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December 12, 2002

NO. 02-AA-1368 Nebraska Avenue Neighborhood Association vs. DC Board of Zoning Adjust

District of Columbia Board of Zoning Adjustment
Jerrily Kress, Director
#210S
441 - 4th Street, N.W.
Washington, D.C. 20001

Dear Sir/Madam:

Pursuant to the rules of this Court I am transmitting, herewith, a copy of the petition for review filed on 12/10/02 in the above-entitled case.

Yours very truly,

Garland F. Pinkston
Clerk of Court

By: Ruth Sawtt
Information Center Supervisor

cc: Charles L. Reischel, Esq.

BZA
Case No. 16879
Exhibit No. 56

Board of Zoning Adjustment
District of Columbia
CASE NO.16879
EXHIBIT NO.56

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

Nebraska Avenue Neighborhood Association, **5126 Nebraska Ave., N.W.** **Washington, DC 20008** **and** **Anne Page Chiapella** **5126 Nebraska Ave., NW** **Washington, DC 20008** **Petitioners,** **V.** **DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT** **One Judiciary Square** **441 4th Street, N.W.** **Suite 210** **Washington, D.C. 20001** **Respondent**	**Case No.** 02-AA-1368

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PETITION FOR REVIEW OF AN ORDER OF THE DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

Nebraska Avenue Neighborhood Association and Anne Page Chiapella, President of NANA, respectfully petition this Court for review of Order of the District of Columbia Board of Zoning Adjustment (the "Board"), dated November 8, 2002, dismissing Appeal No. 16879, which challenged the issuance of Building Permits Nos. B435464 and B442149, issued to Sunrise Assisted Living LLC to construct a seven story

"assisted living facility" on Square 1989, Lots 49-57 and 161.

In support hereof, Petitioners state as follows:

Parties

1. Petitioner Nebraska Avenue Neighborhood Association ("NANA"), the Appellant below, is an unincorporated association of persons who reside within Square 1989, which was formed in 1988 to address concerns about the impacts of development in Square 1989 on the residential character and quality of life in the neighborhood.

2. Petitioner Anne Page Chiapella is a member of NANA who resides within 200 feet of the property that is the subject of the November 8, 2002 order of the Board of Zoning Adjustment in Appeal No. 16879 (hereinafter referred to as "Order of November 8, 2002.").

3. Respondent D.C. Board of Zoning Adjustment ("Board") is an independent agenc of the Government of the District of Columbia. D.C. Code § 6-641.07.

Allegations of Error

4. The Board applied an incorrect legal standard in granting the motion to dismiss in Appeal No. 16879;

5. The Board's Order of November 8, 2002 is not supported by findings of fact based on substantial evidence in the record, and its conclusions do not flow rationally from the findings;

6. The Board's Order of November 8, 2002 was arbitrary, capricious, and otherwise not in accordance with applicable law, including, without limitation, the D.C.

Zoning Regulations, 11 DCMR, and the D.C. Administrative Procedure Act, § 2-510, *et seq.*

7. The conclusions of law in the Board's Order of November 8, 2002 were arbitrary, capricious, and otherwise not in accordance with applicable law, including, without limitation, , the D.C. Zoning Regulations, 11 DCMR, and the D.C. Administrative Procedure Act, § 2-510, *et seq.*

8. The Board's procedural rulings during the course of Appeal No. 16879 were not in accordance with applicable law, including, without limitation, the D.C. Zoning Regulations, 11 DCMR, and the D.C. Administrative Procedure Act, § 2-510, *et seq.* , and deprived the Petitioners of due process of law.

WHEREFORE, Petitioners respectfully request that this Court of Appeals:

(a) Hold unlawful, reverse and set aside Order No. 16879; and

(b) Grant such other relief as this Court may deem just and proper.

A copy of Order No. 16879 is attached.

