ShawPittman LLP

A Limited Liability Partnership Including Professional Corporations

April 3, 2002

RECEIVED
D.C. OFFICE OF ZONING
2002 APR -3 PM 2:54

By Hand Delivery

Jerrily Kress, FAIA
Director, Office of Zoning
441 4th Sreet, NW
Second Floor
Washington, DC 20001

Re: BZA Appeal No. 16879 of the Nebraska Avenue Neighborhood Association and Advisory Neighborhood Commission 3G

Dear Ms. Kress:

We are in receipt of your letter dated March 29, 2002 and received on April 2, 2002, indicating that the above-referenced appeal will be scheduled for public hearing. For the reasons discussed more fully below, we respectfully request that you return the appeal to the appellants with a letter indicating that it does not meet the filing requirements of §3126.11 of the Zoning Regulations. Specifically, we submit the following:

1. The appeal is based on the same facts as the prior appeal No. 16716.

2. Pursuant to 11 DCMR §3126.11, the appeal is barred from being accepted for processing until one year from the date of the prior order, or until February 15, 2003.

3. The appeal should be returned to the appellants under the same processes followed by the Office of Zoning with respect to the recently filed request for reconsideration of the Order on Reconsideration, which also did not meet the requirements of the Zoning Regulations.

The Appeal is Based on the Same Facts as the Prior Appeal

A review of the latest filing demonstrates that this new appeal is based on the same facts as the prior appeal. Accordingly, it is barred until February 15, 2003. Indeed, this latest filing is the fourth attempt by the appellants to challenge the construction of the Sunrise project. The first challenge was the filing of the original appeal. The second was the motion for reconsideration, which the Board denied. And the third was the attempted filing of a motion for reconsideration of the Order on Reconsideration, which the Office of Zoning correctly returned to the appellants. This fourth attempt represents a clear

BZA
Case No. 16879
Exhibit No. 13

Board of Zoning Adjustment
District of Columbia
CASE NO.16879
EXHIBIT NO.13

abuse of the administrative process and should not be countenanced. Further, it is specifically prohibited by the Zoning Regulations.

Attached is a chart listing the "issues" raised in the latest appeal and a point by point summary of how those issues were already addressed and decided by the Board.[1] As this chart clearly demonstrates, there can be no doubt that this appeal is based on the same facts, the same building and the same uses, and that it raises the same issues that have already been exhaustively heard and reheard by the BZA. Further, the BZA has decided these issues against the appellants in the original appeal and in the motions for reconsideration. No further process is required or permitted.

The Appeal is Barred Under Section 3126.11:

Precisely to avoid the problems associated with relitigating the same issues, and in the interest of administrative efficiency, the Zoning Regulations prohibit the filing of a second appeal in this instance. Specifically, 11 DCMR §3126.11 states:

> "An applicant or appellant whose appeal or application has been denied shall not institute a new appeal or application ***on the same facts*** within one (1) year from the date of the order upon the previous appeal or application." (Emphasis supplied.)

There is no requirement under the Zoning Regulations that appeals be identical for Section 3126.11 to apply, merely that the appeals be based on the same facts. Here there can be no doubt that the facts in the proposed appeal are the same as those fully adjudicated in the previous BZA appeal. Thus, the new appeal is barred from being accepted for processing until February 15, 2003, one year from the date of BZA Order No. 16716-B.

All of the arguments raised by the appellants were either addressed in the previous case or could have been addressed if properly and timely raised in the previous

---

1 It is important to note that the only change from the original permit was the elimination of the elevator penthouse. Thus, the plans now are the same building in terms of use, FAR, rear yard, etc., and the issues now raised by the appellants concern the same building. Further, the plan showing the elimination of the elevator was filed in the record of the original appeal. (See the last page of the attached Exhibit D, Appellants' Motion for Reconsideration in the prior appeal, in which they specifically reference the "new elevator plan".) Thus the facts are the same and the issues now raised are a repeat of the same issues raised before.

proceedings. (See attached chart.) Appellants have had more than ample opportunity to present their case to both the BZA and the Zoning Commission and in both instances their claims were denied. The Zoning Regulations do not permit appellants yet another "bite at the apple." [2]

The Office of Zoning Should Return the Filing to the Appellants

This is not the first time the appellants have attempted to file a claim that is not permitted under the Zoning Regulations. On February 28, 2002, the appellants filed a request for reconsideration of the Board's Order on Reconsideration and the Office of Zoning, after consultation with the Board and Corporation Counsel, returned the filing. In its letter, the Office of Zoning pointed out that the filing was not permitted under Section 3126.2 of the Zoning Regulations. (See the attached Exhibit E.) The same procedure should be followed here. Under §3126.11, the filing is not permitted and the Office of Zoning, after consultation with the Board and Corporation Counsel, can return the filing to the appellants. No further action is required of the Board.

---

2 Indeed, §3126.11 of the Zoning Regulations is based on established principles of *res judicata* and collateral estoppel, both of which apply to administrative proceedings. We are not briefing this issue, but counsel to the Board, Alan Bergstein, is well aware that land use approvals are subject to the doctrines of *res judicata* and collateral estoppel. Rhema Christian Center v. District of Columbia Board of Zoning Adjustment, 515 A. 2d 89 (DC 1986 and Towles v. District of Columbia Board of Zoning Adjustment, 578 A.2d 1128 (DC 1990.) The Court clearly articulated its adoption of the *res judicata* doctrine in the Rhema case:

> Generally, once a claim has been finally adjudicated, the doctrine of claim preclusion or *res judicata* prevents the same parties from relitigating the same claim, including any issue that either was or might have been raised in the first proceeding .... (Rhema, 515 A.2d at 193.)

For the foregoing reasons and based on the clear application of §3126.11 of the Zoning Regulations, we respectfully request that the appeal be returned to the appellants, with no further action by the Board.

Sincerely yours,

Maureen E. Dwyer

Allison C. Prince by mcd

Allison C. Prince

Paul A. Tummonds, Jr.

cc: Alan Bergstein, Office of Corporation Counsel
NANA
ANC 3G
(All copies by hand-delivery this date.)

