GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 17127 of Nebraska Avenue Neighborhood Association (NANA), pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decisions of the Department of Consumer and Regulatory Affairs (DCRA) in the issuance of Building Permit No. B454315 dated August 25, 2003, and Building Permit No. B456618 dated November 7, 2003,[1] revision permits issued for the Sunrise Assisted Living Facility (Sunrise or the Facility), located at 5111 Connecticut Avenue, NW in the R-2 and R-5-B zone (Square 1989, Lot 162)

DECISION AND ORDER

HEARING DATES: April 13, 2004 and May 25, 2004
DECISION DATE: May 25, 2004

This appeal was filed with the Board of Zoning Adjustment (the Board) on January 5, 2004, challenging DCRA's decisions to approve two revised building permits at the Facility. The first revised permit, dated August 25, 2003, modified the seventh floor balconies, allegedly in violation of various setback requirements. The second revised permit, dated November 7, 2003, allowed Sunrise to relocate a trash room enclosure to the rear of the building, allegedly resulting in an increase in the floor area ratio (FAR) over that permitted as a matter of right and an unlawful protrusion into the rear yard. Sunrise moved to dismiss the appeal of both permits, claiming the appeal of the August 25, 2003 permit was untimely, and the appeal of the November 7, 2003 permit was barred by the doctrine of *res judicata*. After hearing argument and reviewing the written submissions of the parties, the Board voted to dismiss the appeal of both permits, finding that the appeal of the August 25, 2003 permit was untimely, and that the Appellant failed to state a claim of error with respect to the November 7, 2003 permit.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Public Hearing

The Office of Zoning scheduled a hearing on the appeal for April 13, 2004. In accordance with 11 DCMR § 3113.4, the Office of Zoning mailed notice of the hearing to the Appellant, the property owner, and DCRA.

[1] As originally filed, the appeal also challenged Building Permit Nos. B454064, B454523, B454596 and B453159. However, the scope of the appeal was narrowed at the public hearing held on April 13, 2004.

BZA
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Board of Zoning Adjustment
District of Columbia
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Parties

The Appellant in this case is the Nebraska Avenue Neighborhood Association (NANA) and the Advisory Neighborhood Association 3/4G (ANC 3/4G) (collectively, the Appellant). Sunrise, the owner of the subject property, was represented by Allison Prince, Esq. of Shaw Pittman, LLP. As the property owner, Sunrise is automatically a party under 11 DCMR § 3106.2. DCRA was represented by Lisa Bell, Esq., Senior Counsel.

Requests for Party Status

The Board received requests for party status from Anne Page Chiapella and John Frye, both residents of 5126 Nebraska Avenue, NW. However, Ms. Chiapella and Mr. Frye withdrew their requests for party status after clarifying that the Appellant represented their views and that they would assist the Appellant during its case presentation.

FINDINGS OF FACT

Background

1. The Sunrise facility is an assisted living facility located at 5111 Connecticut Avenue, NW. The property is located in a "split" zone: a portion of the property is in the R-2 zone and a portion is in the R-5-D zone.

2. NANA appealed DCRA's issuance of the main building permit for the Facility on or about March, 2001. The issuance of that permit was ultimately upheld by this Board and the DC Zoning Commission through its *sua sponte* review process[2] in BZA Orders No. 16716A, 16716B and Zoning Commission Order No. 952.

3. NANA filed a second appeal on or about March, 2002 challenging a remedial permit that, in part, modified the elevator penthouse in accordance with the Zoning Commission's decision. This Board dismissed the second appeal in BZA Order No. 16879-A, dated February 4, 2003. NANA moved for reconsideration of the Board's Order of dismissal, but the motion was dismissed as untimely.

4. NANA filed a third appeal on or about March, 2003 challenging a wall test report while construction was ongoing. This Board denied that appeal as premature in BZA Order No. 17010.

5. On or about December 5, 2003, the Sunrise facility was issued Certificate of Occupancy (C of O) No. 66771 by DCRA. The first resident moved into Sunrise

[2] The *sua sponte* review process is a discretionary review process of BZA orders that is set out in section 3128 of the Zoning Regulations.

on or about January 6, 2004, and twenty-two senior citizens resided there by the time of the public hearing in this appeal.

The Present Appeal

6. The present appeal was filed on January 6, 2004, and concerns a challenge to two revision permits, both of which were issued by DCRA prior to the C of O: permit B454315 issued by DCRA on August 25, 2003 (the August permit), and permit B456618 issued by DCRA on November 7, 2003 (the November permit).

