Ret'd 11/26

November 22, 2002

BEFORE THE BOARD OF ZONING ADJUSTMENT FOR THE DISTRICT OF COLUMBIA

IN RE: 5111 Connecticut Ave. N.W.	)	
Square 1989, New Lot 162	)	**BZA Appeal No. 16879**
Previous Lots 49-57 & 161	)	**Motion to Dismiss to Appeal**
	)	
Appeal of	)	
	)	
The Nebraska Avenue	)	
Neighborhood Association and	)	
Advisory Neighborhood	)	
Commission 3G	)	

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MOTION FOR RECONSIDERATION OF DISMISSAL OF APPEAL No. 16879 AND MOTION FOR HEARING IN APPEAL No. 16879

The Nebraska Avenue Neighborhood Association ("NANA") finds substantive errors in the appeal process and in the Decision of the Board of Zoning Adjustment (the "Board") to dismiss appeal No. 16879. Further, in a recent communication, Sunrise Assisted Living, Inc. ("Sunrise") contradicts testimony presented to the Board. NANA hereby moves for reconsideration of the decision to dismiss Appeal No. B16879 and further moves to for a public hearing in Appeal No. 16768.

BZA
Case No. 16879
Exhibit No. 55

Board of Zoning Adjustment
District of Columbia
CASE NO.16879
EXHIBIT NO.55

SUMMARY

I. BACKGROUND.

II. ERRORS IN THE DECISION AND ORDER FOR MOTION TO DISMISS APPEAL No. 16879:

A. THE DECISION IS NOT BASED ON THE RECORD.

B. THE DECISION DID NOT ADDRESS THE SPECIFIC CLAIMS PRESENTED IN THE MOTION TO DISMISS.

C. ERROR IN CONCLUSION THAT DCRA ONLY APPROVED CHANGES TO THE ELEVATOR PENTHOUSE.

D. ERROR IN THE DECISION THAT THERE IN NOTHING PROJECTING ABOVE THE MAIN ROOF LINE IN THE VICINITY OF THE ELEVATOR [in Permit B442149 Plans --- NANA alleges these plans do not comply with Regulations] .

II. BASES FOR MOTIONS FOR RECONSIDERATION OF THE DECISION TO DISMISS APPEAL No. 16879AND FOR PUBLIC HEARING IN APPEAL No. 16879

A. NEW EVIDENCE SHOWS THAT SUNRISE NOW AGREES THAT PERMIT B442149 REVISES THE ELEVATOR. Appeal 16879 alleges that the penthouse of this elevator does not comply with Zoning Regulations.

B. NEW EVIDENCE SHOWS NONCOMPLIANCE WITH REAR YARD SETBACK AND FAR.

C. CHANGE OF USE; USE NONCOMPLIANT IN R-2 ZONE.

III. PROCEDURAL IRREGULARITIES,

A. FAILURE OF DCRA TO SERVE ITS MATERIALS ON PARTIES;

B. LACK OF PUBLIC HEARING (11 DCMR §§3117.2; 3117.11);

C. LACK OF OPPORTUNITY TO CROSS EXAMINE;

SUMMARY
Continued

III. PROCEDURAL IRREGULARITIES, continued

D. BOARD'S REVIEW AND RELIANCE ON EX PARTE ORAL STATEMENTS AND WRITTEN DOCUMENT SUBMITTED BY DCRA OFFICIALS.

IV. BASES FOR MOTIONS FOR RECONSIDERATION OF THE DECISION TO DISMISS APPEAL No. 16879AND FOR PUBLIC HEARING IN APPEAL No. 16879

A. NEW EVIDENCE SHOWS THAT SUNRISE NOW AGREES THAT PERMIT B442149 REVISES THE ELEVATOR. Appeal 16879 alleges that the penthouse of this elevator does not comply with Zoning Regulations.

B. NEW EVIDENCE SHOWS NONCOMPLIANCE WITH REAR YARD SETBACK AND FAR.

C. CHANGE OF USE; USE NONCOMPLIANT IN R-2 ZONE.

V. MOTIONS

THE NEBRASKA AVENUE NEIGHBORHOOD ASSOCIATION RESPECTFULLY MOVES FOR RECONSIDERATION OF THE DISMISSAL IN APPEAL No. 16879 AND HEARING IN APPEAL No. 16879.

BODY

I. BACKGROUND

This appeal is based on alleged errors in the administrative decisions to issue (a) Building Permit No. B435464 (dated July 7, 2001 -- appeal points are based on new information not available at the time of the Public Hearing of Appeal No 16716, June 4, 2001) and (b) revision Permit No. B442149, dated Jan. 20, 2002). NANA alleges these permits are noncompliant with Zoning Regulations ("11 DCMR").