CHART OF ISSUES

A. Issue #1[3]:

§400.7(b): Housing for mechanical equipment, a stairway or elevator penthouse shall be set back from all exterior walls a distance equal to its height above the roof upon which it is located.

Raised in original appeal (see the attached Exhibit B, page 2 of NANA's July 25, 2001 filing.)[4]

Raised in first Motion for Reconsideration filed October 25, 2001 (see the attached Exhibit C.)

Raised in second Motion for Reconsideration, filed on December 31, 2001, which was based on the revised plans filed with the Zoning Commission, the same plans that are the subject of this appeal. (See the attached Exhibit D.)

The Board heard this issue and ruled against the appellants in its Orders dated October 12, 2001 and February 15, 2002.

Issue #2:

§411.5: Enclosing walls of roof structure shall be of equal height and shall rise vertically from main roof level.

Raised in original appeal. (See the attached Exhibit B.)

Raised in first Motion for Reconsideration. (See the attached Exhibit C.)

The Board heard this issue and ruled against the appellants in its Orders dated October 12, 2001 and February 15, 2002.

Issue #3:

§402.4: FAR in excess of 3.5 in an R-5-D District.

Raised in original appeal. (See the attached Exhibit B.)

---

3 Attached as Exhibit A is a copy of the appellants' amended filing in BZA Appeal No. 16879 with the issues identified as #'s 1-7 to correspond to the issues discussed in this chart.

4 For ease of reference we have attached relevant pages from the prior appeal. All of the attachments are in the public record and no new information is being submitted.

Raised in first Motion for Reconsideration. (See the attached Exhibit C.)

Raised in second Motion for Reconsideration. (See the attached Exhibit D.)

The Board heard this issue and ruled against the appellants in its Orders dated October 12, 2001 and February 15, 2002.

Issue #4:

§3202.4(b): Any amendment of the permit shall comply with the provisions of this title in effect on the date the permit is amended.

The Zoning Commission, in its sua sponte review of the BZA order, heard this issue and ruled against the appellants. In ZC Order 952 the Commission held that the setdown requirements were met, that the change in the plans was a minor modification, and "that DCRA should continue to process this application under the zoning that existed before the proposed zoning was set down." No appeal was taken from that decision and this issue is not before the BZA.

Issue #5:

§§§303, 304, 359: Uses subject to BZA approval/community-based residential facility/health care facility.

Raised in original appeal. (See the attached Exhibit B.)

Raised in second Motion for Reconsideration. (See the attached Exhibit D.)

The Board heard this issue and ruled against the appellants in its Orders dated October 12, 2001 and February 15, 2002.

B. **Issue #6:**

Rear yard, calculation of FAR, measurement of height of building, roof embellishment. (All of these issues are referenced as issues with regard to the original building permit issued March 8, 2001.)

Raised in original appeal. (See the attached Exhibit B.)

Raised in first Motion for Reconsideration. (See the attached Exhibit C.)

Raised in second Motion for Reconsideration. (See the attached Exhibit D.)

The Board heard these issues and decided against the appellants in its Orders dated October 12, 2001 and February 15, 2002.

C. **Issue #7:**

§354: Convenience store requires BZA approval.

Raised in original appeal. (See the attached Exhibit B.)

Raised in second Motion for Reconsideration. (See the attached Exhibit D.)

The Board heard this issue and decided against the appellants in its Orders dated October 12, 2001 and February 15, 2002.

Revised and Faxed 3/20/02 PC

Appeal of Sunrise Assisted Living Facility at 5111 Connecticut Ave. NW
Appellant: Nebraska Avenue Neighborhood Association

Allegations of 11 DCMR Zoning Code violations:

A. Permit No. B442149 (revision of B435464) dated 1/22/02:

#1 400.7(b) Housing for mechanical equipment, a stairway or elevator penthouse shall be set back fro: 1 all exterior walls a distance equal to its height above the roof upon which it is located

#2 411.5 Enclosing walls of roof structures shall be of equal height, and shall rise vertically from main roof level

#3 402.4 FAR in excess of 3.5 in an R-5-D district.

#4 3202.4(b) Any amendment of the permit shall comply with the provisions of this title in effect on the date the permit is amended.

#5 USES SUBJECT TO BZA APPROVAL:
303.8-303.9 Community-Based Residential Facility for greater than 15 persons in an R-2 district

304.1, 304.4-304.6, 304.9 Health care facility for 9 - 300 persons in an R-2 District

359.1, 359.2, 359.4 Health care facility for 16 to 300 residents in an R-5 District

#6 B. Permit B435464, dated 3/8/01:

199.1 Rear yard ... shall be unoccupied except as specifically authorized in this title.
2502.1 Rear yard open space shall be open and unobstructed to the sky.

199.1, 402 Exclusion of shafts, vents, porches and attics from gross floor area and FAR

199.1 Measurement of height of building to cornice, not highest point of the roof or parapet

400.3 Roof considered an embellishment

RECEIVED
D.C. OFFICE OF ZONING
2002 MAR 20 PM 1:08

#7 C. Not addressed in Final Order of Appeal No. 16716:

354 CONVENIENCE STORES IN APARTMENTS (R-5)
354.1 Shall be approved by the BZA
354.2 Shall be located on the first floor or lower
354.6 Principal entrance shall be more than 1/4 mile from a Commercial District
354.8 The Board shall give consideration to:
(a) proximity of Commercial Districts
(b) adequacy and convenience of parking spaces existing in or for the Commercial Districts
(c) adequacy and scope of commodities & services provided within the Commercial Districts

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION

Form BLRA-16 (Rev. 9/30/99)

BUILDING PERMIT (Type) MISC.

PERMIT NO. B442149

Date 1/22/02 Lot 0162 Square 1989

Address of work 5111 CONN AVE NW

Permission is hereby granted to SUNRISE CONNECTICUT AVE ASSISTED LIVING LLC (Owner) NO.

to erect/alter/repair/demolish/use/occupy/convert/move/ the building/structure/premises as described shown above in strict accordance with the conditions stated on BOTH sides of this permit.

