ShawPittman LLP

A Limited Liability Partnership Including Professional Corporations

August 28, 2001

BY HAND DELIVERY

Ms. Sheila Cross Reid, Chairperson
District of Columbia Board of Zoning Adjustment
441 4th Street, N.W., Suite 210
Washington, D.C. 20001

Re: Sunrise Connecticut Avenue Assisted Living LLC (the "Property Owner")
5111 Connecticut Avenue, N.W. - BZA Appeal No. 16716

Dear Ms. Reid and Members of the Board:

On behalf of the Property Owner, enclosed please find the Proposed Findings of Fact and Conclusions of Law for the above-mentioned appeal. In addition, the accompanying letter sets forth the Property Owner's comments on the post-hearing submission of Olutoye Bello, Chief of the Zoning Review Branch. Finally, we have enclosed 10 copies of a drawing that depicts the tower embellishment at the rear edge of the building.

The Property Owner looks forward to a decision on this appeal at the Board of Zoning Adjustment's September 4, 2001 public meeting.

Very truly yours,

Maureen E. Dwyer

Allison C. Prince

Paul A. Tummonds, Jr.

Enclosure
cc: See attached Certificate of Service

BZA
Case No. 16716
Exhibit No. 51

Document #: 1157603 v.1

Board of Zoning Adjustment
District of Columbia
CASE NO.16716
EXHIBIT NO.51

ShawPittman LLP

A Limited Liability Partnership Including Professional Corporations

August 28, 2001

Sheila Cross Reid, Chair
Board of Zoning Adjustment
441 4th Street, NW, Room 210
Washington, D.C. 20001

Re: BZA Appeal No. 16716
Response of Sunrise Connecticut Avenue Assisted Living, LLC, (the "Property Owner") to Memorandum from DCRA to BZA dated August 15, 2001

Dear Chairperson Reid and Members of the Board:

The purpose of this letter is to respond to the memorandum of Olutoye Bello, Chief of the Zoning Review Branch, Office of the Zoning Administrator, dated August 15, 2001. In the memorandum, Mr. Bello addressed the issue of why the tower element that encloses an elevator room is not subject to the setback requirements of Section 400.7(b) of the Zoning Regulations. On behalf of the Property Owner, we fully support Mr. Bello's conclusions in the August 15, 2001 memorandum. Specifically, we support his conclusion that the tower element constitutes an architectural embellishment designed for the predominant purpose of the architectural uniformity of the roof plan. While the Zoning Regulations historically have been interpreted to preclude the location of habitable space within an architectural embellishment, the regulations do not preclude the location of mechanical equipment in such an embellishment. There are numerous examples of embellishments that contain mechanical equipment, some of which were cited in Mr. Bello's memorandum.

Since the purpose of the penthouse setback requirement is to hide equipment from public view and the purpose of an embellishment is to add a design feature that is clearly within the public view, an embellishment that fully encloses mechanical equipment is entirely consistent with the purposes of the setback requirements. The mechanical equipment is fully out of view and the embellishment is permitted to serve its decorative function.

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The enclosed drawing clearly shows that the tower feature constitutes an architectural embellishment. It should be noted that the peaked metal roof over the tower is purely decorative and contains no equipment whatsoever and that the building height of 83 feet was measured to the base of the peaked roof.[1]

Mr. Bello also attached to his post-hearing submission, a receipt demonstrating that the property owner submitted the required $2,000 filing fee to the Permit Processing Division on July 10, 2000, the date upon which the building permit was filed. DCRA's acceptance of the filing fee demonstrates that the application was deemed sufficient for filing.

Mr. Bello's memorandum fully clarifies the architectural embellishment issue as well as the sufficiency of the building permit filing. The Appellants have failed to satisfy their burden of proof and the building permit should be upheld.

Very truly yours,

Maureen E. Dwyer

Allison C. Prince

Paul A. Tummonds, Jr.

Enclosure

Document #: 1156725 v.1

[1] The Appellants have also argued that the tower constitutes an illegal eighth story. Since the parapet level of the tower is seven feet below the maximum permitted height and since the tower contains only 600 feet of gross floor area, even if it were considered as an eighth story, the building would fully comply with the Zoning Regulations because it would be within the height limit and the maximum permitted FAR. Such a determination is not necessary however, because the tower feature clearly constitutes an architectural embellishment consistent with the other structures on the roof.

