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May 22, 2002

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By Hand Delivery

Mr. Geoffrey Griffis
Chairman
Board of Zoning Adjustment
441 4th Street, N.W.
Second Floor
Washington, DC 20001

Re: BZA Appeal No. 16879 – Response to the Board's Request for Additional Information on May 21, 2002

Dear Chairman Griffis and Members of the Board:

At the public meeting yesterday concerning the pending motion to dismiss BZA Application No. 16879, the Board requested certain additional information. Specifically, the Board requested a copy of the building permit plans that were filed in connection with the modification of the elevator penthouse along with an affidavit from the architect indicating that the modification affected only the roof plan/structure, and not any other aspect of the Sunrise project. Enclosed please find the building permit plans (Exhibit A) and affidavit from the project architect (Exhibit B). In addition, we have included:

1. BZA Order No. 16716A, dated October 12, 2001, denying the appeal of the building permit (Exhibit C).

2. Sunrise's submission to the Zoning Commission on November 9, 2001 in connection with the *sua sponte* review of the Board's Order denying the original appeal (Exhibit D). The plans that were submitted in connection with the *sua sponte* review are entirely consistent with those that were filed in connection with the modified building permit.

3. NANA's submission to the Commission dated December 3, 2001, raising the same issues that NANA now raises about the modified plans (Exhibit E).

BZA
Case No. 16879
Exhibit No. 27

Board of Zoning Adjustment
District of Columbia
CASE NO.16879
EXHIBIT NO.27

4. The BZA order denying the Motion for Reconsideration/Rehearing which had been held in abeyance during the *sua sponte* review and was decided after the *sua sponte* review was completed (Exhibit F).

This entire package of material is being served by hand delivery on all parties today. Yesterday, the Board agreed that the parties will have until the morning of May 29 to respond to this submission. The Board will deliberate on the Motion to Dismiss at a special meeting that will be held on the afternoon of May 29.

Summary of Argument

In Order No. 16716A, the BZA upheld the building permit for the Sunrise project. Immediately thereafter, the Zoning Commission initiated a *sua sponte* review to consider a narrow issue involving the elevator penthouse setback. Specifically, the Commission was concerned that the elevator penthouse was included in an architectural embellishment that was not set back from the edge of the roof. At the request of the Commission, Sunrise filed modified plans with the Commission for the sole purpose of addressing the concern about the lack of setback of the elevator penthouse. The modified plans fully addressed the concerns of the Commission by eliminating the embellishment entirely and reducing the elevator penthouse to a height of only 18 inches. Under Section 411.17, roof structures of less than four feet in height are not subject to the section of the Regulations governing penthouses. These modified plans were part of the record before the BZA at the time it considered and denied the Motion for Reconsideration/Rehearing of Order 16716A denying the appeal.

Accordingly, the issues that had been raised by NANA in its fourth attempt to challenge this project have been fully and completely considered by this Board and the Zoning Commission. The extremely detailed level of review of the Sunrise project has included:

1. the original Appeal;

2. the Commission's *sua sponte* review which included the modified roof drawings;

3. NANA's Motion for Reconsideration/Rehearing of the Board's denial of the appeal; and

4. NANA's second effort at a Motion for Reconsideration which was rejected on its face since it is not permitted by the Board's Rules.

The current appeal represents yet another effort to challenge this project after series of unsuccessful efforts. The Board found that the original roof structure plan including an elevator penthouse within an embellishment complied with the Regulations. At the time the Board rejected NANA's Motion for Reconsideration/Rehearing, it was aware that the embellishment had been eliminated and the elevator equipment was reduced in height to 18 inches.

In summary, the record is clear that: (1) the permit modification affected only the roof plan/structure; (2) no other aspects of the plans were changed; (3) the modified plans have been in the record of the original appeal case since November 9, 2001; (4) the modified plans are entirely consistent with the plans that were filed with DCRA to secure the permit modification; (5) the BZA and the Zoning Commission have fully deliberated on this matter; and (6) no new issues have been raised.

In light of the foregoing, we respectfully request that the Board dismiss this duplicative appeal without further delay.

Sincerely,

Maureen E. Dwyer

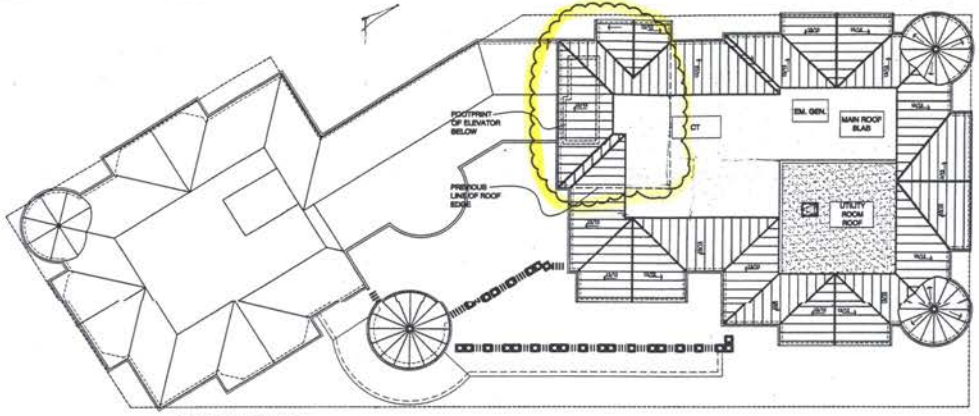
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Paul A. Tummonds

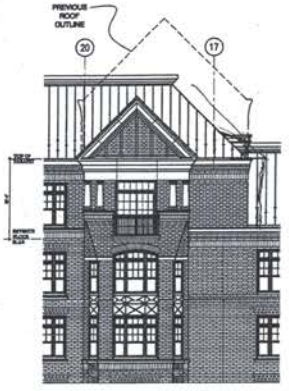
Attachments

cc: Alan Bergstein, Office of Corporation Council (by hand)
NANA (by hand)
Joe Bishop, ANC 3G (by hand)

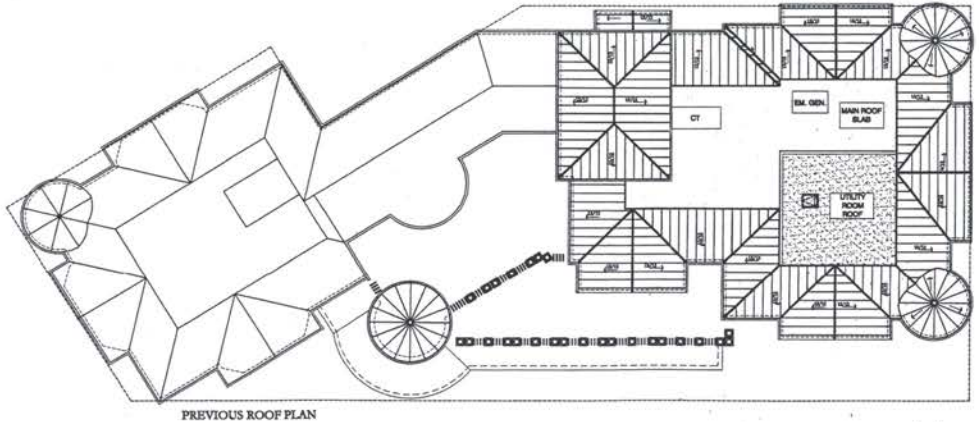
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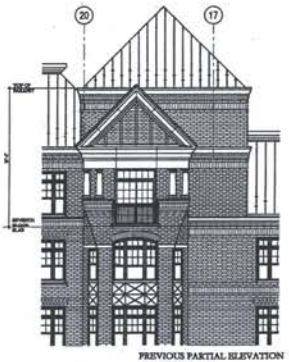
REVISED ROOF PLAN



REVISED PARTIAL ELEVATION
LOOKING WEST



PREVIOUS ROOF PLAN



PREVIOUS PARTIAL ELEVATION
LOOKING WEST

ROOF PLAN COMPARISON

SUNRISE
of Connecticut Avenue, DC

24 October, 2001

BEERY, RIO AND ASSOCIATES
ARCHITECTS

cf. 6 page 3 of Rev Attmen



G1 REAR ELEVATION

MATERIALS KEYING LEGEND

GENERAL NOTES

Key Plan

No	Revisions / Submissions	Date
A	ELEVATOR REVISION	11/29/01
	PERMIT SUBMISSION SET	07/07/00

5111 Connecticut Avenue, NW
Washington, D.C. 20015

BEERY, RIO AND ASSOCIATES ARCHITECTS

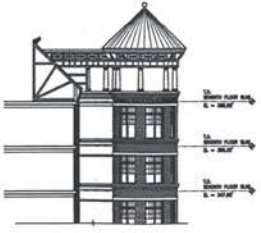
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DATE	07/07/00
SHEET NO.	A202



G1 FRONT ELEVATION

1/8" = 1'-0"



A13 PARTIAL ELEVATION @ ROOF GARDEN

1/8" = 1'-0"

MATERIALS KEYING LEGEND

GENERAL NOTES

Key Plan



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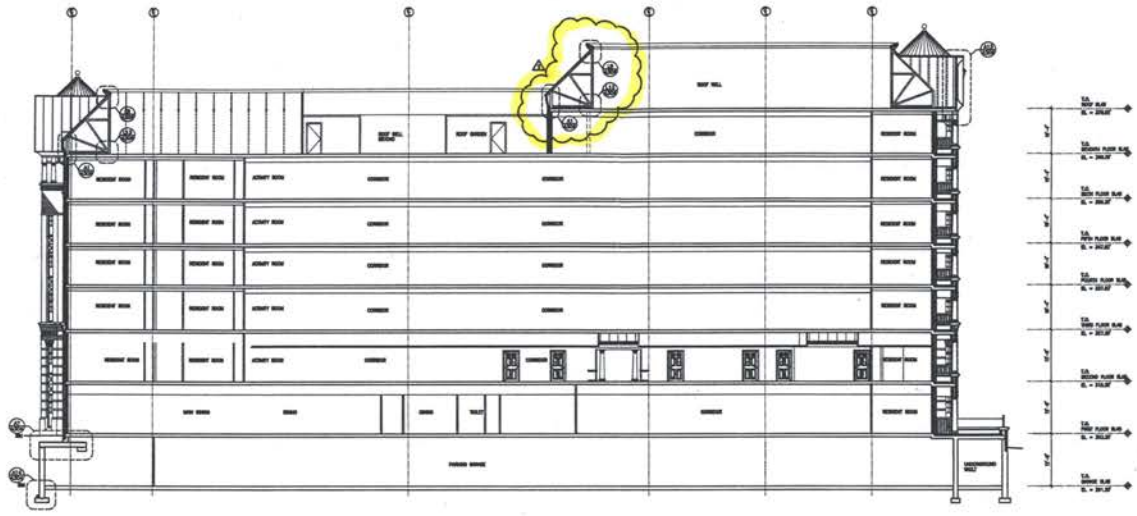
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BEERY, RIO AND ASSOCIATES
ARCHITECTS

