**GOVERNMENT OF THE DISTRICT OF COLUMBIA**
**Board of Zoning Adjustment**

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

**HEARING DATE:** September 1, 2009
**DECISION DATE:** September 1, 2009

## DECISION AND ORDER ON REMAND

This case was remanded to the Board of Zoning Adjustment ("Board" or "BZA") for further proceedings consistent with the District of Columbia Court of Appeals ("Court of Appeals" or "Court") decision in *Chiapella, et al. v. D.C. Bd. of Zoning Adjustment*, 954 A.2d 996 (D.C. 2008).

## Procedural History

The Petitioner in *Chiapella* requested that the Court of Appeals review the Board's order of June 2, 2005 ("2005 Order") dismissing the Nebraska Avenue Neighborhood Association's ("NANA's" or "Appellant's") appeal of two building permits issued by the Department of Consumer and Regulatory Affairs ("DCRA") on August 25 and November 7, 2003. Specifically, the Petitioner claimed that the Board erred in: (1) Dismissing the appeal of the August permit as untimely; (2) Dismissing NANA's claim that the November permit allowed a trash room to unlawfully occupy part of the required rear yard, by finding that it was an accessory building; and (3) Dismissing NANA's claim that the building proposed by the November permit would exceed matter-of-right floor area ratio ("FAR") because the claim was not stated with particularity.

The Court of Appeals decision affirmed the Board's dismissals relating to the timeliness of the

[1] Although the subject property is currently zoned R-5-B, the base building permit, Building Permit No. B43564, was processed under R-5-D zoning controls.



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August permit and NANA's rear yard claim relating to the November permit. However, the Court found that the Board improperly dismissed NANA's FAR claim without a hearing, concluding that "the question whether addition of the trash room resulted in a FAR beyond the allowable amount is a question of fact, and [NANA was] entitled to present evidence to support [its] claim at an evidentiary hearing." *Chiapella*, 954 A.2d at 1004. The Court also found that the Board failed to hear or consider NANA's claim that the November permit approved plans that no longer showed a required loading space.

In accordance with the Court's ruling, the Board held an evidentiary hearing on September 1, 2009 to dispose of the FAR and loading issues. Each of the current Board members has read the record of this appeal as it existed prior to the issuance of the 2005 Order, including the initial hearing transcripts. Following the remand hearing, the Board deliberated and voted to deny the two remaining portions of the appeal.

**Parties**

The Appellant in this case is NANA. Advisory Neighborhood Commission 3/4G ("ANC 3/4G" or "the ANC") was automatically a party to the appeal, as was DCRA and the property owner, Sunrise Connecticut Avenue Assisted Living, L.L.C. ("Sunrise").

**ANC 3/4G**

The ANC filed two written reports with the Board prior to the Board's original hearing on April 13, 2004. In a report dated February 27, 2004, ANC 3/4G indicated that, at a regularly scheduled monthly meeting with a quorum present, the ANC voted to support the appeal and to request party status. (Exhibit 13). In a report dated April 12, 2004, ANC Commissioner Christopher Fromboluti, a registered architect, expressed his concerns regarding the FAR and loading issues. (Exhibit 18). Mr. Fromboluti stated that the relocation of the trash room resulted in a FAR above the maximum permitted because the trash room structure was mostly a "basement" (which counts toward FAR) and the FAR calculations erroneously excluded this area. Mr. Fromboluti stated further that an electric transformer was improperly occupying a required loading berth.

**Relevance of 2001 Order**

In addition to the record and the portions of the 2005 Order not related to FAR, the findings of fact that follow also rely upon relevant findings made by the Board in *Appeal No. 16716A of Nebraska Avenue Neighborhood Association,* 48 DCR 10157 (2001) ("2001 Order"). That appeal challenged the decision of the Zoning Administrator (the "ZA") to approve Building Permit No. B435464, the base building permit which allowed Sunrise to construct the assisted living facility.[2] NANA raised several issues during the 2001 appeal. Among other things,

[2] Between March, 2001 and March, 2003, NANA filed two other appeals with the Board alleging that the facility was in violation of several zoning regulations. The Board issued final orders in each of those matters. However, they are not germane to the current controversy.

NANA argued that the approved building violated FAR requirements, and that the loading areas for the approved building were "inappropriate".

## FINDINGS OF FACT

### The Property

1. The subject property is located at 5111 Connecticut Avenue, N.W., Square 1989, and Lot 162.

2. On March 8, 2001, the date that the base building permit for the project (No. B43564) was issued, the site was zoned R-5-D and was located in Square 1989, Lots 49-57 and 161.

