GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16879-A 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) 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).

DECISION DATE: February 4, 2003

DECISION AND ORDER

This decision and order concerns a Motion to Accept a Late Filed Motion for Reconsideration and Rehearing of Appeal No. 16879, filed by Appellant, Nebraska Avenue Neighborhood Association ("NANA"). For the reasons stated below, the Board finds that the Appellant did not make a showing of good cause to excuse its late filing. The Board therefore denies the Appellant's Motion.

Background

NANA filed appeal No. 16879 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. NANA had previously unsuccessfully challenged the initial building permit for the same location in Appeal No. 16716A, and then filed a subsequent unsuccessful Motion for Reconsideration and Rehearing for that case.

By the issuance of an order dated November 8, 2002, the Board dismissed Appeal No. 16879, having found: 1) the issue regarding the safe functioning of the elevator was outside the Board's jurisdiction; 2) materials submitted to the Board by Sunrise were not misleading; 3) there were no changes in the minimum rear yard requirements; and 4) the revised permit drawings did not show that there had been a increase in the floor area ratio.

On November 22, 2002, NANA filed a written request for a rehearing and reconsideration for Appeal No. 16879. Section 3126.2 of the Zoning Regulations provides that a "motion for reconsideration . . . of any decision of the Board" must be "filed with the Director within ten (10) days from the issuance of a final written order by the Board." Section 3110.2 provides that the last day of the period specified in any rule "shall be included unless it is a Saturday, Sunday or

Board of Zoning Adjustment
District of Columbia
CASE NO.16879
EXHIBIT NO.71

official District of Columbia holiday, in which event the period shall run until the end of the next day that is neither a Saturday, Sunday, nor official holiday". "[T]hree days shall be added to the prescribed period" when service is by mail. 11 DCMR § 3110.3.

Since the Board's decision was served by mail, three days were added to the prescribed ten-day period. The thirteenth day did not fall on a weekend or holiday. The Motion for Reconsideration and Rehearing was filed fourteen days after the date of the order dismissing NANA's appeal, and was therefore returned to NANA by the Office of Zoning.

On November 29, and December 3, 2002, NANA filed letters asking the Board to accept NANA's late-filed motion. The Board treated NANA's November 29 request as a motion. The December 3rd letter was not made part of the record.

On December 3, 2002, NANA also filed a Petition for Review of this case with the District of Columbia Court of Appeals (Case No. 02-AA-1368). The filing of the petition effectively transferred jurisdiction over this case to the Court of Appeals. In order to consider the November 29th motion to accept NANA's late filed pleading that was filed with the Board, the Appellate Division of the Office of the Corporation Counsel asked that that the case be remanded to the Board. On January 7, 2003, the Court of Appeals remanded the case accordingly.

On December 20, 2002 and January 13, 2003, NANA submitted additional requests for a rehearing and/or reconsideration of Appeal No. 16879.[1]

On February 4, 2003, at its regularly scheduled meeting, the Board denied NANA's motion to accept the late filed motion.

Decision

NANA should have filed its motion for reconsideration and rehearing by November 21, 2002, the thirteenth day after the date the final order was issued and mailed on its appeal. The motion was filed one day later. Any prescribed time period may be extended by the Board for good cause. 11 DCMR § 3110.4.

NANA makes no claim that circumstances beyond its control prevented it from filing its motion to reconsider by November 21st. Instead NANA chose to interpret the time computation rule in a manner that would provide an extra day for filing and thus consciously took the risk that its motion would be ruled untimely. Further, NANA insinuates that the Board has no choice but to accept this interpretation, because a staff member purportedly agrees with it. Neither of these circumstances constitute good cause.

NANA's Interpretation of the Board's Time Computation Rules

[1] These submissions too were not timely filed (see above discussion) and no motion to accept these filings was made. Moreover, NANA does not allege that the information could not have been presented at the hearing, or any other earlier date. Therefore, these submittals were not considered in deciding this motion.

NANA claims, in its November 29th motion, that it relied on a "literal interpretation" of the Zoning Regulations to ascertain that November 22, 2002, was the last day for filing its motion for reconsideration and rehearing. Pursuant to the regulations cited above, parties are given ten days to file a motion for reconsideration and/or rehearing, with three days added to that time period where the decision was served by mail. When the last day of a time period falls on a weekend or holiday, the time period is extended to the first following business day. However, the November 21st date does not fall on a weekend or a holiday. Nevertheless, NANA appears to believe that since the November 11th Veteran's Day holiday fell three days after the November 8th service date, an additional day was added to the time for filing its motion. Thus, NANA assumed that the three extra days for mailing constitutes a separate time period that is added *to the beginning* of the ten-day period, and that this separate three-day period may also be extended if its last day falls on a holiday. The Board finds this interpretation untenable.

A motion for reconsideration must be filed within ten days after the issuance of a final decision. 11 DCMR § 3126.2. Because the final order on this appeal was served on NANA by mail on November 8, 2002, "three (3) days [were] added *to the prescribed period*", 11 DCMR § 3110.3 (emphasis added). That means that the ten-day period became a thirteen-day period. The thirteenth day (in this case November 21, 2002) was the "last day of the period". Because the last day did not fall on a "Saturday, Sunday, or official District of Columbia holiday", it was "included" in the computation, 11 DCMR § 3110.2.