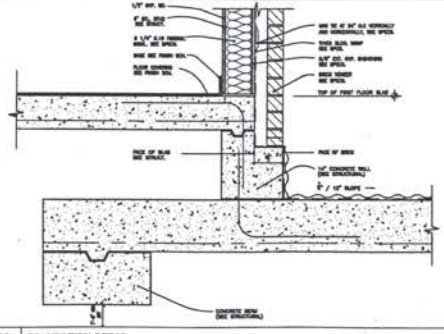
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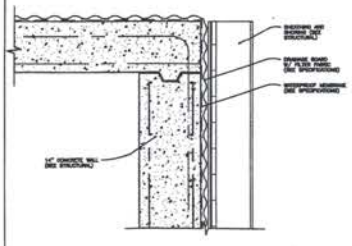
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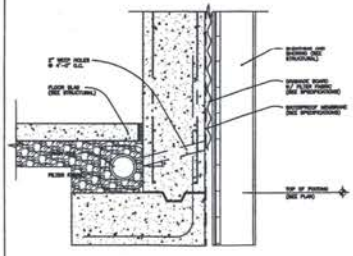
G1 BUILDING SECTION



A1 FOUNDATION DETAIL



A8 FOUNDATION DETAIL



A13 FOUNDATION DETAIL

MATERIALS KEYING LEDGE

GENERAL NOTES

Key Plan



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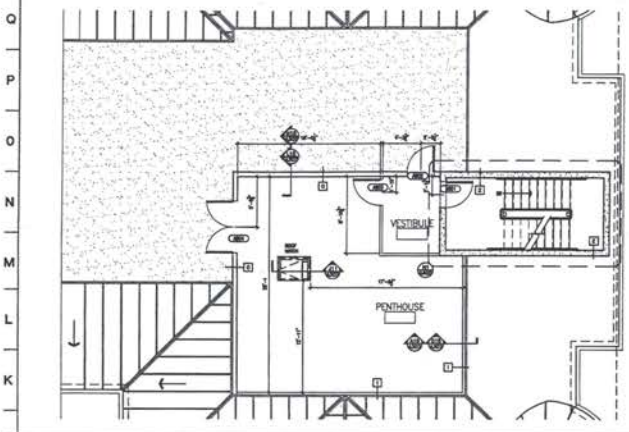
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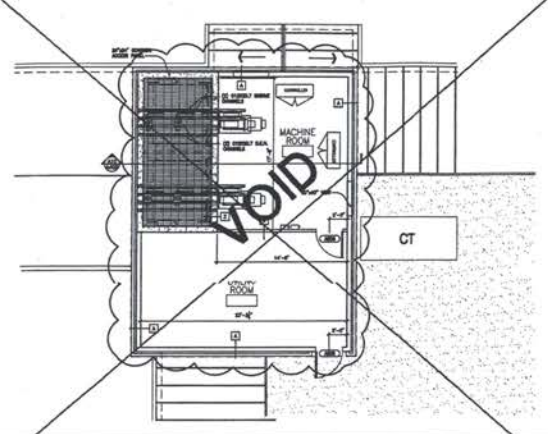
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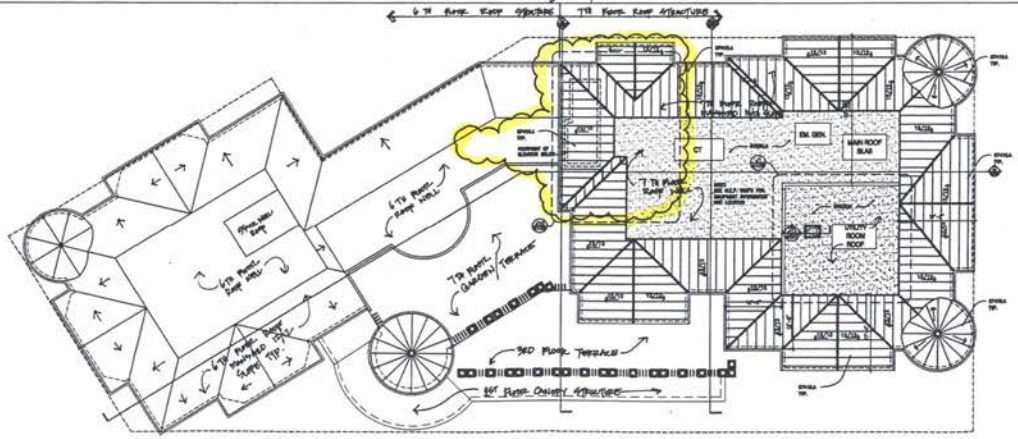
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J1 UTITITY ROOM PLAN



J10 MACHINE ROOM PLAN



A1 ROOF PLAN

GENERAL NOTES

Key Plan

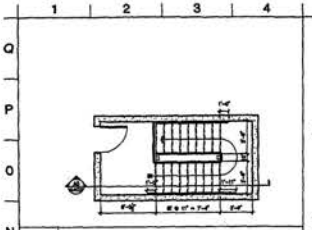
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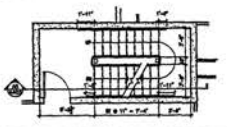
BEERY, RIO AND ASSOCIATES ARCHITECTS

ROOF PLAN

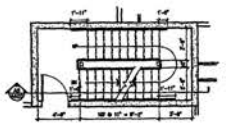
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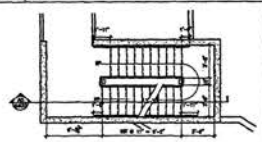
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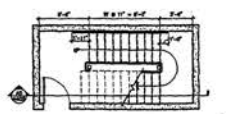
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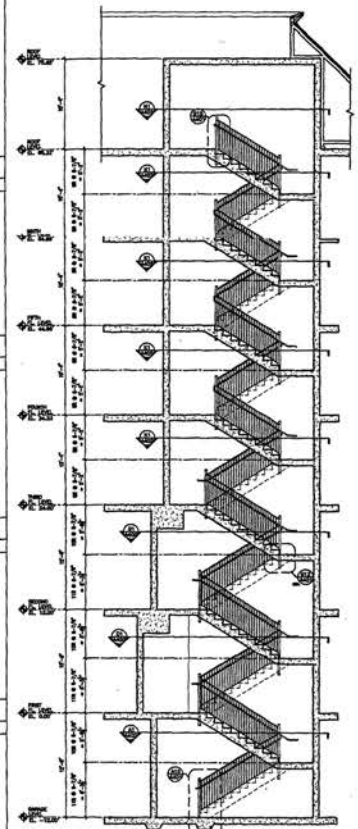
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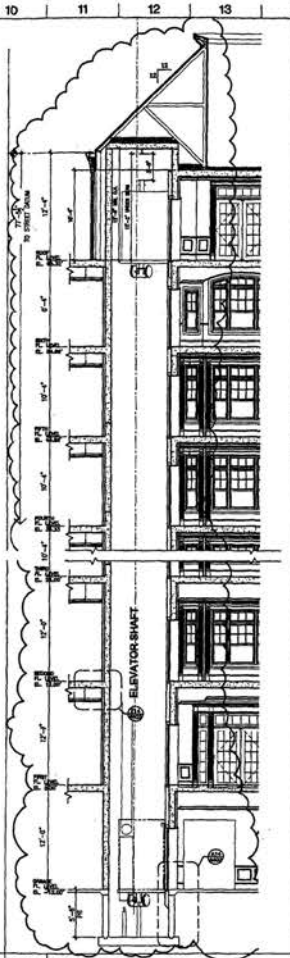
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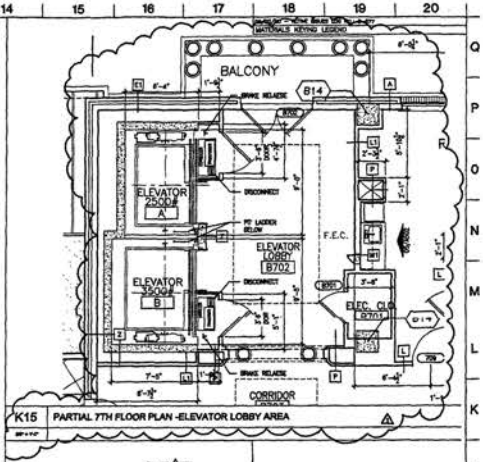
A1 STAIR "A" PLAN @ GARAGE LEVEL



A5 STAIR "A" SECTION



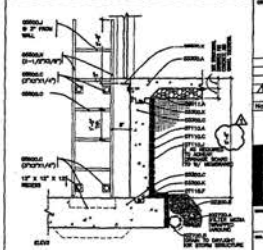
A10 SECTION @ ELEVATOR SHAFT



K15 PARTIAL 7TH FLOOR PLAN -ELEVATOR LOBBY AREA



F14 SECTION DETAIL @ ELEVATOR SILL



A14 SECTION DETAIL @ ELEVATOR PIT

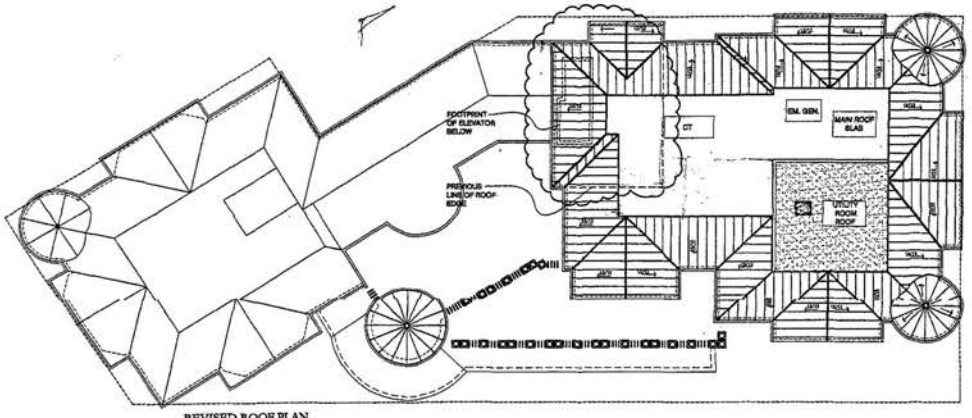
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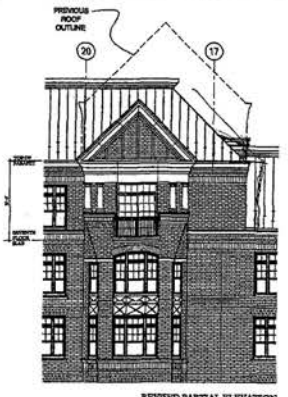
BEERY, RIO AND ASSOCIATES ARCHITECTS

