Nebraska Avenue Neighborhood Association
5126 Nebraska Avenue, N.W.
Washington, D.C. 20008

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

By Hand Delivery

IN RE: 5111 Connecticut Ave. N.W.
Square 1989, Lot 162

BZA Appeal No. 16879

Appeal of

The Nebraska Avenue Neighborhood Association

and

Advisory Neighborhood Commission 3/4G

RECEIVED
D.C. OFFICE OF ZONING
2003 JUN -5 PM 3:50

Re: Errors in Final Order
Request for Reconsideration and Hearing of Appeal No. 16879

June 5, 2003

Members of the Board of Zoning Adjustment:

We request that the Board of Zoning Adjustment (the "Board"), on motion of this Appellant and/or on its own motion as provided in 11 DCMR 3126.7, immediately reconsider its Final Order dated May 27, 2003 and hear this appeal. The request is based on (a) legal and factual errors in the Final Order, (b) procedural errors in the appeal process, (c) new evidence not available at the time of hearings [Attachment A] and (d) the requirements of due process and equitable treatment of Parties to a contested case. (11 DCMR 3126.2, 3126.4, 3126.6, 3126.7).

BZA
Case No. 16879
Exhibit No. 73

Board of Zoning Adjustment
District of Columbia
CASE NO.16879
EXHIBIT NO.73

Summary of Main Points

A. Alleged errors in Order 16879-A:

A-1 Contrary to Board's finding that Appeal 16716 was denied, Appellants' original appeal was sustained in part.

A-2 The Board erred in its finding that Appellant's August 21, 2002 and November 22, 2002 filings were "virtually identical."

A-3 The Board erred in its conclusion that extension of the period for mailing to compensate for holidays and weekends serves no purpose.

A-4 The Board erred in concluding that the Appellant "consciously took the risk that its motion would be ruled untimely."

A-5 The Board's conclusion that the Appellant should have filed at the "earliest possible date" is not supported by the record or by law.

A-6 The Board erroneously goes outside the record.

B. Related points:

B-1. The extension of time to file, as interpreted by the Appellant, is supported by D.C. Court of Appeals.

B-2. Appellant agrees with the Board's conclusion that the "Board cannot let its decision-making authority be usurped." Appellant also believes that granting the requested waiver does not usurp such authority.

B-3. To the best of our knowledge, the May 27, 2003 Order is the first notice by the Board of its current specific interpretation of 11 DCMR § 3110.3.

B-4. History: The Board has generally provided waivers of its rules for late filings. These are frequently provided on the Board's own motion.

B-5. History: The Board, on its own motion, granted additional time and filing to the Intervenor in this contested case.

B-6. There is requirement for fairness in contested cases.

C. **Resubmission: The Appellant's August 21, 2002 filing documented new information and requested reconsideration and hearing, based on that new information (attached). It is herewith resubmitted.**

BODY

A-1. **The Board erred in its finding that NANA's challenge of the initial building permit was unsuccessful**. It was upheld in part (Zoning Commission Order No. 952, dated December 20, 2002). Because of this successful appeal, the Intervenor needed to obtain a revised permit. That permit and additional information was supplied to the Appellant by the Department of Consumer and Regulatory Affairs. It provided the basis of Appeal No. 16879.

A-2. **Board's finding that Appellants' August 21, 2002 and November 22, 2002 filings were "virtually identical" is erroneous.**

Appellant's August 21 filing (Attachment A) was based on substantive new information not available at the time of hearing on the motion to dismiss. That filing and motion for reconsideration was based on a letter to the Board of Appeals and Review ("B.A.R.") in which the Intervenor contradicted its testimony to this Board. Intervenor's new position contradicted conclusions reached by this Board at it's hearing on their Motion to Dismiss Appeal No. 16879. Appellant's August 21 submission focused exclusively on that information and the points relating directly to it which supported our motion for reconsideration. The Board returned the filing, saying that it "premature."

In contrast, the body of the November 22 filing (Attachment B) mainly addressed the specific points in the Final Order, issued November 8, 2002. The Appellant did not learn these details until the Final Order was issued. We also included a request for reconsideration based on resubmitted information from the August 21 filing that had not yet been considered by the Board.

