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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 – Statement of Sunrise Assisted Living ("Property Owner")

Dear Chairman Griffis and Members of the Board:

We are in receipt of numerous lengthy and duplicative documents that have been filed by the Appellant, the Nebraska Avenue Neighborhood Association ("NANA"), suggesting the expansion of the issues that the Board will consider at the appeal hearing on June 18, 2002. The purpose of this letter is to clarify any confusion that may have resulted from NANA's continuing efforts to revisit issues that were fully considered during the hearing on the first appeal. At the hearing on June 18, we will be prepared to address the only two issues that are before the Board: (1) the alleged change to the 7th floor FAR as a result of the penthouse modification, and (2) the alleged existence of a "new structure" in the rear yard. While we will be prepared to address the 7th floor FAR and rear yard issues, neither issue is properly before the Board at this time since each was fully addressed in the hearing on the first appeal. The 7th floor FAR and the rear yard have not changed since the first appeal hearing. The penthouse modification plans had absolutely no effect on the FAR of the 7th floor and there is no new structure in the rear yard. The identical plans are before this Board in connection with this second appeal.

For purposes of the public hearing, it is important to understand the applicable legal standard. The recent filing by the Nebraska Avenue Neighborhood Association and ANC 3G of an appeal of building permit B442149 issued on January 22, 2002, is not reconsideration of the prior appeal of building permit B434564, dated March 12, 2001. The Board's order denying the former appeal is final, no petition for review has been filed in the District of Columbia Court of Appeals, and there is no basis under the Board's Rules of Practice and Procedure, the District of Columbia Administrative Procedures Act, or the decisions of the District of Columbia Court of Appeals to now challenge that decision.

The issue before the Board is whether the filing of the second appeal is permitted under the zoning regulations which state, in Section 3126.11, that an appellant whose appeal has been denied shall not institute a new appeal on the same facts within one year from the date of the order upon the previous appeal. Sunrise submits that there can be no doubt that the facts are the same and, thus, the new appeal is barred under principles of res judicata and collateral estoppel. Further, since the only change permitted by building permit B442149 is the change in the elevator

BZA
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Exhibit No. 38

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penthouse structure, the appeal is limited to that issue and that issue alone. Accordingly, all of the other issues raised by appellants, including the rear yard structure issue and the seventh floor issue are not properly before the Board and the Board has no jurisdiction to entertain them. For these reasons, Sunrise reinstates its request that BZA Appeal No. 16879 be dismissed.

Factual Background

NANA and ANC 3G appealed the issuance of a building permit to Sunrise Connecticut Avenue Assisted Living LLC in BZA Appeal No. 16716. The BZA, and the Zoning Commission through the sua sponte review process, ultimately upheld the Building and Land Regulation Administration's (BLRA) issuance of the building permit in BZA Orders No. 16716A, 16716B and Zoning Commission Order No. 952. BZA Appeal No. 16879 merely restates issues that were raised in the initial case and is based on the identical set of facts. Indeed, the remedial permit which is the subject of this second appeal was filed as part of both the Zoning Commission and BZA cases. Specifically, the two issues raised by NANA – the rear yard structure and the seventh floor plan – are based on the permit plans reviewed and approved in the prior appeal. Accordingly, any claims NANA has concerning either the rear yard structure or the seventh floor were required to have been raised by them in the earlier appeal. Whether the issues were raised and decided, or never raised, makes no difference. The opportunity was provided and the decision of the Board is final.

NANA had full opportunity to raise the issues then and also in its Motion for Reconsideration which was denied by the Board. Any further recourse by NANA could only be through a petition for review with the District of Columbia Court of Appeals. No petition for review was filed and the time period for filing one has expired. Since NANA has not chosen to pursue the only legal remedy available to itself (and any other appellant), it has no further remedy. The Board's decision stands and is entitled to its res judicata effect. Anything further is a clear abuse of the administrative process and a denial of Sunrise's rights as a property owner to proceed with construction of its assisted living facility for a protected class of residents under the Fair Housing Act.