ELEVATOR, STAIR SECTIONS & DETAILS

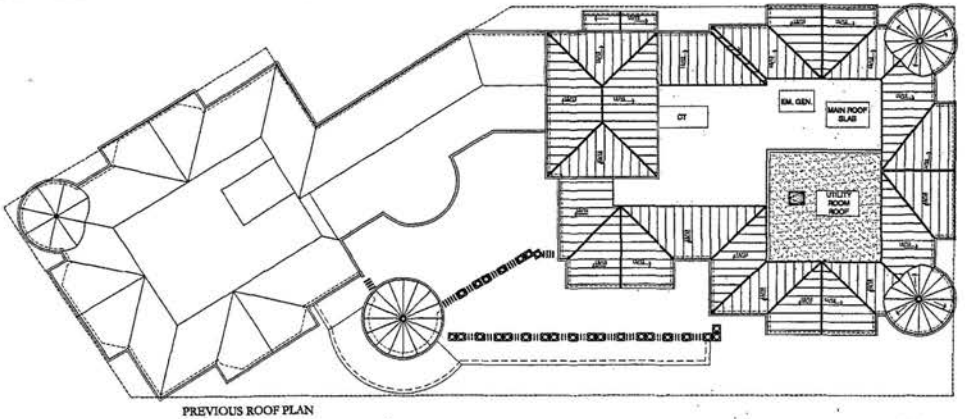
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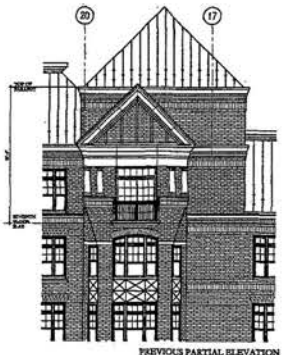
REVISED ROOF PLAN



REVISED PARTIAL ELEVATION
LOOKING WEST



PREVIOUS ROOF PLAN



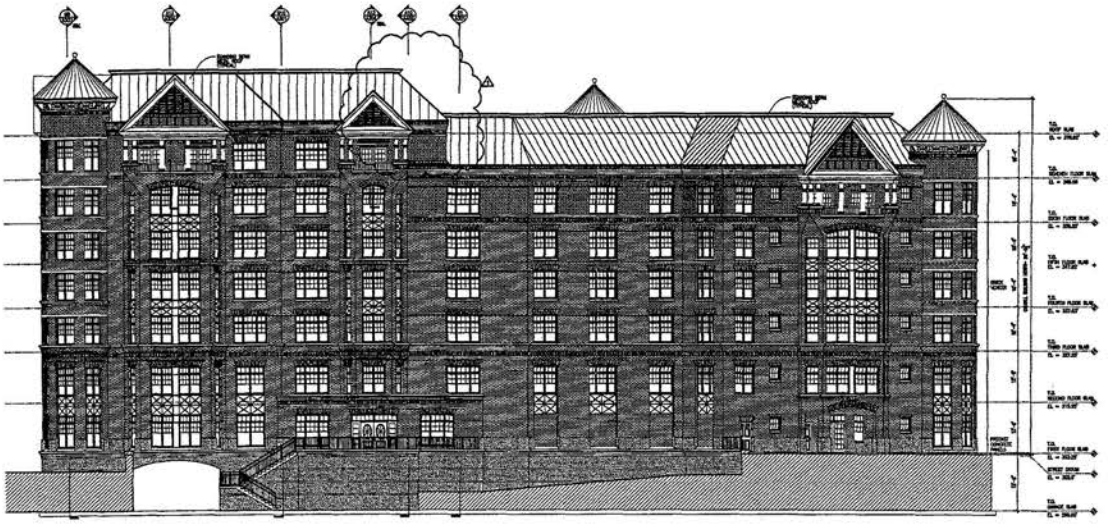
PREVIOUS PARTIAL ELEVATION
LOOKING WEST

ROOF PLAN COMPARISON

SUNRISE
of Connecticut Avenue, DC

24 October, 2001

BEERY, RIO AND ASSOCIATES
ARCHITECTS



G1 REAR ELEVATION

MATERIALS KEYING LEGEND

GENERAL NOTES

Key Plan

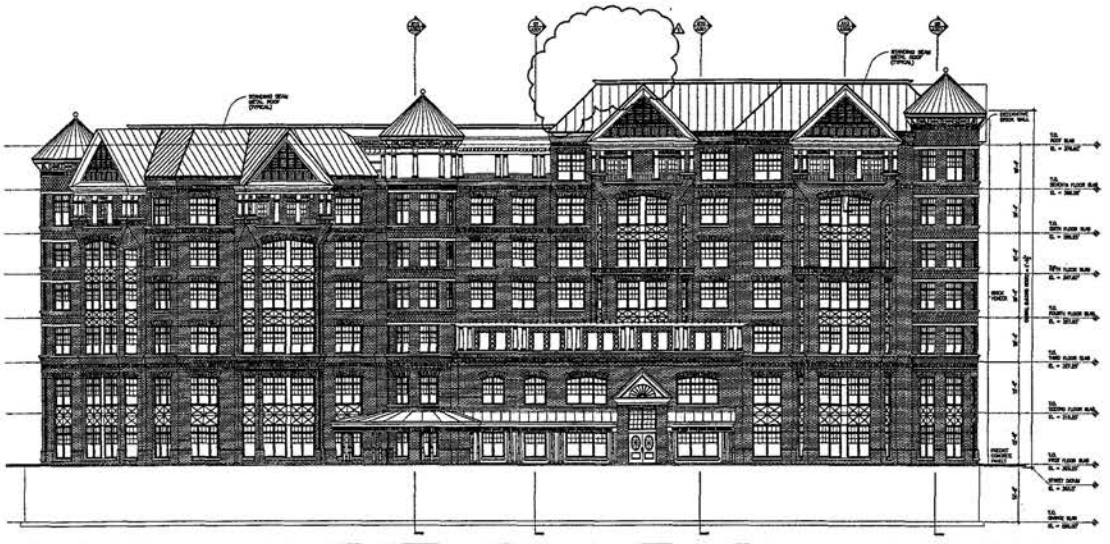
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5111 Connecticut Avenue, NW
Washington, D.C. 20015

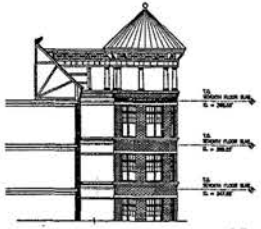
BEERY, RIO AND ASSOCIATES ARCHITECTS

ELEVATIONS

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G1 FRONT ELEVATION



A13 PARTIAL ELEVATION @ ROOF GARDEN

GENERAL NOTES

Key Plan



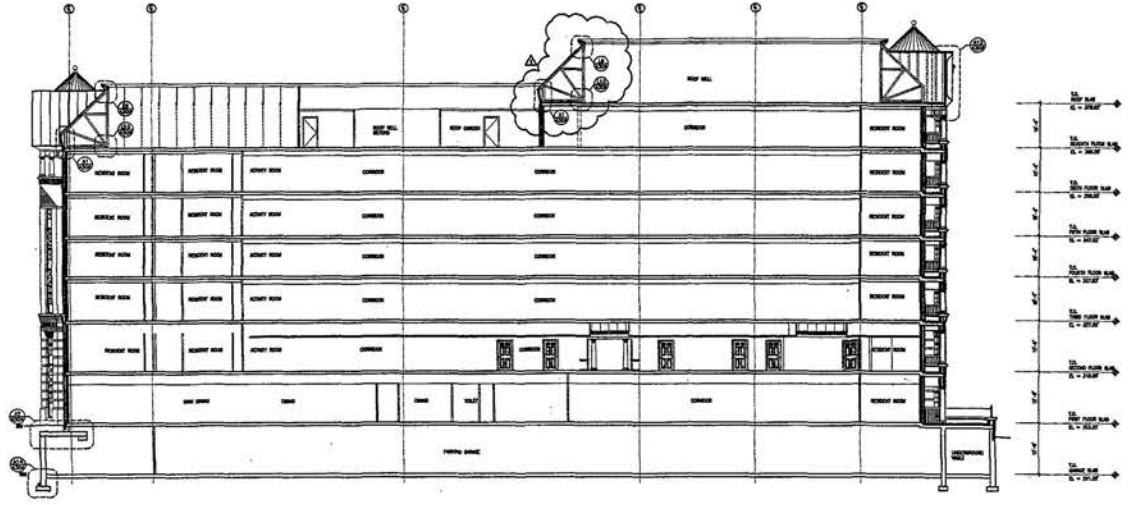
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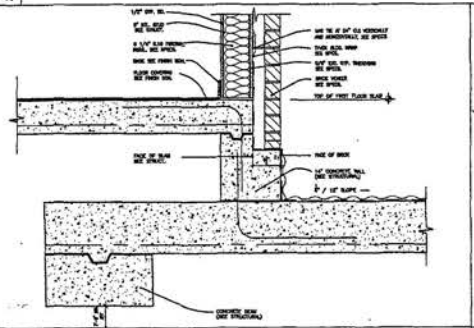
BERY.RIO AND ASSOCIATES ARCHITECTS

ELEVATIONS

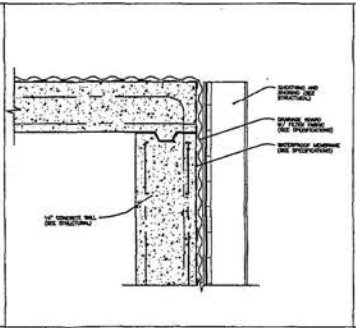
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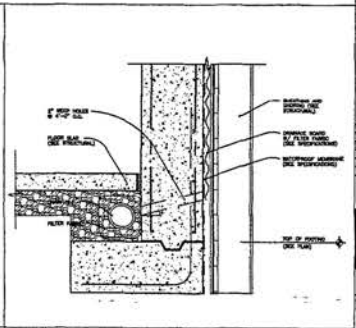
G1 BUILDING SECTION



