GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPEAL NO. 16716B

As Director of the Office of Zoning, I hereby certify and attest that on FEB 15 2002 a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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BZA
Case No. 16716B
Exhibit No. 67

Board of Zoning Adjustment
District of Columbia
CASE NO.16716
EXHIBIT NO.67

Alan Bergstein
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ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16716B 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**

ORDER DATE: **October 12, 2001**

RECONSIDERATION DECISION DATE: **January 2, 2002**

ORDER ON MOTIONS FOR RECONSIDERATION AND REHEARING

PROCEDURAL HISTORY:

By Order issued October 12, 2001, the Board denied the appeal filed 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 ("Sunrise") to construct the seven-story Sunrise Assisted Living facility at 5111 Connecticut Avenue, N.W.[1] In addition to NANA, parties to the proceeding were Advisory Neighborhood Commission ("ANC") 3G and Sunrise Assisted Living.

On October 25, 2001, ANC 3G and NANA each submitted a timely request for reconsideration on the grounds that the Board erred, the record did not support the Board's decision, and the Board's Order contained material inconsistencies and factual errors or omissions. In the alternative, NANA sought rehearing on the grounds there was new evidence to be presented. Both challenged the Board's findings regarding the elevator penthouse/rooftop structures setbacks, correct Floor Area Ratio ("FAR") calculation for the basement, and rear yard setback. ANC 3G challenged the Board's decision regarding side yard setbacks and contended that the

[1] **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. 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.**

Board failed to give "specific factual findings made by the ANC" the "great weight" to which they were entitled. ANC 3G submitted an additional statement on December 21, 2001 pursuant to a notice from the Office of Zoning. NANA questioned the referral of the roof structure plans to the Office of Planning and setbacks for the combined stair penthouse and utility room. NANA also challenged the decision on the grounds that the Board based its decision on new evidence that was not a part of the public hearing record or the "official DCRA files," erroneous information and testimony from the Zoning Administrator, erroneous interpretations of the Zoning Regulations, and "DCRA precedence" instead of the Zoning Regulations.

Sunrise opposed the motions for reconsideration and rehearing on all grounds in memoranda filed November 5, 2001. Sunrise submitted an additional statement renewing its opposition to reconsideration and rehearing on December 21, 2001, pursuant to a notice from the Office of Zoning.

The Board held its review of the motions in abeyance pending completion of the Zoning Commission's *sua sponte* review of two issues in the Board's Decision and Order pursuant to 11 DCMR § 3128.1. The Commission completed its review and issued Zoning Commission Order No. 952, dated December 10, 2001. The Commission reversed that portion of the Board's order concerning the setback of the elevator penthouse and sustained that portion of the order finding harmless error in the failure of the Zoning Administrator to refer the roof plans to the Office of Planning.

On January 2, 2002, the Board denied NANA's Motion for Reconsideration and Rehearing and ANC 3G's Motion for Reconsideration at its regularly scheduled public meeting.

DECISION

Pursuant to the Board's Rules of Practice and Procedure, any party may file a motion for reconsideration or rehearing of any decision of the Board, provided that the motion is filed within 10 days from the issuance of a final written order. 11 DCMR § 3126.2. The motions for reconsideration or rehearing were filed in a timely manner on October 25, 2001, the prescribed 10-day period having been extended by three days to account for service by mail. 11 DCMR § 3110.2.

REHEARING

Section 3126.6 of the Board's Rules provides that: "[n]o request for a rehearing shall be considered by the Board unless new evidence is submitted which could not reasonably have been presented at the original hearing." NANA identified supplemental statements, documents or exhibits that the Board requested to clarify points discussed during the hearing, as well as the surveyor's plat for the new subdivision, as new evidence. The Board found that the materials do not justify the granting of a motion for rehearing because the materials were not new evidence, which could not reasonably have been presented at the original hearing on August 3, 2001. Accordingly, the Board denies NANA's motion for rehearing.

RECONSIDERATION

The Zoning Commission assumed jurisdiction of the issue of the elevator penthouse/architectural embellishment of the tower and entered a decision reversing the decision of the Board that this roof structure need not comply with the setback requirements of 11 DCMR § 400.7(b). As a result, the issue of the Zoning Administrator's response to the BZA regarding precedents and architectural tower embellishment is moot.

With respect to the referral issue, the Zoning Commission's determination to sustain this portion of the Board's decision lends credence to the legitimacy of the position taken. No credible argument is presented for the Board to reverse its finding of harmless error. On FAR calculations, the Board credited the testimony of the Zoning Administrator because he used the proper points of measurement in his FAR calculations while the appellants' expert testified that to determine the basement FAR he utilized the contours of the site, an incorrect point of measurement. The Board thoroughly considered rear and side yard setback during the hearing as reflected in its Order.

Regarding the proper location for measurements from the front of a building on corner lots, the Zoning Administrator has discretion because the applicants may choose the front of their property. On the issue of the subdivision of the property, the record before the Board is clear as to what part of the site was considered the R-5-D area, lots 49-57; the Board determined that the Zoning Administrator's calculations were not made in error. For zoning review purposes, it is not necessary for the building plans to show the actual elevator machinery and where it will be housed or demonstrate that the machinery can operate. During the Board's hearing and deliberations, it addressed the stair enclosure on the roof at length. The Board concluded that the plans show the stairwell enclosed behind the mansard, which serves as a single unifying enclosure around the building's perimeter.

The Board received the letter dated June 25, 2001 from ANC 3G in which it joined the NANA appeal. The presentation by the Appellant, including ANC 3G's statement, was considered to be representative of the ANC. Therefore the entire submission and the ANC's testimony received the "great weight", in that the Board addressed, with particularity, each of the points raised by the Appellant in a detailed manner.

The Order in BZA Appeal No. 16716A clearly indicates that the Board thoroughly reviewed and addressed all of the relevant issues raised by NANA and ANC 3G in their respective motions for reconsideration and rehearing. The Board's Order clearly and thoroughly outlines the reasoning for its decision to deny the appeal of NANA and ANC 3G. The Board finds no errors that justify reconsideration or rehearing of its original Order. The motions for reconsideration and rehearing are denied.

It is **ORDERED** that the motion for **REHEARING** is **DENIED.**

VOTE: 3-0-1 (Carol J. Mitten, Geoffrey H. Griffis, David W. Levy to deny; Anne M. Renshaw not voting, recused.)

It is also **ORDERED** that the motion for **RECONSIDERATION** is **DENIED.**

VOTE: **3-0-1** **(Geoffrey H. Griffis, David W. Levy, Carol J. Mitten, to deny; Anne M. Renshaw not voting, recused.)**

Accordingly, it is **ORDERED** that the motions for reconsideration and rehearing are **DENIED.**

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

Each concurring member has approved the issuance of this Order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director

Final Date of Order: FEB 15 2002

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.