The August 21 itself filing did not prepare the Appellants for the response to the November 22 Final Order.

A-3. **The Board erroneously concluded that an extra day allowed for mailing** when the initial 3-day mailing period ends on weekends and holidays (under 11 DCMR § 3110.3) **serves no purpose**. When there is no holiday mail delivery, the extra day extends the period to a mail delivery day. The additional day then contributes to providing the full allotted response time (separate from the mailing time) when the period for mailing ends on a weekend or holiday.

A-4. **The Board erred in concluding that the Appellant "consciously took the risk** that its motion would be ruled untimely." There is no support for this in the record. The Appellant operated in good faith under its understanding of the regulations. Upon learning of the error, Appellant requested a waiver.

A-5. **The conclusion that the Appellant should have filed at the "earliest possible date" is not supported by the record or by law.** The Board itself took almost five months in preparing its order and the Appellant was under pressure in preparing a detailed response in a few days.

A-6. **The Board goes outside the record**:

The Board goes outside the record in submission to Court of Appeals and in its Final Decision (11 DCMR 3127.2):

The Board "returned" Appellant's August 21 filing as "untimely," excluded it from the record. **At that point it presumably was no longer in the record**. However the Board then submitted it, through counsel, to the Court of Appeals in support of its Motion for Expedited Remand of this case back to the Board. Once remanded, the Board misrepresents content this filing in its Final Order and again refers to it as "not timely filed" and not in the record.

The Board again went outside the record of this case in the conclusion of its Final order. The Board referenced Appellants' (Nebraska Avenue Neighborhood Association and ANC 3G) Appeal No 17010, filed in March, 2003.

B. Additional Related Points:

B-1. The extension of time to file, as interpreted by the Appellant, is supported by D.C. Court of Appeals.

In the Jan 2, 2003 submission to the District of Columbia Court of Appeals (Attachment C) Corporation Council submitted, on behalf of the Board, that "it is permissible to construe language similar to that in the Board's rules as establishing two separate periods of time for calculating a filing deadline when service is by mail (*Wallace v. Warehouse Employees Union # 730, 482 A.2d 801 (D.C. 1984)*." This supports the Appellant's argument.

B-2. As far as the Appellant is aware, **the May 27, 2003 Order is first notice by the Board of its current specific interpretation of 11 DCMR § 3110.3**. The Board errs in holding Appellants responsible for knowing the Board's interpretation of this regulation. To our knowledge, the Board has not previously published this interpretation of the 3-day period for mailing and argues against itself in it's Jan. 2, 2003 submission to the Court of Appeals.

B-3. As far as the Appellant is aware, the May 27, 2003 Order is first notice by the Board of its current specific interpretation of 11 DCMR § 3110.3. We believe the Board should interpret ambiguous language in the regulations in favor of

adversely affected parties up to the time when clarification is provided.

B-4. History: **The Board has generally provided, frequently on its own motion, waivers of its rules for late filings.** In a search of the Office of Zoning Website BZA public meeting and hearing transcripts, the cases demonstrate that the Board has allowed almost if not all reasonable requests for waivers for untimely filings.

B-5. **The Board, on its own motion, granted an additional filing and additional time to Intervenor in this contested case.** (BZA Public Meeting, May 22, 2002, transcript pp. --- , Appeal No. 16879 Exhibit No. 29). This was prejudicial to the Appellants who were not given opportunity for cross-examination on the submitted information.

B-6. **The Board, in contested cases, must be fair and equitable**. D.C. Code 1961 §§ 1-216, 1-218, 5-412, 5-413, 5-414, 5-42; *Jarrott v. Scrivener*, D.D.C. 1964 225 F.Supp. 827

C. The Appellant's August 21, 2002 filing (attached) and **request for reconsideration and hearing, based on substantive new information**[1] and which was determined (Appeal 16879 Exhibit 46) by the Board to be prematurely filed, is