Authorized work and conditions or performance thereof:

MODIFICATION TO PERMIT NO. B435464 REVISION TO ROOF PLAN/STRUCTURE TO INCLUDE ELEVATOR ONLY AS PER PLANS.

FILE COPY

TOTAL PERMIT FEE $
FILING FEE $
DATE
FEE PAYABLE $ 300.00
FOR INSPECTIONS CALL XXXXXXX 442-4641

Builder—
Width of Bldgs. Length
Zone R5D
Height of terrace above grade
Address of owner SAME
Deposit No. Amount $
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

Value $ No. of Bldgs.
No. of Stories 7
Height
To be occupied as ASST. LIVING RESIDENCE
Projections:

D CLARK 32301
DIRECTOR

Permit Clerk

PERMIT

BEFORE THE BOARD OF ZONING ADJUSTMENT OF THE DISTRICT OF COLUMBIA

IN RE: 5111 Connecticut Ave. N.W.	)	
Square 1989, New Lot 162	)	**BZA Appeal No. 16716**
Previous Lots 49-57 & 161	)	
	)	
Appeal of	)	
	)	
The Nebraska Avenue	)	
Neighborhood Association and	)	
Advisory Neighborhood	)	
Commission 3G	)	

APPLICANTS' APPEAL OF THE ADMINISTRATIVE DECISION OF THE ZONING ADMINISTRATOR* TO ISSUE BUILDING PERMIT No. 435464

I.
Introduction

The Nebraska Avenue Neighborhood Association and Advisory Neighborhood Commission 3G appeal the decision of the Zoning Administrator and/or the Acting Administrator of the Building and Land Regulation Administration in issuing building permit No. B435464. The permit was issued to Louis and Sonny Reyes by the Department of Consumer and Regulatory Affairs on March 8, 2001 for property located at 5111 Connecticut Avenue, N.W. The bases of this appeal are various noncompliances with DCMR Title 11 Zoning Code and procedural errors committed in evaluating the application (590AA) and issuing the permit.

*The Zoning Administrator and/or the Acting Administrator of BLRA.

SUMMARY OF NONCOMPLIANCE WITH TITLE 11 ZONING CODE CONTAINED IN THE APPLICATION

(Sections in parentheses are from DCMR Title 11, unless otherwise specified.)

A. STRUCTURAL

Issue #3 1. FAR over 3.5 in an R-5-D residential district (§402.4);

Issue #6 2. Inadequate rear yard setback -- setback does not extend across entire rear of building (§404.1);

Issue #6 3. Height over 90 feet in an R-5-D district (§400.7), and/or

Issues #'s 1+2 4. Improper housing for mechanical equipment, stairway, and elevator penthouse on the main roof (§§400.7 and 411);

5. Lack of appropriate parking and loading plans and the basis for computation of those plans (§§2101.1, 2201.1 and 3202.2 (a) (3)) ;

Issue #7 6. Convenience stores inappropriately located in the building (§§ 354.2 and 354.4).

B. USE; AND CODE AND LICENSING REQUIREMENTS FOR THAT USE

Issue #5 1. Development does not meet a matter of right use (§§303.5 (I) and 359).

2. The proposed facility does not meet all applicable code and licensing requirements (e.g. 22 DCMR §§ 3242 and 3257).

C. PROCEDURAL NONCOMPLIANCE and IRREGULARITIES:

1. The building permit application was not complete before setdown date for rezoning (Oct. 16, 2000). The application is not vested under R-5-D zoning and must comply with R-5-B zoning (§§ 3201 and 3204).

2. Inaccurate and incomplete information supplied on application materials (application and Environmental Impact Screening Form) invalidates these forms (Appendices E-1 and G).

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

In Re: 5111 Connecticut Ave., N.W. Square 1989, New Lot 162 Previous Lots 49-57 & 161	)	BZA Appeal No. 16716
Appeal of: Nebraska Avenue Neighborhood Association Advisory Neighborhood Commission 3G	)	

GOVERNMENT OF D.C.
ZONING COMMISSION
'01 OCT 15 P3:39

Motion for Reconsideration
Submitted by ANC 3G

Advisory Neighborhood Commission 3G respectfully submits this motion for reconsideration of the Decision and Order dated October 12, 2001, in BZA Appeal No. 16716, an appeal of a decision by the Zoning Administrator to issue a building permit to Sunrise Assisted Living Facility to construct a building at 5111 Connecticut Avenue, N.W. As grounds for this motion, ANC 3G contends that the decision contains material inconsistencies and factual errors and omissions. As a consequence, the findings and conclusions are not supported by the record. Our specific assertions of error are summarized below.

ELEVATOR PENTHOUSE

(1) The findings concerning the elevator penthouse structures are materially inconsistent in that they make contradictory findings as to the nature of the rooftop structure housing the elevator machinery.

> Findings 26 and 49 indicate that this rooftop structure is a penthouse. In accordance with these findings, the decision concludes that the penthouse qualifies for the excess FAR for penthouses (Finding 26) and is not subject to the building height limitation (Finding 49). Further, Findings 53 and 54 assert that the elevator penthouse meets the requirement of 11 DCMR § 411.3 concerning placement of penthouses within a single enclosure. Issue #2
>
> In direct contradiction, Finding 56 concludes that the rooftop structures are not penthouses at all but that the elevator equipment is instead an elevator tower housed within an "architectural embellishment." In addition, Findings 56 and 60 assert that the elevator penthouse is not subject to the penthouse setback requirement of 11 DCMR § 400.7. Issue #1

BZA
Case No. 16716
Exhibit No. 57

(2) The "architectural embellishment" said to contain the elevator penthouse is also described in materially contradictory fashion.

In some findings the architectural embellishment is said not to constitute usable space (Finding 28) and not to constitute habitable space (Finding 50).

In other findings it is conceded that the architectural embellishment has a functional use of housing mechanical equipment (Finding 57), has a dual function (Finding 58), and has a "functional duality" (Finding 62).

A structure that is used for functional purposes and that is conceded to have more than a purely decorative function cannot properly be considered an architectural embellishment within the meaning of the zoning code.

(3) The decision erroneously relies on previous errors made by the Zoning Administrator.

