GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Office of Zoning

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

HEARING DATES: July 17, 2001; August 3, 2001

DECISION DATES: September 4, 2001; October 2, 2001

DECISION AND ORDER

This appeal was filed on March 16, 2001, by the Nebraska Avenue Neighborhood Association (NANA) challenging on various grounds the Zoning Administrator's decision to approve the issue of Building Permit No. B435464, to Sunrise Assisted Living LLC to construct the 7-story Sunrise Assisted Living facility at 5111 Connecticut Avenue, N.W. After a public hearing, the Board denied the appeal, affirming the Zoning Administrator's approval of the permit.

PRELIMINARY AND PROCEDURAL MATTERS

Parties. The co-appellants in this case are the Nebraska Avenue Neighborhood Association, represented at the hearing by its President, Dr. Anne Page Chiapella, and Advisory Neighborhood Commission ("ANC") 3G, represented at the hearing by Marilyn Holmes, Esq., Commissioner of ANC Single Member District (SMD) 3G-07. The subject property is located within the area served by ANC 3G. As indicated by its letters dated April 9, 2001 (Ex. 16) and June 25, 2001 (Ex. 29), ANC 3G joined in this appeal with NANA in challenging the Zoning Administrator's decision.

Toye Bello, from the Department of Consumer and Regulatory Affairs, Zoning Review Branch, appeared on behalf of the Zoning Administrator. The Office of the Corporation Counsel represented the Zoning Administrator.

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

BZA
Case No. 16716
Exhibit No. 55

Board of Zoning Adjustment
District of Columbia
CASE NO.16716
EXHIBIT NO.55

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. Sunrise is represented by ShawPittman LLP.

Notice of Appeal and Notice of Public Hearing. By memoranda dated March 26, 2001, the Office of Zoning advised Sunny and Louis Reyes, ANC 3G, the Zoning Administrator, the ANC Commissioner for the single-member district within which the property is located, the Ward 3 council member, the D.C. Office of Planning, and the Office of the Corporation Counsel of the filing of the appeal.

The Board scheduled a public hearing on the appeal for July 17, 2001. Pursuant to 11 DCMR § 3112.14, the Office of Zoning, on May 31, 2001, mailed ANC 3G, NANA, and the Zoning Administrator notice of hearing. Notice of hearing was also published in the *D.C. Register* on June 1, 2001, at 48 DCR 4898-99.

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.

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.

Appellants' Case. The Appellants raised eight issues on appeal that they assert 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 plans were not referred to the Office of Planning (OP) for review and report before final approval of the roof structures plan; and

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

Zoning Administrator's Case. Mr. Bello, Chief of the Zoning Review Branch, testified about the components of a complete building permit application and discussed the plan review process. He described the use of architectural embellishments and their application to the roof structures here, the FAR calculations for the cited areas of the building, and the judgments required due to the uniquely shaped lot. Mr. Bello described the Zoning Administrator's practices regarding application intake, application amendments, plan referral to OP, building height measurements, and uniform treatment of community-based residential facilities under the Regulations.

Property Owner's Case. Sunrise presented testimony from Sean Ambrose, its Vice President for Development. Sunrise also called two expert witnesses, one in architecture, Steve Ruiz the project architect, and one in building and zoning regulatory matters, Armando Laurenco. Messrs. Ambrose and Ruiz testified about consultations with the Zoning Administrator pre-application and plan changes requested by the Zoning Administrator during the application review process. Sunrise, through counsel, objected to the appellants' testimony and argument regarding the Building Code and Department of Health as outside the jurisdiction of the Board.

Public Agency Reports. There are no public agency reports in this case.

ANC Report. There is no ANC report in this case. ANC 3G presented testimony and argument at the hearing.

Closing of the Record. The record closed at the conclusion of the August 3, 2001 hearing, with the exception of an e-mail from OP related to the referral regarding 11 DCMR §411.10 and Mr. Bello's additional response to elevator machine room setback and documentation establishing when the application was actually accepted for intake.

When submitting its proposed findings of facts and conclusions of law, Sunrise attached a drawing illustrating the penthouse. NANA filed a memorandum requesting a public hearing to permit additional cross-examination on the exhibit. Sunrise then moved to strike the memorandum or to withdraw the exhibit. The Board declined to accept the drawing and ordered it stricken from the record. *See* 11 DCMR §§3121.5, 3121.9.

