismiss the appeal and clarify any confusion that may have resulted from NANA's continuing efforts to revisit issues that were considered fully during the hearing on the first appeal of the Sunrise Facility (BZA Appeal No. 16716).

The issue before the Board is whether the filing of this fourth appeal of the Sunrise Facility is permitted or is barred under principles of res judicata and collateral estoppel. The minor building permits[1] that are the subject of this appeal resulted in changes that have no bearing whatsoever on zoning matters. NANA's assertion that these interior permits were used to circumvent D.C. zoning and building regulations is absurd. Accordingly, those permits cannot and should not be used as a vehicle for rehashing old arguments and revisiting the Board's decision to uphold the main Sunrise building permit that was the subject of NANA's first appeal, Appeal No. 16716.

It should be noted that NANA may have resorted to this desperate effort to seek a fourth "bite of the apple" because on December 30, 2003, the Board of Appeals and Review rejected NANA's appeal, joining in the BZA's and the Zoning Commission's

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[1] This appeal involves Building Permits No. B456618, B454064, B454315, B454523, B454596, B453159.

BZA
Case No. 17127
Exhibit No. 17

Board of Zoning Adjustment
District of Columbia
CASE NO. 17127
EXHIBIT NO. 17

recognition of the validity of the permit authorizing the construction of the Sunrise Facility.

Factual Background

NANA's efforts to challenge to Sunrise Facility span over three years. On March 16, 2001, NANA and ANC 3G appealed the issuance of the main building permit for the Sunrise Facility. The BZA, and the Zoning Commission through the sua sponte review process, ultimately upheld the Building and Land Regulation Administration's (BLRA) issuance of the building permit in BZA Orders No. 16716A, 16716B and Zoning Commission Order No. 952. Subsequently, on March 19, 2002, NANA filed a second appeal, BZA Appeal No. 16879. That appeal merely restated issues that were raised in the initial case and was based on the identical set of facts. Indeed, the remedial permit that was the subject of the second appeal was filed in response to issues that were raised in both the Zoning Commission and BZA cases. Accordingly, the Board dismissed the second appeal given the finality of its original decision.

The Board's decisions with respect to the first and second appeals stand and are entitled to res judicata effect. Any further appeals constitute a clear abuse of the administrative process and a denial of Sunrise's rights as a property owner to proceed with the operation of its assisted living facility for a protected class of residents under the Fair Housing Act.

In its final order dismissing the second appeal, B2A Order No. 16879-A dated February 4, 2003, the Board noted that the modification of the elevator penthouse that was required by the Zoning Commission in connection with the *sua sponte* case had absolutely no effect on the rear yard or on the building's FAR. NANA then filed an untimely motion for reconsideration of the order. The Board dismissed the motion as untimely. In its decision, the Board noted:

> As evident from the filings in this case, NANA has used every conceivable procedural device to stop the building of a facility for persons with disabilities that it has so adamantly opposed. Indeed, NANA has since filed yet a third appeal of the same project, this time appealing the approval of a Wall Test Report. ***While NANA may continue its relentless efforts to challenge what the Board continues to find to be a lawful structure and use, the***

Board is not compelled to treat NANA's tactical miscalculation as good cause. [Emphasis added.]

Undaunted, on March 7, 2003, NANA filed a third appeal (BZA Appeal No. 17010) challenging a wall test report while construction was ongoing. That appeal was rejected by the BZA as premature. NANA was advised to refrain from filing any additional appeals until the issuance of a certificate of occupancy for the building.

Now, in the instant appeal, NANA has challenged six minor permits that were issued during the course of construction of the project. The need for minor permit revisions in the course of a major construction project is not at all unusual. These permit revisions involved small matters such as the alteration of model rooms and the installation of mechanical equipment in the ceiling of certain portions of the building. The work approved by these permits had no effect on any of the zoning matters that were the subject of the first appeal. They were routine, construction-related modifications that affected only the building's interior and had no effect on building height, FAR, rear yard setback, etc.

In the present appeal, NANA has resurrected virtually every argument that it raised in the first two appeals. NANA has challenged Sunrise's vested rights, and the compliance of the building's rear yard, penthouse setback, height, and loading. Even if NANA had not raised these issues before, they would be prevented from doing so now under the well-established doctrine of claim preclusion.

