FINDINGS OF FACT

BZA Appeal No. 16716
August 28, 2001

Submitted by the
NEBRASKA AVENUE NEIGHBORHOOD ASSOCIATION
Appellant

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INTRODUCTION

I. The Zoning Administrator's representative (ZA) claims that Building Permit No. B435464 was issued appropriately based on the implication that DCRA "precedence" in accepting certain characteristics of building permit applications overrides Title 11, Zoning Regulations of the District of Columbia Municipal Regulations (11 DCMR). The ZA claims practices of DCRA as the standards to evaluate applications. **He claims this for issues on which 11 DCRA is not silent, but is mandatory**, such as setback requirements and referrals to other agencies. (BZA hearing testimony, August 3, 2001; ZA submission to BZA, August 15, 2001). To sustain this instant permit based on DCRA "precedence" would deprive the Zoning Commission of the power to provide enforceable regulations, the BZA of power to enforce the regulations and the regulations themselves of any consistent interpretability. The BZA should find in favor of the Appellants if the application does not meet the stated requirements of 11 DCMR.

II. The ZA has inappropriately relied on "precertification letters" presented by the Applicant and information in application No. 590AA itself, rather than evaluate several code requirements directly. Specific code requirements at issue include use, parking, FAR and rear yard setback requirements. Two of the "precertification letters," prepared well in advance of submission of the application, requested and received (signature or initialed) agreement from a ZA not an employee at the time of the application and one by a Zoning Administrator who did not attend the hearing and could not be cross-examined.

It is significant that the "precertification letters" do not provide specific and accurate details of the use, property, footprint and setbacks that were agreed to. Moreover, details relating to use and design of the structure changed between signing of the letters and submission of the application and plans. These "precertification letters" are not appropriate substitutes for ZA evaluation of application 590AA under 11 DCMR.

III. The ZA redefines terms in order to defend the decision to issue Building Permit No. 435464. 11 DCMR is not silent of definitions of terms not specifically provided (11 DCMR §199.2 (g)). Words not defined in this section shall have the meanings given in Webster's Unabridged

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Dictionary. It follows that a standard brick wall may not be defined as a façade in order to avoid setback requirements of roof structures; a roof may not be defined as an embellishment on order to avoid height limitations, setback requirements, or FAR requirements. Many roofs are over open space normally defined as "attic." (11 DCMR §199.1)

IV. "Testimony" refers to BZA meeting or hearing testimony, unless otherwise specified. "11 DCMR" refers to in the District of Columbia Municipal Regulations, Title 11 Zoning Regulations. Item references in the Introduction and Main Findings of Fact refer to numbered items presented in the Detailed Findings of Fact. References in the Detailed Findings of Fact refer to materials submitted to BZA Case No. 16716 on the date, section and page(s) specified, unless otherwise noted..

MAIN FINDINGS OF FACT

A. July 17, 2001, Sunrise Assisted Living, LLC (Sunrise), as Intervener, claims to have recently purchased all properties in the subject development site. They did so knowing (1) there is a covenant limiting development on the subject site, (2) ANC 3G and the DC City Council had voted against a previous alley-closing application for the alley stub bordering this site (S.O. 86-46), (3) the area was to be down-zoned from R-5-D to R-5-B, and there was an appeal of the building permit No. B435464. The first two events occurred before Sunrise purchased any property or submitted an alley-closing application. They proceeded at their own risk. (Items 1-10, 24-29)

B. Louis and Sunny Reyes et al submitted a building permit application (No. 590 AA) on July 10, 2000. The application form and other required materials contained many errors and omissions, some of which were later identified by DCRA. Errors and omissions included lack of specified residential use of the building, misstatement of current use of the site, lack of information on penthouse setbacks, and lack of site plan. The Applicants submitted a revised application on February 5, 2001. The Building and Land Regulation Administration (BLRA) issued a building permit, No. 435464, on March 8, 2001. The Nebraska Avenue Neighborhood Association (NANA) appealed the issuance of this permit on March 16, 2001, based on numerous non- compliances with 11 DCMR.. (Items 12-15, 17-24)

C. The roof structures do not comply with 11 DCMR §§400.7, 411.3 and 411.10.

> Section 400.7 requires setback from the exterior wall by a distance at least equal to the height above the main roof. There is no setback for the roof structures. (Items 34-35; see also Items 36-39).
>
> Section 400.7 requires that the roof structures shall not exceed 18 ft. 6 in. In height. The elevator penthouse exceeds this height by several feet. (Item 41)

Section 411.3 requires that there is a single structure. There are two structures. The roof around the entire Main Roof does not make the two structures a single structure; the roof itself is not setback by a distance equal to its height. (Item 42)

Section 411.10 requires the Zoning Administrator to submit the roof structure plans to the Director of the Office of Planning. This was not done. (Item 43; see also Items 44-45)

D. The height of the building shall not exceed 90 feet in the R-5-D District. (11 DCMR §400.1) However, the height of this building to the top of the roof over the 7th floor is at least 92.93 feet. The height of the building measured from the front curb to the highest point of the roof or parapet wall (which is the top of the roof over the elevator penthouse) is nearly 98 feet. (Items 46-50; see also Items 51-52)