ShawPittman LLP

Certificate of Service

I hereby certify that a copy of the foregoing response of the property owner to the August 15, 2001, submission of the Office of the Zoning Administrator to the Board of Zoning Adjustment and the Proposed Findings of Fact and Conclusions of Law, was delivered by hand on this 28th day of August, 2001, to the following:

Page Ann Chiapella
5126 Nebraska Avenue, NW
Washington, DC 20015

Joseph Bishop, ANC 3G
3210 Chestnut Street, NW
Washington, DC 20015

Marilyn Holmes, ANC 3G
3700 Military Road, NW
Washington, DC 20015

William Bennett, Esq.
Office of the Corporation Counsel
441 4th Street, NW
Washington, DC 20001

Olutoye Bello
Chief Zoning Review Branch
Office of the Zoning Administrator
941 N. Capitol Street, NE
Washington, DC 20002

Paul A. Tummonds, Jr.

Document #: 1139169 v.4

Document #: 1139169 v.4

PROPERTY OWNERS'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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 8, 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 49-157 and 161).

HEARING DATE: **August 3, 2001**

DECISION DATE: **September 4, 2001**

PROCEDURAL HISTORY:

1. This appeal was filed on March 16, 2001, by the Nebraska Avenue Neighborhood Association (hereinafter referred to as "NANA" or the "Appellants") 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. Advisory Neighborhood Commission ("ANC") 3G joined in this appeal with NANA in challenging the Zoning Administrator's decision.

2. When the building permit application was filed on July 10, 2000, the subject property was owned by a number of individual property owners and Sunrise Connecticut Avenue Assisted Living LLC (hereinafter "Sunrise" or "owner"). Subsequent to the issuance of the building permit on March 8, 2001, Sunrise completed its purchase of all

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

PRELIMINARY MATTERS:

1. On May 7, 2001, Sunrise filed a motion to recuse Board Member Anne Renshaw. On July 10, 2001, after reviewing the motion and the responses thereto and debating the matter in a public meeting, four members of the Board requested that Member Renshaw voluntarily recuse herself. When Ms. Renshaw refused to recuse herself, the Board voted 4-1-0 to recuse her. An Order evidencing this decision was mailed to all parties to this appeal on July 26, 2001. No challenge of that order has been filed.

2. On July 16, 2001, NANA filed a request for clarification of the status of Sunrise as the property owner, a request to strike from the record a portion of the Property Owner's Statement and a motion for the participation of four Board Members requesting that the Board not proceed with the hearing with fewer than four Board members participating. After confirming the Board's right to consider any application or appeal with a quorum of three members, the Board noted that the request was moot since four members were in attendance. Further, the Board confirmed that Sunrise is the owner of all the property that is the subject of the appeal and that there was no basis for striking a portion of the Property Owner's Statement.

BACKGROUND INFORMATION:

1. The property that is the subject of these applications is located at 5111 Connecticut Avenue, N.W., Lots 49-57 and 161, Square 1989 ("subject property"). The

subject property is an irregularly shaped lot that includes frontage on Connecticut Avenue, N.W. and Chevy Chase Parkway, N.W.

2. On October 15, 1998, Sunrise met with the Deputy Zoning Administrator at that time, Gladys Hicks, to discuss the proposed use of the property as an assisted living facility. On December 17, 1998, Sunrise received written confirmation from Ms. Hicks that the proposed assisted living use would be permitted as a matter of right, once the proposed amendments to the Zoning Regulations were adopted regarding housing for the handicapped.[1]. Sunrise received additional confirmation from Ms. Hicks on March 8, 1999, regarding the number of required parking spaces and loading berths for the assisted living facility. (Property Owner's Statement p. 5, Exhibit 34 of the record.)

3. The Appellants became aware of Sunrise's plans early in the process. An alley closing application was filed by Sunrise on August 2, 1999, to close the alley stub in Square 1989 adjacent to the subject property. The ANC and the community decided to oppose the alley closing application. As a result of this opposition and despite the fact that none of the reviewing District of Columbia agencies had objected to the alley closing, Sunrise abandoned the alley closing application and pursued a building design that did not require closure of the alley. (Property Owner's Statement p. 6, Exhibit 34 of the record.)

4. On May 2, 2000, Sunrise met with the current Zoning Administrator, Michael Johnson, to review the matter-of-right zoning requirements for the proposed building, including height, rear yard setback, side yard setback and court determinations. On July

[1] The D.C. Zoning Commission adopted these amendments to the Zoning Regulations in Zoning Commission Order No. 869, which became effective on April 30, 1999.

8, 2000, Michael Johnson provided written confirmation of the appropriate development parameters for the proposed assisted living facility on the site. (Property Owner's Statement p. 6-7, Exhibit 34 of the record.)