7. Appellant claims that the August permit, which approved changes at the 7th floor roof level, resulted in a stairwell and penthouse not being enclosed, allegedly in violation of setback requirements in the Zoning Regulations.

8. Appellant claims that the November permit, which approved a relocation of a trash room enclosure, resulted in an unlawful increase in the FAR and a protrusion into the required rear yard.

The Motion to Dismiss

9. Prior to the public hearing, Sunrise filed a motion to dismiss the present appeal.

10. Sunrise contended that the August permit had no zoning impacts but that, in any event, that portion of the appeal challenging the August permit must be dismissed as untimely.

11. Sunrise originally claimed that the challenge to the November permit was barred by the doctrine of *res judicata*. In essence, Sunrise claimed that all zoning challenges had been adjudicated in the prior appeals; and, because the November permit made only minor interior changes to the Facility, no new zoning issues had been raised by the present appeal. Sunrise later withdrew its claim of *res judicata*, conceding that the relocation of the trash room was an exterior change that could have zoning implications and that this challenge had not been adjudicated during the prior Board appeals. Notwithstanding its change in legal theory, Sunrise maintained throughout the proceedings that the appeal of the November permit should be dismissed without a hearing because it did not state a factual or legal basis to support a claim of error.

The August Permit

12. Given the Appellant's close scrutiny of the Sunrise project, including three prior

appeals to this Board, the Board is persuaded that the Appellant knew or should have known about the August permit on or about the date it was issued, on August 25, 2003.

13. Appellant filed this appeal on January 6, 2004, more than 120 days after the August permit was issued.

14. Although it may have been difficult for the Appellant to obtain details from DCRA regarding the revised permits and plans, there is no evidence that DCRA's actions substantially impaired Appellant's ability to file an appeal.

The November Permit

15. The November permit authorized, among other things, the relocation of a trash room enclosure from a location adjacent to the alley stub to the southeastern corner of the site adjacent to the building.

16. The trash room, comprising approximately 80 square feet, abuts the rear of the Sunrise building. Although it was built into an existing retaining wall, it is not part of the building. It has a roof that was constructed at grade level.

17. According to the project architect, Sunrise was not constructed to its full allowable FAR, but had a "surplus" FAR of approximately 187 square feet. Also according to the architect, relocating the trash room did not result in an FAR calculation that exceeded the maximum allowed (Exhibit 24).

18. The Appellant did not provide specific information as to the amount of allowable FAR at the project, the amount of FAR existing before the trash room enclosure was moved, or the amount of FAR at the project after it was moved.

CONCLUSIONS OF LAW

The Appeal of the August Permit was Untimely

The District of Columbia Court of Appeals has held that "[t]he timely filing of an appeal with the Board is mandatory and jurisdictional." *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994). The Board's Rules of Practice and Procedure (11 DCMR, Chapter 31) require that all appeals be filed within 60 days of the date the person filing the appeal had notice or knew of the decision complained of, or reasonably should have had notice or known of the decision complained of, whichever is earlier. 11 DCMR § 3112.2(a). This 60-day time limit may

be extended only if the appellant shows that: (1) "There are exceptional circumstances that are outside the appellant's control and could not have been reasonably anticipated that substantially impaired the appellant's ability to file an appeal to the Board; and (2) "The extension of time will not prejudice the parties to the appeal." 11 DCMR 3112.2(d).

This appeal, filed January 6, 2004, was untimely filed as to the August permit. As stated in the Findings of Fact, Appellant knew or should have known about the permit approval when it was issued on August 25, 2003, or shortly thereafter. Thus, under section 3112.2(a) of the Regulations, the appeal should have been filed within 60 days of that date, or by October 24, 2003. Instead, it was filed on January 6, 2004, approximately 136 days after the Appellant was charged with notice of the decision complained of. While the Appellant may have had difficulties in preparing its actual case, the Board did not find any exceptional circumstances outside of its control that impaired its ability to file a timely, good faith appeal with respect to the August permit.

The Appeal of the November Permit

The *Res Judicata* Issue

The appeal of the November permit is not barred by the doctrine of *res judicata*, as originally claimed by Sunrise. Under the doctrine of *res judicata*, once a claim has been litigated, a party is precluded from relitigating the same claim in a subsequent proceeding. *Rhema Christian Center v. BZA*, 515 A.2d 189 (D.C. 1986). However, the appeal of the November permit raised new issues involving the alleged zoning impacts of the trash room relocation. It was undisputed by the parties that this permit approved the relocation of a trash room at the property. Because this relocation constituted an exterior change – not a minor interior change as originally suggested by Sunrise – it could conceivably have had a zoning impact. Appellant alleged that the relocation to the rear of the property resulted in an unlawful increase in FAR and an unlawful protrusion into the rear yard. While Sunrise denied each of these assertions, the issues were properly before the Board for its consideration.