E. The FAR in a R-5-D district is 3.5. (11 DCMR §401) The Applicant's estimated FAR, which was used by the ZA, incorrectly excludes square footage in the basement, 3rd floor, 7th floor, attics and the main roof structures. The actual FAR is substantially over the allowed 3.5. (Items 53-62)

F. The rear yare setback is noncompliant with 11 DCMR §§199.1 and 404.1. The rear yard setback does not extend across the entire rear yard–there is no setback at all across part of the rear of the building. In addition, where there is a rear yard setback, it does not meet the required 4 inches per 12 inches. (Items 63-68)

G. The parking requirement for a CRF serving 16 or more residents is to be determined by the BZA. (11 DCMR §2101.1) The parking requirement for this application, however, was not determined by the BZA but by a "precertification letter" signed by a former DCRA employee who did not evaluate the actual application or the actual use at the time of application. The parking was determined to be 1 space per 6 units, based on **subsidized housing reserved for the elderly and/or handicapped**. That is not the use of this facility. The parking requirement for this facility has not been appropriately evaluated. (Items 69-71)

H. Application 590 AA plans do not include a separate delivery plan showing routing and grading, as required by 11 DCMR §§ 2200.3 and 3201. The Grading plan shows grade is not appropriate for deliveries for the in the service/delivery space located next to the trash enclosure. In addition the loading dock does not have unobstructed access to the building as required by 11 DCMR §2203.2. The loading and delivery requirements of 11 DCRA are not met. (Items 72-75)

I. The Applicant claims a matter-of-right use based on the facility meeting requirements as a Community Residence Facility (CRF) serving the handicapped, as defined by the Fair Housing Act (11 DCMR §330.5(i). Applications for CRFs shall meet all applicable code and licensing requirements (11 DCRA §358.6). This facility is noncompliant with many of the requirements for a CRF, including requirements for common toilets and not confining residents (the facility

contains a locked ward on the third floor). The facility is located in an R-2 District, which requires a special exception for a CRFs of more that 8 residents (this facility has 130 residents). The application does not meet a mater-of-right use in R-5-D/R-2 Districts. (Items 76-82)

J. Application No. 590 AA is not vested under R-5-D District, as it was substantially incomplete at the time of the a Zoning Commission remapping setdown hearing on October 16, 2000. The application did not comply with vesting requirements in 11 DCMR §§3204 and 3202.2 which require the application be complete, including all necessary information needed to evaluate the application. The July 10, 2000 application contained significant errors and omissions, including specific use, plat, delivery plan, basis for computing parking and loading plans, current use of the property and work to be done. The specific use, for example, was not declared until a revised application was submitted on 2/5/01. The application is not vested under R-5-D. (Items 12, 16-20, 25-26 and 83-88)

DETAILED FINDINGS OF FACT

BACKGROUND AND TIME LINE

1. A covenant limiting development to single family homes was provided for the property bordering on Connecticut Ave. NW in Square 1989 was created in 1923. This includes all lots facing on Connecticut Avenue, NW (testimony 8/3/01; Appellant's submission, 8/3/01)

2. In 1986, Louis and Sunny Reyes applied to close the public alley stub which borders on the subject development. (Appellant's submission dated 7/7/01-- Application No. S.O. 86-46; Public records, Surveyor's Office, DCRA).

3. 1988 ANC 3G unanimously voted against closing the public alley and discussed downzoning the area. The District of Columbia unanimously voted against closing the alley. (Testimony 7/10/01; Appellant's submission, 7/7/01; ANC 3G public records; DC Register, 1988).

4. In December, 1998, Sunrise Assisted Living, LLC (Sunrise) met with Deputy Zoning Administrator Gladys Hicks regarding an assisted living residence proposal on the subject property. Specific details of the proposed development are not documented. Sunrise provided a letter, dated Dec. 15, 1998, to Gladys Hicks requesting that Ms. Hicks agree that the development would qualify as a Community Residence Facility serving the handicapped, as that term is described in the Fair Housing Act. Ms. Hicks signed the letter indicating her agreement. (Testimony 8/3/01; Appellant's submission, 7/3/01, Appendix G, p.1; equals Intervener's submission 7/10/01, Appendix A)

5. In 1999, the Zoning Commission added a matter-of-right use to R-4 Districts, .11 DCMR 303.5 (i) : ((i) Community based residential facility; Provided, that notwithstanding any provision in this title to the contrary, the Zoning Administrator has determined that such community based facility, which otherwise complies with the zoning requirements of this title that are of general and uniform applicability to all matter of right uses in an R-4 District, is intended to be operated as housing for the handicapped as that term is defined under Section 3602 (h) of the Fair Housing Act, as amended, 42 U.S.C. Section 3601 et seq. (1955). Section 802 of the FHA defines handicap as follows:

> (h) "Handicap" means, with respect to a person;
> (1) A physical mental impairment which substantially limits one or more of such person's major life activities.
> (2) A record of having such an impairment, or being regarded as hiving such an impairment..