5. On July 10, 2000, Sunrise filed a building permit application with the Building and Land Regulation Administration ("BLRA") of the Department of Consumer and Regulatory Affairs ("DCRA"). The detailed working drawings that were filed with the application included 178 pages and showed the construction of an assisted living facility for seniors. (Property Owner's Statement p. 7, Exhibit 34 of the record.)

6. After a heavily scrutinized, eight-month review process, Building Permit No. B43564 was issued on March 8, 2001, authorizing the construction of a seven story cast in place concrete structure containing assisted living residences (CRF, housing for the handicapped as the term is defined in the fair housing act) with underground parking. (Property Owner's Statement p. 7, Exhibit 34 of the record.)

FINDINGS OF FACT:

1. The Appellants raised seven issues on appeal which it asserts constitute error on the part of the Zoning Administrator, and which form the basis for their argument that the building permit should be revoked. The issues are:

(a) the building permit application was not complete before the Zoning Commission setdown date for the rezoning of the property

(b) incomplete and inaccurate information on the Building Permit Application materials invalidates these forms

(c) the approved building violates the FAR requirements

(d) the building has an inadequate rear yard setback

(e) the height of the building exceeds the permitted height in the R-5-D zone

(f) the housing for the mechanical equipment and the elevator penthouse is improper

(g) the parking spaces and loading areas are inappropriate

(h) the proposed facility does not meet all applicable code and licensing requirements of 22 DCMR 3242 and 3257.

2. Building Permit Application. As to the issue whether Sunrise filed a complete Building Permit Application before October 16, 2000, the Zoning Commission setdown date for the rezoning of the subject property, and whether alleged incomplete and inaccurate information provided in the building permit application materials invalidates these forms, the Board finds as follows:

(a) A complete Building Permit Application had to be filed by October 16, 2000, in order to allow the processing of the building under the R-5-D zoning.

(b) Mr. Olutoye Bello, the Chief of the Zoning Review Branch, testified that a complete Building Permit Application was filed on July 10, 2000. In a post-hearing submission on August 15, 2001, he submitted a receipt evidencing that the filing fee was paid on July 10, 2000. At the hearing, he testified that the acceptance of the filing fee constitutes verification that the application was deemed complete by the intake officials at the Permit Review Branch.

(c) The Chief of the Zoning Review Branch testified that once plans are filed,

it is extremely common for the various permit reviewers to comment on aspects of the plans and in some cases require additional drawings in order to clarify specific issues. He concluded that the clarifications associated with the subject Building Permit Application were typical of the building permit process.

(d) The Chief of the Zoning Review Branch testified that the Building Permit Application correctly referred to the proposed use as an assisted living facility. He testified that any internal notes made on the Building Permit Application by the permit intake personnel did not invalidate or in any way affect the owner's representation of the proposed use.

(e) Mr. Armando Lourenco, admitted as an expert in zoning and building code matters, (hereinafter "the owner's zoning expert"), testified that a full and complete set of drawings was accepted by the Department of Consumer and Regulatory Affairs on July 10, 2000.

(f) Mr. Steve Ruiz, admitted as an expert in architecture, (hereinafter "the owner's architect"), testified regarding the extensive level of work associated with preparation of the 178-sheet set of permit drawings. He testified that the set was full and complete in all respects.

3. The Use of the Proposed Building as a Community Residence Facility. Regarding the question whether the use of the proposed building as a community residence facility (providing housing for the handicapped) constitutes a matter-of-right use in the R-5-D zone, the Board makes the following findings:

(a) Mr. Bello, the Chief of the Zoning Review Branch, testified that a

community residence facility providing housing for the handicapped is permitted as a matter-of-right in the R-5-D zone pursuant to Section 330.5(i) of the Zoning Regulations.

(b) The owner's zoning expert supported Mr. Bello's conclusion and testified that the Zoning Regulations clearly permit a community residence facility ("CRF") as a matter-of-right in the R-4 and higher zone districts provided that the Zoning Administrator determines that the CRF is intended to be operated as housing for the handicapped as that term is defined in the Fair Housing Act. The zoning expert noted that this section was added to the Zoning Regulations to address restrictions previously contained in the Zoning Regulations, as a result of the Justice Department's determination that the original requirements in the regulations were volatize of the non-discrimination provisions of the Federal Fair Housing Act.

(c) The owner's zoning expert also testified that the law, the Assisted Living Regulatory Reform Act of 2000, and federal court precedent is clear that an assisted living facility constitutes housing for the handicapped and that an assisted living facility is a type of a community residence facility. He concluded that the proposed facility, as an assisted living facility providing housing for the handicapped, is permitted as a matter-of-right on the subject property given its R-5-D zoning.