Decision Meeting. At its decision meeting on September 4, 2001, the Board, voting 4-0-1, with Member Renshaw not voting, denied the appeal in all aspects, except for the structure plan not reviewed by the Office of Planning and the stair and elevator/penthouse setback requirements. The Board, voting 3-1-1, with Member Renshaw not voting, denied the appeal based on roof structure not being reviewed by the Office of Planning. The Board, voting 3-1-1, with Member Renshaw not voting, moved to deny the appeal regarding the stair and elevator penthouse setbacks and locations adjacent to exterior walls.

Motion for Reconsideration. At the Board's October 2, 2001 public meeting, Zoning Commission member Carol J. Mitten requested that the Board reconsider its September 4, 2001 votes on the roof structure review by the Office of Planning and the stair and elevator penthouse setbacks. Ms. Mitten, who heard the Appeal but submitted her vote by proxy at the September meeting, wished to present her reasons for her vote and her request for reconsideration to the Board in person. After discussion, the Board voted 2-2-1, with Member Renshaw not voting, and the motion for reconsideration of the Board's previous votes failed for want of a majority.

FINDINGS OF FACT

The Subject Property

1. The property that is the subject of the appeal is located at 5111, 5113, 5117, 5119, 5121, 5123, and 5125 Connecticut Avenue, N.W., and 5201, 5203, and 5205 Chevy Chase Parkway, N.W., Square 1989, Lots 49-57 and 161, in an R-5-D District.

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

Pre-Application Rulings and Building Permit Application Intake and Review

3. On October 15, 1998, Sunrise met with then Deputy Zoning Administrator, 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. (Record Exhibit ("Exh.") 34, p. 5.)

4. The Appellants became aware of Sunrise's development plans early in the process. The ANC and the community opposed the alley closing application filed by Sunrise on August 2, 1999, to close the alley stub in Square 1989 adjacent to the subject property.

5. As a result of this opposition, Sunrise abandoned the alley closing application and pursued a building design that did not require closure of the alley. (Exh. 34, p. 6.)

6. 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 8, 2000, Michael Johnson provided written confirmation of the appropriate development parameters for the proposed assisted living facility on the site. (Exh. 34, pp. 6-7.)

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[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.

7. 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. (Exh. 34, p. 7.)

8. Among other information the submission contained scaled drawings that showed the lot's exact shape, topography and dimensions; the plan, elevation, location and dimensions of existing and proposed structures and the proposed use; parking and loading plans; and building plats required by 11 DCMR §3202. The building permit application filed on July 10, 2000 was complete.

9. DCRA accepted a filing fee and issued a receipt on July 10, 2000. DCRA will only accept a filing fee for a building permit application that the intake officials at the Permit Review Branch deem complete.[2]

10. The building permit application correctly referred to the proposed use as an assisted living facility.

11. Internal notes made on the building permit application by the permit intake personnel did not invalidate the initial filing date or in any way affect the owner's representation of the proposed use.

12. During its October 16, 2000 public meeting, the Zoning Commission set down for hearing a proposed map amendment that would downzone the subject property from R-5-D to R-3.

13. By virtue of 11 DCMR §3202.5, the property owner had to file a complete building permit application by October 16, 2000, in order to allow the processing of the building under the R-5-D zoning.

14. Once plans are filed, it is common for the permit reviewers to comment or make notations on the plans, require plan clarification, additional drawings or plan modifications to address specific issues.

15. DCRA reviewed the application and the detailed working drawings for eight months. During the review process, DCRA required Sunrise to amend or supplement portions of its plans. The adjustments associated with this building permit application were typical of the building permit review process.

16. During the review process, the Zoning Administrator did not specifically refer the roof structure plans to the Director of the Office of Planning for review and report as required by 11 DCMR §411.10.

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[2] Except where otherwise noted, the findings of facts stated herein are based upon the testimony of Toye Bello, Sean Ambrose, Steve Ruiz and Armando Laurenco and the evidence admitted in the record in the course of that testimony.

17. The Office of the Zoning Administrator has not made a specific referral of roof plans to the Office of Planning for several years.

18. Sunrise submitted a revised building permit application in February 2001.

19. 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 by the Fair Housing Act) with undergrd parking." (Exh. 6.)