6. March, 1999, Sunrise met with Ms Hicks and discussed the delivery and loading dock requirements of a building of 30,000 to 100,000 sq. ft. and the parking requirements of a residential building providing **subsidized housing reserved** for the handicapped and elderly [emphasis added]. March 9, 1999, Ms. Hicks signed a letter agreeing that these were the requirements for such a building. (Appellant's submission, 7/3/01, Appendix G, p.3; equals Intervener's submission 7/10/01, Appendix B)

7. In 1999, Sunrise purchased two properties on Chevy Chase Parkway, 5203 Chevy Chase Parkway (zoned R-5-D) and 5205 Chevy Chase Parkway (zoned R-2), which are included in the subject development proposal. (DC tax records)

8. August 2, 1999, Sunrise applied to close a public alley in order to build a 110,000 sq. ft. building with FAR of 3.72 at the subject property. (Sunrise Statement submitted 7/10701; Appellant's submission, 7/7/01--Sunrise alley-closing application)

9. At ANC 3G public meeting on February 14, 2001, Sunrise discussed it's alley-closing application and planned development for a building of 110,000 sq. ft. building with FAR of 3.72 at the subject property. The project was described as an independent **and** assisted living facility for the elderly. (Intervener's submission, 7/10/01; ANC 3G public records)

Under 11 DCRA, such use could qualify as an apartment building and/or a Community-Based Residence Facility / Community Residence Facility (11 DCMR 199.1). At this meeting, the denial of the previous alley-closing application was discussed.

10. May, 2000, ANC3G, after many meetings with the Applicant, voted to oppose closing the alley (ANC 3G minutes; public records; Intervener's submission, 7/7/01)

11. May 2, 2000, Sunrise met with Zoning Administrator, Michael Johnson, and discussed height, setback and courts of the proposed development. A site map shows the development on Lots 49 to 56 in Square 1989. Minimal frontage of the development on Chevy Chase Parkway is shown because Lot 161 (R-2) is omitted from the development plan. The court mentioned in the letter to Michael Johnson is shown on the map as Lot 57. (Appellant's submission, 7/3/01, Appendix D, page 1 [identical to] Intervener's submission, 7/10/01, Appendix E, page 1; Appellant's submission 7/10/01, page 2). Sunrise requested Mr. Johnson initial a letter indicating his agreement to the described requirements, including the side court listed as 22 ft 6 in. wide. Mr. Johnson initialed his agreement on July 8, 2001. This "precertification letter" and map did not accurately represent the project as submitted in the July 10, 2000 building permit application No. 590 AA. (Appellant's submission 7/3/01, Appendix A, pp 1-13, Appendix B)

12. July 10, 2000, Mario Escalante, as Agent for Owner, submitted a building permit application for a "New Building" at the subject site on behalf of "Louis and Sunny Reyes et AL".

The zoning was listed as **R-5-E**.

The Lot was described as "(Site per Sub)" but no site plan was provided.

The use of the building (Question-16) was listed as "residential;" the current use of the site (Q-13) was listed as "Vacant" after "residential" was crossed out by the Applicant. [Application form states: ERASING, CROSSING OUT, WHITING OUT, OR OTHERWISE ALTERING ANY ENTERED INFORMATION WILL VOID THIS APPLICATION]

Under Q-11 Type of Proposed Work (**check all applicable boxes**) [emphasis added] only New Building was checked.

Retaining Walls was not listed even though the plans showed retaining walls, regrading land to be held up by retaining walls, including raising grades which require retaining walls to protect neighbors' property and the alley.

No demolition was listed although Q-22 razing a building was marked Yes; Q-23 area to be disturbed more than 50 sq. ft was marked Yes; and submitted plans included a Demolition Plan.

No Soil Erosion Control Methods (Q-24) were listed, AS REQUIRED by Q-23.

No. of Footings or Columns was not listed (Q-26) although plans clearly showed footings and columns.

Total Lot Area was incorrectly listed as 23,106 sq. ft. which includes only the nine R-5-D lots although the plans clearly showed the project extending onto the R-2 lot (5205 Chevy Chase Parkway, Lot No. 161) which added an additional 4,059 square feet. This lot was included on all the relevant submitted plan drawings.

Present Gross Floor Area of Bldg.. (Q-44) was blank, consistent with Vacant land." Listing of percentage paved area and greenery (Q-43) was blank.

Number and type of projections (Q-48) was blank although plans showed projecting balconies and storm-water facility projecting into a required side yard; stairs and elevated patio projecting into rear yard.

Volume of new building listed as 1,048,615 which approximates the volume of areas included in FAR calculation areas plus cellar only, and appears to exclude volume under roof, roof structures, storm water management facility, etc.

Intake zoning approval (page 4) was left blank.

(Appellant's submission, 7/3/01, Exhibit D, page 1--Building permit application 590AA dated 7/10/00; Appellant's submission, 8/10/01 Plan Correction List, dated July 18, 2000).

13. July 18, 2000, DCRA submitted a Plan Correction List which requested, among several items, a site plan for the subject development (Appellant's submission, 8/10/01; DCRA public records)..

14. On or after July 29, 2000, the Applicant provided a site plan, "Date: July 23, 2000 (REVISED JULY 29, 2000)," for the subject development. (Site Plan: Applicants' submission, 7/3/01, Appendix A, Page 1–Site Plan)

15. September 13, 2000, the architect for the development, Mr. Stephen Ruiz, submitted an Environmental Impact Screening Form inaccurately stating the height of the building as 23 ft. 2 inches and the cost as $1.38 million dollars. Agency reviews were conducted based on the inaccurate information. (Appellant's submission, 7/3/01, Appendix F; testimony, 8/3/01).