(d) The Appellants did not challenge the determination that the facility would provide housing for the handicapped.

4. FLOOR AREA RATIO ("FAR"). As to the issue of whether the approved building violates the FAR requirements of the R-5-D zone, the Board makes the following findings:

(a) The Chief of the Zoning Review Branch stated that the FAR for the project was calculated correctly and that all proper exclusions were taken. As an example, he stated that contrary to allegations of the Appellants, the third floor roof terrace is not countable to FAR because it does not constitute habitable space and is not under roof.

(b) The Chief of the Zoning Review Branch also testified that the structures on the roof, including penthouses and architectural embellishments were correctly excluded from the building's FAR calculation.

(c) The owner's zoning expert testified that the building's FAR of 3.47 is in full compliance with the 3.5 limit applicable in the R-5-D zone. He testified that the computation was properly calculated because the architect included in the gross floor area the portions of the building that are to be counted pursuant to the definition of gross floor area and correctly excluded the areas for which the Zoning Regulations specifically provide exemptions. He testified that the plans correctly excluded, for example, ventilation and utility shafts and rooftop terraces. He also testified that the portion of the lower level that qualifies as basement was correctly counted towards the building's FAR. Finally, the owner's zoning expert noted that

all FAR calculations were based on the lot area of the R-5-D portion of the split-zoned site and no credit was sought for the R-2 portion of the subject property.

(d) The owner's zoning expert testified that ANC 3G's computations of FAR were defective in many respects. For example, the rooftop terrace over the low roof of the second floor was improperly counted toward FAR by the ANC as if it were an exterior balcony. In addition, he testified that ANC 3G did not apply the perimeter wall computation correctly in determining the gross floor area of the lower level of the building. In determining whether portions of the perimeter constituted basement or cellar, he testified that ANC 3G incorrectly measured from adjacent finished grade to the underside of the slab rather than the finished ceiling. This error resulted in an overstatement of the basement area and, accordingly, an overstatement of gross floor area.

5. Rear Yard. As to the issue of whether the Zoning Administrator correctly designated the project's rear yard, the Board finds as follows:

(a) The Chief of the Zoning Review Branch testified that the side and rear yard computations had been determined appropriately given the highly unusual configuration of the lot. He testified that corner lots, by definition, have more than one front and that once a front is chosen for purposes of determining yards, the rear yard is designated as the yard opposite the chosen front. He testified that in the case of unusually shaped lots, the Zoning Administrator must make a judgment call.

(b) The owner's zoning expert concurred with the Chief of the Zoning Review Branch and testified that the manner in which the rear yard was computed for this irregularly configured lot was reasonable and consistent with the longstanding interpretation of the Zoning Regulations by the Office of the Zoning Administrator and does not yield an unnatural result. He testified that given the lot's highly unusual configuration, the Zoning Administrator correctly determined that with Connecticut Avenue as the front, the portion of the lot east of the building (abutting the north-south rear alley that runs roughly parallel to Connecticut Avenue) was the rear.

(c) The owner's zoning expert concluded that given the Zoning Administrator's interpretation, the rear yard depth of 34 feet was correctly measured as the depth of the yard located between the rear building line and the north-south alley. He also noted that while a side yard is not required in the R-5-D zone, there is an extremely generous open space between the proposed building and the residential properties to the north, because the entire R-2 zoned portion of the site will contain no building area. He concluded that the ruling of the Zoning Administrator yielded an appropriate and natural result because it will ensure ample open space surrounding the building, consistent with the intent of the Zoning Regulations.

6. Building Height. As to the issue of whether the proposed building exceeds the permitted height in the R-5-D zone. The Board finds as follows:

(a) The Chief of the Zoning Review Branch testified that the building height, as measured from the middle of the curb in front of the building to the highest point of the roof or parapet, was 83 feet which is seven feet less than the maximum permitted height of 90 feet. He testified that the penthouse and the architectural embellishments are not countable toward building height.

(b) The owner's zoning expert concurred with the Chief of the Zoning Review Branch and testified that the building height was measured properly. He explained that the accurate measurement of height requires a detailed knowledge of the regulations and the correct classification of the architectural and structural features that are permitted on rooftops. He testified that the building height is the vertical distance between the level of the curb at the middle of the front of the building to the highest point of the roof or parapet. He noted that in determining the height of the subject building, the height was measured to the top of the three-foot parapet.