Matter-of-Right Use

20. A community residence facility intended to be operated as housing for persons with handicaps is permitted as a matter-of-right in the R-5-D zone pursuant to 11 DCMR §330.5(i) which permits a community based residential facility as a matter-of-right in the R-4 and higher zone districts provided that the Zoning Administrator determines that the community based facility, otherwise complies with the zoning requirements of Title 11 that are of general and uniform applicability to all matter of right uses in an R-4 district, and is intended to be operated as housing for persons with handicaps.

21. The Sunrise facility, as described, is a community residence facility.

22. The Appellants did not challenge the determination that the facility would provide housing for the handicapped.

23. The proposed facility, as a community residence facility that provides housing for the handicapped, is permitted as a matter-of-right use on the property given its R-5-D zoning.

Floor Area Ratio ("FAR") Calculations

24. FAR for the building was calculated correctly in that the gross floor area calculations included all 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. For example, ventilation and utility shafts and rooftop terraces are excluded, but interior balconies are included.

25. The third floor roof terrace is excluded from FAR because it does not constitute habitable space; it is not fully enclosed. The terrace's columns are not exterior walls, there is no permanent roof, and the space is open to the elements.

26. The building has only seven stories. The eighth level consists only of roof structures, housing for mechanical equipment, stairway and elevator penthouses, described 11 DCMR §411.1 and therefore is not a story within the meaning of 11 DCMR §199.1. The penthouses qualify for the excess FAR that is allowed penthouses under 11 DCMR §411.7.

27. Floors or levels in roof structures that are less than six feet and six inches in height are excluded from FAR. The mechanical room on the roof was correctly excluded from the building's FAR calculation.

28. The architectural embellishments above the roof's parapet line do not constitute usable space and therefore are excluded from FAR.

29. The Zoning Administrator uses a perimeter calculation to determine the ratio of gross floor area that would constitute a basement by applying the definition of basement or cellar and prorating the amount of square footage that is devoted to each function. Testimony of Bello.

30. The portion of the building's lower level that qualifies as basement was correctly counted and included in the building's FAR. The FAR computations correctly excluded a portion of the garage level of the building because only 11.9% of that level constitutes basement space as defined in 11 DCMR §199.1.

31. FAR calculations were based only on the lot area of the R-5-D portion of the split-zoned site.

32. The building's FAR of 3.47 fully complies with the 3.5 limit applicable in the R-5-D zone.

33. Appellants' FAR computations were erroneous in many respects. The computations improperly included rooftop penthouses. The rooftop terrace over the low roof of the second floor was improperly counted toward FAR as if it were an exterior balcony. The appellants did not apply the perimeter wall computation correctly in determining the gross floor area of the lower level of the building in that they 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.

Rear Yard and Side Yard

34. The property is on a corner lot with a highly unusual configuration.

35. Corner lots, by definition, have more than one front. Once the property owner chooses the front, for purposes of determining yards, the rear yard is designated as the yard opposite the chosen front.

36. For a corner lot, "the depth of rear yard may be measured from the center line of the street abutting the lot at the rear of the structure." 11 DCMR §404.2.

37. A side yard is not required in an R-5-D district, but if one is provided, it must be at least three inches wide per foot of height of the building, but no less than eight feet wide. 11 DCMR §405.6.

38. In the case of unusually shaped lots, the Zoning Administrator must make a judgment call. The side and rear yard computations were determined appropriately given the highly unusual configuration of the lot.

39. The Zoning Administrator correctly determined that Connecticut Avenue and Chevy Chase Parkway were the fronts and the portion of the lot east of the building, abutting the north-south rear alley that runs roughly parallel to Connecticut Avenue and Chevy Chase Parkway, was the rear.

40. 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.

41. 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.

42. The Zoning Administrator correctly determined that the south side yard was the portion of the lot that abutted the building on the south at 5109 Connecticut Avenue.

43. The building's north wall continues to the building restriction line on the north that coincides with the boundary line separating the R-5-D and R-2 zones. The Zoning Administrator determined that no side yard is required on the north side.

44. 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.

45. The Zoning Administrator's ruling yielded an appropriate and natural result because it will ensure ample open space surrounding the building, consistent with the intent of the Zoning Regulations.

Building Height

46. The building height is the vertical distance between the level of the curb opposite the middle of the front of the building to the highest point of the roof or parapet. 11 DCMR §199.1.