16. October 16, 2000: Zoning Commission setdown hearing for remapping of east side of Connecticut Ave., NW, between Nebraska Ave NW and Jocelyn Street NW.

17. Nov. 13, 2000, Mrs. Xian Mac submitted a Plan Correction List asking the specific "residential" use of the building and the setback of the penthouse from the exterior walls. (Appellant's submission, 7/3/01, Appendix E, page 1).

18. January 19, 2001, Denzil Noble writes letter to Paul Tummonds, attorney for the Sunrise, instructing the Applicants how to describe the use of the building in order to obtain it's use as a "matter-of-right." (Appellant's submission, 73/01, Appendix E, page 2).

19. In the January 19, 2001, letter, Sunrise was also informed that the city had investigated the properties and found that they were not vacant. The Applicant was told to correct the building permit application. (Testimony, 8/3/01; Appellant's submission, 73/01, Appendix E, page 2)

20. February 5, 2001, Applicants submitted a revised application listing proposed the use: "CRF (housing for the handicapped as the term is defined by the Fair Housing Act);" current use as "Residential, partially vacant Facilities." Current use of the site was corrected to say residential, partly vacant. (Appellant's submission, 7/3/01, Appendix E, page 6).

21. DCRA approvals of the revised application occurred rapidly and evaluations missed critical items, such as requirement for two emergency exits from each floor and each fire compartment. Fire Compartment B on the 1st floor and the 7th floor each have only one emergency exit. (The stairwell on the first floor, Fire Compartment B, does not give immediate exit from the building at ground level. The first floor stairs–1 ½ flights-- in the Compartment B stairwell do not match the basement or 2nd - roof level stairs.) (Appellant's submission 710/01, pages 6 and 8; Applicant's submission, 7/3/01, Appendix A, pages 6-13; testimony, 8/3/01).

22. Chronology of plan sign-offs reported on REV 590 AA::

Clearance to file plans	
Zoning	2/7/01
Approvals:	
Mechanical Eng. Review	2/2/01*
Plumbing Eng. Review	2/2/01*
Electrical Eng. Review	2/7/01
Health Plan Review	2/7/01
Elevator Plan Rev. Sec.	2/7/01
Zoning	2/14/01
Fire Prevention Plan Review	2/16/01
Erosion Control	3/6/01
Storm Water Mgmt	3/6/01
DPW Permit and Records Div	3/8/01
Water/Sewer Design Branch	3/8/01
Environmental Policy Review	3/8/01
Structural Eng	3/8/01
Q.C.	3/8/01

*Signed by same person

23. March 8, 2001, permit No. 435464 was issued for the subject site (Appellant's submission 7/3/01, Appendix E, page 9)

24. March 16, 2001, Nebraska Avenue Neighborhood Association filed to the BZA an appeal of the Zoning Administrator's decision to issue Building Permit No.435464.

25. March 29, 2001, Zoning Commission hearing on remapping of east side of Connecticut Ave, NW as described in Oct. 16, 2000 setdown hearing.

26. June 5, 2001, Zoning Commission votes to remap east side of Connecticut Ave., Nebraska Ave. to Jocelyn Street, NW.

27. June 16, 2001, Demolition Permit approved for 5111 Connecticut Ave., NW, **owners Louis and Sunny Reyes**. (DCRA public records; not supplied by DCRA at time of Appellant's pre- or post-hearing filings)

28. July 10, 2001. Sunrise claims to have purchased all properties involved in the development. The D.C. tax records on July 15, 2001 showed Sunrise as owning only 2 properties. Sunrise claims that is because the tax records are not up to date. (Testimony, July 10, 2001).

29. Public records show that Sunrise did not purchase all the property before June 16, 2001. (Item 27; public records showing applications for other demolition and plumbing permits by Reyes, attached) At the time of any such purchase, Sunrise was aware of the Covenant, alley-closing denial in 1988, remapping proposal P32-00, appeal of Building Permit No.435464, and that numerous errors in the application had been pointed out to DCRA. They proceeded at their own risk.

DESCRIPTION OF THE SITE

30. The subject properties are located at current addresses 5111, 5113, 5115, 5117, 5119, 5121, 5123 Connecticut Avenue, NW, and 5201, 5203, and 5205 Chevy Chase Parkway; as of July 2000, the lots were Nos. 49-57 and 161 in Square 1989. The zoning of the parcels on July 10, 2000, was R-5-D for all but 5205 Chevy Chase Parkway, which is R-2.

31. The Applicant's materials describe the property borders are as follows: north--Chevy Chase Parkway; west Connecticut Avenue, NW; south--lot No. 48; east--lot no. 161 alley stub and alley. (Appellant's submission on July 3, 2001, Appendix B, page 1)

32. The natural topography of the area is sloping with the elevation falling as you travel from west to east and north to south. The current finished grade at the rear of the current houses in the R-5-D zone is more than 4 feet to the ceiling for all properties. The rear of the proposed building extends more than 10 feet downgrade compared to the current residences (Appellant's

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submission, 7/3/01, Appendix A, page 5–Grading Plan). The rear of current dwellings bordering on the alley stub have nearly a full basement at the rear of each residence (Grading Plan; Appellant's submission 7/10/01 page 4–photo of alley stub).

ROOF STRUCTURES

Required setbacks:

33. Roof structures do not meet 11 DCMR §§4 (The roof structures shall be setback from the main roof by a distance equal to their height.). Setback is not equal or greater than height.