(c) The owner's zoning expert testified that the roof contained several structures that do not count toward the determination of the height of the building as allowed by the regulations. These structures include a mechanical penthouse that houses mechanical equipment, a stairway and an elevator machine room. He also noted that architectural embellishments above the parapet line that do not constitute habitable space and do not count toward the building's height under Section 400.8

of the Zoning Regulations. These embellishments include towers such as the one that houses the elevator equipment which is capped with a purely decorative peaked roof element as well as the other architectural embellishments that simulate the look of a mansard roof around the building's perimeter.

(d) The owner's zoning expert concluded that the building height is 83 feet, well below the allowable 90 foot height in the R-5-D zone and that the Zoning Administrator's determination that the height of the building was in compliance with the Zoning Regulations was correct and followed standard review procedures that had been used in thousands of cases since 1958.

(e) The Appellants were unable to refute the accuracy of the datum points that formed the basis of the measurement of the building height.

7. Elevator Penthouse and Rooftop Mechanical Equipment. As to the issue of whether the housing for the mechanical equipment and the elevator penthouse is improper, the Board finds as follows:

(a) The Chief of the Zoning Review Branch testified that the architectural embellishments and penthouse elements were correctly excluded from both the height and FAR computations.

(b) The Chief of the Zoning Review Branch determined that the mansard roof-like structure that wraps around the perimeter of the building acts as an enclosure of the entire penthouse as required under the Zoning Regulations. Accordingly, the roof plan meets the requirement in the

regulations that the rooftop penthouse be within a single enclosure.

(c) The Chief of the Zoning Review Branch also testified that the elevator tower located at the rear edge of the roof of the building was located within an architectural embellishment and accordingly was not subject to the penthouse setback requirement. In a post-hearing submission dated August 15, 2001, Mr. Bello stated that there is no prohibition against including mechanical equipment within an architectural embellishment. He also provided examples of numerous other buildings in which architectural embellishments that are not set back from the edge of the roof include mechanical equipment. Mr. Bello testified that his office regularly approves tower elements and architectural embellishments that are not set back from the exterior face of the building.

(d) In his post-hearing submission dated August 15, 2001, the Chief of the Zoning Review Branch concluded that the enclosing façade of the elevator penthouse was deemed to be an architectural embellishment design for the purpose of architectural uniformity of the roof plan. Therefore, it was not subject to the set back requirements of Section 400.7(b).

(e) In the post-hearing submission dated August 15, 2001, the Chief of the Zoning Review Branch noted that the determination that the façade was an architectural embellishment is consistent with well-established precedent whereby architectural embellishments such as extensions of a façade or curtain wall above the main roof line of a building have been considered architectural embellishments. The Chief of the Zoning Review Branch

also noted that the Zoning Regulations are silent on the issue of the amount of functionality that is permitted for an architectural embellishment. While architectural embellishments cannot be used to provide habitable space, there is no prohibition of the functional duality afforded by locating mechanical equipment in an architectural embellishment.

(f) The Chief of the Zoning Review Branch also stated that the decision to include the elevator enclosure in the excess FAR allowed penthouses is logical given the roof plan proposal, which was designed to create uniformity with the mansard and turret roofs on other portions of the building, and the function of the penthouse enclosure.

(g) The Chief of the Zoning Review Branch testified that roof plans have not been referred to the Office of Planning by the Office of the Zoning Administrator for several years.

(h) The owner's zoning expert also testified that although Section 411.10 of the Zoning Regulations suggests a need to refer certain roof plans to the Office of Planning, the longstanding practice between the two agencies (and routinely followed by the Office of the Zoning Administrator) is that when structures proposed to be erected clearly fall within the parameters specifically outlined in the Zoning Regulations, no referral is made to the Office of Planning. In addition, the owner's zoning expert testified that this point is moot because in this case, the project underwent a thorough environmental impact review by the Office of Planning and the roof plan

was part of several documents submitted to the Office of Planning in connection with that review. No comments were made by the Office of Planning as to any negative impact of the roof structure on neighboring properties.

8. Parking and Loading. As to the issue whether the project satisfies the parking and loading requirements for a community residence facility in the R-5-D zone, the Board finds as follows:

(a) The Chief of the Zoning Review Branch testified that adequate parking and loading were provided. Since the regulations do not explicitly establish a ratio of required parking spaces for community residence facilities in the R-5-D zone, the Zoning Administrator applied the ratio applicable to publicly-assisted housing for the elderly. In reviewing the permit application, the Chief of the Zoning Review Branch testified that he applied an even more restrictive standard, that for a rooming house or a boarding house. The more restrictive requirements applied by the Chief of the Zoning Review Branch were also satisfied by this project.

