MEMORANDUM

To: Board of Zoning Adjustment
Date: August 30, 2001
Case No. **16716**
From: Page Chiapella
Nebraska Avenue Neighborhood Association

Re: New substantive material submitted by Intervenor on August 28, 2001

On August 28, 2001, the Intervenor submitted to the BZA new partial plans for the project at 5111 Connecticut Ave, NW. These plans are substantially different from the ones submitted to DCRA, as noted below, and have not been approved by DCRA. If these plans are to be accepted into the record as support for not enforcing the mandatory roof structure setback and height limitations, the Nebraska Avenue Neighborhood Association (NANA) requests that the BZA hold a public hearing to allow cross-examination on these new materials.

Continuing presentation of changing and inconsistent plans by the Intervenor documents the Appellant's contentions that (1) the Zoning Administrators who signed agreement to the "precertification letters[1]" were not necessarily presented with final plans (footprint, structure or use) and (2) the plans submitted on July 10, 2000, were not substantially complete and in their final form. NANA requests that the requirements of 11 DCMR be enforced and not be bypassed based on the "precertification letters" and newly contrived plans.

Substantive changes include but are not limited to the following:

1. Extension of the rear of the main building at the elevator lobby, on floors 2 through 7. Note that rear-most the elevator which was next to the rear wall is now removed from the rear wall by several feet. Note also that this new extension should be included in FAR. (Compare with Appellant's submission, 7/3/01, Appendix A, pp 4, 7-13: Rear Elevation, 1st-7th floors; 7/10/01 submission, pp. 7 & 8: 3rd and 7th floors)

2. Conversion of the 7th floor "balcony" to include it in the main building; (Compare with Appellant's submission, 7/3/01, Appendix A, p. 4-- Rear Elevation; Appellant's submission, 7/10/01, p 8-- 7th floor)

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[1] "Precertification letters:" letters addressed to Gladys Hicks, dated 12/15/98 and 3/8/99 and Michael Johnson, dated 5/16/00. Initial building permit applied for on 7/10/00. (Appellant's submission, 7/3/01, Appendix G and Appendix D)

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3. Addition of 10 foot high semi-freestanding wall to the rear of the elevator penthouse; (Compare with Appellant's submission, 7/3/01, Appendix A, p.4--Rear Elevation)

4. Added roof supports under the penthouse attic roof. On the original plans, this roof and all other "non-mansard" type roofs are not shown to have this "support;" (Compare with Appellant's submission, 7/10/01, pp 9-11--building sections)

5. Addition of what appears to b a concrete slab on the floor of the penthouse attic. (Compare with Appellant's submission, 7/10/01, p 9-- Longitudinal section)

6. Retraction edge of the elevator penthouse roof to the inside of the exterior wall and addition of what appear to be gutters. On the original plans, roofs all extend outside the exterior walls and have no gutters. (Compare with Appellant's submission, 7/3/01, pp.-5--Elevations; Appellant's submission, 7/10/01, pp 9-11--building sections)

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Findings of Fact: 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). 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. The Board may reverse the decision of the Zoning Administrator if the plans for the proposed building are not fully compliant with the requirements of the Zoning Regulations as shown by the preponderance of the evidence. The burden of proof rests with the appellant. (11 DCMR §3101.7) The guidelines in determining its decision relate to the Zoning Regulations themselves and include that:

(a) The Board of Zoning not exceed its prerogatives and thus in effect change the zoning;

(b) The Board of Zoning not violate a basic policy of the Zoning Commission, as expressed in the Zoning Regulations. (11 DCMR §3103.8)

The Board finds that:

(1) The height of the building does not comply with Zoning Regulations. The height of the building, including 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 is over that allowed in an R-5-D District. The highest point of the roof, as presented by both the Appellants and Intervener, is over the elevator penthouse. This height exceeds 90 feet. The height of the building does not comply with Zoning Regulations.

(2) The roof structures are not setback from the exterior walls of the building, as is mandatory. The height of the roof structures exceed the mandatory height limit of 18 feet, 6 inches. The structures do not meet the mandatory single structure requirement. The roof plan was not submitted to the Office of Planning, as is mandatory. (11 DCMR §§400.7, 411.3 and 411.10) The roof structures do not comply with Zoning Regulations.

(3) The rear yard has a mandatory requirement to extend across the full width of the lot (11 DCMR §199.1: Yard). The rear yard has a mandatory minimum depth of 4 inches per foot of vertical distance from the mean finished grade at the middle of the rear of the structure to the highest point of the main roof or parapet wall, but not less than 15 feet. (11DCMR §404.1) The distance from the rear of the structure to the rear of the lot has been shown to vary from 0 to 34 feet. The rear yard setback does not comply with Zoning Regulations.