As support for the erroneous conclusion that the elevator penthouse need not comply with some of the penthouse requirements in 11 DCMR § 411, the decision relies on similar rulings by the Zoning Administrator wherein architectural embellishments housing mechanical equipment were not set back from the edge of the roof, as required by 11 DCMR § 411 (Finding 59).

Previous errors by the Zoning Administrator cannot support the BZA's approval of an error in the instant case. Indeed, this pattern of repeated errors in rulings by the Zoning Administrator (none of which, apparently, was previously challenged) argues not for a continuation of mistakes but for an emphatic reversal by the BZA. The BZA should correct the Zoning Administrator's erroneous interpretation and application of these zoning code provisions.

FAR NONCOMPLIANCE – BASEMENT

(4) The decision contains erroneous conclusions concerning the inclusion of a ceiling at the basement level of the building.

Findings 30 and 33 indicate that only 11.9 percent of the lower level constitutes basement space (Finding 30) and that the percentage of basement space calculated by the ANC was incorrect (Finding 33). Further, Finding 33 states that the ANC incorrectly measured from adjacent finished grade to the underside of the slab rather than to the finished ceiling.

Nothing in the building plans submitted to the Zoning Administrator shows a basement ceiling in the lower level. To the contrary, the Longitudinal Building Section included in the record (NANA Volume II, Page 9) clearly shows ceilings on every floor except the basement level.

It was unreasonable and erroneous for the Zoning Administrator to assume the building would include a ceiling at the basement level in the absence of any indication on the building plans that the basement level would include a ceiling and in view of the fact that the inclusion of a ceiling on a basement level is an unnecessary expense that almost all builders choose to forego.

Although an expert witness for Sunrise referred to a basement ceiling, he failed to indicate anywhere on the plans the existence of a ceiling or provide any other basis for his assertion, which constitutes mere speculation. Moreover, this oral testimony was not available to the Zoning Administrator to serve as a basis for measuring the basement perimeter and calculating the building's FAR. It is also telling that neither Sunrise's own architect nor its vice president, both of whom testified under oath, stated that the basement level includes a ceiling.

(5) Taking into account a hypothetical ceiling at the basement level, the building mass still exceeds the 3.5 FAR limit. Issue #3

Even assuming (contrary to the building plans) that a ceiling were built at the basement level, a substantial portion of the lower level perimeter would still qualify as basement space within the meaning of the zoning code. The grading plan clearly indicates that approximately 20 to 25 percent of the perimeter – not 11.9 percent as asserted by Sunrise and assumed by the Zoning Administrator – is more than four feet above the adjacent finished grade.

Even assuming a hypothetical ceiling, the basement floor area would be 3,000 to 4,000 square feet, not the 2,180 square feet assumed by the Zoning Administrator. Adding the minimal 820 square feet (3000 minus 2,180) to the building mass assumed by the Zoning Administrator (80,870) results in a FAR of 3.54, in excess of the maximum 3.5 (81,690 divided by 23,107 = 3.54).

REAR YARD SETBACK

(6) The decision erroneously denied the existence of an ANC report in this case and ignored the specific factual findings made by the ANC.

The section on page 3 of the decision headed ANC Report states, erroneously, "There is no ANC report in this case."

ANC 3G submitted an ANC report in a letter dated June 25, 2001, to the BZA. The ANC 3G report included a specific factual finding that the rear property line for this building lot "extends along the entire elngthy of the rear alley and alley stub, roughly parallel to and the same length as the front property line along Connecticut Avenue, which extends to the corner with Chevy Chase Parkway."

(7) The decision fails to accord the findings of ANC 3G the statutorily required "great weight" to which they are entitled.

The Zoning Administrator implicitly found that the rear property line consisted of one short, straight segment extending less than half the full width of the lot. In contrast, the Zoning Administrator implicitly found that the north side property line consisted of seven distinct segments and four 90-degree turns.

These findings are in complete contradiction to the findings of ANC 3G as to the rear property line of this lot and are, on their face, unreasonable. If the ANC's findings are given great weight, as required, the unreasonable determinations of the Zoning Administrator must be set aside and the permit revoked for failure to provide an adequate rear yard setback along the full width of the rear property line.

(8) The BZA decision also ignores the erroneous assessment by the Zoning Administrator as to the side yard setback requirement.

The BZA decision makes no finding as to the north side property line but instead notes only that the building's north wall extends along the boundary line separating the R-5-D and R-2 lots (Finding 43). The decision thus ignores the fact that the north side property line is on the eastern edge of the R-2 lot. As a consequence, a portion of the building is on the north side property line while other portions of the building are set back from the north property line.

Although no side yard is required in and R-5-D zone, where one is provided it must meet minimum setback requirements along its full extent (Finding 37). The BZA decision ignores the fact that north side yard for this property fails to satisfy this zoning code requirement.

For the foregoing reasons, ANC 3G respectfully urges the BZA to correct these errors and inconsistencies, to issue a revised decision reflecting the actual facts in the record of this matter, and to revoke the building permit erroneously issued by the Zoning Administrator.

Respectfully submitted,

Joseph L. Bishop

Joseph L. Bishop
Vice Chair, ANC 3G

Nebraska Avenue Neighborhood Association
5126 Nebraska Avenue, N.W.
Washington, DC 20008

District of Columbia Board of Zoning Adjustment
Room 210
441 4th Street, N.W.
Washington, D.C. 20001

October 25, 2001

RE: BZA Appeal No. 16716
5111 Connecticut Avenue, N.W.
Request for Re-review/Further Hearing

Dear Members of the Board:

On behalf of the Nebraska Avenue Neighborhood Association (NANA), an Appellant in the above referenced appeal, this is a request for the Board to re-review, reopen the record and require further hearing on designated issues, as provided in 11 DCMR §3126.2. The instant appeal challenges the issuance of building permit No B435363 to build a community residence facility on this property. The appeal was heard on August 3, 2001. The Board voted to deny the appeal at a public meeting held on Sept 4, 2001 and not to re-review the appeal on October 2, 2001. The order was issued on October 12, 2001 and received by NANA on October 15, 2001.