(b) The Chief of the Zoning Review Branch testified that the proposed loading facilities fully satisfy the requirements of the Zoning Regulations. He testified that the exact manner in which the loading facilities will function is beyond the purview of the review of the Office of the Zoning Administrator.

(c) The Chief of the Zoning Review Branch testified that the approved plans adequately depict the location of the loading berth, loading platform and

service delivery space. He also testified that the plans show that the loading platform is contiguous to the loading berth and that there is unobstructed access from the berth to the platform.

(d) The owner's zoning expert testified that the plans, which include 31 parking spaces, meet the parking requirement applicable for the subject use. Since the Zoning Regulations do not provide a parking ratio for the proposed use, the owner's zoning expert opined that the Zoning Administrator correctly applied a ratio of required parking spaces for the most similar use for which a ratio is established in the Zoning Regulations, publicly-assisted housing for the elderly. In addition, he testified that since the Zoning Regulations do not provide a ratio for loading spaces, the Zoning Administrator correctly applied the ratio required for any other use in all districts.

9. Licensing Requirements of 22 DCMR 3242 and 3257. As to the issue of whether the facility will meet the licensing requirement of 22 DCMR 3242 and 3257, the Board finds as follows:

(a) Such licensing issues are issues that are beyond the scope of this appeal.

Conclusions of Law and Opinion

The Board of Zoning Adjustment has jurisdiction to hear this appeal and render a decision and order pursuant to D.C. Code Section 5-424(f). Pursuant to 11 DCMR Section 3119.2, the Appellants have the burden of proof in this matter. In considering an application for a building permit, the Zoning Administrator is required to determine whether the plans for the proposed building meet the requirements of the Zoning

Regulations. To reverse the Zoning Administrator's decision approving the issuance of the building permit, the Appellants must demonstrate to the Board, by a preponderance of the evidence, that the building permit was issued in error because the proposed building would violate the Zoning Regulations.

Based on the above findings of fact, the Board concludes that Building Permit No. B435464 was properly issued. The Board concludes that:

(1) The property owner filed a complete Building Permit Application on July 10, 2000, prior to the Zoning Commission setdown date for the rezoning of the subject property.

(2) The proposed community residence facility, providing housing for the handicapped, constitutes a matter-of-right use in the R-5-D zone.

(3) The approved building satisfies the FAR requirements in the R-5-D zone.

(4) The building has an adequate rear yard set back.

(5) The height of the building is less than the maximum permitted height in the R-5-D zone.

(6) The penthouse requirements of the regulations are satisfied and the determinations regarding architectural embellishments were proper.

(7) The parking and loading requirements of the regulations are satisfied.

Complete Building Permit Application. In order to vest its rights under the R-5-D zoning, the owner had to file a complete Building Permit Application prior to October 16, 2000, the date upon which the Zoning Commission set down the application for the downzoning of the site for public hearing. Based on the evidence submitted by the property owner, the testimony of the Chief of the Zoning Review Branch, and evidence in

the record including a receipt evidencing the payment of a filing fee on July 10, 2000, the Board concludes that the property owner filed a complete Building Permit Application on July 10, 2000, well in advance of the October setdown date.

The Proposed Use of the Property. The Board concludes that the property owner's proposed use of the building as a community residence facility providing housing for the handicapped, is permitted as a matter-of-right under the R-5-D zone that governs the Building Permit Application. The Board notes that such use is clearly permitted under Section 330.5(i) of the Zoning Regulations and that the regulations were specifically amended to ensure that they were not volatize of the Federal Fair Housing Amendments Act ("FFHAA"). The Board finds that based on the Assisted Living Regulatory Act of 2000, assisted living facilities constitute a type of community residence facility. Further, the Board notes that historically, assisted living facilities have been treated as a type of community residence facility.

The background of Section 330.5(i) of the Zoning Regulations clarifies this issue. Prior to the revision of Section 330.5(i) in 1998, the Zoning Regulations did not permit a CRF in a residential zone regardless of whether it served handicapped people, unless the facility served fewer than nine people. After the adoption of the FFHAA, the United States Justice Department determined that the District of Columbia Zoning Regulations did not provide equal housing opportunities for handicapped persons to reside in multi-family zones. In practice, many handicapped facilities were deemed CRFs and were subject to limitations that did not apply to housing serving non-handicapped persons. The Justice Department threatened to sue the District government to resolve this differential treatment.