Legal Argument

The District of Columbia Court of Appeals has held clearly that land use approvals are subject to the doctrines of res judicata and collateral estoppel. Rhema Christian Center v. District of Columbia Board of Zoning Adjustment, 515 A. 2d 189 (D.C. 1986) and Towles v. District of Columbia Board of Zoning Adjustment, 578 A. 2d 1128 (D.C. 1990). These cases concerned the second and third of three consecutive attempts by the Rhema Christian Center to secure a special exception to operate a parochial school. In Rhema, the review of the second denial of a special exception, the court explained the application of res judicata in administrative cases generally and zoning specifically.

> In determining whether preclusion doctrine is applicable in a particular case, "[t]he threshold inquiry is whether the earlier proceeding [was] the essential equivalent of a judicial proceeding." The Board is an adjudicatory agency; it hears and decides cases (applications and appeals) initiated by parties other than the Board itself. D.C. Code §5-424 (1981). Moreover, our local Administrative Procedure Act, D.C. Code §§1-1501 to 1510 (D.C. 1981), as well as the Board's own procedural regulations, 11 DCMR §§3300-3399 (1985), ensure the essential elements of due process in adjudication, including notice, representation, a hearing with presentation of evidence and cross-examination, and a written decision with findings of fact and conclusions of law.***There is no question that these procedural requirements were met in the first proceeding. Thus, the "threshold inquiry" for preclusions is satisfied. [Citations omitted.]1
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> Interestingly, traditional zoning law itself incorporates the preclusion concept. As a general proposition, when a special exception or variance is denied and the applicant, after a required waiting period, resubmits the same or a substantially similar application, the applicant must demonstrate that conditions have changed, such that the reasons for the previous denial no longer apply. *** See First Baptist Church of Washington v. District of Columbia Board of zoning Adjustment, 432 A.2d 695, 701 (D.C. 1981) (opponent to reissuance of permit extending special exception must show "change of conditions ... [or] other considerations materially affecting the merits") [emphasis supplied] (quoting Spencer v. Board of Zoning Appeals, 141 Conn. 155, 157, 104 A.2d 373, 375 (1954)) see generally, 3 Anderson, AMERICAN LAW OF ZONING, §§20.52-.53 at 573-79 (2d ed. 1977); Annot., 52 A.L.R.3d 494, 498-502, 510-19. Id. At 193. [Citations omitted.]

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[1] There can be no doubt that this threshold test is met here. NANA had notice, a public hearing, the right to cross-examination and a written decision with findings of fact and conclusions of law All administrative procedural requirements were met.

The court did not have to apply res judicata, however, since it affirmed the BZA on the merits of the denial.

Undaunted by its previous failures, Rhema Christian Center went to the BZA a third time and did secure the special exception. In Towles, the Court of Appeals reversed and adopted the res judicata doctrine as explicated Rhema.

> Generally, once a claim has been finally adjudicated, the doctrine of claim preclusion, or res judicata, prevents the same parties from relitigating the same claim, including any issue that either was or might have been raised in the first proceeding, and the doctrine of issue preclusion prevents the same parties from relitigating an issue actually decided in a previous, final adjudication, whether on the same or a different claim. Rhema I, 515 A.2d at 193. ***The Court explained:
>
> When a material change of circumstances affecting the merits of the application has not occurred [and] the application is not for a use that materially differs in nature and degree from its predecessor the board of adjustment may not lawfully reach the merits of the petition. If it were otherwise, there would be no finality to proceedings before the board of adjustment, the integrity of the zoning plan would be threatened, and an undue burden would be placed on property owners seeing to uphold the zoning plan. Id., at 194 (quoting Fisher v. City of Dover 120 N.H. 187, 412 A.2d 1024, 1027 (1980)).

Although Rhema and Towles dealt with the effect of an initial denial of special exception relief, the citation in Rhema (515 A.2d at 1930) to First Baptist Church and case law from other jurisdictions makes it clear that the doctrine applies to any administrative proceeding, including appeals and variances. See, e.g., Grava v. Parkman Township, 653 N.E.2d 226 (Ohio 1995), in which the Ohio Supreme Court held that after a property owner's initial variance application was denied, that a second application involving the same building and the same lot was barred by the doctrine of res judicata. See also Restatement (Second) of Judgments, §§ 24 & 25.