47. The building height was 83 feet, which is seven feet less than the maximum permitted height of 90 feet in the R-5-D zone.

48. Accurate measurement of height under the Zoning Regulations requires the correct classification of the architectural and structural features that are permitted on rooftops. In determining the height of the subject building, the height was measured to the top of the three-foot parapet. 11 DCMR §199.1.

49. The roof contains several structures that do not count toward the determination of the height of the building under 11 DCMR §400.8. These structures include a mechanical penthouse that houses mechanical equipment, a stairway and an elevator machine room.

50. Architectural embellishments above the parapet line do not constitute habitable space and are not counted toward the building's height. 11 DCMR §199.1; Testimony of Bello. 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.

51. The Zoning Administrator correctly determined that the height of the building was in compliance with the Zoning Regulations and followed standard review procedures that had been used in cases since 1958.

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

Elevator Penthouse and Rooftop Mechanical Equipment

53. The architectural embellishments and penthouse elements were correctly excluded from both the height and FAR computations.

54. The Chief of the Zoning Review Branch correctly determined that the mansard roof-like structure that wraps around the perimeter of the building serves as an enclosure of the entire penthouse under 11 DCMR §411.3.

55. The roof plan meets the requirement that penthouses and mechanical equipment be placed within a single enclosure.

56. The Chief of the Zoning Review Branch correctly determined 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.

57. There is no prohibition against including mechanical equipment within an architectural embellishment.

58. The Zoning Review Branch regularly approves tower elements and architectural embellishments that are not set back from the exterior face of the building when they are incorporated with any other architectural element for dual functions and are not designed to gain additional habitable space.

59. The same doctrine was applied by the Zoning Administrator in approving similar designs in which architectural embellishments that are not set back from the edge of the roof include mechanical equipment at 2590 L Street, N.W., 1725 I Street, N.W., and 1818 H Street, N.W.

60. The enclosing façade of the elevator penthouse was deemed to be an architectural embellishment designed for the predominant purpose of architectural uniformity of the roof plan and therefore, not subject to the setback requirements of 11 DCMR § 400.7(b).

61. The determination that the façade was an architectural embellishment is consistent with a previous design in which the architectural embellishment was proposed as an extension of a façade or curtain wall above the main roofline to conceal mechanical equipment behind the wall.

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

63. 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.

64. The Office of Planning made no comments as to any negative impact of the roof structure on neighboring properties although it received notice of the appeal and had access to the plans.

Parking and Loading

65. The plans meet the parking requirement the Zoning Administrator applied to the proposed use.

66. The Zoning 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 because the Regulations do not provide a parking ratio for the proposed use.

67. In reviewing the permit application, the Chief of the Zoning Review Branch applied an even more restrictive standard, that for a rooming house or a boarding house. The project also satisfied the more restrictive requirements for a rooming or boarding house. The plans provide for 31 parking spaces.

68. The proposed loading dock and berth fully satisfy the requirements of the Zoning Regulations.

69. The convenience of use or the exact manner in which the loading facilities will function is beyond the purview of the review of the Zoning Administrator.

70. The approved plans adequately depict the location of the loading berth, loading platform and service delivery space. 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.

71. 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.

Licensing Requirements of 22 DCMR 3242 and 3257

72. Such licensing issues are issues that are beyond the scope of this appeal because they fall within the jurisdiction and expertise of the Department of Health.

Referral of Roof Plans to the Office of Planning

73. See Findings of Fact 16 and 17.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized under §8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended; D.C. Code, 2001 Ed. §6-641.07(g)(1) (2001)) ("Zoning Act"), to hear and decide appeals where it is alleged by an appellant that an administrative officer erred in any administrative decision based in whole or in part upon any Zoning Regulation or Zoning Map. This appeal is properly before the Board pursuant to 11 DCMR §§ 3100.2, 3101.5, and 3200.2. The notice requirements of 11 DCMR §3112 for the public hearing on the appeal have been met.

The appellants, NANA and ANC 3G, appeal the decision of the Zoning Administrator to approve the issuance of a building permit for a seven-story building to permit the construction of a 102-unit handicapped assisted-living-apartment residence on a variety of procedural and substantive grounds.

Complete Building Permit Application

In order to vest its rights under the R-5-D zoning, pursuant to 11 DCMR §3202.5, Sunrise had to file a complete Building Permit Application prior to October 16, 2000, the date upon which the Zoning Commission set down the application to down zone 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 for 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 for the rezoning of the property.