NANA's effort to use these minor permits to gain yet another opportunity to reargue all of its original challenges is a complete abuse of process that is unfortunately entirely characteristic of its actions to date. The Board should not countenance these abuses and should dismiss the appeal without a hearing.

The Sunrise Assisted Living Facility is Open and Operating

The Sunrise facility was issued Certificate of Occupancy No. 66771 by DCRA on December 5, 2003. The first resident moved in on January 6, 2004. Currently twenty-two senior citizens reside in the building and ten more are scheduled to move in within the next month. The facility provides needed senior housing and has operated with minimal impact on the neighbors. The Executive Director meets regularly with nearby neighbors to address any concerns about the operation of the facility.

Legal Argument

The District of Columbia Court of Appeals has held clearly that land use decisions are subject to the doctrines of res judicata and collateral estoppel. Rhema Christian Center v. District of Columbia Board of Zoning Adjustment, 515 A. 2d 189 (D.C. 1986) and Towles v. District of Columbia Board of Zoning Adjustment, 578 A. 2d 1128 (D.C. 1990). These cases concerned the second and third of three consecutive attempts by the Rhema Christian Center to secure a special exception to operate a parochial school. In Rhema, the review of the second denial of a special exception, the court explained the application of res judicata in administrative cases generally and zoning specifically.

> In determining whether preclusion doctrine is applicable in a particular case, "[t]he threshold inquiry is whether the earlier proceeding [was] the essential equivalent of a judicial proceeding." The Board is an adjudicatory agency; it hears and decides cases (applications and appeals) initiated by parties other than the Board itself. D.C. Code §5-424 (1981). Moreover, our local Administrative Procedure Act, D.C. Code §§1-1501 to 1510 (D.C. 1981), as well as the Board's own procedural regulations, 11 DCMR §§3300-3399 (1985), ensure the essential elements of due process in adjudication, including notice, representation, a hearing with presentation of evidence and cross-examination, and a written decision with findings of fact and conclusions of law.***There is no question that these procedural requirements were met in the first proceeding. Thus, the "threshold inquiry" for preclusion is satisfied. [Citations omitted.][2]
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> ***

[2] There can be no doubt that this threshold test is met here. NANA had notice, a public hearing, the right to cross-examination and a written decision with findings of fact and conclusions of law All administrative procedural requirements were met.

> Interestingly, traditional zoning law itself incorporates the preclusion concept. As a general proposition, when a special exception or variance is denied and the applicant, after a required waiting period, resubmits the same or a substantially similar application, the applicant must demonstrate that conditions have changed, such that the reasons for the previous denial no longer apply. *** See First Baptist Church of Washington v. District of Columbia Board of zoning Adjustment, 432 A.2d 695, 701 (D.C. 1981) (opponent to reissuance of permit extending special exception must show "change of conditions ... [or] other considerations materially affecting the merits") [emphasis supplied] (quoting Spencer v. Board of Zoning Appeals, 141 Conn. 155, 157, 104 A.2d 373, 375 (1954)) see generally, 3 Anderson, AMERICAN LAW OF ZONING, §§20.52-.53 at 573-79 (2d ed. 1977); Annot., 52 A.L.R.3d 494, 498-502, 510-19. Id. At 193. [Citations omitted.]

The court did not have to apply res judicata, however, since it affirmed the BZA on the merits of the denial.

Reluctant to give up, Rhema Christian Center went to the BZA a third time and did secure the special exception. In Towles, the Court of Appeals reversed and adopted the res judicata doctrine as explained in Rhema.

> Generally, once a claim has been finally adjudicated, the doctrine of claim preclusion, or res judicata, prevents the same parties from relitigating the same claim, including any issue that either was or might have been raised in the first proceeding, and the doctrine of issue preclusion prevents the same parties from relitigating an issue actually decided in a previous, final adjudication, whether on the same or a different claim. Rhema I, 515 A.2d at 193. ***The Court explained:
>
> When a material change of circumstances affecting the merits of the application has not occurred [and] the application is not for a use that materially differs in nature and degree from its predecessor the board of adjustment

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> may not lawfully reach the merits of the petition. If it were otherwise, there would be no finality to proceedings before the board of adjustment, the integrity of the zoning plan would be threatened, and an undue burden would be placed on property owners seeing to uphold the zoning plan. Id., at 194 (quoting Fisher v. City of Dover 120 N.H. 187, 412 A.2d 1024, 1027 (1980)).

