GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16716 of Nebraska Avenue Neighborhood Association, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, in the issuance of a building permit (No. B435464) on March 3, 2001, to Sunny and Louis Reyes et al. to permit the construction of a 102 unit handicapped assisted living apartment residence in an R-2 and R-5-D District at premises 5111, 5113, 5117, 5119, 5121, 5123, and 5125 Connecticut Avenue, N.W., and 5201, 5203, and 5205 Chevy Chase Parkway, N.W. (Square 1989, Lots 49-57 and 161).

ORDER

This matter is before the Board of Zoning Adjustment pursuant to a motion to recuse Board Member Anne M. Renshaw from this appeal filed on May 7, 2001, by Sunrise Assisted Living LLC (Sunrise), the party-in-interest in this appeal.[1] After reviewing the motion and the responses thereto and debating the matter in a public meeting, and having asked Member Renshaw to voluntarily recuse herself, the Board, on July 10, 2001, voted 4 – 1 – 0 to recuse Member Renshaw.

Procedural Background

This appeal was filed on March 16, 2001, by the Nebraska Avenue Neighborhood Association (NANA) to challenge the Zoning Administrator's approval of the issuance of Building Permit No. B435464, involving the Sunrise assisted living facility at 5111 Connecticut Avenue, N.W. Under the Board's Rules of Practice and Procedure, the Advisory Neighborhood Commission (ANC) for the area within which the property that is the subject of the appeal is located is automatically a party to the case. 11 DCMR § 3199.1. The subject property is located within the area served by ANC 3G. As indicated by its letters dated April 9, 2001 (Ex. 16) and June 25, 2001 (Ex. 29), ANC 3G joined in this appeal with NANA in challenging the Zoning Administrator's decision. Member Renshaw serves as the chairperson of ANC 3G.

The public hearing on this appeal was scheduled for July 17, 2001. On May 7, 2001, Sunrise filed its motion to recuse Member Renshaw, but failed to serve any of the parties to the appeal. To allow for a decision prior to the commencement of the public hearing on this case, the Board scheduled a decision meeting on the motion for June 26, 2001. At the June 26th

[1] As the owner of the property that is the subject of this appeal, Sunrise is automatically a party pursuant to 11 DCMR § 3199.1.

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meeting, staff advised the Board that the motion had not been served on the parties. The Board therefore continued the meeting to July 10, 2001, to afford the parties the opportunity to submit written responses to the motion. In accordance with its customary practices, the Board did not allow oral testimony or argument on the motion. To ensure service of the motion, Office of Zoning staff mailed all the parties to the case a copy of the motion. The Board reviewed the motion and the responses thereto at a decision meeting on July 10, 2001.

In its motion, Sunrise argues that Member Renshaw must be recused on the grounds of personal bias and knowledge of the facts of the case gained outside of the Board's hearing room, based on Member Renshaw's presence and participation at various ANC meetings involving the proposed project. Sunrise asserts, and Member Renshaw does not dispute, that Member Renshaw was present at a number of meetings involving the Sunrise project, including:

(1) ANC meetings on the proposed closing of an alley stub behind the project site, which included discussion of the proposed use, height, and mass of the building, and which resulted in redesign of the project;

(2) ANC meetings involving the down-zoning of a three-block area that includes the subject property, as well as the Zoning Commission map amendment hearing;

(3) ANC meetings at which the Sunrise project was discussed in great detail; and

(4) An ANC meeting at which the instant appeal, which involves the effect of the down-zoning on the project; the application of the area restrictions and parking and loading requirements of the Zoning Regulations to the project; and the proposed use of the building, was discussed.

NANA filed a response to Sunrise's recusal motion on July 6, 2001, encouraging the Board to preserve its full voting strength and disputing Sunrise's allegations of bias. Sunrise responded on July 9, 2001, reiterating its request for recusal.

ANC 3G, in a letter dated July 7, 2001, requested additional time to respond to the motion. As the recusal of a Board member is not a decision affecting an ANC area, but rather involves the Board's ethical conduct, the Board declined to further postpone a decision on the motion.

In addition, NANA, on July 10, 2001, filed a "Motion to Dismiss the Motion by Sunrise Assisted Living LLC to Recuse Anne Renshaw," arguing that the Board should not consider the Sunrise motion since Sunrise had not served it on the parties to the appeal and that Sunrise failed to establish bias. As the Office of Zoning had distributed the Sunrise motion to all the parties before the Board's decision meeting, thus affording the parties an opportunity to submit a written response, the Board believes it was appropriate to proceed with the recusal motion. As discussed

below, the Board does not base its decision on the grounds of personal bias. The Board thus voted 4 – 1 – 0 to deny NANA's motion to dismiss.