A1 FOUNDATION DETAIL



A8 FOUNDATION DETAIL



A13 FOUNDATION DETAIL

GENERAL NOTES

Key Plan



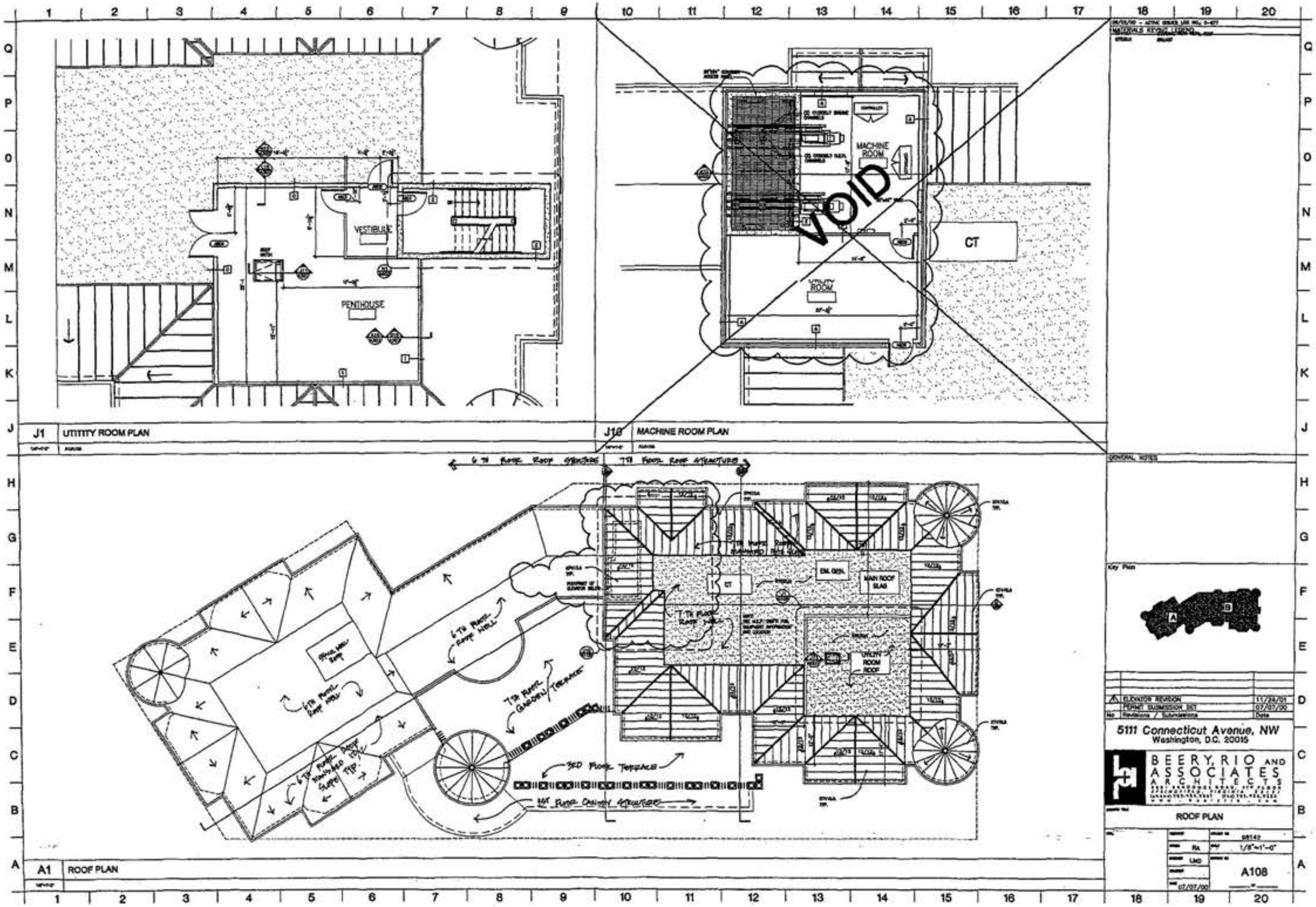
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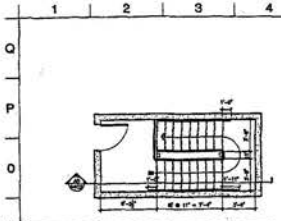
BEERY, RIO AND ASSOCIATES
ARCHITECTS

BUILDING SECTIONS AND DETAILS

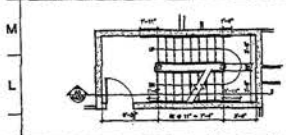
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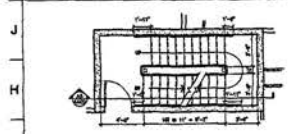
J1 UTITITY ROOM PLAN
VESTIBULE
PENTHOUSE
J10 MACHINE ROOM PLAN
MACHINE ROOM
UTILITY ROOM
VOID
CT
6TH FLOOR ROOF STRUCTURE
7TH FLOOR ROOF STRUCTURE
EM. GEN.
MAIN ROOF SLAB
UTILITY ROOM ROOF
7TH FLOOR GARDEN/TERRACE
3RD FLOOR TERRACE
1ST FLOOR CANOPY STRUCTURE
A1 ROOF PLAN
GENERAL NOTES
Key Plan
A
B
ELEVATOR REVISION 11/29/01
PERMIT SUBMISSION SET 07/07/00
No Revisions / Submissions Date
5111 Connecticut Avenue, NW
Washington, D.C. 20015
BEERY, RIO AND ASSOCIATES ARCHITECTS
ROOF PLAN
98142
RA
1/8"=1'-0"
LMO
A108
07/07/00



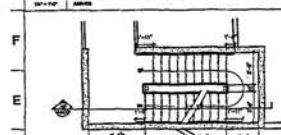
N1 STAIR "A" @ ROOF LEVEL



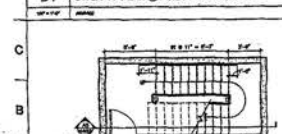
K1 STAIR "A" PLAN @ THIRD TO SIXTH FLOOR



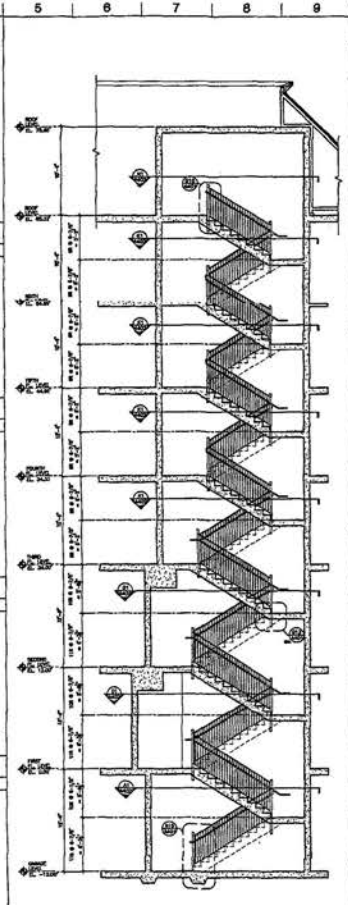
G1 STAIR "A" PLAN @ SECOND FLOOR LEVEL



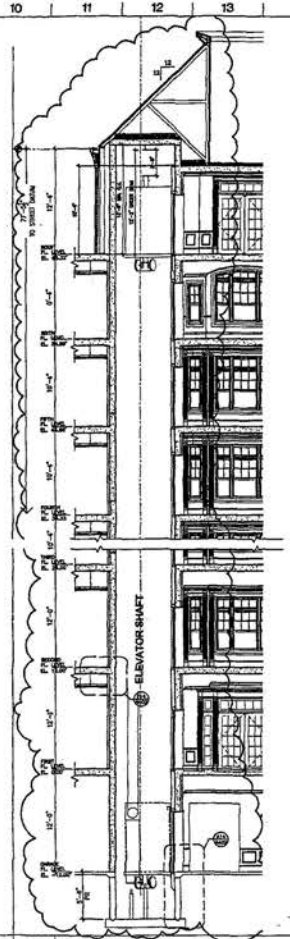
D1 STAIR "A" PLAN @ FIRST FLOOR LEVEL



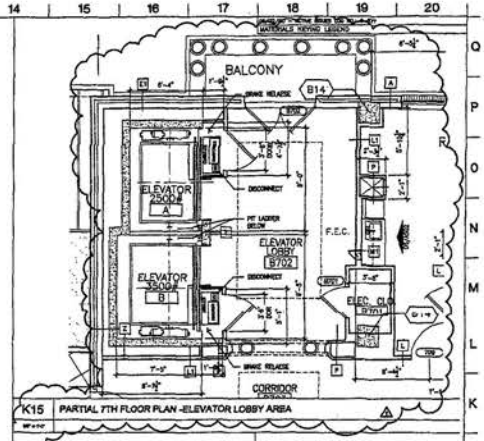
A1 STAIR "A" PLAN @ GARAGE LEVEL



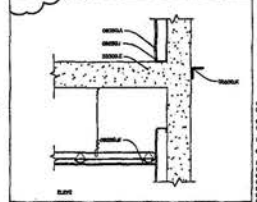
A5 STAIR "A" SECTION



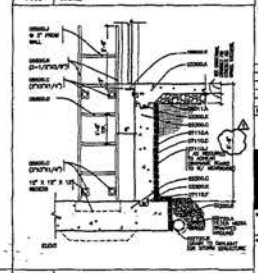
A10 SECTION @ ELEVATOR SHAFT



K15 PARTIAL 7TH FLOOR PLAN -ELEVATOR LOBBY AREA



F14 SECTION DETAIL @ ELEVATOR SILL



A14 SECTION DETAIL @ ELEVATOR PIT

1	ELEVATOR REVISION	11/29/21
	PERMIT SUBMISSION SET	02/07/20
No.	Revision / Submissions	Date

5111 Connecticut Avenue, NW
Washington, D.C. 20015

BEERY, RIO AND ASSOCIATES ARCHITECTS

ELEVATOR, STAIR SECTIONS & DETAILS

	38142
	AS NOTED
LHO	
07/02/20	A402

AFFIDAVIT

I am a partner in the architecture firm of Beery, Rio & Associates.

I am the architect of record for the building permit application plans that resulted in the issuance of Building Permit No. B435464 as well as a modification of that permit (modification Permit No. 442149) which authorized the "revision to roof plan/structure to include elevator only". This building permit and modification permit authorize the construction of the Sunrise Assisted Living Facility at 5111 Connecticut Avenue, N.W. (the "project")

The plans that were submitted to the Department of Consumer and Regulatory Affairs (Building and Land Regulation Administration) on November 30, 2001, for the issuance of the modification permit, only included revisions to the elevator/mechanical penthouse.

These revisions to the elevator/mechanical penthouse were the same revisons that were filed in the record of the Zoning Commission sua sponte case and reviewed by the BZA in its decision to deny the motion for reconsideration.

No changes were made to the project, in the set of plans filed on November 30, 2001, that would have any impact on the total FAR of the project.

No changes were made to the project, in the set of plans filed on November 30, 2001, that would have any impact on the uses included in the project.

No changes were made to the project, in the set of plans filed on November 30, 2001, that would have any impact on the rear yard setback requirements of the project.

No changes were made to the project, in the set of plans filed on November 30, 2001, that would have any impact on the measurement of the height of the project.