I. As grounds for further review, reopening the record and/or rehearing, this Appellant states as follows:

A. We have carefully reviewed the record in this case, including transcripts of the public hearings and public meetings at which the case was decided. The record reflects that the Board erroneously :

(1) relied and based its decision on new evidence provided after the public hearing which was not available to Appellants for cross-examination;

BZA
Case No. 16716
Exhibit No. 58

(2) relied for its decision on erroneous information and testimony, unsubstantiated by evidence, provided by the Office of the Zoning Administrator (OZA) and the Intervener, and shown to be erroneous by evidence from official DCRA files (Testimony Aug 3) which was accepted into the record for case No. 16716;

(3) relied on erroneous interpretations of 11 DCMR presented by the OZA and the Intervener;

(4) relied on claimed "DCRA precedence," for which the city did not present evidence that could be evaluated by the appellants, instead of basing determinations on 11 DCMR;

(5) relied on exhibits provided by the Intervener which were prepared in July, 2001, after issuance of the permit, are not included in DCRA official files, and are in conflict with material in official DCRA files associated with the instant building permit application;

B. We are referencing and submitting new evidence added to the DCRA records for the subject development and which could not reasonably have been presented at the August 3, 2001 hearing.

II. The following briefly summarized the inherent errors in the hearing and decision-making process. Evidence which comprises copies of official DCRA records for building permit application No. 590AA, which was approved and led to Permit No. 16716, will be referred to as "DCRA records."

A. Limitation of basement contribution to FAR by claimed ceiling in the lower level (parking garage). The Intervenor's witness, Mr. Laurenco, testified that there is a ceiling in the basement, 4 feet below the lower surface of the 1st floor slab. The Board accepted existence of this ceiling as reason to deny the Appellants calculation of additional FAR contributed by the basement. This additional FAR contributed by the ground level put the FAR over the 3.5 limit for an R-5-D district. In fact, DCRA records, which show all ceilings at all levels of the building, demonstrate that there is no ceiling in the basement (Exhibit 42: building sections). The OZA failed to provide evidence that the plans show that there is in fact said ceiling in the basement/cellar level and that OZA calculations of the FAR reflect said ceiling. All the information the OZA provided to the Appellants contradicts that finding. Lacking said ceiling, the lower level basement contributes substantially more than required to bring the FAR above 3.5.

B. The main roof contains two structures including an elevator penthouse and combined stair penthouse and utility room. Parties agree that these structures are not set back from the exterior wall. Both the OZA testified that this is required of roof structures (Testimony,August 3, 2001). In new information contained in a letter from OZA to the BZA dated Aug.15, 2001, the OZA reversed its view and relied upon "prededence" to override 11 DCMR 400.7. Three District of Columbia addresses were cited as evidence of the "precedence of this doctrine" that the elevator penthouse is not subject to the setback requirements of Section 400.7(b) (Exhibit 49). The OZA failed to demonstrate the relevance of these three properties and did not present evidence that would demonstrate how these examples would relate to the building permit that is the subject of the instant appeal. The Appellant is entitled to review and cross examine on this new information on which the BZA relied for its Decision.

Issue #1

C. The OZA did not refer roof structure plans to the Office of Planning (OP), as mandatory by11 DCMR §411. It was also claimed that the OZA has not done that for several years (the period after the time Mr. Laurenco was Acting Zoning Adminsitrator) and has an agreement with OP not to do that. The OZA erred in not submitting roof structure plans to the OP and did not substantiate its testimony with documentation presented from the OP. The current OZA has failed to substantiate its own practice.

D. The OZA states that for corner lots, different streets may be used as front for the purpose of determining height versus determining building front. The OZA cites the existence of a standing BZA opinion to that effect (Testimony, page 173). The OZA, however, erred in interpreting that both Connecticut Ave. and Chevy Chase Parkway may be the front of the lot for purpose of determining building front (Testimony, page 172). That interpretation does not follow from the opinion allowing use of one street to measure height and another street as the front of the building. The OZA has failed to present evidence of BZA opinion relating to the interpretation in the instant case. The OZA's determination of the rear year setback is based on the interpretation that the building front for corner lots may be on two streets. This interpretation illogical result--lack of consistency in ability to interpret the rear of lots and/or structures.

Issue #6

III. Additional new Information:
On 9/27/2000, the **OZA assigned a new zoning district of R-5-D to the R-2 portion (former Lot No. 161) of the plat for the new subdivision (Lot 162)** which incorporates the previous Lots 49-57 and 161 into Lot 162. This effectively gives the entire new Lot 162 an R-5-D designation (copy attached). It is therefore unclear how the OZA evaluated the zoning district of the building permit application when approving the subject permit, if he believed the entire lot was zoned R-5-D. The OZA has not provided evidence of its specific method of evaluating the FAR for the basement (for example) to resolve this issue.

The OZA's references to use of CAD software and the perimeter method (testimony August 3, 2001) does not substantiate the method of calculating basement contribution to FAR. The OZA's attested to percentage (11.9%) does not agree with those in DCRA records (Exhibit No. 42). The OZA failed to present and justify the basis of its evaluation of FAR actually used in passing the permit of the instant appeal, especially in light of the OZA action to sign off on the lot as entirely R-5-D zoning district.

IV. The impact of changing the interpretion of the Zoning Regulations on future development throughout the District of Columbia: The Board must be cognizant of the effect of its ruling on the application on the Zoning Regulations across the city. For example, there are vast numbers of corner lots bordering on two streets for which there would be great confusion when both streets are defined as the front of the lot and building. The standing BZA opinion regarding the different fronts for the purpose of determining height and front of the building does not cover this situation. This decision sets a new precedent.

V. Impact of the OZA incorrectly assigning new zoning districts to plats for new subdivisions: The board must also be cognizant of the effect of the OZA assigning new zoning district to plats prepared by DCRA. The information on certified copies the official plat from the surveyor's office is what zoning officials rely on in evaluating compliance with zoning regulations. The BZA would be setting new precedent by allowing or even appearing to allow OZA reliance on such documents in evaluating zoning compliance.