---

[1]A major determinant of the decision to deny the appeal was Intervenor's argument that the revision permit modified only the elevator penthouse--that no change in the elevator or the the elevator enclosure below the penthouse was included in the revision permit. Appellants pointed out that the revision permit stated: "to include elevator only as per plans." An elevator shaft was shown in plans, including cross-section and footprint. The penthouse itself did not accommodate any known elevator. And there was ambiguity in the plans. Appellants argued that the full set of permit application materials was appropriately included in the appeal. Appellants also pointed out that ambiguities in the plans in Intervenor's permit applications, both the original (B435464 issued March 8, 2001) and the revision permit No. 442149 are noncompliant with Zoning Compliance Review Data of the Building Code [(12 DCMR §107.15; 11 DCMR §101.4(d)]. The Board, however, accepted Intervenor's argument in Order No. 16879. Thus this new evidence in which Intervenor reverses itself support's the case for reconsidering and hearing the appeal. Although it was new information, the Board rejected Appellant's August 21 filing as untimely (Appeal 16879 Exhibit 47). Re-submission of this information and request is for reconsideration based on the information is therefore included in the current submission.

herewith resubmitted. Relief is requested under 11 DCMR § 3100.5 because Appellant has, in good faith, submitted according to its understanding of the regulations and the Board's determination of filing requirements..

> If the Board again finds filing of new information (created after the original hearings) to be untimely or inappropriately filed, we request waiver relief and the Board's advice on how to file relevant and substantive new information. We request that the Board advise us if separate filing is required and we will submit the information as required by the Board. If the Board finds filing of new information untimely, Appellant respectfully requests waiver in order to file the information and motion. The Appellant has filed this twice before: August 21 and Nov. 22, 2002 and in both cases the Board determined that the filings based on new information were untimely.

The Nebraska Avenue Neighborhood Association requests immediate reconsideration and hearing of Appeal No. 16879 based on errors in the Final Order, errors in processing the Appeal, and substantive new information directly relevant to zoning compliance in this contested appeal.

Respectfully,

Page Chiapella

Page Chiapella, President

Attachments:

A. Appellant's August 21, 2002 submission to the Board -- Resubmitted to the Board, June 5, 2003
B. Board's Dec. 20, 2002 submission to D.C. Court of Appeals
C. Board's Jan. 2, 2003 submission to D.C. Court of Appeals

CERTIFICATE OF SERVICE

I hereby certify that a copy the forgoing submission to the Board of Zoning Adjustment, dated June 5, 2003, was mailed by first class, postage prepaid, or hand delivered to the following:

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

Maureen Dwyer, Esq.
Shaw Pittman,LLP
2300 N Street, NW
Washington DC 20037

ANC 3G
Chevy Chase Community Center, 2nd Floor
5601 Connecticut Avenue, NW
Washington, DC 20015

Page Chapella — Signed

6/5/03 — Date

A

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

June 5, 2002
apc

Date: August 21, 2002 **By Hand Delivery**

D.C. OFFICE OF ZONING
RECEIVED
2002 AUG 21 PM 2:43

RE: Appeal No. 16879–Sunrise Assisted Living

REQUEST FOR RECONSIDERATION OF MOTION TO DISMISS

Geoffrey Griffis
Chair, Board of Zoning Adjustment
441 4th Street, N.W., Suite 210 South
Washington, DC 20001

Dear Mr. Griffis and Members of the Board:

The Nebraska Avenue Neighborhood Association (the "Appellant") hereby requests reconsideration of the Motion to Dismiss Appeal No 16879. This request is based on significant new information contained in a July 30, 2002 letter from Sunrise Assisted Living, Inc. ("Sunrise") written to the Board of Appeals and Review (Exhibit A). In this letter, **Sunrise reversed the position that it presented to the Board of Zoning Adjustment** (the "Board") at the June 18, 2002 BZA Public Hearing. Sunrise now claims that Permit B442149 includes modification of the elevator system, not just to the elevator penthouse as they previously claimed to the Board. That is, Permit B442149 includes new elevators, shaft and penthouse. This is important because the revised elevator system (Kone) also has a revised elevator penthouse (different from that shown in Plan Sheet A401 supplied by DCRA!) that the Appellants believe is noncompliant with zoning regulations. This is a basis of Appeal No. 16879.

BACKGROUND OF/JUSTIFICATION FOR THE REQUEST:

1. Sunrise claimed to the BZA (June 18, 2002 Public Hearing) that Permit No. B442149 (revision of Permit No. B435464) modifies only the elevator penthouse.