3. On June 28, 2002, Lots 49-57 were rezoned to the R-1-B zone district.

4. On November 7, 2003, DCRA issued Building Permit No. B456618, which 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.

5. NANA filed an appeal of the permit on January 6, 2004.

6. The grounds remaining for disposition are whether, as a result of the relocation of the trash room, the building permit allowed more FAR than permitted and required fewer loading facilities than required under the Zoning Regulations (Title 11 DCMR).

### The FAR Issue

7. A maximum FAR of 3.5 is permitted in an R-5-D District. 11 DCMR § 402.4.

8. The Board has already determined that, prior to the relocation of the trash room, the building's FAR was 3.47. (2001 Order, Finding of Fact 32).

9. The difference between the 3.47 utilized and the 3.5 maximum FAR available resulted in a surplus FAR of approximately 187 feet prior to the relocation of the trash room.

10. The trash room enclosure is approximately 120 square feet.

11. The roof of the trash room enclosure was constructed at grade level. (2005 Order, Finding of Fact 16, quoted by the Court of Appeals in *Chiapella v. District of Columbia Bd. of Zoning Adjustment*, 954 A.2d at 1004).

12. Since the roof was constructed at grade, the portion of the structure below the roof would be below grade.

13. In addition, the ZA testified, and the Board so finds, that the plans for the November permit and photographic evidence show that the structure was underneath a layer of soil that was held back by a retaining wall that formed the boundary of the grade and, therefore, it was a structure below grade.

**The Loading Issue**

14. The Board previously found that the Sunrise facility is a community residence facility intended to be operated as housing for persons with handicaps pursuant to 11 DCMR § 330.5(d)[3] (2001 Order, Finding of Fact 21).

15. Subsection 2201.1 of the Zoning Regulations (Title 11 DCMR) provides that all new buildings or structures must be provided with loading berths, loading platforms, and service/delivery loading spaces as specified in the table appended to the provision.

16. There is no specific schedule for Community-Based Residential Facilities ("CBRFs").

17. Finding of Fact 71 of the 2001 Order found that the ZA correctly applied the schedule applicable to "any other use" for which no specific schedule applies.

18. That schedule requires one loading space with a depth of 20 feet.

19. The original plans showed a loading space with the required 20-foot depth.

20. The revised plans show the trash room in place of the designated loading space.

21. Sunrise claims that this space, though no longer specifically identified in the plans, was rotated and still exists.

22. Exhibit 2, attachment B-1 shows an area adjacent to the public alley that, though not labeled as such, would provide sufficient room for a loading area. In addition, Exhibit 14, Tab B-3, shows that same approximate area labeled as "Loading Area 800 feet".

**CONCLUSIONS OF LAW**

The Board is authorized by section 8 of the Zoning Act of 1938, D.C. Official Code § 6-641.07(g)(2) (2008 Repl.), to hear and decide appeals where it is alleged by the appellant that there is error in any decision made by any administrative officer in the administration of the Zoning Regulations. The burden of proof rested with the Appellant, 11 DCMR § 3119.2.

**Denial of FAR Claim**

As to this portion of the remand, the question for the Board is whether the relocation of the trash

[3] Current 11 DCMR § 330.5(d) was formerly cited as 11 DCMR § 330.5(i).

room enclosure triggered additional gross floor area, thereby increasing the FAR, and whether any such increase exceeded that maximum amount of FAR permitted.

At the outset, the Board notes that both the Appellant and the ZA reviewed the November permit under the R-5-D FAR standard, even though the property had been rezoned to R-5-B before the revised permit was issued. The Board will therefore undertake its analysis based upon the R-5-D standard. In doing so, the Board does not intend to establish precedent concerning the application of § 3202.4, which vests construction rights based upon the date a building permit is issued, but provides that "[a]ny amendment of the permit shall comply with the provisions of this title in effect on the date the permit is amended."

The resolution of the FAR claim depends upon whether the relocation of the trash room increased FAR above the 3.5 limitation. The Board had previously concluded in its 2001 Order that prior to the relocation of the trash room, the project's FAR was 3.47. The parties agree that the critical issue is whether all or part of the structure is below grade. That is because the computation of FAR only includes gross floor area. The definition of gross floor area does not expressly exclude buildings that are to be constructed entirely beneath grade. Rather, the definition of gross floor area found at 11 DCMR § 199.1 provides that "the term gross floor area includes basements, but not cellars."

A cellar is defined as "that portion of a story, the ceiling of which is less than four feet (4 ft.) above the adjacent finished grade" whereas a basement is "that portion of a story partly below grade, the ceiling of which is four feet (4 ft.) or more above the adjacent finished grade." Since no portion of a story less than four feet above the adjacent finished grade is counted against FAR because it is a cellar, an accessory building constructed at or below grade is not counted either because it is a stand-alone cellar, or more logically is simply not counted because no portion is above grade.