The doctrine of res judicata involves both claim and issue preclusion, that is, it applies to claims actually litigated and claims which could have been litigated but were not raised. Thus, res judicata applies as well to any supposedly "new" claims such as those raised by NANA in the present appeal, and NANA's failure to include the claims in the prior appeal bars raising it now. These claims are clearly part of the aggregate of connected operative facts that should have been litigated in the prior case. Indeed, there is no substantive difference between the claims asserted here and those that were "or might have been litigated" in the prior case. As the court held in

Diversified Foods v. First National Bank of Boston, 985 F.2d 27 (1st Cir. 1993), cert. denied, 125 L.Ed. 2d 694:

> Accordingly, so long as the parties are the same in both cases and a final judgment was entered in the prior action, "a subsequent suit that arises out of the same operative facts shall be barred even though the second suit relies upon a legal theory not advanced in the first case, seeks different relief than that sought in the first case, and involves [different] evidence." 985 F.2d at 30. (Emphasis in original.)

In Petromanagement Co. v. Acme – Thomas Joint Venture, 845 F.2d 1329 (10th Cir. 1988), the Tenth Circuit had before it the question as to whether a subsequent suit alleging misrepresentation and breach of contract was barred by res judicata. Applying the transaction approach of the Restatement, the court concluded that:

> Under this approach, a "contract" is generally considered to be a "transaction," so that all claims of contractual breach not brought in an original action would be subject to bar of claim preclusion, so long as the breaches antedated the original action. See, Restatement of Judgments, §62 comment h at 250 (1942) ("All the breaches of contract prior to the commencement of the suit are treated as a single cause of action.") Prospero Associates v. Burroughs Corp. 714 F.2d 1022, 1027-28 (10th Cir. 1983). Petromanagement, 835 F.2d at 1336.

To avoid claim splitting, the rule requires that the plaintiff bring all claims at one time. As the court explained in U.S. v. Athlone Industries, 746 F.2d 977 (3rd cir. 1984) (quoting David v. United States Steel Supply, 688 F.2d 166, 171 (3rd Cir. 1982)):

> ... [a] single cause of action may comprise claims under a number of different statutory and common law grounds ... Rather than resting on the specific legal theory invoked, res judicata generally is thought to turn on the essential similarity of the underlying events giving rise to the various legal claims, although a clear definition of that requisite similarity has proven elusive .... Whatever the conceptual difficulties inherent in any definition of a "cause of action," often the presence of a single causes of action is clear. 746 F.2d at 983-84. (Emphasis in original.)

The court went on to state:

> Although we declined to adopt one specific theory in Davis, we indicated a predisposition toward taking a broad view of what constitutes identity of causes of action – "an essential similarity of the underlying events giving rise to the various legal claims." 746 F.2d at 984.

NANA could have included the present claims in the prior appeal but chose not to do so. Res judicata now bars this claim whether it was "or might have been" litigated in the prior case.

Further, actual knowledge is not a prerequisite to the application of res judicata; the standard is objective. The controlling issue is the existence of the present claim, not party awareness of it. Meekins v. United Transportation Union, 946 F.2d 1054, 1057 (4th Cir. 1991). See also, Harnett v. Billman, 800 F.2d 1308, 113 (4th Cir. 1986), cert. denied, 480 U.S. 932 (1987) (For purposes of res judicata, it is not necessary to ask if the plaintiff knew of this present claim at the time of the former judgment, for it is the existence of the present claim that controls.)

Under the facts and the well-established case law, res judicata bars the appeal.

Conclusion

It is apparent that NANA and ANC 3G will clearly stop at nothing to prevent Sunrise from moving forward with this project. All of the arguments proposed by NANA and ANC 3G in BZA Appeal No. 16879 were either addressed in the previous decisions of the BZA and the Zoning Commission or could have been addressed if properly and timely raised in the previous proceeding. NANA and ANC 3G had ample opportunity to present their case to both the BZA and the Zoning Commission and in both instances their claims were denied. The BZA should not provide these groups with yet another opportunity to present the same claims. Based on the established doctrines of issue and claim preclusion enumerated above, NANA and ANC 3G should not be permitted to cause further undue delay and cost to the Sunrise project. As the Court stated in Rhema, to hold otherwise means that there is no finality to proceedings before the

Board, the integrity of the zoning plan would be threatened, and an undue burden would be placed on property owners.

Respectfully submitted,

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Certificate of Service

I hereby certify that on June 13, 2002, a copy of the foregoing letter was hand delivered to the following:

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