We therefore request the BZA to review, reopen the record, and schedule further hearing on the application, pursuant to 11 DCMR §3126.2. We believe that the following 3 issues are areas which the Board should address further through additional testimony and reevaluation:

1. FAR;
2. Roof structures, (setbacks and plan referral);
3. Rear yard setback.

Such hearing and reevaluation should address these issues in order for the Board to assess whether its present decision should stand.

Yours truly,

Anne Page Chiapella

Anne Page Chiapella, Ph.D.
President, Nebraska Ave. Neighbor Assn.

BEFORE THE BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

IN RE: 5111 Connecticut Ave. N.W.	)	
Square 1989, New Lot 162	)	**BZA Appeal No. 16716**
Previous Lots 49-57 & 161	)	
	)	
Appeal of	)	
	)	
The Nebraska Avenue	)	
Neighborhood Association	)	
	)	
Advisory Neighborhood	)	
Commission 3G	)	

Motion for Re-review

We request re-review/rehearing based on (1) presentation of new information by the Intervener Sunrise Assisted Living, LLC ("Sunrise") which was not available to the Appellants by the time of the hearing on August 3, 2001 (11 DCMR §3101.1) and (2) lack of decision on an Appellant's appeal point in the BZA's Decision and Order that the use and plans are noncompliant with use as a **Community Residence Facility** ("CRF"), as quoted below:

" USE; AND CODE AND LICENSING REQUIREMENTS FOR THAT USE Issue #5

1. Development does not meet a matter of right use (§§303.5 (i) and 359).

2. The proposed facility does not meet all applicable code and licensing requirements (e.g. 22 DCMR §§ 3242 and 3432.3.)."

The Intervener, Sunrise Assisted Living, LLC ("Sunrise") supplied a critical exhibit to the BZA which was not served on the Appellants. This exhibit [Exhibit 44-- DC Act 13-297 with handwritten notations (the "Act")] appears to be a basis for a conclusion in the Decision and Order. The Decision and Order refers to the term "Assisted Living Facility" as used in DC Act 13-297 (the "Act"). There are material differences between an ALFs and a CRFs. CRF, not ALF, is addressed in 11 DCMR. **CRF is the specified use on the building application that is the basis for claiming a matter-of-right use.**

Under the Act, ALF and CRF are not synonymous (§101). An ALF is not necessarily a CRF, contrary to the claim of the Intervener (Exhibit 44). In particular, locked wards for severely impaired Alzheimers patients are "other facilities," not CRFs. Residents of CRFs must generally be oriented as to time and place. Residents of CRFs may not be confined, unlike severely impaired patients in ALFs. Permit No. B435464 plans clearly show the inclusion of a locked ward to confine patients.

Sunrise has presented new and misleading information which incorrectly equates an ALF as a CRF. This facility does not comply with the requirements of a CRF.

Based on the above points, the Appellants respectfully request a re-reveiw/rehearing of this issue.

Yours truly,

Page Chiapella

Page Chiapella
President, Nebraska Ave. Neighborhood Assn.

Cc December 31, 2001 by first class mail:

Maureen E. Dwyer, Esq.
Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037-1128

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

Toye Bello
Acting Zoning Administrator
941 North Capital Street, NE, Second Floor
Washington, DC 20002

ANC 3G
Chevy Chase Community Center
5601 Connecticut Avenue
Washington, DC 20015

BEFORE THE BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

IN RE: 5111 Connecticut Ave. N.W.	)	
Square 1989, New Lot 162	)	**BZA Appeal No. 16716**
Previous Lots 49-57 & 161	)	
	)	
Appeal of	)	
	)	
The Nebraska Avenue	)	
Neighborhood Association	)	
	)	
Advisory Neighborhood	)	
Commission 3G	)	

Re: **Motion for Re-review**

The following is in support of motion for re-review of the Decision and Order dated October 12, 2001, in BZA Appeal No. 16716. One item of the Appeal was not addressed in the Decision and Order. Consideration of this Appeal item is requested. The other items document errors in the Decision and Order.

The item not addressed in the Decision and Order is as follows:

"6. <u>INAPPROPRIATE LOCATION OF CONVENIENCE STORES IN THE FACILITY</u> Issue #7

§354.2 The adjuncts authorized under this section <u>shall</u> be limited to the main floor of the building or below.

§354.6 Convenience stores in apartments (R-5). The center of the principal entrance of the apartment house <u>shall</u> be more than one-fourth mile walking distance from the nearest principal business street frontage of any business district previously established and operating in a Commercial or Industrial district." [Exhibit 28, BZA Appeal No. 16716. Underlining added]

These adjuncts are defined by the zoning regulations (§354.1) as convenience stores providing foods, drugs, sundries and personal services servicing tenants' daily living needs, include a beauty salon and a bistro. They are only allowed if approved by the Board of Zoning Adjustment. Note that this development is located about 300 feet from a commercial district--not in compliance. The beauty salon is located on the fourth floor--not in compliance.

CONCLUSION: The convenience store adjuncts are not in compliance. We request the appeal be sustained based on this noncompliance.

BRIEF SUMMARY OF ITEMS PROPOSED FOR RECONSIDERATION:

A. Nonconforming (excessive) FAR: **The FAR contribution from the basement alone (excluding the 3rd floor balcony or the 8th floor) brings the building FAR well above the 3.5 limit for a R-5-D district.** The parking garage ceiling claimed by the Intervener does not exist. In addition, the rear adjacent grade is at the bottom of the rear concrete staircase. The Intervener is incorrect in excluding basement based on said ceiling and use of the top of the staircase as adjacent grade.

B. Nonconformity with required rear yard setback: The Front and Rear Building Elevations document the front (Connecticut Avenue) and rear (along the alley) of the building. The project does not comply with the required setback across the entire rear yard (§199.1—yard, rear). **The unprecedented definition of the building having two simultaneous building fronts** is used to contradict the application materials which clearly show front and rear.