Elevator penthouse:

34. There is no setback from the exterior wall for the elevator penthouse. The entire rear wall* of the penthouse is on the same plane as the rear wall of the building.

*Note that the **7th floor balcony** which is adjacent to the elevator lobby, is considered by the ZA as **OUTSIDE the exterior wall** for purposes of evaluating gross floor area and FAR. Therefore, the **entire elevator penthouse rear wall** is on the same plane as the building rear wall, as defined by the ZA. (Appellant's submission, 7/3/01, page 4, Rear Elevation and page 13, 7th floor; Appellant's submission, 7/10/01, page 9, Longitudinal building section and page 8, Seventh Floor Plan 107A)

Utility room/stairwell penthouse setback:

35.Appellant's submission 7/10/01, page 12, "Wall Section," shows that the utility room is not set back from the main wall.

The utility room and stairwell penthouse are contiguous structures. The stairwell, which is not setback from the exterior wall, accesses the utility room on the south side of the building. The wall section shows that the height of the building at this section is a full 8 stories plus 12 foot high roof. (Appellant's submission 710/01, pages 9 and 11–Building and Wall cross-sections)

In addition, the cross sections show that the **roofs of structures and connections between structures are not setback equal to their height**. The roofs start **above** the level of the main roof and **extend outside the exterior walls** before taking a 45-degree angle sloping upwards and inwards. (Appellant's submission 7/3/01, Appendix A, pages 1-3, Building elevations; Appellant's submission 710/01, pages 9-11: Building cross-section and Wall cross-sections)

The exterior wall on the front of the building is considered to be straight across the exterior face of the building, as is shown in the 7th floor plan (Appellant's submission, 7/10/01, page-8) where this area is labeled "BALCONY." Note that the roof with attic underneath projecting out from

the main roof is over "balcony" which is excluded from the gross floor area or FAR. The ZA considers this a projection over a balcony, not the exterior wall. **The rectangular portion of the utility room is not setback to by it's height.**

36. Mr. Bello claims that a roof structure (elevator penthouse) does not need to follow 11 DCMR 411.7(b) setback requirements if, in the Zoning Administrator's opinion, it provides architectural uniformity of the roof plan. Architectural uniformity, Mr. Bello claims, is provided by the elevator penthouse because the rear wall of the building continues directly up above the main roof level to enclose the elevator penthouse. Therefore the walls match (8/3/hearing transcript). This interpretation effectively states that a setback for roof structures is not required if the walls of such roof structures match the exterior walls of the building. This clearly violates 11 DCMR §411.

37. Bello Memorandum to the BZA, dated August 15, 2001: states that "The first enclosure of relevance, the Utility Room is clearly set back 17 ½ feet from the exterior wall of the building." This is incorrect. The documentation above shows the claim is clearly erroneous.

38. The Bello Memorandum claims that "the Zoning Regulations is silent on the threshold of functionality allowed an Architectural Embellishment." (Bello Memorandum to the BZA, dated August 15, 2001). For the purpose of determining height, etc, the Zoning Regulation is **not silent on the definition of what is excluded as embellishment**: 11 DCMR §400.3: A spire, tower, dome, pinnacle, or minaret serving as an architectural embellishment, or an antenna may be erected to a height in excess of that which this section otherwise authorized in the district in which it is located. "Roofs," and "mansard roofs" are not included as architectural embellishments in this exclusion. (Memorandum from Toye Bello to BZA dated August 15, 2001).

39. The Bello Memorandum claims that the ordinary wall of the elevator penthouse, which is on the same plane and of the same material as the rear exterior wall, is "enclosing façade." Therefore, the he claims, the elevator penthouse does not require a setback. This is clearly erroneous. (Memorandum from Toye Bello to BZA dated August 15, 2001).

40. Conclusion: The roof structures do not meet the required 11 DCMR §411 setback requirements.

<u>Height of roof structures:</u>

41. Height of the elevator penthouse, including its roof, is clearly greater than 18 feet, 6 inches, as shown on the rear elevation and interior cross-section. (Appellant's submission, 7/10/01, page 5)

Multiple roof structures:

42. There are two roof structures on the main roof-- an elevator penthouse and a machine room connected to the roof stairwell. The connecting roof, which actually sets out from the main wall, does not meet standards for making all roof structures a single structure. (1) the roof does not go directly between the two structures; (2) the roof is not setback from the exterior walls by a distance equal to its height. (Appellant's submissions 7/3/01, Appendix A, pages 14–Main roof plan; page 3 and 4--Building elevations)

Required review of roof structures:

43. The roof plan was not submitted to the Office of Planning for review as required by 11 DCMR §411. (Appellant's submission 8/10/01– E-mails to Ellen McCarthy from Page Chiapella and from Jennifer Steingasser to Page Chiapella re: Roof Plan Review).

44. The ZA and former Acting Zoning Administrator claim that DCRA does not necessarily send roof structures to the Office of Planning if the ZA considers the roof plan to be architecturally appropriate (August 3, 2001 hearing testimony). The ZA thought these roof structures were appropriate. Therefore, the ZA claims, this plan did not need to be sent for review by the OP. This clearly violates 11 DCMR §411.