On September 30, 1997, the District signed a "Stipulated Agreement" with the Justice Department agreeing to petition for a change to the Zoning Regulations by December 24, 1998, to eliminate this unequal treatment. The changes that are relevant in this case are the amendments to Section 330 of the Zoning Regulations which allowed CRFs for handicapped persons in the multi-family zone as a matter-of-right, so that such facilities are not subject to a greater level of regulation than that applicable to housing for non-handicapped persons. The Board concludes that based on the representations of the owner, the proposed assisted living facility will comply fully with the newly adopted Assisted Living Regulatory Act of 2000 and will provide residents with assistance in activities of daily living, such as eating, bathing, toileting and grooming. This particular facility will also serve individuals with cognitive impairment caused by Alzheimer's Disease. These residents clearly meet the definition of handicapped under the FFHAA and qualify as members of a protected class under the FFHAA by virtue of having "a physical or mental impairment which substantially limits one or more of such person's major life activities." 42 U.S.C. § 3602(h); see, e.g., *Hovson's, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 and n. 3 (U.S. Ct. App. 1996); *Assisted Living Associates of Morristown, LLC v. Morristown Township*, 996 F.Supp. 409, 435 (D.N.J. 1998).

Calculation of FAR. The Board concludes that the building's FAR has been properly calculated and fully complies with the 3.5 FAR limit applicable in the R-5-D zone. The testimony of record from the architect and the owner's zoning expert demonstrates that the FAR was based on a careful evaluation of gross floor area contained in the regulations. The testimony demonstrates that the FAR computations

correctly excluded a portion of the garage level of the building since only 11.9% of that level constitutes basement space. In determining the amount of the garage level that should count towards the building's FAR, the architect applied the well-established and long recognized "perimeter wall test." The owner's zoning expert discredited the Appellants' computation of FAR and demonstrated that several areas of the building that are not countable toward FAR were incorrectly included by the Appellants. The Board concludes that it has accorded ANC 3G the great weight to which it is entitled, but notes that it concludes that ANC 3G's FAR computations were demonstrated to be inaccurate in several respects.

Rear Yard Set back. The Board concludes that the proposed building fully complies with the rear yard setback requirement. The Board notes that while a typical square lot contains four sides, the subject lot is multi-sided and hence highly irregular. Further, an alley stub protrudes into the lot at an angle. The Board concludes that in considering the lot's unusual configuration, the Zoning Administrator correctly determined that Connecticut Avenue was the front, and that the portion of the lot abutting the north-south alley to the rear, running roughly parallel to Connecticut Avenue was the rear. The Board concludes that the ruling of the Zoning Administrator yields a logical and natural result.

In contrast, the Board concludes that the Appellants have suggested an inappropriate interpretation of the rear yard requirement that is not logical, appropriate or reasonable and simply cannot be supported by the regulations. The portion of the building that abuts the alley stub cannot be considered the "rear line of the building" and

such a determination would render a disproportionately large portion of the lot unbuildable. The Board concludes that the building, as proposed, provides significant open space and ample light and air to adjacent properties consistent with the intent of the yard requirements.

Building Height. The Board concludes that the Chief of the Zoning Review Branch and the owner's zoning expert have demonstrated that the building height was measured properly and that, at 83 feet, the height is well below the allowable 90-foot height limit in the R-5-D zone. The Chief of the Zoning Review Branch and the owner's zoning expert also demonstrated that architectural embellishments and penthouses do not count toward the building height, therefore they were correctly excluded from the building's height computation. The Board further notes that the 83-foot building height was conservatively measured to the parapet line of the tower element which contains the elevator machine equipment, while the Zoning Regulations would permit the measurement to be taken at a lower point, the roof itself, thus resulting in an even lower height for the building. The Board also notes that, while a portion of the building consists of seven stories, the southern portion of the building steps down to only six stories. The Appellants produced no evidence to demonstrate that the height of the building was measured incorrectly. The Board concludes that it has accorded ANC 3G the great weight to which it is entitled, however, the ANC produced no persuasive evidence to discredit the testimony of the owner's zoning expert or the Chief of the Zoning Review Branch.