Sunrise claimed that the permit authorized no other modification of Permit B435464.

2. Sunrise reverses itself.

In a letter dated July 30, 2002 to the Board of Appeals and Review (Exhibit A), Sunrise changed its claim about Permit No. B442149 to say that **the permit modifies not only the elevator penthouse but also the elevator system** (Exhibit A).

3. The BZA has not evaluated the new elevator system penthouse for zoning compliance.

The elevator modification in Permit B442149 is actually a new elevator system – two Kone Elevators (2500 and 3500 capacity). The Kone Elevator system includes the new elevators, a new elevator shaft, elevator lobby and relocated electrical closet (Plan Sheet A401, 11/29/01 and Kone manufacturers information in Appellants Exhibit E, May 29, 2002, "Exhibit E"). The elevator penthouse for this Kone Elevator system (Exhibit E) is noncompliant with Zoning Code, as was the original Otis Elevators and penthouse. **The Kone Elevator system, including its penthouse, has not been evaluated for compliance by the BZA**. This penthouse was one of the Appellant's appeal points

4. The new Kone Elevator system is included in Permit B442149 application.

Kone elevator details included with application materials for Permit B442149 are included in Exhibit E in the Appellant's May 29, 2002 submission to the Board. The required elevator penthouse is accurately depicted in that material. An affidavit is attached (Exhibit B) stating that Appellant's May 29, 2002 Exhibit E was copied from official DCRA files and provided to the Appellant by DCRA.

5. Permit B442149 is noncompliant with zoning regulations.

The newly stated Sunrise position agrees with the Appellant's documentation that Permit No. B442149 modifies the elevator system. Wording on Permit No. B442149 also substantiates this position-- Permit B442149 authorizes revision "to include elevator only as per plans." These plans are provided in the application and include a penthouse of the Kone Elevator system that is different from the one shown in Plan Sheet A401. The Kone Elevator system with the required taller penthouse also renders the roof structures with the same noncompliances affecting the disallowed Otis Elevators, including noncompliance with 11 DCMR §§400.1, 400.7(a), 400.7 (b), 402.4, 411.1, 411.2, 411.3, and 411.5.

6. The BZA's oral decision to dismiss Appeal No. 16879 based on erroneous interpretation.

The BZA's oral decision to accept Sunrise's motion to dismiss Appeal No. 16879 appeared to be substantially based on the assumption that Permit B442149 modified only the elevator penthouse as shown in Plan Sheet A401. Sunrise's revised position matches the Permit No. B442149 application and shows that this interpretation is incorrect.

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

The Appellants respectfully request reconsideration of the Motion to Dismiss Appeal No. B16879. The request is based on new information in which Sunrise contradicts and reverses its position presented before the Board on July 18, 2002. The new Sunrise position supports the appeal case. We believe due process requires the Board to hear Appeal No. 16879 and allow the Appellants to make their case before the Board. The Final Decision should be based on full appeal process including required service of information on all parties and the opportunity for parties to cross examine those presenting "evidence."

Yours truly,

Page Chiapella

Page Chiapella,
President, Nebraska Avenue Neighborhood Assn.

Attachments: Exhibit A: Sunrise letter dated July 30, 2002 to the Board of Appeals and Review
Exhibit B: Affidavit stating that records are copies of official DCRA records
Certificate of Service

Cc: Denzil Noble
Toye Bello
William Bennett, Esq.
Alan Bergstein, Esq.
Maureen Dwyer, Esq.
ANC 3G

CERTIFICATE OF SERVICE

I hereby certify that a copy the forgoing submission to the Board of Zoning Adjustment, dated August 21, 2002, was mailed first class, postage prepaid, to the following:

Denzil Noble, Acting Zoning Administrator
941 North Capital St., NE
Washington, DC 20002

Toye Bello, Former Acting Zoning Administrator
941 North Capital St., NE
Washington, DC 20002

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

Alan Bergstein, Esq.
Office of the Corporation Council
441 4th Street, NW
Washington, DC 20001

Maureen Dwyer, Esq.
Shaw Pittman,LLP
2300 N Street, NW
Washington DC 20037

ANC 3G
Chevy Chase Community Center, 2nd Floor
5601 Connecticut Avenue, NW
Washington, DC 20015

Page Chiapella
Signed

Aug. 21, 2002
Date

EXHIBIT A

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.