45. The BZA Commissioners, requested Mr. Bello to provide evidence that the ZA has authority to grant variances on the roof structures. (8/3/01, testimony) In his August 15, 2001 memorandum, Mr. Bello did not provide such evidence. (DCRA 8/10/01 submission)

HEIGHT OF THE BUILDING

46. Roofs and parapets are included in measuring the height of a building (11 DCMR §199.1: Building, height of - the vertical distance measured from the level of the curb opposite the middle of the front of the building to the highest point of the roof or parapet.) "Roofs," and "mansard roofs" are not included as architectural embellishments in measuring the height of a building: 11 DCMR §400.3: A spire, tower, dome, pinnacle, or minaret serving as an architectural embellishment, or an antenna may be erected to a height in excess of that which this section otherwise authorized in the district in which it is located.

47. The height limit of buildings in R5D districts is 90-feet.. (11 DCMR §400.1)

48. 11 DCMR §400.3: A spire, tower, dome, pinnacle, or minaret serving as an architectural embellishment. Mr. Bello claims that the standard roof over the elevator penthouse is an "architectural embellishment" and does not count in height measurements. However, roofs are not excluded in measurements of the height. (11 DCRA §199.1)

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49. The elevation opposite the middle of the front of the building is 302.79, as shown on the grading plan (Appellant's submission 7/3/01, Appendix A, page 5). The elevation to the top of the main roof slab from which the roof above the 7th floor starts is 379.72. The sloped part of the roof starts at least 3 feet above the main roof. The sloped part of the roof extends 12 feet. The structural element at the peak of the roof structure extends at least one foot height. (Appellant's exhibit July 10, 2001, page 11: WALL SECTION). The elevation to the height of the roof over the 7th floor (excluding the elevator penthouse) is at least as follows: 379.72 +3+12+1 or 395.72. The height of the building to the **height of the roof over the 7th floor** (excluding the elevator penthouse) is 395.72 minus 392.79, or **92.93 feet**.

50. The **height of the elevator penthouse roof** (the highest point of the roof or parapet wall) is at least 5 feet above that of the roof over the 7th floor, or at least **97.93 feet.** This is more than 7 feet above that allowed by 11 DCMR §400.1. (Appellant's submission 7/10/01, page 9--interior cross-section of the building -- Application 590-AA does not provide height measurements above the main roof slab. The figures provided above are measured by ruler and rounded downward, to provide a conservative estimate.)

51. Mr Bello claims that "the Zoning Regulations is silent on the threshold of functionality allowed an Architectural Embellishment." (Bello Memorandum to the BZA, dated August 15, 2001). For the purpose of determining height, etc, the Zoning Regulation is **not silent on the definition of what is excluded as embellishment**:

52. Conclusions:

> The height of the roof over the 7th floor, excluding the elevator penthouse and utility room and roof stairwell, is 92.93 feet. This is almost 3 feet over the 90 ft. limit allowed by 11 DCMR §400.1.
>
> The height of the elevator penthouse roof (the highest point of the roof or parapet wall) is at least 5 feet above that of the roof over the 7th floor, or at least 97.93 feet (Appellant's exhibit II-9). This is more than 7 feet above that allowed by 11 DCMR §400.1.

FAR

53. Initial zoning was incorrectly listed as R5E (FAR 6.0). The R2 zone is not listed. The FAR presented in the application appeared to be substantially under that allowed in an R5E district. The ZA did not fill out computation sheet showing independent evaluation of the FAR. The ZA relied on the Applicant's estimate of FAR, reported as 3.49. (Appellant's submission, 7/10/01, page 14—Building Code summary Sheet)

54. The Applicant's estimated FAR incorrectly excludes square footage from the basement, 3rd floor, 7th floor, attics and main roof structures.

Inclusion of attics and basements in the FAR:

55. The Zoning Regulations, 11 DCMR §199.1 and 402 evaluate "attics,"* "basements" and "cellars" for their bulk, not their intended use. "Attic" space with height greater than 6 ft. 6 in. basements with ceilings greater than 4 ft. above adjacent grade are included in "gross floor area." Gross floor area does not include cellars of any height or use. Inclusion in FAR is determined by inclusion in gross floor area. The intended use of the basement/cellar does not change at the specified 4 ft. above grade requirement for inclusion in gross floor area and FAR. To be included in FAR, an attic need not have a floor, only a height greater than 6' 6". Clearly, bulk, not use, determines inclusion in gross floor area and FAR.
*"The part of a building immediately below the roof and wholly or partly within the roof framing." [Webster's Third International Dictionary, Unabridged, 1966]

Basement:

56. In the rear yard is a concrete stairwell and raised platform attached to the building and to be used as the route from the loading dock to the rear entrance of the building and an elevated patio. This is constructed as part of the building (Appellant's submission 7/10/01, page 10–Building section) This structure varies from zero to about 12 feet depth from the rear exterior wall of the main building. (Appellant's submissions, 7/3/01: Appendix A, pp. 4, 5 and 6--Rear Elevation; Grading Plan, **Basement Floor Plan**). The structure itself is not the "adjacent grade." It does not provide exclusion of basement from FAR calculation.

57. All of the adjacent grade in the alley stub bordering the building is more than 4 feet below the ceiling of the basement. (Appellant's submission 7/3/01, Appendix A, page 5 --- Grading Plan; Appellant's submission July 10, 2001, page 4-- photo showing full building floor of current building at the top of the alley stub.)