II. ERRORS IN THE DECISION AND ORDER FOR MOTION TO DISMISS APPEAL No. 16879:

A. THE DECISION IS NOT BASED ON THE RECORD.

(1) The Decision is not based on the complete record. The Decision appears to be based on an arbitrary selection of materials in the record and some not in the record.

(2) The Decision is based on ambiguous and incomplete Permit B442149 documents. The plan sheets referenced by the Board as a basis for their decision are ambiguous and do not meet DCMR regulation standards for building permits that plans be unambiguous (implicit in Title 11; explicit in 12 DCMR "Zoning Compliance Review Data" §107.15(3) and DC Code). **Exhibit A** illustrates ambiguities in plans and documents in applications for both Building Permits B435464 and B442149, including ambiguities in plans for the elevator enclosure and penthouse. The Decision did not take into consideration these ambiguities.

B. THE DECISION DOES NOT ADDRESS THE SPECIFIC CLAIMS PRESENTED IN THE MOTION TO DISMISS.

The Sunrise Assisted Living, Inc. ("Sunrise") motion for dismissing Appeal No. B16879 relies on the claim that the Appeal was based on the same **issues** as Appeal No. B16716. At issue here is whether the **facts** in Appeal No. 16879 are the same as those in Appeal 16716.

NANA addressed Sunrise's showing that there were new facts not available during the open record for BZA Appeal 16716:

(a) Building Permit No. B442149 was not applied for until of hearings and fact-finding phase of appeal No. B435464. No official materials for permit B442149 were available before Jan. 20, 2002, issuance date of that permit. *Copies of full relevant application materials*, as filed for Permit B442149, *were not submitted to the Zoning Commission nor the BZA*.

(b) DCRA did not provide the complete record of the application for Permit B435464 while the record for Appeal No. 16716 was open. DCRA provided additional records after closure of the record and Decision and Order for Appeal No. 16716. This was in spite of substantial effort by Appellants to access complete records. This is documented in the public record of Appeal No. B435464 and in BZA June 18, 2002 transcript (p. 109-110).

C. ERROR IN CONCLUSION THAT DCRA ONLY APPROVED CHANGES TO THE ELEVATOR PENTHOUSE.

There is no evidence supporting this conclusion. The evidence contradicts this conclusion. DCRA submitted documents to the Board showing change to the elevator enclosure footprint, changes to the 7th floor elevator lobby and other changes. Sunrise claims the permit revisior B442149 includes revision to the elevator (**Exhibit B**). DCRA records show an elevator and enclosure.

D. ERROR IN THE DECISION THAT THERE IN NOTHING PROJECTING ABOVE THE MAIN ROOF LINE IN THE VICINITY OF THE ELEVATOR.

The top of the "main roof," as designated by the applicant (Plan Sheet A-108) is located 10 ft. 4 in. above the top of the 7th floor slab. The elevator stub clearly sticks up above this main roof.

The "main roof" line referred to in Finding of Fact 6 is a roof that projects above the 90 feet height limit in the R-5 District. In the Decision and Order in Appeal No. 16717, this was referred to as an "embellishment," in order to allow the building to comply with height, FAR and roof penthouse requirements.

The Plan Sheets showing floor plans and cross-sections are ambiguous. Accurate dimensions of the elevator penthouse structure cannot be derived from these plans. The most logical interpretation of the plans indicates that the elevator penthouse in noncompliant with 11 DCMR §§400.7(b),411.3 and 411.5. Appendix B further addresses the issue of ambiguity of plans.

III. PROCEDURAL IRREGULARITIES

NANA asks for reconsideration and rehearing based on procedural irregularities. NANA believes that these irregularities deprived the Appellants of due process. These issues were noted at the June 18, 2002 BZA hearing (Transcript, pp 107-113). [Some statements made raising those points are incorrectly attributed to Carol Mitten.]

(1) Failure of DCRA to serve its materials on Parties;

(2) Lack of public hearing (11 DCMR §§3117.2; 3117.11);

(3) Lack of opportunity to cross examine other Parties on their submitted evidence, including DCRA (Exhibit A illustrates inconsistencies in evidence);

(4) Board's review of and reliance on ex parte oral statements and written documents submitted by DCRA officials.

IV. BASES FOR MOTIONS FOR RECONSIDERATION OF THE DECISION TO DISMISS APPEAL No. 16879AND FOR PUBLIC HEARING IN APPEAL No. 16879

A. NEW EVIDENCE SHOWS THAT SUNRISE NOW AGREES THAT PERMIT B442149 REVISES THE ELEVATOR. Appeal 16879 alleges that the penthouse of this elevator does not comply with Zoning Regulations.