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

Allison C. Prince, Esq.
Paul A. Tummonds, Jr., Esq.
Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037

Date: July 30, 2002

EXHIBIT B

Anne Page Chiapella, Ph.D.
5126 Nebraska Avenue, NW
Washington, DC 20008

AFFIDAVIT

1. My name is Anne Page Chiapella. I am a taxpaying citizen of the District of Columbia. I have owned and resided in my home at 5126 Nebraska Avenue, NW since 1986. I am President of the Nebraska Avenue Neighborhood Association.

2. I certify that under the supervision of DCRA staff who maintained full control of the records, I viewed official Department of Consumer and Regulatory Affairs ("DCRA") records containing the application materials for and a copy of Building Permit No. B442149 (a revision of Building Permit No. B435464). Those official records included revised plans for elevator shaft, elevators and elevator lobby and specifications for Kone Ecosystem elevators.

3. I certify that I requested from DCRA photocopies of the complete official file of application materials and issued permit No. B442149 and that I paid all appropriate fees to the Government of the District of Columbia for photocopies from the official files for Permit No. B442149.

4. I certify that the records provided to the Board of Zoning Adjustment in Exhibit E of the May 29, 2002 submission by the Nebraska Avenue Neighborhood Association are photocopies of records from DCRA official files for Building Permit No. B442149.

Signed,

Anne Page Chiapella

Anne Page Chiapella

Notarized:

Melisa S. Lee, Notary Public
Montgomery County
State of Maryland
My Commission Expires Sept. 1, 2002

B

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

Nebraska Avenue Neighborhood Association and Anne Page Chiapella, Petitioners,	)	
v.	)	No. 02-AA-1368
District of Columbia Board of Zoning Adjustment, Respondent.	)	

CONTESTED MOTION FOR AN EXPEDITED ORDER TO REMAND TO THE BOARD OF ZONING APPEALS

For the reasons that follow, pursuant to the District of Columbia Administrative Procedure Act, D.C. Official Code § 2-510(a) (2001 ed.), the Board of Zoning Appeals seeks an expedited order to remand this case to it for the purpose of considering petitioners' pending request for a waiver of its rule governing the timeliness of petitions for reconsideration and for further proceedings as may be appropriate.

The Board issued its final decision in this case on November 8, 2002, and mailed it to the parties that day. See Petition for Review, Order No. 16879. Petitioners filed a reconsideration petition 14 days later, on November 22; it was returned to them as untimely – one day late.[1] On November 29, petitioners sought a waiver of section 3126 (App. 1-2) on the ground that an Office of Zoning employee had advised them that the three-day period allowed for service by mail was to be calculated separately from the ten-day period for filing reconsideration motions, and thus that November 11 Veterans Day holiday, three days after the Board mailed its decision, should not be counted in calculating the due date. On December 2, petitioners renewed their

[1] 11 DCMR § 3126.2 (1999) 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." 11 DCMR § 3110.2 (1999) provides that the "last day" of the period of time specified in any rule "shall be included unless it is a Saturday, Sunday, or 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." 11 DCMR § 3110.2 (1999). Three days are added when service is by mail. 11 DCMR § 3110.3 (1999).

waiver request on the ground that the periods for filing and mailing should be counted separately under the language of the Board's rules. App. 5-6.

The Board has petitioners' request on its proposed calendar for January 7, 2003, and would like to dispose of it and take any other action that may be appropriate following disposition of the request. However, the Petition for Review has transferred jurisdiction of this case from the Board to this Court. Accordingly, the Board moves to have this Court issue an order on or before January 6, 2002, to permit it to construe its own rules in the first instance, to act on the request pending before it, and to otherwise proceed as may be appropriate.

Paul A. Tummonds, Jr., who represents intervenor Sunrise Connecticut Avenue Assisted Living LLC, states that it will oppose this motion. We also called petitioner, Anne Page Chiapella (966-9619), on several occasions today but were unable to speak to her.