C. Nonconforming roof penthouse(s)? The Zoning Commission sustained the requirement that roof penthouses must follow requirement of setback from all exterior walls by a distance at least equal to its height above the roof on which it is located (§400.7(b)). The roof penthouse, including the **stairwell/machine room penthouse, is not set back from the exterior wall.** Issue #1

DETAILED EXPLANATIONS:
(References are to BZA August 3, 2001 hearing exhibits and transcript and to District of Columbia Municipal Regulations 11, Zoning Code.)

A. **The FAR contribution from the lower level basement alone (excluding the 3rd floor balcony or the 8th floor which are also under contention) brings the building FAR well above the 3.5 limit for a R-5-D district.** The entire lower level at the rear of the building along the alley is greater that 4 feet above adjacent grade. This comprises over 30% of the perimeter of the basement, not 11% as claimed by the Intervener. This can be seen clearly in the South and Rear Elevations (Ref: Exhibit 28). Issue #3

The Zoning Administrator/Intervener claims 11% based on (1) a nonexistent ceiling 4 feet below the first floor slab and (2) using the top of the rear stair as the adjacent grade. **Both of these claims must be true to decrease the FAR below 3.5. Neither is substantiated.**

The Appellants have shown that there is no ceiling in the lower level 4 feet below the first floor slab (Exhibit 42, building longitudinal and cross sections; ceiling and reflected ceiling plans). The only claim of that ceiling was by former zoning administrator, Armando Lourenco: "I would note also in passing that there's a ceiling to that basement and the calculations that were

presented here by the appellant are based on the distance to the underside of the slab forgetting that there is a four foot difference between that level and the level of the ceiling." (P. 266) Mr. LAURENCO later states that there is a 12 foot [high] garage entrance " .. immediately adjacent to the loading platform there is a 12-foot door into a garage," (p. 275). Note that the claimed ceiling would pass about 4 feet below the top of the garage entrance. No plans have been provided to the record demonstrating the said ceiling. The officially approved plans in the record show the lack of said ceiling.

In addition, the rear concrete stair is an emergency exit, required to access public space. MR. LOURENCO, referring to the rear stairs: "You still need to gain access to public area and that's what completes that means of egress. And that's the reason why those steps are there. It's not to lug the furniture up or lug the groceries up." (p. 276) The rear external staircase is an integral part of the building and is only allowed to extend into the required rear yard because it is an open concrete stair (DCMR §§ 199.1, 2502.1, 2502.6). To call it anything else would violate the requirement that the rear yard be open to the sky from the ground up. **The bottom of this stair, not the top, is the adjacent grade.**

CONCLUSION: The basement contribution to FAR brings the building FAR above the 3.5 limit. The FAR is noncompliant.

B. Nonconformity with required rear yard setback: The Front and Rear Building Elevations (Exhibit 28) document the front (Connecticut Avenue) and rear (along the alley) of the building. Only **the unprecedented definition of the development having two simultaneous building fronts**, one on Connecticut Avenue and one on Chevy Chase Parkway (as opposed to one street for height and another for building front), leads to the illogical conclusion that part of the rear of the building (shown on the rear elevation and located opposite the Connecticut Avenue front) is a side.

The interpretation of two fronts leads to obvious confusion: Mitten (p. 176): "How would you know where the rear is if the front is sort of, you know debatable.: "So if you have two fronts, does that mean you have two rears?" And Chair Reid (p.170): "How many sides are we talking about here?" Mr. Bello: " two of the sides [the two streets] constitute the front." Note that this is not consistent with the definition of a "corner lot" but of a "through lot" where the two fronting streets differ in direction by less that 45 degrees (§199.1). Issue #4

The conclusions of both zoning administrators is consistent with the Appellants' arguments that there is only one front and that the entire rear should be included in the rear setback: Mr. Bello (p. 167): "The rear would be the opposite location of the front." According to zoning expert Lourenco (p. 268): "And if you ask anybody, everybody can tell you what's the front and what's the back. The front is to the front, the back is the other way."

This unusual shaped lot, zoned R2/R-5-D was **created by a subdivision which occurred after the permit application was submitted** and **purchased by Sunrise after the appeal was filed.** Zoning code provides the Board with the power to grant variances from the strict

application of the regulations (§3107.2): As set forth in D.C. Code §5-424(g)(3) (1981), "Where, by reason of exceptional narrowness, shallowness or **shape of a specific piece of property at the time of the original adoption of the regulations**...the strict application of any regulation adopted under D.C. Code §§5-413 to 5-432 (1981) would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, to authorize, upon an appeal relating to the property, a variance from the strict application so as to relieve the difficulties or hardship..

CONCLUSION: The rear yard setback is nonconforming.

C. Nonconforming roof penthouse(s). The Zoning Commission sustained the requirement that roof penthouses must follow requirement of setback from all exterior walls by a distance at least equal to its height above the roof on which it is located (§400.7(b)).

The roof penthouse, including the stairwell/machine room penthouse, is not set back from the exterior wall. In addition, the new elevator penthouse and connecting wall are not set back from the exterior wall by a distance equal to their height from the main roof. The "mansard roof" (connecting wall and cover to the new elevator structure) extends above the main roof and outside the building exterior walls.

New elevator plan supplied to the Appellants by Sunrise Assisted Living, LLC shows a smaller elevator replacing one of the original two. As pointed out by architect Chris Fromboluti, expert witness for the appellants, only a single emergency exit is provided for the 7th floor, instead of the required two (p. 192). The decreased elevator capacity may exacerbate the emergency exit problem. The required Elevator Needs Study (11 DCMR 358.5 reference to Title 22 requirements) has not been conducted.

CONCLUSION: Roof structures are not compliant with §400.7(b) set-back requirements.

For the foregoing reasons, the Nebraska Avenue Neighborhood Association respectfully requests the BZA to correct these errors and issue a revised decision reflecting the actual facts in the record of this case and to revoke the building permit erroneously issued by the Zoning Administrator, Department of Consumer and Regulatory Affairs.

Yours truly,

Page Chiapella

Page Chiapella
President, Nebraska Ave. Neighborhood Assn.