Steven Ruiz

Subscribed and sworn to before me this 22nd day of May, 2002.

Notary Public, D.C.

My commission expires: 03/14/06

Hold Decision Pending

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

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) (2001) 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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Office of Zoning

BZA APPEAL NO. 16716A

As Director of the Office of Zoning, I hereby certify and attest that on OCT 12 2001 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:

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

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

Marilyn Holmes
Single Member District Commissioner 3G07
3700 Military Road, N.W.
Washington, DC 20015

Maureen E. Dwyer
ShawPittman
2300 N Street, N.W.
Washington, DC 20037-1128

Michael Johnson, Zoning Administrator
Dept. of Consumer and Regulatory Affairs
Building and Land Regulation Administration
941 North Capitol Street, N.E., Suite 2000
Washington, DC 20009

Councilmember Kathleen Patterson
Ward 3
1350 Pennsylvania Avenue, N.W.
Suite 107
Washington, DC 20004

Alan Bergstein
Office of the Corporation Counsel
441 4th Street, N.W., 7th Floor
Washington, DC 20001

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

ShawPittman LLP

A Limited Liability Partnership Including Professional Corporations

November 9, 2001

RECEIVED
D.C. OFFICE OF ZONING
2001 NOV -9 PM 3:46

Ms. Carol Mitten, Chairperson
District of Columbia Zoning Commission
441 4th Street, NW, Room 210
Washington, DC 20001

Re: *Sua Sponte* Review of BZA Appeal No. 16716
Response of Sunrise Connecticut Avenue Assisted Living, LLC ("Sunrise") to Issues Raised in Connection with *Sua Sponte* Review

Dear Chairperson Mitten and Members of the Commission:

Sunrise, the owner of 5111 Connecticut Avenue, N.W., hereby responds to the Zoning Commission's decision to review BZA Appeal No. 16716 pursuant to its *sua sponte* authority as set forth in 11 DCMR §3128 (BZA Rules of Practice and Procedure). As this Commission is aware, the appeal involved the challenge of a building permit for an assisted living project in Ward 3. The Appellants alleged numerous perceived deficiencies in the permit in support of its appeal. After a lengthy hearing which included extensive expert testimony, the Board concluded that there was absolutely no basis for the revocation of the permit.

In exercising its *sua sponte* authority, the Commission has raised only two narrowly defined issues and has not challenged the vast majority of the Board's conclusions. The two issues are as follows:

1. Whether the Board ruled correctly when it accepted the Zoning Administrator's conclusion that mechanical equipment can be located inside an architectural embellishment.

2. Whether the Board was correct in upholding the building permit although the roof plan had not been referred to the Office of Planning for comment as required by Section 411.10 of the Zoning Regulations.

I. The Board's Decision was Based on Sound Reasoning and Relevant Precedent.

Sunrise fully supports both the Zoning Administrator's and the Board's conclusion that the tower element along the rear roofline of the proposed building constitutes an architectural embellishment designed for the predominant purpose of the architectural uniformity of the roof plan. (See Sunrise's letter dated August 28, 2001, attached as Exhibit A.) The Zoning Regulations historically have been interpreted to preclude the

location of habitable space within an architectural embellishment; however, the regulations do not preclude the location of mechanical equipment in such an embellishment. The subject plans do not present an unusual condition. The Zoning Administrator based his determination on well-established precedent. The Zoning Administrator cited three other recently constructed buildings in downtown Washington in which there is mechanical equipment located inside architectural embellishments. The ample precedent on this issue only strengthens the Zoning Administrator's ruling and demonstrates that the ruling was not unusual or extraordinary in any way.

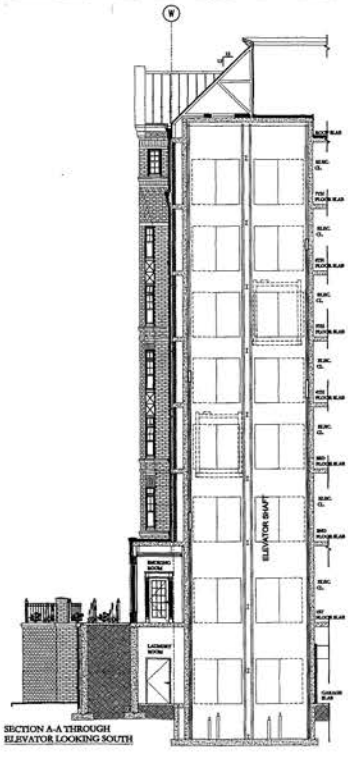
The ruling was entirely logical given the purpose of the penthouse setback requirement. The requirement is intended to remove equipment from public view. Embellishments, on the other hand, are intended to add design features that are clearly within public view. An embellishment that fully encloses mechanical equipment is entirely consistent with the purposes of the setback requirements because the equipment is fully screened from view and the embellishment is permitted to serve its decorative function.

Finally, the Zoning Administrator's failure to refer the roof plan to the Office of Planning ("OP") pursuant to Section 411.10 of the Regulations clearly constitutes harmless error. For that reason, the Board determined that the lack of a referral was not a basis for granting the appeal. As the Zoning Administrator testified, the practice of referring roof structures to OP was suspended for several years due to OP's inability to handle the requests. Literally thousands of building permits were issued during that time. None of the roof plans associated with those buildings were reviewed by OP. We are not aware of a challenge of any other building permits due to the failure to make the referral. The suggestion that the failure to make the referral for this permit undermines its validity while numerous other permits lack the same referral inappropriately singles out this permit for disparate treatment. Further, as both the Zoning Administrator and Board Chairman noted, DCRA is not bound to respond to any comments received from OP. The review is advisory only, and the fact that it did not occur for this permit, had no effect on the ultimate outcome of the matter.

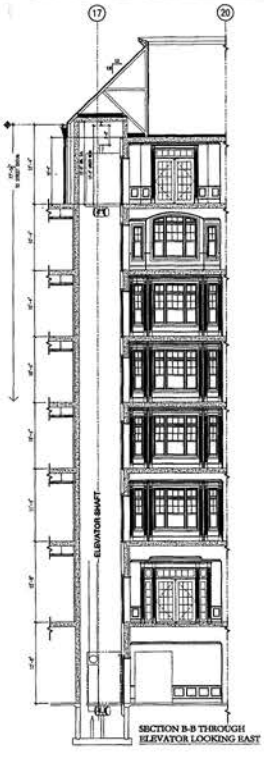
Courts have long recognized the concept of harmless error. Minor procedural defects in the processing of a building permit or a zoning application typically do not create grounds for the revocation of the permit or the reversal of the decision. (See, for example, Shiflett v. D.C. Board of Appeals and Review, 431 A.2d 9 (1981 D.C.); Glenbrook Road Association v. D.C. Board of Zoning Adjustment, 605 A.2d 22 (1992 D.C.).)

II. The Issues Will Become Moot Through the Issuance of Curative Permit.

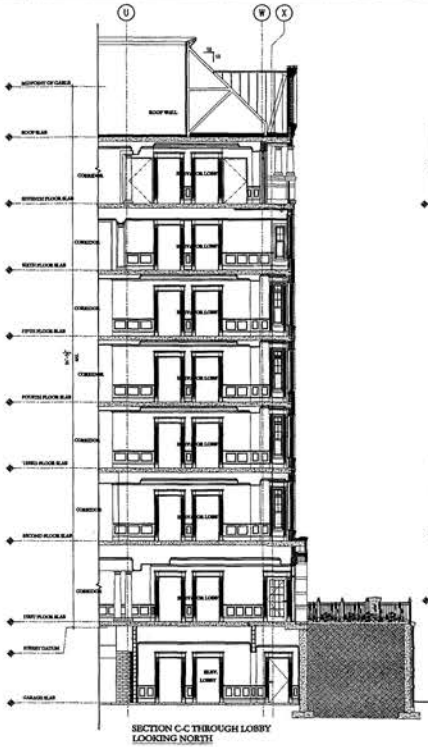
The Sunrise project was designed in a manner that is fully consistent with the Zoning Regulations and the past interpretation of those regulations as demonstrated by ample



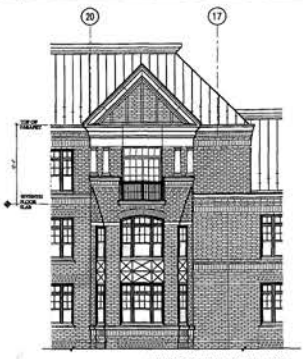
SECTION A-A THROUGH
ELEVATOR LOOKING SOUTH



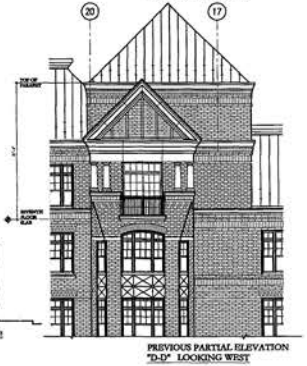
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ELEVATOR LOOKING EAST