It was the burden of the Appellant to prove that a portion of the trash room was above grade and, as to that portion above grade, provide an exact computation of FAR that allocates the portion that was a cellar and that which was a basement. This Appellant failed to do this. In fact, the Appellant never proffered what the final FAR was after the trash room was moved. When questioned by Vice-Chairman Dettman, the Appellant's representative conceded that she was unable to calculate the gross floor area after the trash room was relocated. (Transcript, BZA Hearing of September 1, 2009, ("T.") p. 373 – 375). Instead, the Appellant stated that she needed further "advice" from the ZA in order to make this calculation. (T., p. 375).

Even though this failure of proof is enough to deny the appeal, the Board concludes that there is sufficient evidence in the record to conclude that the structure was entirely below grade and therefore not countable towards FAR. First, there is the Board's own finding in the 2005 Order that the roof of the structure was at grade, and the structure itself was, therefore, below grade. However, because it is not clear that this determination was "essential" to the Board's disposition of the accessory building issue, see *Ali Baba Co., Inc. v. WILCO, Inc.* 482 A.2d 418, 421 (D.C. 1984), that finding does not have a preclusive effect. It is, however, corroborated by the

photographic evidence presented by the ZA, and his interpretation of it. Therefore, the Board concludes the trash room was below grade and was properly excluded from the FAR calculation.

Even if the accessory building were completely above grade, its contribution towards FAR would not have resulted in the facility's FAR exceeding 3.5 because the total square footage of the trash room of 120 square feet was less than the 187 square feet of surplus FAR available.

**Denial of the Loading Claim**

Likewise, the Appellant failed to establish that the ZA erred with respect to the loading requirements. The Board determined in 2001 that the Sunrise facility was a CBRF, not a 102-unit apartment building as claimed by the Appellant (T., p. 396). Because 11 DCMR § 2202.1 contains no specific schedule for a CBRF use, as it does for an apartment house, the Board found both that the ZA appropriately used the schedule pertaining to "any other use" and that the necessary facilities were provided.

The required facilities include one service/delivery loading space with a minimum depth of 20 feet. The original plans showed such a space that met this requirement. However, the plan for the relocated trash room showed that structure at a location where the loading space had been. The Appellant argues that the space no longer exists, while Sunrise claims that the space was re-located.

The Board agrees with the ZA that a properly dimensioned space was provided for on the revised plans. Specifically, Exhibit 2, attachment B-1 shows an area adjacent to the public alley that, though not labeled as such, could be used as a loading space with a depth of at least 20 feet. Thus, the missing loading berth has been accounted for.

**ANC Issues and Concerns**

Section 13(b) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10 (d)(3)(A)), requires that the Board's written orders give "great weight" to the issues and concerns raised in the recommendations of the affected ANC (herein referred to as the "Commission"). Specifically:

> The written rationale of the decision shall articulate with particularity and precision the reasons why the Commission does or does not offer persuasive advice under the circumstances. In so doing, the government entity must articulate specific findings and conclusions with respect to each issue and concern raised by the Commission. Further, the government entity is required to support its position on the record.

The Board has considered the ANC's issues and concerns, but does not find the ANC's advice to be persuasive. The ANC asserted that the placement of dirt at the trash enclosure room was insufficient to create a below grade structure, and that most of the structure was a "basement"

instead of a cellar. For the reasons explained above, the Board finds that the ZA did not err in finding that the trash room was below grade, and that its relocation had no impact on the FAR.

The ANC asserts non-compliance with the loading requirements because it alleges that an electric transformer occupies the site of a required loading berth. If true, that would be a violation of the Zoning Regulations and the ANC could request DCRA to investigate the matter. However, the revised plans show the required number of loading facilities with no electric transformer present. Therefore, the ANC's concern is not relevant to this appeal.

Therefore, for the reasons stated above, it is hereby **ORDERED** that those portions of the appeal relating to the FAR claim and loading facilities claim, are hereby **DENIED.**

Vote taken on September 1, 2009

**VOTE:** **4-0-1** (Marc D. Loud, Shane L. Dettman, Meridith H. Moldenhauer and Michael G. Turnbull to Deny the appeal; No other Board member (vacant) participating)

**BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT**
A majority of the Board members approved the issuance of this Decision and Order, all of whom read the record on the appeal.

**ATTESTED BY:** _____
**JAMISON L. WEINBAUM**
**Director, Office of Zoning**

**FINAL DATE OF ORDER:** JUN 17 2010

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND 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