Recusal

In *Morrison v. District of Columbia Board of Zoning Adjustment*, 422 A.2d 347, 349 (D.C. 1980), the Court of Appeals held that the rules governing the recusal of judicial officers apply to agency decision-makers acting in a quasi-judicial or adjudicative capacity. As recently as January 25, 2001, in *Dupont Circle Citizens Ass'n v. District of Columbia Alcoholic Beverage Control Board*, 766 A.2d. 59, 65 (D.C. 2001), the Court reaffirmed that quasi-judicial agencies must adhere to the criteria governing the recusal of judicial officers. The Court thus applied the Code of Judicial Conduct, effective June 1, 1995,[2] in a case upholding the decision of the ABC Board to recuse one of its members who, before being appointed to the ABC Board and while serving as chairperson of his ANC, had been involved in opposing an applicant's previous ABC Board application. The Court also stated that an agency tribunal may, as "an important aspect of agency self-governance," determine whether to assert "the authority to itself disqualify a member." 766 A.2d at 65.

Section 3E(1) of the Code of Judicial Conduct states in pertinent part as follows with the respect to the disqualification or recusal of a judge:

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, included but not limited to instances where:
>
> (a) *the judge has* personal bias or prejudice concerning a party or a party's lawyer, or *personal knowledge of disputed evidentiary facts concerning the proceeding*;
>
> ....
>
> (d) *the judge* or the judge's spouse, or a person within the third degree of relationship to either or them, or the spouse of such a person:
>
> (i) *is* a party to the proceeding, or *an officer*, director or trustee *of a party* . . . .

(emphasis added). The term "knowledge" is defined in the Code of Judicial Conduct as "actual knowledge of the fact in question. A person's knowledge may be inferred from the circumstances."

Member Renshaw states that she has no personal bias concerning Sunrise; and in this order, the Board makes no findings or conclusions that Member Renshaw should be disqualified

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[2] A copy of the Code of Judicial Conduct may be obtained from the Executive Office of the District of Columbia Courts, H. Carl Moultrie I Courthouse, 500 Indiana Avenue, N.W., Washington, D.C. 20001.

on the grounds of personal bias. Nonetheless, section 3E(1)(a) of the Code of Judicial Conduct requires disqualification whenever a judge has "personal knowledge of disputed evidentiary facts concerning the proceeding." There is no question but that Member Renshaw has personal knowledge of disputed facts concerning this appeal by virtue of her attendance and participation in a number of ANC meetings at which the Sunrise project, the down-zoning of the property, and the instant appeal were discussed in detail. The fact that Member Renshaw abstained from voting at the ANC meetings does not cure the disqualification, since the disqualification results from her personal knowledge of facts involved in the appeal, not from whether or not she voted on matters involving Sunrise or involving this appeal.

As a matter of due process and under the District of Columbia Administrative Procedure Act, D.C. Code § 2-509(c) (2001), as well as the Board's own Rules of Practice and Procedure, 11 DCMR § 3127.2, the parties to this appeal are entitled to a decision based upon the official or "exclusive record" of the proceedings before the Board. The parties are thus afforded the opportunity "to conduct such cross-examination as may be required for a full and true disclosure of the facts." D.C. Code § 2-509(b). Given the extent and nature of Member Renshaw's familiarity with the facts involved in this appeal, the Board can find no practical method of affording the parties a meaningful opportunity to cross-examine or respond to information that Member Renshaw gained outside the Board's hearing room.

In addition, ANC 3G, which is automatically a party to the appeal and whose recommendations concerning the zoning issues in dispute will be given "great weight" by the Board pursuant to D.C. Code § 1-309.10(d) (2001), has determined to join with NANA in bringing the appeal. Under Section 3E(1)(d)(i) of the Code of Judicial Conduct, a judge must recuse himself or herself whenever he or she is an officer of a party to the proceeding. As chairperson of ANC 3G, an officer of a party, Member Renshaw is disqualified from hearing and participating in this case.

In conclusion, Member Renshaw is disqualified from participating in the Board's proceedings because (1) she has personal knowledge of the disputed facts of the appeal and (2) she is an officer of a party to the appeal. Sunrise has not agreed to waive the disqualification, as would be required under Section 3F[3] of the Code of Judicial Conduct in order for Member Renshaw to participate in this appeal. Therefore, as Member Renshaw has declined to recuse herself, the Board has determined to recuse her from this appeal.

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[3] Section 3F provides a procedure whereby the parties to a proceeding may waive the disqualification, provided the disqualification is not based on personal bias or prejudice concerning a party:

> Remittal of Disqualification. A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceedings.

ORDER

Based on the above, it is ORDERED that the Motion to Dismiss the Motion by Sunrise Assisted Living LLC to Recuse Anne Renshaw filed by the Nebraska Avenue Neighborhood Association is **DENIED.**

VOTE: 4 – 1 – 0 (Sheila Cross Reid, Carol J. Mitten, Geoffrey Griffis, and Susan Morgan Hinton, to deny the motion; Anne M. Renshaw, opposed).

It is further **ORDERED** that the Motion to Recuse Board Member Anne Renshaw filed by Sunrise Assisted Living LLC is **GRANTED.**

VOTE: 4 – 1 – 0 (Carol J. Mitten, Susan Morgan Hinton, Sheila Cross Reid, Geoffrey Griffis, to grant the motion; Anne M. Renshaw, opposed).

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

Each concurring member has approved the issuance of this Order.

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

DATE OF ORDER: JUL 26 2001

MS

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPEAL NO. 16716

As Director of the Office of Zoning, I hereby certify and attest that on JUL 2 6 2001 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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