Penthouse. The Board concurs with, and precedent supports, the Zoning Administrator's interpretation of the portions of the Zoning Regulations addressing roof-top structures and longstanding precedent regarding architectural embellishments. Accordingly, the Board concludes that the penthouse and architectural embellishments associated with the proposed building fully comply with the Zoning Regulations. The testimony of the Chief of the Zoning Review Branch and post-hearing submission on this issue provide compelling evidence that architectural embellishments do not count toward building height and are not subject to the penthouse setback requirements. The Board agrees with the testimony of the Chief of the Zoning Review Branch and his conclusion that the elevator tower located at the rear edge of the roof of the building was correctly designated as an architectural embellishment, and accordingly is not subject to the penthouse setback requirements. The Board concludes that the post-hearing submission of the Chief of the Zoning Review Branch dated August 15, 2001, correctly notes that there is no prohibition against including mechanical equipment within an architectural embellishment and that there is ample precedent for this issue in other recently approved buildings in the District of Columbia. The Board concludes that the Office of the Zoning Administrator regularly approves tower elements as architectural embellishments that are not set back from the exterior face of the building. The Board also concludes that the mansard roof-like structure that wraps around the perimeter of the building acts as an enclosure of the entire penthouse as required by the regulations. Accordingly, the roof plan meets the requirement for having a single penthouse enclosure. The Board also concludes that the building's FAR is below the maximum permitted FAR and that even if the elevator tower embellishment were counted toward FAR, the building would still

comply with the Zoning Regulations. Further, the Board notes that the building height was measured to the parapet at the top of the stair tower, while the regulations do not require measurement to that point.

The Board concludes that the Appellants have not successfully refuted the Zoning Administrator's interpretation of the penthouse requirements and the longstanding interpretation of the treatment of architectural embellishments. While the Appellants argued that the elevator tower embellishment constitutes an eighth story, the Board concludes that the Chief of the Zoning Review Branch demonstrated that such an element does not meet the definition of a story. While the Board concludes that it has accorded ANC 3G the great weight to which it is entitled, the Board concludes that the ANC has not offered sufficient evidence to merit a reversal of the Zoning Administrator's ruling regarding this matter.

Regarding the referral to the Office of Planning described in Section 411.10, the Board concludes that the Office of the Zoning Administrator does not routinely refer roof plans to the Office of Planning. Further, the owner's zoning expert noted that such referral is made only when the roof structure does not comply with the regulations. Given past interpretation of this section by the Office of the Zoning Administrator, the failure to refer the subject plans does not constitute a violation of the Zoning Regulation.

Parking and Loading. The Board concludes that the building permit drawings correctly show fully compliant loading facilities. In addition the plans include 31 parking spaces, which exceed the number required under the regulations. The Board concludes that the Zoning Administrator correctly determined the applicable parking and loading

requirements, and that a ruling from the Zoning Administrator was necessary since the regulations do not set forth specific parking and loading ratios for a community residence facility in the R-5-D zone. The Board concludes that the loading facilities provide unobstructed access as required under the Zoning Regulations.

The Board concludes that the Appellants offered no persuasive evidence to merit a reversal of the Zoning Administrator's ruling on this issue.

Non-Zoning Issues. With regard to the non-zoning issues raised by NANA, the Board finds that these issues are outside the scope of the Board's review authority. The Zoning Act (D.C. Code Sec. 5-424(f) (2000)) provides for appeals to the BZA that are "based in whole or in part upon any zoning regulation or map." In implementing that provision of the Act, the Zoning Regulations (11 DCMR 3100.2) provide that the BZA may "hear and decide appeals where it is alleged by the Appellants that there is error in any order, requirement, decision, determination, or refusal made by any administrative officer or body, including the Mayor, in the administration or enforcement of this Title." The BZA has consistently confirmed that interpretation on many occasions. Accordingly, the allegations brought by NANA that DCRA officials failed to address external agency concerns and did not provide full access to DCRA records are not zoning matters and are not properly before the Board. Similarly, any and all issues related to the licensing of assisted living facilities are similarly outside of the scope of the Board's authority.

CONCLUSION

The Board concludes that the issuance of Building Permit No. B435464 by the Zoning Administrator of the Department of Consumer and Regulatory Affairs was

appropriate. The testimony establishes that the Zoning Administrator applied a high level of scrutiny to the review of this Building Permit Application, and that the Zoning Administrator's determination of compliance was in accordance with the plain language of the Zoning Regulations and consistent with past precedent of the District of Columbia. The Board concludes that the Appellants failed to prove, by a preponderance of the evidence, that the building permit was issued in error; and therefore, the appeal of the NANA is denied.

DECISION

In consideration of the Findings of Fact and Conclusions of Law contained in this order, the Board of Zoning Adjustment for the District of Columbia **ORDERS DENIAL** of this appeal of the Zoning Administrator's decision in the issuance of Building Permit No. B435464.

For the reasons stated above, the Board concludes that the Appellants have not met their burden, it is hereby **ORDERED** that the appeal be **DENIED**.

VOTE:

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

ATTESTED BY: _____
JERRILY KRESS

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