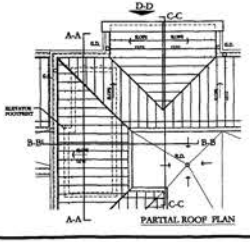
SECTION C-C THROUGH LOBBY
LOOKING NORTH



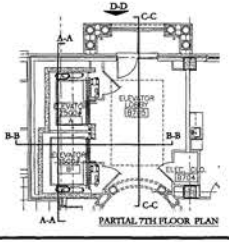
REVISED PARTIAL ELEVATION
"D-D" LOOKING WEST



PREVIOUS PARTIAL ELEVATION
"D-D" LOOKING WEST



PARTIAL ROOF PLAN



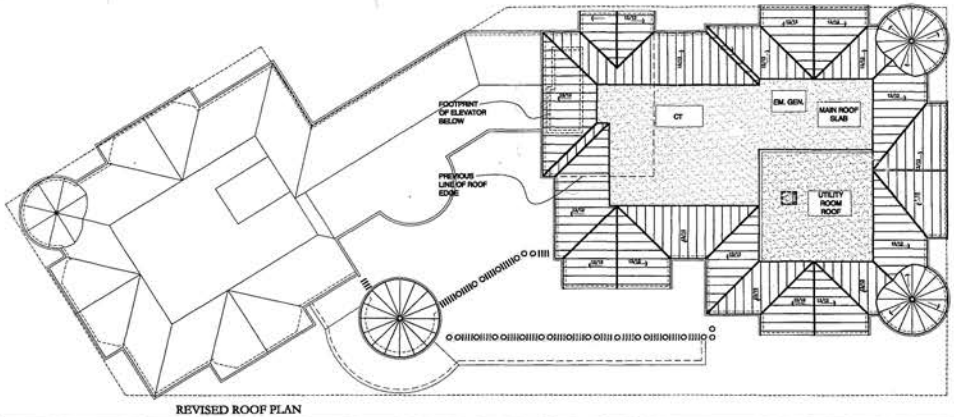
PARTIAL 7TH FLOOR PLAN

ELEVATOR DESIGN CRITERIA

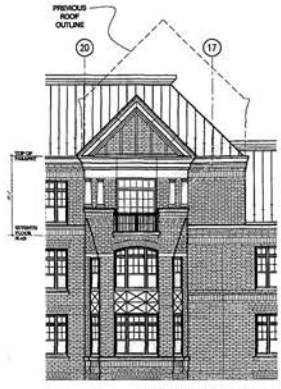
19 October, 2001

SUNRISE
of Connecticut Avenue, DC

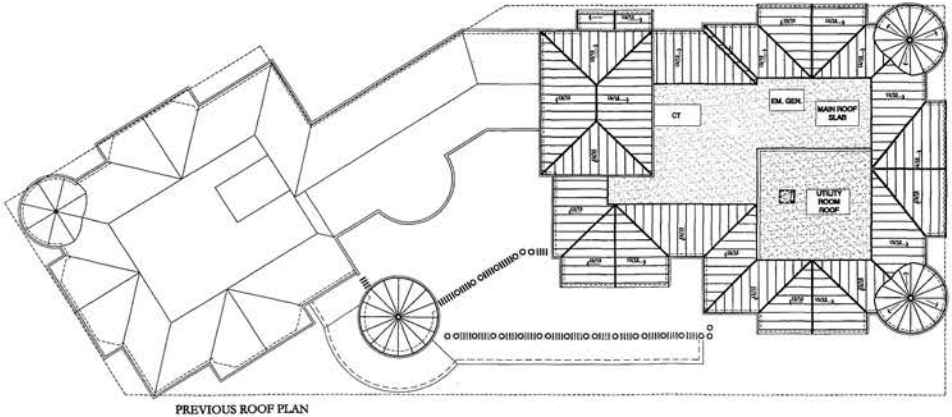
BEERY, RIO AND ASSOCIATES
ARCHITECTS



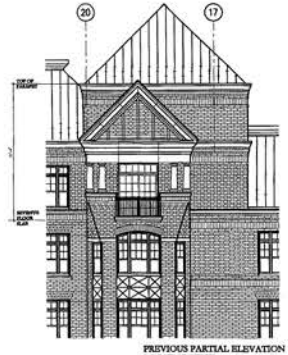
REVISED ROOF PLAN



REVISED PARTIAL ELEVATION
LOOKING WEST



PREVIOUS ROOF PLAN



PREVIOUS PARTIAL ELEVATION
LOOKING WEST

ROOF PLAN COMPARISON

SUNRISE
of Connecticut Avenue, DC

24 October, 2001

BEERY, RIO AND ASSOCIATES ARCHITECTS

precedent. Nonetheless, Sunrise is most anxious to avoid further delay while the Zoning Commission grapples with these issues. For that reason, Sunrise has redesigned the roof level of the building to eliminate the tower embellishment. (See the plans attached as Exhibit B.) Further, the equipment that was located in the tower has been greatly reduced in height. As now designed, the equipment is only 18 inches above the surface of the roof and, accordingly, is not subject to the penthouse setback requirements which do not govern rooftop equipment of less than four feet in height. (See Section 411.17.)

DCRA has reviewed the plans and confirmed that they present no zoning issues. Once formally filed with DCRA as a correction to the existing permit, the revised roof plan will be referred to OP pursuant to Section 411.10. As a result, the Commission's two issues will become moot, the continuation of the *sua sponte* review will be unnecessary and this important project can proceed without further delay. We strongly urge the Commission to determine that the Board's Order was correct in all respects and terminate the *sua sponte* review or, in the alternative, order the filing of the "curative" plan to render the issues moot.

In the event that the Commission decides to follow either of these two approaches, Sunrise will forego its opportunity for oral argument that is provided under Section 3128.4(b). Such argument will be unnecessary and would only delay the project further. In the event that the Commission follows a different approach, Sunrise reserves the right to present oral argument.

Respectfully submitted,

Maureen E. Dwyer

Alison C. Prince

Paul A. Tummonds
APT

Enclosures

Certificate of Service

I hereby certify that a copy of the foregoing letter regarding Owner's Response to Issues Raised in Connection with *Sua Sponte* Review, was delivered by hand on this 9th day of November, 2001, 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

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

Allison C. Prince

Document #: 1139169 v.6

ShawPittman LLP

A Limited Liability Partnership Including Professional Corporations

August 28, 2001

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

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

Dear Chairperson Reid and Members of the Board:

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

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

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

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

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

Very truly yours,

Maureen E. Dwyer

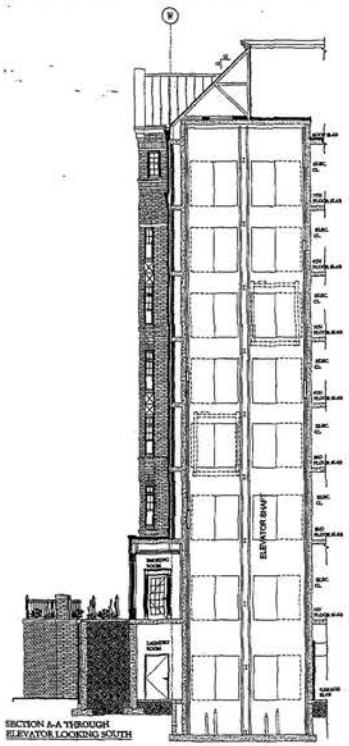
Allison C. Prince

Paul A. Tummonds, Jr.

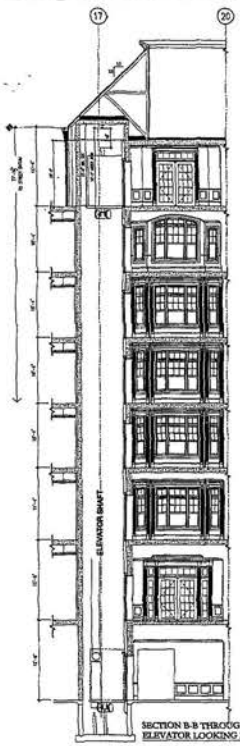
Enclosure

Document #: 1156725 v.1

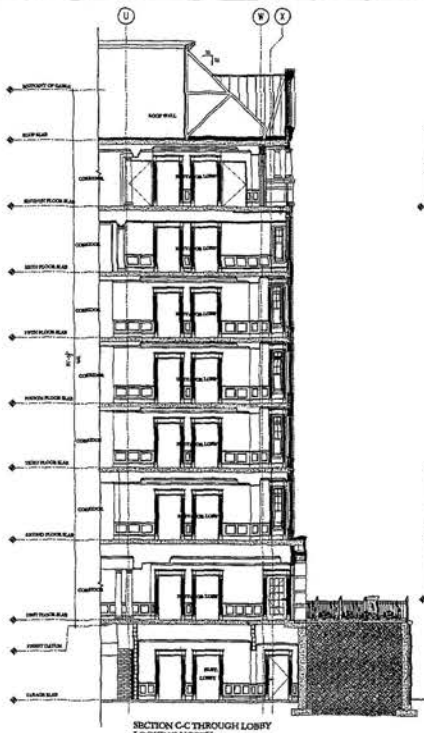
[1] The Appellants have also argued that the tower constitutes an illegal eighth story. Since the parapet level of the tower is seven feet below the maximum permitted height and since the tower contains only 600 feet of gross floor area, even if it were considered as an eighth story, the building would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



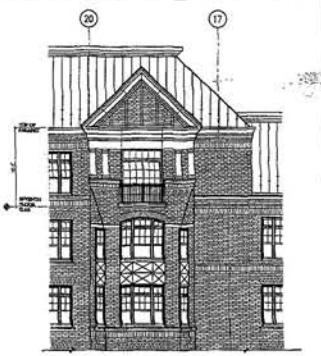
SECTION A-A THROUGH
ELEVATOR LOOKING SOUTH



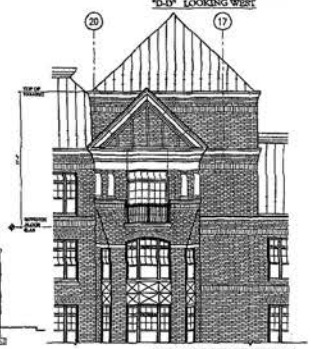
SECTION B-B THROUGH
ELEVATOR LOOKING EAST



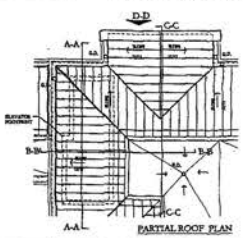
SECTION C-C THROUGH LOBBY
LOOKING NORTH



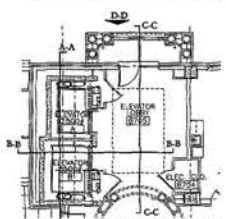
REVISED PARTIAL ELEVATION
"D-D" LOOKING WEST