Although Rhema and Towles dealt with the effect of an initial denial of special exception relief, the citation in Rhema (515 A.2d at 1930) to First Baptist Church and case law from other jurisdictions makes it clear that the doctrine applies to any administrative proceeding, including appeals and variances. See, e.g., Grava v. Parkman Township, 653 N.E.2d 226 (Ohio 1995), in which the Ohio Supreme Court held that after a property owner's initial variance application was denied, that a second application involving the same building and the same lot was barred by the doctrine of res judicata. See also Restatement (Second) of Judgments, §§ 24 & 25.

The doctrine of res judicata involves both claim and issue preclusion, that is, it applies to claims actually litigated and claims which could have been litigated but were not raised. Thus, res judicata applies as well to any supposedly "new" claims such as those raised by NANA in the present appeal, and NANA's failure to include the claims in their prior appeal bars raising them now. These claims are clearly part of the aggregate of connected operative facts that should have been litigated in the prior case. Indeed, there is no substantive difference between the claims asserted here and those that were "or might have been litigated" in the prior case. As the court held in Diversified Foods v. First National Bank of Boston, 985 F.2d 27 (1st Cir. 1993), cert. denied, 125 L.Ed. 2d 694:

> Accordingly, so long as the parties are the same in both cases and a final judgment was entered in the prior action, "a subsequent suit that arises out of the same operative facts shall be barred even though the second suit relies upon a legal theory not advanced in the first case, seeks different relief than that sought in the first case, and involves [different] evidence." 985 F.2d at 30. (Emphasis in original.)

To avoid claim splitting, the rule requires that the plaintiff bring all claims at one time. As the court explained in U.S. v. Athlone Industries, 746 F.2d 977 (3rd cir. 1984) (quoting David v. United States Steel Supply, 688 F.2d 166, 171 (3rd Cir. 1982)):

> ... [a] single cause of action may comprise claims under a number of different statutory and common law grounds ... Rather than resting on the specific legal theory invoked, res judicata generally is thought to turn on the essential similarity of the underlying events giving rise to the various legal claims, although a clear definition of that requisite similarity has proven elusive .... Whatever the conceptual difficulties inherent in any definition of a "cause of action," often the presence of a single causes of action is clear. 746 F.2d at 983-84. (Emphasis in original.)

The court went on to state:

> Although we declined to adopt one specific theory in Davis, we indicated a predisposition toward taking a broad view of what constitutes identity of causes of action – "an essential similarity of the underlying events giving rise to the various legal claims." 746 F.2d at 984.

NANA could have included, and in many cases did include, the present claims in the prior appeal. Res judicata now bars any claims that could have been litigated in the prior case.

Under the facts and the well-established case law, the doctrine of res judicata bars the present appeal.

Conclusion

It is apparent that NANA will stop at nothing to prevent Sunrise from continuing its operation of this assisted living facility. All of the arguments proposed by NANA in BZA Appeal No. 17127 were either addressed in the previous appeals or could have been addressed if properly and timely raised in the previous proceedings. NANA had ample opportunity to present its case to both the BZA and the Zoning Commission and in both instances its claims were denied. The BZA should not provide NANA with yet another opportunity to present the same claims and claims it could have raised earlier. Based on

the established doctrines of issue and claim preclusion enumerated above, NANA should not be permitted to force Sunrise to continue to defend its well-established right to use the building. As the Court stated in Rhema, to hold otherwise means that there is no finality to proceedings before the Board, the integrity of the zoning plan would be threatened, and an undue burden would be placed on property owners.

Respectfully submitted,

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Certificate of Service

I hereby certify that on April 8, 2004, a copy of the foregoing letter was mailed first class, postage prepaid, to the following:

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