Respectfully submitted,

Arabella W. Teal
Interim Corporation Counsel

Charles L. Reischel
Deputy Corporation Counsel
Appellate Division

Donna M. Murasky
Senior Litigation Counsel

Office of the Corporation Counsel
One Judiciary Square
Sixth Floor South
441 4th Street, N.W.
Washington, DC 20001

Telephone: (202) 724-5667/727-6252

APPENDIX

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

By Hand Delivery

November 29, 2002

Geoffrey Griffis
Chair, Board of Zoning Adjustment
441 4th Street, N.W.
Suite 210 South
Washington, DC 20001

RECEIVED
D.C. OFFICE OF ZONING
2002 NOV 29 AM 9:14

Re: Appeal No. 16879

Dear Mr. Griffis and Members of the Board:

We hereby formally request that the Board grant a waiver and accept our November 22, 2002 submission into the record. We were under the understanding that this was the due date.

JUSTIFICATION: WE RELIED ON A LITERAL INTERPRETATION OF TIME REQUIREMENTS UNDER TITLE 11 ZONING REGULATIONS.

Title 11 Zoning Regulations state that in computing *any time specified* in Chapter 31 of the Zoning Regulations ("11 DCMR"), an additional day shall be allowed when a Saturday, Sunday or official holiday is the last day of a computed period (11 DCMR § 3110.2[1]). In a phone conversation with Office of Zoning staff Linda Pelzer, we understood that the Board has used this interpretation for service by mail when the 3rd day fell on a holiday (11 DCMR §3110.3[1]). If we were in error, it was an honest mistake. We respectfully request that the Board accept our November 22 filing into the record. If this requires a waiver of the 3 days for mailing (§3110.3) in order to allow for the holiday (under §3110.2), we respectfully request such waiver. We understand waivers extending the date of receipt for filings have been granted for other filings to the Board.[2]

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[1] DISTRICT OF COLUMBIA REGISTER. NOTICE OF FINAL RULEMAKING, Z.C. CASE No. 98-19.

[2] Personal communication with Dorothy Miller, Foggy Bottom ANC.

BZA
Case No. 16879
Exhibit No. 53

We further note that in August 21, 2002 we filed with the Board for rereview and hearing of the Appeal based on new evidence (Exhibit No 45 ~~(copy attached)~~). The submission included all required copies and was served on all parties. We understand there is BZA precedence to accept filings into the record between oral and final decisions (BZA Appeal No. 16533).

We respectfully request and move that the Board accept these filings into the record. We believe that the timing of our submissions did not adversely affect any Party in this appeal.

Yours truly,

Page Chiapella

Page Chiapella
President, Nebraska Avenue Neighborhood Association

Attachments: Certificate of Service
~~Copy of August 21, 2002 filing~~
See Exhibit No 45, Case No 16879

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 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
Shaw Pittman
2300 N Street, N.W.
Washington, D.C. 20009

Robert Kelly, Zoning Administrator
Department of Consumer and Regulatory Affairs
Building and Land Regulation Administration
941 North Capital street, NE, Suite 2000
Washington, DC 20009

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

Page Chiagella (Signed) Nov. 29, 2002 (Date)

Attachme

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

November 29, 2002

Geoffrey Griffis
Chair, Board of Zoning Adjustment
441 4th Street, N.W.
Suite 210 South
Washington, DC 20001

Delivery by FAX: (202) 727-6072

RECEIVED
D.C. OFFICE OF ZONING
2002 NOV 29 PM 12:04

Re: Appeal No. 16879
Clarification of language: "Requests" and "Motions"

Dear Mr. Griffis and Members of the Board:

We hereby move that the Board treat our formal "requests" submitted on August 21, 2002 and November 22, 2002 as "motions."

Treating "requests" as motions follows the Boards practice. The Board treated the request for dismissal of Appeal No. 16879, made by Sunrise Assisted Living, Inc. as a motion. The Board also allowed and acted on a "request" for rehearing submitted by Whayne S. Quin and Steven E. Sher, representatives for the Intervenor in Appeal No. 16533. The "request" was submitted on May 8, 2000, after the oral decision and before the written order. This is analogous to our August 21, 2002 "request" requesting re-review and hearing of Appeal No. 16879. The public record for Appeal No. 16533 is entered into the record by reference.