Matter-of-Right Use

Historically, the Zoning Regulations have treated assisted living facilities as a type of community based residence facility. 11 DCMR §199.1. The owner's property is located in an R-5-D zone. The Board notes that housing for the handicapped is clearly permitted as a matter of right use in an R-4 District under 11 DCMR §330.5(i), which states:

> 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 persons with handicaps. For purposes of this subsection, a "handicap" means, with respect to a person, a physical or mental impairment which substantially limits one or more of such person's major life activities, or a record of having, or being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance.

The Board concludes that the Zoning Administrator applied general and uniform zoning requirements applicable to multi-family residences in an R-4 District, such as parking requirements, in his review of the application for a building permit. There is no evidence in this case that the proposed building does not otherwise satisfy the zoning requirements for a multi-family residence in an R-4 or R-5 District. Community residential facilities for handicapped persons in the multi-family districts are not subject to a greater level of regulation than that applicable to housing for non-handicapped persons.

Appellants presented no evidence that the proposed building is not intended to provide housing for "handicapped" residents within the meaning of Section 330.5(i). Finding of Fact ("FF") 22. Based upon its testimony, Sunrise plans to serve residents who meet the definition of handicapped under the Federal Fair Housing Amendments Act and qualify as members of a protected class under the act 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). The proposed facility will assist residents in major life activities such as eating, bathing, toileting and grooming. This particular facility will also serve individuals with cognitive impairment caused by Alzheimer's Disease. The Board concludes that the uses of the building, described by Sunrise, are consistent with a community residence facility providing housing for the handicapped. Therefore, Sunrise' proposed use is permitted as a matter-of-right in an R-5-D zone.

Floor Area Ratio ("FAR") Calculations

The Board concludes that 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. In determining the amount of the garage level that should count towards the building's FAR, Sunrise applied the well-established and long recognized "perimeter wall test." The owner's zoning expert demonstrated to the Board's satisfaction that several areas of the building that are not countable toward FAR were incorrectly included by the Appellants.

Rear Yard and Side Yard

The Board concludes that the proposed building fully complies with the rear yard setback requirement of 11 DCMR §404.1. The Board notes that the subject lot has more than the usual four sides and hence its shape is 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 designated 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 that is consistent with the intent and meaning of the Zoning Regulations.

The Board is also constrained to conclude that the Appellants' interpretation of the rear yard requirement is not supported by the regulations and would produce illogical results. 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 not buildable. 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.

Elevator Penthouse and Rooftop Mechanical Equipment

The Board concurs with, and longstanding administrative precedent supports, the Zoning Administrator's interpretation of the portions of the Zoning Regulations addressing rooftop structures and 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 agrees with the Zoning Administrator and therefore concludes 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 practice represents a reasonable interpretation of the Zoning Regulations. 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. 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.

Failure to Refer Roof Plans to the Office of Planning

Section 411.10 of the Zoning Regulations provides that:

> Before taking final action on a roof structure plan, the Zoning Administrator shall have submitted the plan to the Director of the Office of Planning for review and report. The report shall be returned within fifteen (15) days of the date of submission unless a different period has been provided by mutual agreement of all parties involved.

There is no dispute that the Zoning Administrator failed to make this referral. Instead, it was pointed out to the Board that Office of the Zoning Administrator does not routinely make such referrals. The customary violation of a zoning regulation does not repeal the provision. Thus, the Zoning Administrator's failure to refer the subject plans violated the specific roof referral requirement set forth in the Zoning Regulations.

However, in this instance, the Board does not believe that this single violation justifies revocation of the permit issued here. Based upon its review of the record, the Board has found no substantive grounds for revoking the permit. During the course of this hearing, the Board could have requested the input from the Office of Planning with respect to the roof structure plans (*see,* D.C. Official Code §6-626.04 (2001), but did not do so. OP's only statement on the issue was an email stating that it does not customarily review such plans. Even if the Board remanded the permit for the purpose of a referral, OP's views would not be binding on the Zoning Administrator. Thus, a referral could very well accomplish nothing but delay. Given the fact that the Board has concluded that issuance of the building permit was consistent with the substantive requirements of the Zoning Regulations, the administration of those regulations is

not furthered by having the Office of Planning make non-binding recommendations with respect to matters already decided in this Order.