Third floor balcony:

58. The Applicant lists the 3rd floor **and** balcony/porch (which sits over the 2nd floor below it) in the list of floor area to be counted in the building gross floor area. The balcony depth is greater than 6 feet from the exterior wall. Balconies extending more that 6 feet from an exterior wall are included in the gross floor area (11 DCMR 199.1). The Applicant correctly lists the 3rd floor balcony in the gross floor area chart but incorrectly omits this in the actual calculation. (Appellant's submission 7/3/01, Appendix A, page 13; Appellant's submission 3/10/01, page 8).

Roof structures:

59. Attics, stairwells, elevator penthouses and equipment rooms are included in the FAR (11 DCMR §199.9: definitions of FAR and Gross floor area). Roof structures which are setback

from the walls of the building, are of height under 18 ft. 6 in., are approved by the Office of Planning (11 DCMR §411) shall be granted supplemental FAR up to 0.37, if they serve the purpose of housing mechanical equipment, stairwells or elevator penthouses. These roof structures do not meet the requirements for the supplement. In addition, there is attic space in the turrets and penthouse roof which does not meet the exclusion use. (Appellant's submission 7/10/01, page 9–longitudinal cross section and page 11, Wall section)

Attics

60. Attics are included in the gross floor area when headroom is greater that 6 ft. 6 inches (11 DCMR 199.1: gross floor area). The ZA incorrectly omits all attic (7th and 8th floors) from the FAR.

Upper level porches:

61. The front and rear elevations shows porches (see definition of porch) under roofs (not balconies, see definition of balcony) at the 6th and 7th levels. The floor plans do not show these porches. The ZA's FAR calculation incorrectly omits these porches from the FAR.

62. Conclusion: The ZA incorrectly calculated the FAR. The FAR exceeds the allowed 3.5 for an R-5-D District.

REAR YARD SETBACK

63. The rear yard shall extend across the entire lot and the rear yard setback requirement is 4 inches per 12 inches of building height across the entire rear yard. (11 DCMR §§199.1 and 404.1)

64. The raised patio is shown as part of the structure on all floor plan drawings. It is not the adjacent grade. (Appellant's submission, 7/10/01, page 10–Building Section; Appellant's submission, 7/3/01, Appendix A, page 4, Rear Elevation)

65. Height of building from rear is12 feet greater than that from the front (97.93 feet, Item 50), or 109.93 feet total.

66. The height of the building from the rear wall (elevation, 292, grading plan: A's submission, 7/3/01, Appendix A, page 5, Grading Plan) to the highest point on the roof (top of elevator penthouse roof, adjacent to exterior rear wall of building, measures 402 ft (measured by ruler): (Appellant's submission, 7/10/01, page 9–Longitudinal building section; Appellant's submission, 7/3/01, Appendix A, page 4–Rear elevation) Height = 402 minus 292 or 110 feet tall.

67. The rear of the building extends parallel to the main alley and the alley stub (with a 30 degree angle along the rear exterior wall of the building). (ANC 3G testimony, August 3, 2001; Appellant's submission, 7/3/01, Appendix A– Plat, Grading Plan, all floors of the building)

Rear yard required:
36 feet (4 inches per foot of height)
Rear yard provided:
Rear yard provided across parking garage entrance: 34 feet;
Rear yard provided along raised concrete patio: 26 feet;
Rear yard provided along alley stub: 0 feet .

68. The rear yard requirement is not met.

PARKING

69. 11 DCMR §2101.1, requires parking for a CRF serving 16 or more persons is to be determined by the BZA.

70. The ZA relied on a precertification letter claims parking based on subsidized housing reserved for the elderly and/or handicapped (Appellant's submission, 7/3/10, Appendix G page 3)

71. Application 590 AA does not comply with 11 DCMR requirements for parking.

DELIVERY

72. Application 590 AA plans do not include a separate delivery plan showing routing; grading, as required by 11 DCMR §§ 2200.3 and 3201.

73. Grading plan shows grade is not appropriate for deliveries for the in the service/delivery space located next to the trash enclosure. (Appellant's submission, 73/01, Appendix 1, page 6--- Grading Plan)

74. Loading dock does not have unobstructed access to the building as required by 11 DCMR §2203.2. (Testimony, 8/3/01; Appellant's submission, 7/3/01, Appendix A pp.5-7: Grading Plan, Garage Plan, 1st Floor Plan)

75. Conclusion: The loading and delivery requirements of 11 DCRA are not met.

USE

76. The use claimed on the July 10, 2000 building application No. 590-AA was "Residential." This is not a matter-of-right use. The use claimed on the revised 590-AA application, dated Feb.

5, 2001, was "CRF (housing for the handicapped as the term is defined by the Fair Housing Act)." This may be a matter-of-right use if the R-5-D District if the building complies with all requirements of 11 DCMR for the stated use 11 DCMR §358.5: The proposed facility shall meet all applicable code and licensing requirements. It is not a matter-of-right use in the R-2 District–given the size of the residential program (130 residents).