Respectfully Submitted,

Anne Page Chiapella

Anne Page Chiapella, Ph.D., President
Nebraska Avenue Neighborhood Association
5126 Nebraska Ave. NW
Washington, DC 20008
(202) 966-9619

Dated: December 10, 2002

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Review of an Order of the District of Columbia Board of Zoning Adjustment was served by first-class mail, postage prepaid, this 10th day of December, 2002, upon the following parties who formally participated in the proceedings before the agency:

Anne Renshaw, Chairperson
Advisory Neighborhood Commission 3/4 G
Chevy Chase Community Center
5601 Connecticut Ave., NW
Washington, DC 10015

Ms. Jerrily R. Kress, Director
D.C. Board of Zoning Adjustment
441 4th Street, N.W., Suite 210
Washington, D.C. 20001

Maureen E. Dwyer, Esq.
Shaw Pittman
1600 N Street, NW
Washington, D.C. 20037

Alan Bergstein, Esq.
Office of the Corporation Counsel
441 4th Street, N.W.
Suite 1060 North
Washington, D.C. 20001-2700

Office of the Corporation Counsel
Appellate Division
441 4th Street, N.W., 6th Floor
Washington, D.C. 20001

Anne Page Chiapella
Anne Page Chiapella

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

★ ★ ★

Appeal No. 16879 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. B442149) issued on January 22, 2002, to Sunrise Connecticut Avenue Assisted Living LLC, allowing a modification to Permit No. B435454 (dated March 8, 2001) allowing revisions to the roof plan/structure, including the elevator, in an R-2 and R-5-D District at premises 5111 Connecticut Avenue, N.W. (Square 1989, Lot 162).

HEARING DATE: June 18, 2002
DECISION DATES: May 21, 2002; May 29, 2002; June 4, 2002; June 18, 2002

FINAL ORDER DISMISSING APPEAL

The Nebraska Avenue Neighborhood Association (NANA) filed an appeal with the Board of Zoning Adjustment on March 19, 2002, challenging the decision of the Zoning Administrator to approve the issuance of a building permit to Sunrise Connecticut Avenue Assisted Living LLC (Sunrise) for the "revision to roof plan/structure to include elevator only per plans," at 5111 Connecticut Avenue, N.W. (Square 1989, Lot 162), in an R-2 and R-5-D Zone District, as noncompliant with the Zoning Regulations.

NANA is represented in this proceeding by its president, Page Chiapella. The Zoning Administrator did not participate in the proceedings on this appeal; however, the Administrator of the Building and Land Regulation Administration in the Department of Consumer and Regulatory Affairs (DCRA) provided the Board with the official building permit drawings in issue. Sunrise is represented by the law firm ShawPittman. ANC 3G is automatically a party to this appeal pursuant to 11 DCMR § 3199.1.

Shortly after the appeal was filed, Sunrise sought to have the Office of Zoning return the appeal as duplicative of an earlier appeal filed by NANA relating to the same building that had been denied after extensive proceedings. The Board determined to treat the request from Sunrise as a motion to dismiss, and ultimately dismissed the instant appeal, as two of the issues on appeal are outside of the Board's jurisdiction, while review of the official building permit plans showed that the revised permit to be in compliance with the Zoning Regulations with respect to the other two issues on appeal.

PRELIMINARY AND PROCEDURAL MATTERS

Notice of Filing and Notice of Hearing. By memoranda dated March 29, 2002, the Office of Zoning advised the Zoning Administrator; the Office of the Corporation Counsel; the property owner; Advisory Neighborhood Commission (ANC) 3G, the ANC for the area within which the property that is the subject of this appeal is located; the ANC Commissioner for the affected Single-Member District; the Ward 3 Councilmember; and the D.C. Office of Planning of the filing of the appeal.

The Board scheduled a public hearing on the appeal for June 18, 2002. Pursuant to 11 DCMR § 3113.14, the Office of Zoning on April 24, 2002, mailed the property owner and the Zoning Administrator notice of hearing. NANA was copied with the property owner's notice. The Office of Zoning also mailed NANA and ANC 3G notice of hearing on May 2, 2002. Notice of hearing was also published in the D.C. Register on May 3, 2002, at 49 DCR 4093.

Procedural History of Sunrise Motion to Dismiss. On April 3, 2002, Sunrise requested the Office of Zoning to return the appeal to NANA, arguing that the appeal is based on the same facts as NANA's first appeal of the original permit (BZA Appeal No. 16716); that pursuant to 11 DCMR § 3126.11, the appeal is barred for a period of one year from the date of the final order entered in the first appeal (or until February 15, 2003); and that the Office of Zoning should return the appeal to the NANA as not permitted as further reconsideration of the Board's decision on the first appeal.