Appellant Failed to State a Claim of Administrative Error

The FAR Claim

The Board's jurisdiction in an appeal pursuant to the Zoning Act is limited to whether an administrative official erred in the carrying out or enforcement of the Zoning Regulations. *See* D.C. Official Code 6-641.07(g)(1) (2001). With respect to the FAR claim, the Appellant never articulated what the exact administrative error was, despite repeated attempts from the Board to extract this information. Although the Appellant alleged that the trash enclosure resulted in an excessive amount of FAR, this claim was

never stated with any particularity. The Appellant never specifically alleged the amount of FAR that existed at the Facility before the trash room was moved. Nor did it allege the exact amount by which the allowable FAR had been exceeded, only that it was over that permitted as a matter of right.

The Appellant initially asserted in a pre-hearing submission (Attachment 9 appended to Exhibit 10) that the FAR had increased 78 square feet as a result of the trash enclosure being moved. When questioned by Board members, the Appellant asserted that the FAR had increased by 114 square feet. However, the Appellant never stated what it believed the FAR was to begin with. To be sure, the Appellant argued that the baseline FAR figure could be ascertained from a plan that had been submitted to DCRA. However, the plan referenced by the Appellant was submitted in connection with an earlier permit that preceded several design changes at the project. This plan could not possibly have represented the amount of FAR at the project at the point that the trash room was moved. Because the design changes necessarily resulted in new FAR calculations at each juncture, it was incumbent upon the Appellant to demonstrate the exact FAR prior to the relocation of the trash room, and the amount of additional FAR that resulted from the trash room being moved. Only by supplying these two critical figures could the Appellant have established how the trash room relocation impacted upon the FAR.

Because the Appellant never stated its FAR claim with any particularity, the Board is dismissing that portion of the appeal. As explained above, the Appellant failed to state its FAR- related claim with any degree of particularity, despite being afforded the opportunity to do so during two public hearings and/or by written submissions. In the interests of fairness and justice, and as a matter of law, the Board cannot countenance further proceedings on this issue when Appellant has failed to state a case that can be responded to by the Appellee and Sunrise, and considered by the Board.

The Protrusion Claim

Appellant claims that the November permit allows the trash room to unlawfully protrude into the rear yard of the property. The Board disagrees with this assertion as a matter of law and finds that the trash room enclosure lawfully occupies the rear yard.

Appellant's claim is based upon alleged violations of sections 2502.1 and 2503.1 of the Zoning Regulations. Section 2502.1 prohibits projections into required yards and other open spaces unless excepted elsewhere in section 2502 or section 2503 of the Regulations. Section 2503.1 prohibits structures in required yards unless excepted elsewhere in section 2503. However, Appellant incorrectly concludes that the enclosure is a "projection" or "structure", when in fact it is an "accessory building". Appellant claims the trash room enclosure is not "accessory" to the Sunrise building, but is part of it. The Board concludes otherwise. As stated in the Findings of Fact, the enclosure abuts

the Sunrise facility, but is not part of the building. Having concluded that the trash room enclosure is an accessory building, the Board turns to section 2500.2 of the Regulations. This provision not only permits accessory buildings in a rear yard; it limits their location to the rear yard. As such, the trash room enclosure lawfully occupies the rear yard and the November permit which approved this location was properly issued.

Therefore, for the reasons stated above, it is hereby **ORDERED**:

1. The motion to dismiss the appeal as untimely is **GRANTED** as to the revised building permit of August 25, 2003.

Vote taken on May 25, 2004
VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann, II., and Carol J. Mitten, in favor of the motion)

2. The motion to dismiss the appeal on the grounds of *res judicata* is **DENIED** with respect to the revised building permit of November 7, 2003.

Vote taken on May 25, 2004
VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann, II and Carol J. Mitten, in favor of the motion)

3. The motion to dismiss the appeal on the ground that it fails to state a claim of administrative error is **GRANTED** with respect to the revised building permit of November 7, 2003.

Vote taken on May 25, 2004
VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann, II and Carol J. Mitten, in favor of the motion)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: JUN 0 2 2005

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

SG/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPEAL NO. 17127

As Director of the Office of Zoning, I hereby certify and attest that on JUN 0 2 2005, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY:

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