We therefore move that the Board consider "requests" in August 21 and November 22, 2002 submissions as "motions" for reconsideration and hearing of Appeal No. 16879.

I certify inclusion of this letter in November 22, 2002 service on all parties.

Respectfully,

Page Chiapella

Page Chiapella
President, Nebraska Avenue Neighborhood Association

Cc: Jerrily R. Kress, FAIA

BZA
Case No. 16879
Exhibit No. 4

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

2002 DEC -2 PM 2:06

December 2, 2002

Geoffrey Griffis
Chair, Board of Zoning Adjustment
441 4th Street, N.W.
Suite 210 South
Washington, DC 20001

Delivery by FAX
(202) 727-6072

Re: Appeal No. 16879
Request for waiver to accept one-day late Nov. 22, 2002 filing into the record, and
Request for consideration at a public meeting

Dear Mr. Griffis and Members of the Board:

We respectfully ask for a waiver to accept late filing of our Nov. 22, 2002 submission into record be heard at a public meeting. The Nov. 22 filing was resubmitted this morning. We also ask we be given at least 24 hours notice of the public meeting so that we may arrange to attend.

The Nov. 22 submission was one day later than the 13 days that the Board allowed for that submission. The Veterans Day holiday intervened in the period allowed for mailing and we misunderstood the filing date based on our understanding that 11 DCRA §3110.2 one day extension to any period falling on a holiday applied to the 3 days for mailing allowed in § 3110.3.

Your attention to this matter is greatly appreciated.

Yours truly,

Page Chiapella

Page Chiapella

CC: Served on all Parties listed on Certificate of Service, 12/2/02

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

Date: Dec. 2, 2002 **By Hand Delivery**

RE: Appeal No. 16879–Sunrise Assisted Living
RETURN of Nov. 22, 2002 FILING by Office of Zoning Director

Geoffrey Griffis
Chair, Board of Zoning Adjustment
441 4th Street, N.W., Suite 210 South
Washington, DC 20001

Dear Mr. Griffis and Members of the Board:

We believe that the decision by Office of Zoning Director Jerrily Kress to return our November 22, 2002 filing with the Board was in error. We are hereby resubmitting the November 22 filing to the Board (attached) and move that the Board accept that filing into the record.

In her November 26, 2002 letter to us (copy attached), Ms. Kress cites Title 22, Zoning Regulations ("11 DCMR") §§ 3126.2 and 3110.3 as legal basis for her action. Ms. Kress did not carbon copy her letter to the Board or to Corporation Council. We note that Ms. Kress' letter is dated one day after her receipt of a letter from Sunrise Assisted Living Inc. ("Sunrise").

SUNRISE REQUEST FOR RETURN OF OUR SUBMISSION:

In their letter dated November 25, 2002 (copy attached), Sunrise requested the Board return our Nov. 22 filing, citing 11 DCMR §§ 3126.2 and 3110.3. Sunrise implied that it is "imperative to the integrity of the Zoning Regulations" that NANA be held to the same filing requirements as all other applicants, appellants and parties that appear before the Board." Sunrise states that the deadline was "13 days after the date [that] the Board's decision in BZA Case No. 16879 was mailed to NANA." Sunrise allows no additional time for a holiday as provided in 11 DCMR § 3126.2.

MISINTERPRETATION OF THE REGULATIONS:

We believe Ms. Kress and Sunrise incorrectly interpret the regulations. At the least they use an adverse (to the Appellants) interpretation of an ambiguous regulation. 11 DCMR §3126.2 adds a day to any period specified in Chapter 31 that ends on a holiday. We understand this to apply to the 3-day period allowed for mailing (§3126.3).

We also note that our May 18, 2002 filing was excluded from the record. Our filing responded to a letter from Director Kress dated May 2, 2002 but postmarked May 3, 2002, (attached). On May 22, 2002, **the Board excluded the filing from the record for untimeliness, based on the May 2, 2002 letter date**. We were acting in good faith, however when **we relied on the May 3, 2002 postmark date**. Letter date and postmark date of Office of Zoning mailings are frequently divergent. In evaluating **timeliness of filing**, we respectfully ask the Board to consider postmark date.