The Board reviewed the request from Sunrise on April 23, 2002, and determined that it should be treated as a motion to dismiss. By letter dated May 2, 2002, the other parties to the appeal were provided ten days in which to file a written response to the motion. Both NANA and ANC 3G filed written responses to the motion; however, the responses were not received into the record on the basis that they were untimely. The Board also declined to accept into the record Sunrise's letter dated September 17, 2002, objecting to NANA's letter as untimely.

At a special public meeting on May 21, the Board decided to hold Sunrise's motion to dismiss in abeyance. The Board requested Sunrise to provide by May 22 supplemental information that would support its contention that there is no significant difference between the original building permit and the revised permit. Responses from the other parties to the appeal were due by May 29.

Sunrise filed the supplemental information as directed, again arguing that the permit modification affected only the roof plan/structure, that no other aspects of the building plans were changed, that the modified plans had been available in the record of the first

appeal as of November 9, 2001, in connection with the Zoning Commission's sua sponte review of the Board's final decision and order in the first appeal, and that the modified plans are consistent with the plans filed with DCRA to secure the revised building permit, the Board and the Commission have fully deliberated on this matter, and the second appeal raises no new issues. Sunrise again requested that the appeal be dismissed.

By letter dated May 24, 2002, ANC 3G opposed Sunrise's motion to dismiss, arguing that the second appeal focuses on the revised elevator and penthouse plans, building safety violations adjacent to the revised elevator penthouse not raised in the first appeal, and floor area ratio (FAR) calculations only recently produced by the DCRA. NANA, on May 24, also opposed the requested dismissal. NANA questioned the credibility of Sunrise's architect, and argued that the elevators approved for the building cannot be physically constructed given the amount of space to be provided by the modified elevator/mechanical penthouse; that the plans submitted by Sunrise are incomplete and do not represent the building permit plans; and that new information obtained from DCRA shows a noncompliant rear yard structure and an increase in FAR.

On May 29, 2002, the Board continued the special public meeting on the motion to dismiss to June 4 due to lack of a quorum. At the June 4 meeting, the Board discussed the motion to dismiss; and decided to dismiss the appeal as to all issues involving the functioning and safety of the elevator. The Board denied the motion to dismiss as to the rear yard and FAR issues pending further hearing on June 18.

At the June 18 public hearing, the Board reviewed the official building permit drawings provided by DCRA, and compared the drawings for the original permit and the revision to the permit. The Board determined that the drawings did not show a noncompliant rear yard structure, nor an increase in FAR above the maximum permitted amount, and therefore dismissed the appeal.

FINDINGS OF FACT

1. DCRA issued Sunrise Connecticut Avenue Assisted Living LLC Building Permit No. B442149 on January 22, 2002, for the "modification to Permit No. B435464, revision to roof plan/structure to include elevator only as per plans."

2. In its appeal of Building Permit No. B442149, NANA challenges whether:

   (1) The elevator will be functional and safe;

   (2) Plans submitted by Sunrise to the Board are incomplete, biased, and misleading;

(3) New information from DCRA shows a noncompliant rear yard structure; and

(4) New information from DCRA relating to the configuration of the seventh floor resulting from the elevator that shows an increase in FAR above the maximum permitted amount.

3. ANC 3G supported the appeal, insofar as it raised issues and concerns that:

(1) The revised elevator and penthouse plans do not comply with applicable requirements;

(2) There are building safety violations adjacent to the revised elevator penthouse; and

(3) DCRA produced new FAR calculations that warrant reconsideration of whether the building exceeds the maximum permitted FAR.

4. The Board finds that two of the issues presented on appeal by NANA, and of concern to ANC 3G, involve whether the proposed elevator system will function properly and safely.

5. With respect to the documents submitted to the Board, Sunrise did not submit to the Board each and every document that it had submitted to DCRA. The Board finds, however, that Sunrise was not required to submit to the Board each and every document that was submitted to DCRA, but only those documents relating to compliance with the Zoning Regulations.