PREVIOUS PARTIAL ELEVATION
"D-D" LOOKING WEST



PARTIAL ROOF PLAN



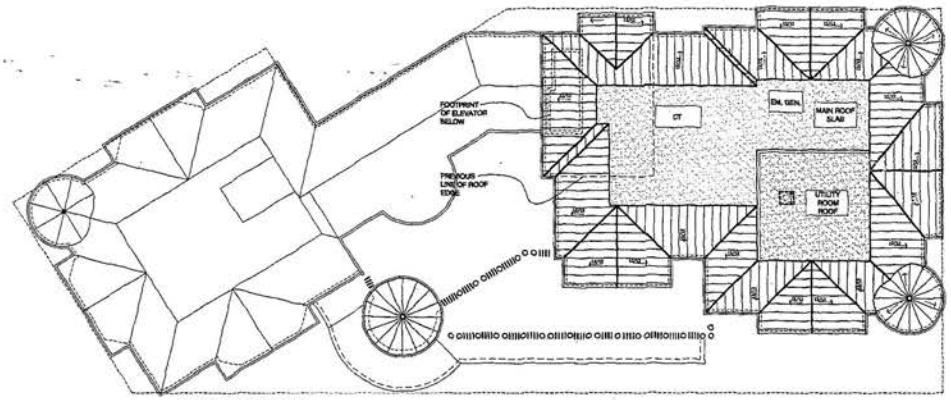
PARTIAL 7TH FLOOR PLAN

ELEVATOR DESIGN CRITERIA

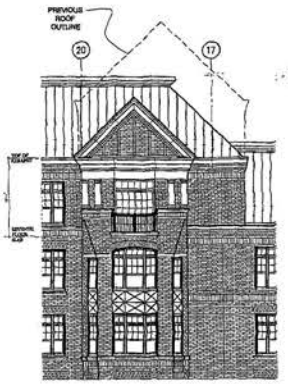
19 October, 2001

SUNRISE
of Connecticut Avenue, DC

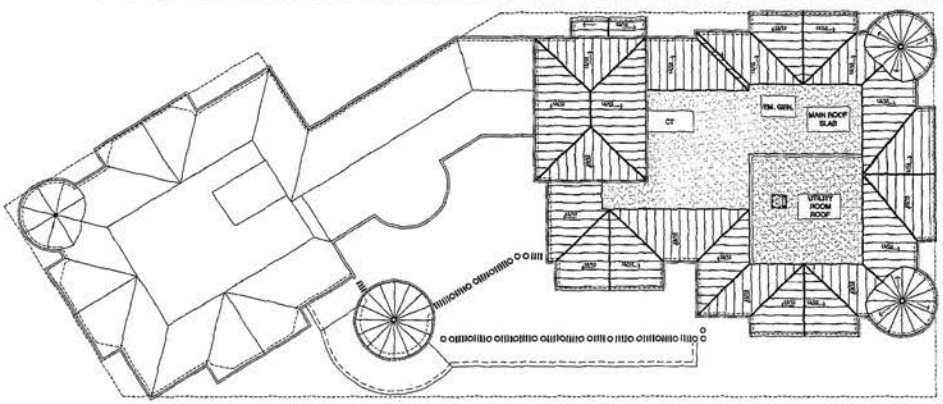
BEERY, RIO AND ASSOCIATES
ARCHITECTS



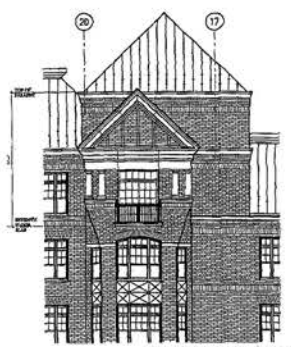
REVISED ROOF PLAN



REVISED PARTIAL ELEVATION
LOOKING WEST



PREVIOUS ROOF PLAN



PREVIOUS PARTIAL ELEVATION
LOOKING WEST

ROOF PLAN COMPARISON

SUNRISE
of Connecticut Avenue, DC

24 October, 2001

BEERY, RIO AND ASSOCIATES
ARCHITECTS

Nebraska Avenue Neighborhood Association
5126 Nebraska Avenue
Washington, DC 20008

December 3, 2001

Carol J. Mitten
Chairperson, Zoning Commission
441 4th St. NW, Room 210 S.
Washington, DC 20001

Dear Chair Mitten and Commissioners:

The following is the Nebraska Avenue Neighborhood Association response to the Zoning Commission November 19, 2001 meeting regarding zoning compliance of the building permit for 5111 Connecticut Avenue, NW (Permit No. 435464). On review of the roof structure plans, we find that the plans do not meet all zoning requirements for roof structures as follows:

(A) The newly designed elevator penthouse (the enclosure over the elevator shafts, mechanical equipment, and the area providing access):

(1) includes a short stump over the elevator shaft, said stump being housed under a taller roof. This roof becomes part of the elevator penthouse. This roof, and thus the penthouse, is not setback from exterior walls by a distance at least equal to its height above the roof upon which it is located (§400.7(b)).

(2) The new elevator penthouse design does not meet code requiring a 7 ½ foot height* for the entire elevator penthouse, thus wouldn't work. (*expert testimony)

(B) A second penthouse, the mechanical equipment/stairwell penthouse, which has not been modified, *is not setback from exterior walls*;

(C) The structure connecting (1) the elevator penthouse and (2) the mechanical equipment/ stairwell penthouse to meet the single enclosure requirement (§411.3) is not set back from exterior walls. If the two penthouses are to be considered a single enclosure, their connecting structure must also be setback from exterior walls.

We conclude that the new building plans supplied to the Commission do not bring the building into compliance with zoning regulations (documentation of points A-C attached below). We believe the Commission would set an unfortunate precedence by allowing noncompliant roof structure set backs as a "matter-of-right."

We respectfully request that the Commission support the appeal of the current building permit based on the fact that the approved plans do not fully comply with Zoning Code of the District of Columbia Municipal Regulations.

Yours truly,

Page Chiapella

Page Chiapella,
Pres., Nebraska Ave. Neighborhood Assn.

Martha Thompson

Martha Thompson,
Vice Pres., Nebraska Ave. Neighborhood Assn.

Attachments

Cc: Maureen Dwyer
Toye Bello
William Bennett

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

Certificate of Service

I hereby certify that a copy of the foregoing letter from the Nebraska Avenue Neighborhood Association to the Zoning Commission, dated December 3, 2001 was mailed first class on December 3, 2001 to:

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

I received official notice of the opportunity to make the above response on November 28, 2001 (by Email, none by mail). That notice presented November 30, 2001 as the due date. However, from my notes taken at the Zoning Commission meeting on November 19, 2001 and from an article in the Northwest Current, I believed the due date was December 3, 2001. I believe I am responding in a timely fashion. I certify that I have not read and am not responding to any submission by any other party submitted to this case on or after November 30, 2001.

Page Chiapella 12/3/01
Page Chiapella Date

LIST OF ATTACHMENTS: DESCRIPTIONS AND SIGNIFICANCE

ATTACHMENT A

1. Sunrise's revised "Elevator Design Criteria" sketch, dated 19 October, 2001 on which is shown the lack of required setback of the elevator penthouse.

2. Testimony by expert witness architect Chris Fromboluti that the elevator penthouse height required by code is 7.5 feet (transcript from August 3, 2001 BZA hearing). The new plans do not meet this height requirement over part of the elevator shaft.

3. Copy (from DCRA files) of 11-6-00 Plan Correction List prepared by DCRA; copy of 11/14/00 response by architects, Beery, Rio and Assoc. These lists deal with requirements of elevator penthouse plans. The revised plans do not and cannot meet all the stated requirements.

ATTACHMENT B

1. Copy of the original approved plan (from official DCRA files) for utility room and stairwell penthouse–showing no setback of these penthouses from exterior walls of the building.

2. Sunrise's revised "Roof Plan Comparison" sketch, dated October 24, 2001, showing no change in the location of the utility room and (hidden under a roof) stairwell penthouse. There is no setback from exterior walls of the building.

3. Longitudinal section showing stairwell penthouse location.

ATTACHMENT C

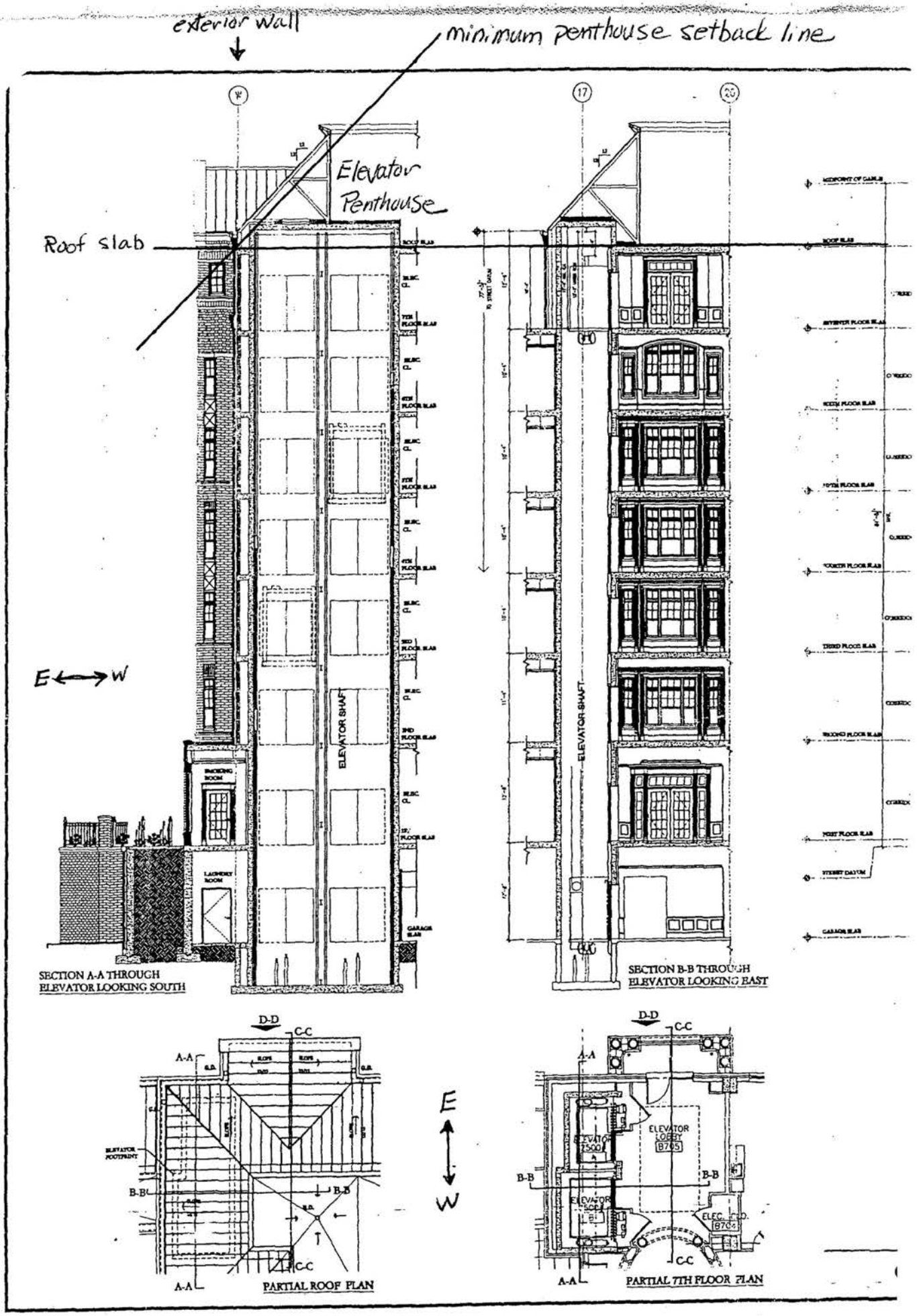
1. ANC 3G Commissioner testifies as to two penthouses.

2-3. Testimony by (2) Zoning official Toye Bello and (3) expert witness Armando Laurenco that a connecting structure is used to connect the two penthouses (elevator penthouse and stairwell/utility room penthouse) in order to consider the entire roof as a single penthouse.