Cc: Maureen Dwyer, Esq.
William Bennett, Esq.
Toye Bello

Government of the District of Columbia
OFFICE OF ZONING

MEMORANDUM

To:
Ms. Anne Paige Chiapella
NANA

Chairman Joseph Bishop
ANC 3G

Commissioner Marilyn Holmes
ANC 3G

Ms. Maureen Dwyer, Esq.
Shaw Pittman LLP

Mr. Paul Tummonds, Jr., Esq.
Shaw Pittman LLP

Mr. Toye Bello
Acting ZA- DCRA

Mr. Alan Bergstein, Esq.
Corporation Counsel

Mr. William Bennett, Esq.
Corporation Counsel

Charlotte Parker, Esq.
Corporation Counsel

Ms. Ellen McCarthy
Office of Planning

From: **Ms. Jerrily R. Kress, FAIA** -Director – Office of Zoning

Date: December 20, 2001

Re: Appeal No. 16716 – Sunrise Connecticut Avenue Assisted Living, LLC

Dear Parties to the Above Referenced Matter:

Due to some confusion regarding the above referenced case, this memo serves as a reminder of the two motions for reconsideration (enclosed, please find copies of the two motions) scheduled before the Board of Zoning Adjustment on January 2, 2002 at 9:30 am. Any responses to these motions are due in the Office of Zoning prior to the meeting. These motions were filed in October, prior to the Zoning Commission's *sua sponte* review of the case. The motions were held in abeyance until the ZC rendered its decision. The following is brief description of their determination:

> ... the Commission *reverses* the BZA Order to the extent it held that the setback provisions of 11 DCMR §400.7 were not applicable to the elevator penthouse of the proposed structure. The Commission *sustains* the Board's finding of harmless error with respect to the Zoning Administrator's failure to refer the roof plans to the Office of Planning. Because the applicant, with the encouragement of the Commission, has filed new roof plans with the Department of Consumer Affairs, it serves no purpose to remand the issue back to the BZA. The new plans filed by the applicant replace the plans that were the subject of the appeal. Thus, the elevator penthouse issue has been now rendered moot with respect to this appeal. The remainder of the Board's order remains unchanged and may now take effect, subject to any action the Board may take with respect to the pending motion(s) for reconsideration.

Please Note: Zoning Commission's sua sponte review of this case is no longer an issue, as parties may not submit motions on a sua sponte review.

441 4th Street, N.W., Suite 210-S, Washington, D.C. 20001
Tel: (202) 727-6311 • Fax: (202) 727-6072
E-Mail: zoning info@dcoz.dcgov.org • Web Site: http://dcoz.dc.gov/

Government of the District of Columbia
OFFICE OF ZONING
★ ★ ★
441 4TH STREET, N.W.
SUITE 210
WASHINGTON, D.C. 20001
(202) 727-6311

March 15, 2002

Anne Page Chiapella
President
Nebraska Avenue Neighborhood Association
5126 Nebraska Avenue, N.W.
Washington, D.C. 20008

Re: BZA Appeal No. 16716-B, Request for Reconsideration of Order On Motions for Reconsideration and Rehearing

Dear Ms. Chiapella,

At its executive meeting on March 12, 2002, the Board authorized me to return your letter, dated February 28, 2002, in which you asked the Board to reconsider its Order, dated February 15, 2002, on your Motion for Reconsideration and Rehearing. Contrary to your interpretation of the provisions of 11 DCMR § 3126.2, the Board's rules do not permit reconsideration of an order on a motion for reconsideration. The Board's rules define a "decision" as "the concurring vote of at least a full majority of the Members with respect to any **application** or **appeal** filed with the Board." (emphasis added) 11 DCMR § 3199.1. The rules define an "order" as "a written order of the Board evidencing its **decision** on an **application** or **appeal.**" (emphasis added) 11 DCMR § 3199.1. The Board's decision to deny your original motion for reconsideration was not a decision upon an application or an appeal and therefore, may not be reconsidered pursuant to § 3126.2.

BZA
Case No. 16716-B
Exhibit No. _____

Accordingly, the Board will not reconsider its Order denying the original motion for reconsideration and rehearing.

Sincerely,

JERRILY R. KRESS, FAIA
Director

cc: See Attestation Sheet - Attached

Government of the District of Columbia

OFFICE OF ZONING



441 4TH STREET, N.W.
SUITE 210
WASHINGTON, D.C. 20001
(202) 727-6311

Letter to Anne Page Chiapella - BZA Application No. 16716-B

As Director of the Office of Zoning, I hereby certify and attest that on MAR 15 2002 a copy of the attached letter 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:

Anne Page Chiapella, President
Nebraska Avenue Neighborhood
Association
5126 Nebraska Avenue, N.W.
Washington, D.C. 20008

Anne Mohnkern Renshaw, Chairperson
Advisory Neighborhood Commission 3G
Chevy Chase Community Center
P.O. Box 6252
Washington, D.C. 20015

Marilyn Holmes, Commissioner 3G07
Advisory Neighborhood Commission 3G
3700 Military Road, N.W.
Washington, D.C. 20015

Maureen E. Dwyer, Esq.
Paul A. Tummonds, Esq.
Shaw Pittman
2300 N Street, N.W.
Washington, D.C. 20037-1128

Kathleen Patterson, City Councilmember
Ward Three
1350 Pennsylvania Avenue, N.W.
Suite 107
Washington, D.C. 20004

Toye Bello Acting, Zoning Administrator
Building and Land Regulation Administration
Department of Consumer and Regulatory Affairs
941 N. Capitol Street, N.E.
Washington, D.C. 20002

Ellen McCarthy, Deputy Director
Office of Planning
801 North Capitol Street, N.E.
4th Floor
Washington, D.C. 20002

Alan Bergstein, Esq.
Office of Corporation Counsel
441 4th Street, N.W., 6th Floor
Washington, D.C. 20001

ATTESTED BY: Jerrily R. Kress

JERRILY R. KRESS, FAIA
Director, Office of Zoning

ShawPittman LLP

Certificate of Service

I hereby certify that a copy of the foregoing letter was delivered by hand on this 3rd day of April, 2002, to the following:

Anne Paige Chiapella
President, Nebraska Avenue Neighborhood Association
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

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

Paul A. Tummonds, Jr.

Document #: 1139169 v.8