6. The official permit drawings submitted in connection with the revised permit show a "cutting off" of the top peak of the tower element and the dropping of the exterior wall of the tower, aligning the roof slab and the roof cornice line all the way across and also aligning the roof. There is nothing projecting above the main roof line in the vicinity of the elevator.

7. The Board finds that in the revised permit, DCRA only approved changes to the elevator penthouse.

8. The Board finds that no changes were made to the project that would have any impact on rear yard setback requirements.

9. The Board finds that the modifications to the elevator penthouse did not increase the seventh floor FAR. If anything, there may have been a slight decrease in the FAR.

CONCLUSIONS OF LAW

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799; D.C. Official Code § 6-641.07(f) and (g)(1) (2001)), to hear and decide appeals where it is alleged by an appellant that there is an error in any decision by an administrative official in the carrying out or enforcement of the Zoning Regulations. This appeal is properly before the Board pursuant to 11 DCMR §§ 3100.2, 3101.5, and 3200.2. The notice requirements of § 3112 for the public hearing on the appeal have been met.

The Board is required under § 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21, as amended; D.C. Official Code § 1-309.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC's recommendations. ANC 3G supports NANA's appeal, insofar as it concerns the issues relating to the elevator penthouse and the seventh floor FAR. As discussed in this order, the Board does not agree with the ANC that the appeal should proceed to hearing with respect to these issues.

First, the question of whether the elevator can function properly and safely, given the size of the penthouse, is within DCRA's jurisdiction pursuant to the Construction Codes Supplement, Title 12 DCMR (1999). The Board's jurisdiction in an appeal pursuant to the Zoning Act is limited to whether an administrative official erred in the carrying out or enforcement of the Zoning Regulations. See D.C. Official Code § 6-641.07(g)(1) (2001). Therefore, the Board concludes that the appeal as to the elevator should be dismissed for lack of jurisdiction.

Second, the Board concludes that the materials submitted to the Board by Sunrise are complete and neither biased nor misleading. Since the Board's jurisdiction on an appeal is limited to issues involving the interpretation and application of the Zoning Regulations, the fact that Sunrise submitted materials to DCRA that it did not also submit to the Board does not in itself demonstrate that that materials submitted to the Board are incomplete, biased, or misleading. As the Board found, the materials submitted by Sunrise in this case are relevant to the zoning issues before the Board. The other materials questioned by NANA, including materials relating to the functioning of the elevator, are not relevant. Therefore, the Board concludes that the appeal should be dismissed insofar as it relates to Sunrise's submissions to the Board.

Third, the Board concludes that the appeal should be dismissed as to the question of compliance with the minimum rear yard requirements, since the permit drawings did not show any changes that would affect the rear yard setback.

Finally, based upon its review of its comparison of the original and revised official building permit drawings, the Board concludes that appeal should be dismissed as to the issue involving whether there has been an increase in the seventh floor FAR. The permit drawings show that the FAR did not increase with the revised permit.

The Board takes this action without a hearing because there is no possibility that testimony or other evidence could alter the determinations made. The Board is an expert body capable of understanding the permit drawings before it, and determining whether the drawings depict a structure that complies with the Zoning Regulations. Having made that finding, no purpose is served, and no party's interest furthered, by holding a hearing.

For the reasons stated above, it is hereby **ORDERED** that the appeal is **DISMISSED.**

Vote taken June 4, 2002, on the motion to grant the property owner's motion to dismiss the appeal as to those issues related to the functioning of the elevator and to deny the motion to dismiss as to the issues relating to whether there has been a change in the seventh floor FAR as a result of the penthouse modification and relating to the rear yard structure).

VOTE: 3-1-1 (Carol J. Mitten, Geoffrey H. Griffis, and David A. Zaidain, in favor of the motion; Curtis L. Etherly, Jr., opposed; Anne M. Renshaw, recused, not voting).

Vote taken June 18, 2002, on the motion to dismiss the appeal as to the those issues relating to the whether there has been a change in the seventh floor FAR as a result of the penthouse modification and relating to the rear yard structure:

VOTE: 3-0-2 (Geoffrey H. Griffis, Carol J. Mitten, David A. Zaidain, to dismiss; Curtis L. Etherly, Jr., not present, not voting; Anne M. Renshaw, recused, not voting).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order.

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

FINAL DATE OF ORDER: NOV - 8 2002

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