77. The R-2 lot is included as an integral part of this development. Various plans show loading dock, trash, handicap ramp/loading ramp, continuation of retaining walls, garden for use of the residents to be located on this lot. Under 11 DCMR §2514.2, this use must be approved by the Board of Zoning Adjustment. In addition, no Reasonable Accommodation Request was submitted for this portion of the property. (BZA testimony, Aug. 3, 2001; Appellant's submission, 7/30/01, page 1; Appellant's submission, 7/10/01, page 12)

78. The proposed facility does not meet the following structural requirements for a CRF: 22 DCMR §3412.3 providing common toilets for residents--1 per 30 residents for floors with common space used by residents who do not have rooms on that floor; 11 DCMR §2101.1 evaluating parking requirements for a CRF serving 16 or more residents; or health care facility: 22 DCMR §3205.7 providing elevator need study; 22 DCMR §3252.1 meeting building code regulations including requirement for two exits from each floor (7th floor has only one emergency exit) and fire compartment (Compartment B on the 1st floor has no effective exit to the outside).

79. The BZA has admitted to the record regulations which are referenced directly or indirectly by 11 DCMR on numerous occasions. (Examples include BZA Appeal No. 16533 references to 12 DCMR; BZA Appeal No. 16716, submission dated 8/3/01–D. C. Council Action). Corporation Council provided the opinion that BZA inclusion of such references is appropriate (hearing testimony 8/3/01). Such evaluation is necessary to fulfill 11 DCMR §358.5: The proposed facility **shall** meet all applicable code and licensing requirements. [Emphasis added] Logic and common sense dictate that the building plans must include sufficient common toilets, emergency exits, elevators, etc. to meet regulations and licensing requirements for the use stated in the application (a CRF). To allow to be built a building which cannot be used for its stated use would put the city in jeopardy of litigation.

80. The "pre-certification" letter signed by Gladys Hicks on Dec. 15, 1998, is not accompanied by information documenting her understanding of the proposed use at that time. In addition, the described uses changed over time including (in order): "assisted living facility"-12/17/98; "publicly assisted housing, reserved for the elderly and/or handicapped, all districts" 3/8/99; independent and "assisted living facility" 2/00 ANC 3G; "Assisted Living Residences"-7/10/00 590AA application; "New apartment building" 7/10/00 BLRA tracking form; "CRF serving the handicapped as described by the Fair Housing Act"–2/5/01 revised 590-AA application. The Applicant and ZA relied on the "pre-certification" letter to determine use (testimony 8/3/01). The "pre-certification" letter holds neither a vested use or a date for determining that use.

81. The Applicant provides locked facility on the third floor for Alzheimers patients. In a CRF, patients may not be confined [in rooms or wards]. 22 DCMR §3415.1. (Appellant's submission, July 10, 2001, page–Sunrise description of "secure" Alzheimers ward; Appellant's submission, July 10, 2001, page 7, 3rd floor show a barrier across elevator lobby, in contrast to July 3, 2001, Appendix A, pages 10 - 13-- 4th -7th floors; 7/10/01 submission, page 8 -- 7th floor).

82. Conclusion: The proposed building does not meet (for the R-5-D lots or the R-2 lot) the requirements of the matter-of-right use which was claimed in the Feb. 5, 2001 application No. 590 AA. The claimed matter-of-right use as a CRF to serve the handicapped is not sustained by the design of the building, the requested parking, and the location crossing into an R-2 District.

VESTING under R-5-D District

83. 11 DCMR §3204 states that the application shall be complete for purposes of evaluation in order to hold vesting rights.

84. 11 DCMR§3202.2: To determine compliance with the provisions of this title, each application for a building permit shall be accompanied by any of the following that is deemed necessary **[emphasis added]**:

(a) Scaled drawings showing the following:

(1) The exact shape, topography, and dimensions of the lot to be build upon;

(2) The plan, elevation, and location by dimensions of all existing and proposed structures, and the **proposed use** of those structures;

(3) The parking and loading plans and the **basis for computation of those plans**; and

(4) Other information necessary to determine compliance with these regulations; and

(b) An **official building plat**, in duplicate, prepared by the Surveyor of the District of Columbia, upon which the Applicant shall indicate in ink and to the same scale dimensions of the following;

(1) All existing and proposed structures;

(2) The number, size, and shape of all open parking spaces, open loading berths, and approaches to all parking and loading facilities, and

(3) Other information necessary to determine compliance with the provisions of this title.

85. The information supplied on July 10, 2000, was incomplete and inaccurate. No matter-of-right use was claimed ("Residential" includes both matter-of-right uses and uses requiring a special exception). The July 10, 2000 application did not meet the requirements to be vested under R-5-D. The

86. The ZA claimed that an application fee **will not be accepted** until an application is complete with all items necessary for evaluation of that application and that acceptance of the fee determines that the application is vested under the Zoning District current when that fee is accepted. The ZA then conceded that applications are not checked for completeness at the time the fee is accepted. (ZA Testimony Aug. 3, 2001)

87. The fee for 590AA was accepted without site plan, (Plan Correction List dated July 19, 2000), use (Plan Correction List dated Nov 13, 2000), intake zoning approval (Application 590-AA, dated July 10, 2000) and other required information. These materials were supplied with the REVISED application, dated Feb. 5, 2001, which is the date on which the Zoning District is vested. The application did not achieve vesting status at the time the initial fee was paid on July 10, 2000.

88. The application was not vested under R-5-D zoning district at the time it was submitted. It did not meet vesting requirements before the setdown date on October 16, 2000. The permit, B435464, is not vested under R-5-D zoning district.