4. Comment by Commissioner Mitten regarding this structure needing to meet the setback requirements. (Transcript from August 3, 2001 BZA hearing)

Conclusion: The "Elevator Design Criteria" (A-1), Roof Plan (B-1), "Roof Plan Comparison" (B-2) show that the roof penthouse structure(s), whether considered one or two, does not meet the setback requirement. The connecting structure, is not setback and, in many places, extends outside the exterior wall of the building. It does not meet the setback requirement.

(A-1)


exterior wall
minimum penthouse setback line
Elevator Penthouse
Roof slab
E ⟷ W
ELEVATOR SHAFT
SECTION A-A THROUGH ELEVATOR LOOKING SOUTH
SECTION B-B THROUGH ELEVATOR LOOKING EAST
D-D
C-C
A-A
B-B
ELEVATOR FOOTPRINT
PARTIAL ROOF PLAN
PARTIAL 7TH FLOOR PLAN
ELEVATOR LOBBY
ELEC. C.O.

(A-2)

these diagrams before but the overhead is 15 feet 4 inches and then the machine room is another 7 foot 6, so if you add in the two structural slabs and I'm going a minimum of 6 inches each we're up to 23 feet 10 inches. I think this is --

Okay, so here it is, 23 feet 10, it comes up to that orange line here. That's where the roof of the elevator machine room needs to be here.

MEMBER LEVY: With your clearance across the full --

MR. FROMBOLUTI: To get -- right. Now, so, you know, that's where the top of the box is going to be. Now, you can see, you know, to keep the point of that roof -- actually it needs to drop down two feet, that's going to be almost a flat roof. Now, it's doable, it's done all the time but you can't have that big pointed roof.

Now, can I have the back elevation?

MEMBER LEVY: You're basing that on a clearance above the top of the cab and then plus the elevator machines themselves?

MR. FROMBOLUTI: Right, which the elevator machine room has to be seven foot 6 inches by Code but yeah, they can make it work but this thing is going to be a big box. It's not going to have this pointed

(A-3)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION
ELEVATOR PLANS REVIEW

PLAN CORRECTION LIST

Job Number	*Address*	*Review Engineer*	*Date*
590 AA	5111 Connecticut Ave. NW	SW	11-6-00

1.	Show hoistway ventilation.
2	Show machine room overhead sheave access. ..
3	Show machine room door location with fire rating.
4	Show machine equipment (Gov.) etc.
	Show sump / drain in pit with interceptor.
6	Show main line located an lock-side of machine room door jamb

(A-3)

BEERY RIO & ASSOCIATES
ARCHITECTS
8001 BRADDOCK ROAD, 4th FLOOR
SPRINGFIELD, VIRGINIA 22151
(p) 703.426.9057 (f) 703.426.9280
www.beeryrio.com

Government of the District of Columbia
Attn: Steve Weaver
Department of Consumer and Regulatory Affairs
Building and Land Regulation Administration
Elevator Plans Review

DATE: 11/14/00

PROJECT NAME: 5111 CONNECTICUT AVENUE, NW

RE: Job Number: 590AA

The following is in response to your code letter dated 11/6/00 for Job Number 590AA.

1. Show hoistway ventilation.

   Response: Hositway ventilation is now shown on elevator section on revised sheet A402.

2. Show machine room overhead sheave access.

   Response: Top of elevator is open to allow access to overhead sheave. Access doors to the governors have been added. See revised sheet A402.

3. Show machine room door location with fire rating.

   Response: Door shown as B label, 90 minute door. See revised sheet A402.

4. Show machine equipment (Gov.) etc.

   Response: See revised equipment plan sheet A402.

5. Show sump/drain in pit with interceptor.

   Response: See revised attached revision showing the drain in the elevator sump connected to the interceptor shown on P-100.

6. Show main line located an lock-side of machine room door jamb.

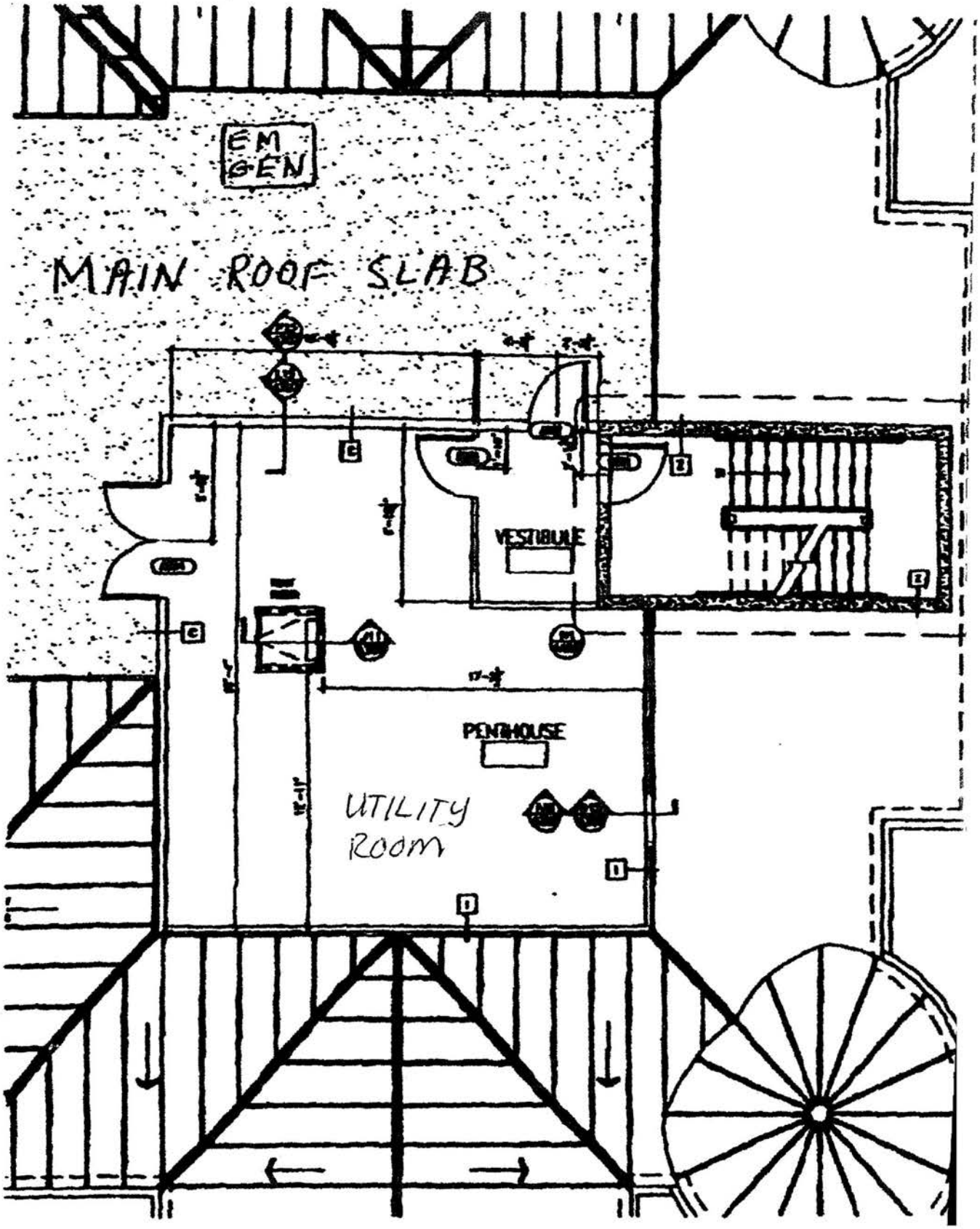
   Response: Mainlines switch now shown on lockside of access door.

Sincerely,

Steven H. Ruiz, AIA
Partner

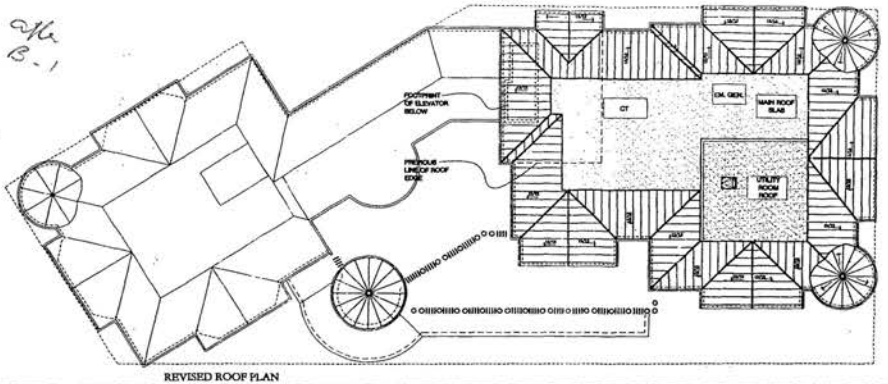
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B-1

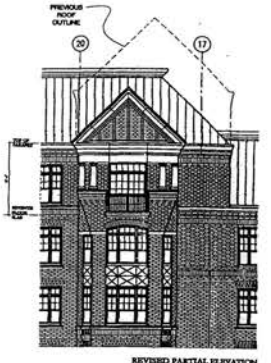


(B-2)

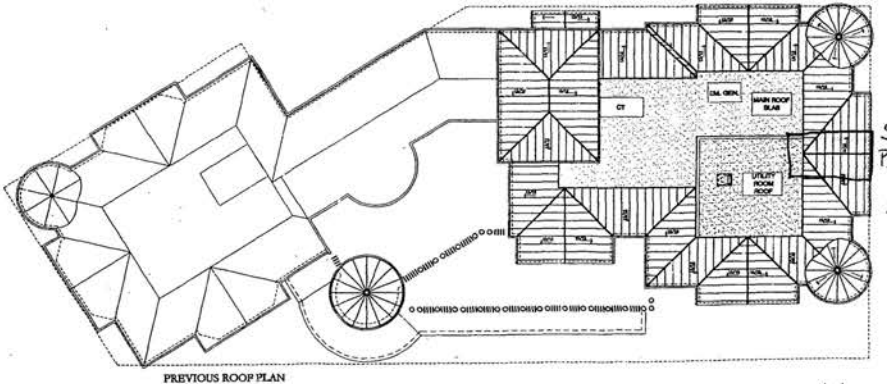
B-2
B-1



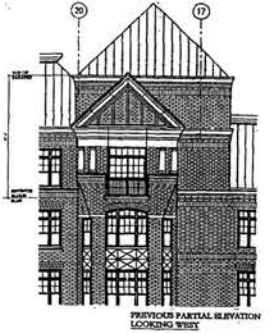
REVISED ROOF PLAN



REVISED PARTIAL ELEVATION
LOOKING WEST



PREVIOUS ROOF PLAN



PREVIOUS PARTIAL ELEVATION
LOOKING WEST

ROOF PLAN COMPARISON

SUNRISE
of Connecticut Avenue, DC

24 October, 2001

BEERY, RIO AND ASSOCIATES
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