Thus, the three days added for mailing are not a separate time period, but extend a "prescribed period", in this case the period by which to file a motion for reconsideration. The three days are intended to compensate for the likely time it takes a mailed document to arrive, so that the party will have the same time to respond as if the document were personally served. The purpose of not counting the last day of the period when it falls on a holiday or weekend, is to prevent a situation in which the last day to file is a day on which the Office of Zoning is closed and therefore cannot accept the submission. NANA's view that the three days for mailing are a separate period that is counted first, and then extended if the third day is a holiday, serves no discernible purpose other than delay.

The Board is mindful that this interpretation differs slightly from that of the District of Columbia Court of Appeals, which has a nearly identically worded rule. *See Wallace v. Warehouse Employees Union* #730, 482 A.2d 801 (D.C. 1984). There, following the federal courts, if the tenth day after a judgment is rendered falls on a Saturday, Sunday, or legal holiday, the ten-day period for filing a motion for reconsideration does not toll until the next business day. It is to this last day that three extra days are then added for mailing. Thus, the Court of Appeals does not look at one thirteen-day period, but considers there to be two separate periods, one of ten days followed by one of three days. If either of these periods ends on a weekend or holiday, the time for filing is extended. *See id.* at 806-08.

The Court of Appeals, however, has noted that its interpretation is at odds with the rule in other states and has been frowned upon by some federal courts, though followed there in the interest of uniformity. *Id.* at 808-09 (1984). The Board follows state court interpretations because the method of calculation reduces the number of variables. Nevertheless, even under the Court of

Appeals' method of calculation, NANA's appeal is untimely because the tenth day after the Board's decision fell on a Monday and the third day of the mailing period fell on a Thursday.

The Board thus finds NANA's interpretation implausible. However, even if the computation rules were susceptible of more than one interpretation, NANA should have filed based upon the earliest conceivable concluding date. Again, NANA offers no explanation why November 22nd was the earliest date that it could have filed its motion. Therefore, NANA failed to demonstrate good cause

NANA's Reliance upon a Staff Person's Purported Statement

NANA states in its November 29, 2002 submittal that, in response to NANA's inquiry, an Office of Zoning staff member indicated that if the third day provided for mailing fell on a holiday, "an additional day shall be allowed". The statement itself is innocuous and does not support NANA's position.

In any event, even if the staff person advised NANA that its interpretation was correct, the Board cannot let its decision-making authority be usurped by parties initiating communication with Office of Zoning staff and then demanding that this Board be bound by whatever informal information is given. To do so would be inconsistent with the requirements of the Administrative Procedures Act that all decisions be based upon a record made in the presence of the parties. D.C. Official Code § 2-509 (2001 Ed.). Moreover, the recognition of such a practice would encourage participants in Board proceedings to seek to supplant entirely proper Board rules by informally seeking advice from Office of Zoning staff. Such a practice would lead to time consuming proceedings over the substance and validity of every such communication, This would unnecessarily and unwisely divert the Board's limited resources from its adjudicatory functions.

Additional considerations

Lastly, the Motion discusses a previously-filed August 21, 2002, motion for reconsideration and rehearing for this appeal. This motion was filed prematurely, after the hearing on this case, but prior to the issuance of the Board's order. The motion therefore was not admitted into the record and cannot be considered timely because the Board's order had not yet been issued, 11 DCMR § 3121.9.[2]

Although the Board is not accepting the late-filed motion for reconsideration and rehearing, even the most cursory review reveals that not a single valid ground for reconsideration or rehearing was raised in that motion. The motion merely repeated arguments made prior to the Board's written order (*See* NANA's May 29, 2002, submission), did not point to any relevant new information that was not already in the record, and raised issues outside the scope of the appeal.

[2] This August 21 improperly filed motion is virtually identical to the motion for reconsideration and rehearing filed on November 22nd. This further convinces the Board that there is no justification for NANA's delay where it already had in place the arguments it would put forward.

As is evident from the filings in this case, NANA has used every conceivable procedural device to stop the building of a facility for persons with disabilities that it has so adamantly opposed. Indeed, NANA has since filed yet a third appeal of the same project, this time appealing the approval of a Wall Test Report. While NANA may continue its relentless efforts to challenge what the Board continues to find to be a lawful structure and use, the Board is not compelled to treat NANA's tactical miscalculation as good cause.

For the reasons stated above, it is hereby **ORDERED** that the motion is **DENIED**.

VOTE: 4 - 0 - 1 (Geoffrey H. Griffis, David A. Zaidain, Carol J. Mitten, Curtis L. Etherly, Jr., to deny, Anne M. Renshaw recusing herself).

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

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

FINAL DATE OF ORDER: MAY 27 2003

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. CB/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPEAL NO. 16879-A

As Director of the Office of Zoning, I hereby certify and attest that on MAY 27 2003 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, Esq.
Shaw Pittman
2300 N Street, N.W.
Washington, DC 20037-1128

Acting 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