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 for comparable uses 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 because 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 the appellants, the Board finds that these issues are outside the scope of the Board's review authority. Section 8 of the Zoning Act provides for appeals to the BZA that are "based in whole or in part upon any zoning regulation or map." In implementing §8 of that act, 11 DCMR §3100.2 provides 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 by the Department of Health and other District agencies are similarly outside of the scope of the Board's authority.

The Board is required under D.C. Official Code §1-309.10(d)(3)(A) (200l) to give "great weight" to the affected ANC's recommendations. Under D.C. Official Code §1-309.10 (d)(3)(B) (2001), the Board must articulate with particularity and precision the reasons why the ANC does or does not offer persuasive advice under the circumstances and make specific findings and conclusions with respect to each of the ANC's issues and concerns. The ANC presented no report in this matter, but joined with the appellant in presenting its legal arguments. The Board has addressed each of the issues raised by the appellants and the ANC, and explained, in each instance, why it agreed or disagreed with the specific positions taken by these parties. The Board thus gave great weight to the issues and concerns raised by the ANC in this appeal.

Motion for Reconsideration – The Effect of a Tie Vote

Under §8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 799, as amended; D.C. Code, 2001 Ed. §6-641.07(h)), "The concurring vote of not less than a full majority of the members of the Board shall be necessary for any decision or order." The Board's Rules of Practice and Procedure likewise provide in 11 DCMR §315.2 that "The concurring vote of at least a full majority of the Board shall be necessary for any decision." Because the Board is composed of five members, a decision to grant Ms. Mitten's Motion for Reconsideration requires at least three affirmative votes.

A tie vote occurs when 50 percent of a body votes in favor of a motion and 50 percent votes against the motion. If there is no way to break a tie vote, the motion is lost. A tie vote that is not broken by a subsequent vote thus operates to deny the relief that was the subject of the motion. *See Morrison v. District of Columbia Bd. of Zoning Adjustment,* 422 A.2d 347, 349 n.5 (D.C. 1980) (tie votes); *see also Hubbard v. District of Columbia Bd. of Zoning Adjustment,* 366 A.2d 427, 428 (D.C. 1976) (failure to achieve super-majority vote tantamount to denial of motion for rehearing). In this case, there is no way to break the tie because the Board's fifth member is recused from this Appeal. Accordingly, the motion for reconsideration is deemed denied.

CONCLUSION

For the reasons stated above, the Board concludes that the appellants have not met their burden of proving by a preponderance of the evidence that the Zoning Administrator erred in approving the issuance of the building permit because the building plans do not conform in all respects to the applicable Zoning Regulations. It is hereby **ORDERED** that the appeal of the issuance of Building Permit Number B435464 filed by the Nebraska Avenue Neighborhood Association and joined by Advisory Neighborhood Commission 3G is **DENIED.**

VOTE: 4 – 0 - 1 (Sheila Cross Reid, Carol J. Mitten, Geoffrey H. Griffis, and David W. Levy to deny appeal in all aspects, except for the structure plan not reviewed by the Office of Planning and the stair and elevator/penthouse setback requirements; Anne M. Renshaw, not voting, recused).

VOTE: 3 – 1 - 1 (Sheila Cross Reid, Geoffrey H. Griffis, and David W. Levy to deny the appeal based on roof structure not being reviewed by the Office of Planning; Carol J. Mitten, opposed; Anne M. Renshaw, not voting, recused).

VOTE: 3 – 1 - 1 (Sheila Cross Reid, Geoffrey H, Griffis, and David W. Levy to deny the appeal regarding the stair and elevator penthouse setbacks and locations adjacent to exterior walls; Carol J. Mitten, opposed; Anne M. Renshaw, not voting, recused).

VOTE: 2 – 2 - 1 (Carol J. Mitten and David W. Levy to grant the motion for reconsideration of the Board's decisions (i) to deny the appeal based on roof structure not being reviewed by the Office of Planning and (ii) the stair and elevator penthouse setbacks and locations adjacent to exterior walls; Sheila Cross Reid and Geoffrey H. Griffis, opposed; Anne M. Renshaw, not voting, recused).

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

Each concurring member approved the issuance of this Order.

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

DATE OF ORDER: OCT 12 2001

AB/PY