(1) On June 18, 2002, the Appellants testified that revision Permit B442149 included the elevator. Sunrise testified that Permit B442149 did not address the elevator but was limited to an elevator penthouse (BZA July 18, 2002 transcript).

(2) In a document to the Board of Appeals and Review dated July 30, 2002, Sunrise reversed itself and claimed that Permit B442149 modified the elevator itself. The Permit thereby includes the elevator as well as the elevator enclosure. (Exhibit B).

(3) Sunrise is currently building the elevator enclosure. Title 13A requires said permit before starting work on an elevator and elevator enclosure (13 DCMR §§ 110.1, 110,2, 110.5).

(4) Appeal 16879 alleges that the elevator penthouse is noncompliant with 11 DCMR §400.7.

(5) The NANA moves for hearing of Appeal 16879 based on new submitted evidence showing Sunrise contradicted its earlier testimony. This is substantial and significant evidence. We move that it be included in the Appeal.

B. NEW EVIDENCE SHOWS NONCOMPLIANCE WITH REAR YARD SETBACK AND FAR.

(1) Appeal of the structure or extension of the building into the rear yard was based on newly discovered evidence, not available at the time of the original appeal. Title 11 §3126.11 prohibits institution of a new appeal on the same facts within one (1) year from the date of the order upon the previous appeal. Appeal No. 16879, however, is based new facts or evidence not available to the Appellants during Appeal No. 16716. It is not barred by §3126.11.

(2) In his evaluation of Permit B435464, the Acting Zoning Administrator ("ZA") approved only a "retaining wall," not part of the building (BZA hearing transcript, Aug. 4, 2001, p 210). The retaining wall supposedly enclosed a walled patio. Plans in Permit B435464 for this rear yard structure/extension are ambiguous (Exhibit B).

The new evidence provided by DCRA on April 10, 2002, as well as current construction, contradicts the ZA's original interpretation and zoning ruling that this is a retaining wall. This affects FAR and rear yard setback of the building.

(3) Due process and 11 DCMR 3112.8, 3117, 3119.3, 3119.4, require that Appellants be granted fair hearing and consideration of this appeal.

(4) NANA incorporates by reference public records for Permit No. B435464 and Appeal No. 16716 of that permit.

C. CHANGE OF USE; USE NONCOMPLIANT IN R-2 ZONE.

(1) Use stated on Revision Permit B442149 is "Assisted Living Facility" ("ALF"). ALF is not a use covered in Title 11. This use may be covered by a combination of uses stated in Title 11. Zoning Officials did not accept ALF as a use on application for Permit B435464 (NANA Appeal 16716: Zoning Plan Correction List dated 11/13/00; Jan. 19, 2001 letter from Denzil Noble to Sunrise requiring use designation as "Community Residence Facility;" letters from property owners changing use to "Community Residence Facility."

(2) "Assisted Living Facility" (use under B442149) and "Community Residence Facility" (use stated on Permit B435464) are clearly different (although potentially overlapping) uses.[1]

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[1] 12 DCMR §§424.2, 424.2(a); 22 DCMR Ch 31, 34.

(3) Facilities with 130 residents are not allowed as a matter-of-right in R-2 Districts. This facility and its required components, such as emergency escape routes, recreational areas and other potential requirements of the facility are located in part, in an R-2 District.

IV. MOTIONS

The Nebraska Avenue Neighborhood Association respectfully moves for reconsideration of the Motion to Dismiss Appeal No. 16879 and hearing of Appeal No. 16879.

Signed and dated

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Attachments:

Exhibit A: Ambiguous Plans
Exhibit B: Document: Sunrise certifies Permit B442149 revises elevator
Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2002 a copy of this submission was mailed first class, postage prepaid, or hand delivered to the following:

Anne M. Renshaw, Chair
ANC 3G
Chevy Chase Community Center
P.O. Box 6252
Washington, DC 20015

Maureen E. Dwyer
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2300 N Street, N.W.
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Department of Consumer and Regulatory Affairs
Building and Land Regulation Administration
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Alan Bergstein
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Washington, DC 20001

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(Signed)

11/22/02
(Date)

EXHIBIT A

EXHIBIT A
AMBIGUOUS PLANS

Examples of ambiguous application materials are demonstrate that the zoning data is not fully and consistently defined:

I. Ambiguous elevations

First floor slab elevation varies from 303.25 to 304.15. Building under construction appears to be higher. Height of garage varies from 12.0 to 12.5 feet.

Plan Sheet	First Floor elevation	Height from Garage to Top of First Floor Slab
A201 & 202 Front & Rear Elevations	303.25 '	12.5 '
A203 South Elevation	N/A	12.5 '
A302 & A303: Building Sections	303.25 '	12.0 '
Site Improvement Plan	304.18 '	N/A
Grading Plan	304.18 '	N/A.