(4) The calculation of the basement portion of the basement/cellar level of the structure improperly excluded a large portion of the rear wall of the structure. Inclusion of the basement brings the FAR over the R-5-D limit of 3.5. (11 DCMR 402.4) Other portions of the structure, each of which individually bring the FAR over the mandatory 3.5 limit, have also been improperly excluded from the FAR, including a third story balcony and the roof structures. Attic and porch areas of the structure have also been excluded improperly. (11 DCMR 199.1: FAR, Gross floor area) The FAR is greater than allowed in an R-5-D zone district and does not comply with Zoning Regulations.

(5) The SCHEDULE OF REQUIREMENTS FOR PARKING SPACES (11 DCMR §2101.1) The parking requirement is determined by use, District, and size. The claimed use of the structure is a Community based residential facility. The District (at the time of the application) was R-5-D. The claimed size of the facility is 130 residents, 102 units. The mandatory requirement for such a facility housing 16 or more persons is "As determined by the BZA." The determination of requirements for parking spaces does not comply with Zoning Regulations.

(6) No application for a building permit for a building or structure to be erected on or after May 12, 1958, shall be approved unless there is included with the plans for the building or structure a loading plan showing the location, dimensions, and grades of all loading berths, loading platforms and service/delivery loading spaces and approaches thereto in accordance with the provisions fo this chapter. (11 DCMR §§ 2200.2, 3201) The mandatory loading plan was not included with the application for the building permit. The Chief of the Zoning Review Branch testified that he did not send detailed plans (such as the curb cuts and driveway openings) to the Department of Public Works, as required by 11 DCMR §2204.13(e). In addition, the Appellant's exhibits show that the loading dock does not have unobstructed access to the building as required. (11 DCMR §2203.2) The off-street loading requirements do not comply with Zoning Regulations.

(7) The claimed use of the facility on the February 5, 2001 revised application is a community-based residential facility serving the handicapped, as that term is defined by the Fair Housing Act. The application is claimed as matter-of-right use for R-4 zone distr5icts and higher under 11 DCMR §330.5(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)

The Board finds that:

(1) The Zoning Administrator did not make the mandatory determination of the intended

use of the building but relied on a letter that claimed that use. The letter was signed in December, 1999, by a previous employee who did not see the instant application. The stated use changed several times between the December 1999 letter and the revised application, February 5, 2001, which claimed the matter-of-right use under 11 DCMR §330.5(i). A matter-of-right use has not been determined by the Zoning Administrator as is required under 330.5(I).

(2) The facility occupies a lot which is situated in both R-2 and R-5-D zone districts. 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, and garden for use of the residents to be located on this lot. Under 11 DCMR §§ 303 and 2514.2, the stated use as a community residence facility housing 130 residents is not a matter-of-right use in an R-2 district and must obtain a special exception from the Board of Zoning Adjustment.

The application does not comply with a matter-of-right use in for a R-2/R-5-D zoned property.

(8) 11 DCMR §3204 states that the application shall be complete for purposes of evaluation in order to hold vesting rights.

To hold vesting under a given zoning district, an application, an application shall be accompanied by the plans and other information required by §3202.2, which are sufficiently complete to permit processing without substantial change or deviation, and by any other plans and information which are required to permit complete review of the entire application under any applicable District of Columbia regulations. (§3202.5) And §3202.2 mandates:
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:

(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.

A Set Down hearing by the Zoning Commission for a zone district classification amendment which included the subject property occurred on October 16, 2000. A claimed matter-of-right use was not supplied until a revised building permit application was filed on February; 5, 2001. Other mandatary information missing from the application included delivery and loading plans and the basis for computation of those plans; and basis for computing parking requirements. At this time, there was a pending proceeding before the Zoning Commission to consider an amendment of the zone district classification of the site of the proposed construction from R-5-D to R-3. In such case, any work authorized by the permit may be carried to completion, only in accordance with the zone district classification of the site pursuant to the final decision of the Zoning Commission in the proceeding, or in accordance with the most restrictive zone district classification being considered for the site. (§3202.5(b) As the application was not complete as required for evaluation before a Set Down hearing for the amendment of the zone district, this application is not vested in the higher density zone (R-5-D) in effect before the Set Down hearing.

CONCLUSION

The Board concludes that the Building Permit No. B435464 issued by the Zoning Administrator of the Department of Consumer and Regulatory Affairs is not in compliance with the Zoning Regulations and was issued in error. It is hereby ORDERED that the appeal be SUSTAINED.