Note that building height and FAR will necessarily be ambiguous as well.

II. Ambiguous location or delivery and trash facilities
Ambiguous design of rear stair and patio/balcony

Plan Sheet	Location of facilities R-5 property	Location of facilities R-2 property	Width of Rear Patio or Balcony
Plat	X		14'
Site Plan	X		14'
Garage Plan		X	8'
First Floor Plan		X	8'

EXHIBIT A
AMBIGUOUS PLANS
(Continued)

III. Ambiguous elevator footprint shape

Elevator Enclosure Footprint	**SHAPE**
1. Footprint of original Otis Elevator in Permit B435464, reversed by Zoning Commission	RECTANGULAR
2. Footprint of elevator in Permit B442149 irregular shaped	IRREGULAR
3. Elevator enclosure under construction	RECTANGULAR

EXHIBIT B

EXHIBIT B

DISTRICT OF COLUMBIA BOARD OF APPEALS AND REVIEW

APPEAL OF NEBRASKA AVENUE NEIGHBORHOOD ASSOCIATION

RE: BUILDING PERMITS NO. B435464 and B442149 ISSUED FOR 5111 CONNECTICUT AVENUE, N.W.

DOCKET NO. BAR 02-5872-BP

PROPERTY OWNERS CROSS APPEAL AND NOTICE OF INTENTION TO INTERVENE

On behalf of Sunrise Connecticut Avenue Assisted Living, LLC (hereinafter "Sunrise"), the owner of the property located at 5111 Connecticut Avenue, N.W. (hereinafter "Subject Property"), we respectfully request that the Board of Appeals and Review (the "Board" or "BAR") deny the above-referenced appeal of the Nebraska Avenue Neighborhood Association. (hereinafter "NANA") as it was not filed in a timely manner in accordance with D.C. MUN. REGS. tit. 1 §503.2 (2002).

The building permits in dispute were issued by the Department of Consumer and Regulatory Affairs ("DCRA") on March 8, 2001, and January 22, 2002. The first permit authorized the construction of an assisted living facility (community residence facility) that provides housing for the handicapped (as that term is defined in Fair Housing Act) on the Subject Property. The second permit authorized the modification of the elevator penthouse structure and elevator system for the facility. NANA challenged each permit in two separate appeals that were filed with the District of Columbia Board of Zoning Adjustment ("BZA") claiming that the building permits did not satisfy the Zoning Regulations. The BZA denied each appeal and determined that the permits were valid.

The permits at issue have been subjected to an extraordinary level of scrutiny. The first permit was issued only after DCRA conducted an exhaustive eight-month review of the building permit application. The subsequent modification of the elevator penthouse and elevator equipment, Building Permit No. B442149, also received significant review and scrutiny by DCRA. This appeal is merely another attempt by NANA to prevent this project from being constructed.

NANA's appeal of the original building permit and subsequent modification permit does not satisfy the requirements of D.C. MUN. REGS. tit. 1 §503.2 (2002). That section requires that

> An aggrieved person, owner of property, or licensee shall file the notice of appeal with the Board within fifteen (15) days after service of the notice of the act, decision, or order with respect to which the appeal is filed.

The original building permit was issued on March 8, 2001. NANA was obviously aware of the issuance of the building permit, since it filed an appeal with the BZA on March 16, 2001. Similarly, NANA filed another appeal with the BZA on March 19 and 20, 2002, this time contesting the validity of the modification permit which was issued on January 22, 2002. Therefore, NANA has failed to satisfy the statutory requirements of D.C. MUN. REGS. tit. 1 §503.2 (2002). NANA should not be allowed to obtain a waiver of this requirement. NANA was fully aware of the issuance of the building permit and modification permit. Sunrise is the party that will be adversely affected if the Board allows the appeal to be heard. The Board should follow its enumerated regulations and not condone NANA's continued harassment of Sunrise.

Sunrise, as the property owner and party in interest, also hereby requests the opportunity allowed to participate in the Board's appeal process. Sunrise will be able to provide relevant

information to the Board as necessary throughout the process and assist DCRA in its defense of the validly issued building permits.

This appeal was mailed to Sunrise on July 19, 2002, thus, this cross appeal is filed in accordance with D.C. MUN. REGS. tit. 1 §§501.5 and 503.4 (2002).

CONCLUSION

The Board should dismiss NANA's appeal because it was not filed in a timely manner, nor does it have any substance or merit. Additionally, the Board should grant Sunrise, as the property owner and building permit holder, the ability to participate in this hearing process.

Respectfully submitted,

Allison C. Prince

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Date: July 30, 2002