WE THEREFORE MOVE THAT THE BOARD:

(1) **accept into the record the November 22, 2002 submission** (based on the literal interpretation or at least honest misinterpretation of an ambiguously written regulations- §3110.2 as it applies to §3110.3).

(2) **provide specific legal interpretation** of §3110.2 and 3110.3 with respect to the 3-day period allowed for any period or time in Chapter 31.

(3) **provide clarification of timeliness of response** when postmark date is later than letter date on mailings from the Board to Parties.

We also ask the Board if it has ever extended the date for receipt of filings (or accepted a late filing) under §§ 3110.2 and 3110.3 for holiday following mailing? For any other reason?

We would appreciate the Board's prompt attention to this matter.

Respectfully submitted,

Page Chiapella

Page Chiapella

Attachments: Resubmitted November 22, 2002 filing
Copy Office of Zoning letter dated November 26, 2002
Copy of Sunrise letter dated November 25, 2002
Copy of Office of Zoning mailing dated May2, 2002 and postmarked May 3, 2002
Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that a copy the forgoing submission to the Board of Zoning Adjustment, dated December 2, 2002, was mailed first class, postage prepaid, or hand delivered to the following:

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

Alan Bergstein, Esq.
Office of the Corporation Council
441 4th Street, NW
Washington, DC 20001

Maureen Dwyer, Esq.
Shaw Pittman, LLP
2300 N Street, NW
Washington DC 20037

ANC 3G
Chevy Chase Community Center, 2nd Floor
5601 Connecticut Avenue, NW
Washington, DC 20015

Paul Chiapella

BZA APPEAL No. 16879

NEBRASKA AVENUE NEIGHBORHOOD ASSOCIATION

NOVEMBER 22, 2002 SUBMISSION

JKL/EG

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	)	

RECEIVED
D.C. OFFICE OF ZONING
2002 NOV 22 PM 2:50

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.

10

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;

//

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 revision 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]

---

[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

Page Chiapella 11/22/02

Attachments:

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

15

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
Shaw Pittman
2300 N Street, N.W.
Washington, D.C. 20009

Robert Kelly, Zoning Administrator
Department of Consumer and Regulatory Affairs
Building and Land Regulation Administration
941 North Capital street, NE, Suite 2000
Washington, DC 20002

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

Page Chiapella 11/22/02
(Signed) (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

Allison C. Prince, Esq.
Paul A. Tummonds, Jr., Esq.
Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037

Date: July 30, 2002

1. Office of Zoning letter to Page Chiapella, dated November 26, 2002
(returning NANA November 22, 2002 filing)

2. Sunrise letter to Jerrily Kress, dated Nov. 25, 2002
(requesting return of NANA November 22, 2002 filing)

3. Office of Zoning letter to Page Chiapella, dated May 2,
and
Envelop postmarked May 3, 2002

Government of the District of Columbia

OFFICE OF ZONING

441 4TH STREET N W
SUITE 210
WASHINGTON D C 20001
(202) 727-6311

November 26, 2002

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

Re: BZA Appeal Order No. 16879 – 5111 Connecticut Avenue, N.W.

Dear Ms. Chiapella:

The Office of Zoning (OZ) received your Motion for Reconsideration and Motion for Hearing ("the motions") in the above-cited appeal on November 22, 2002. The motions were not filed in a timely manner in accordance with the requirements of 11 DCMR §§ 3126.2 and 3110.3 of the Zoning Regulations. For this reason the OZ is returning the motions to you.

SINCERELY,

JERRILY R. KRESS, FAIA
Director

Attachment
cc: Marilyn Holmes
ANC 3G

Maureen E. Dwyer
Shaw Pittman

ShawPittman LLP

A Limited Liability Partnership Including Professional Corporations

November 25, 2002

By Hand Delivery

Ms. Jerrily Kress
Office of Zoning
441 4th Street, N.W.
Second Floor
Washington, DC 20001

Re: BZA Appeal No. 16879 - NANA Motion for Reconsideration of Dismissa
Appeal No. 16879 – Failure to Satisfy Zoning Regulations' Filing Deadline

Dear Ms. Kress:

We are in receipt of the latest filing by the Nebraska Avenue Neighborhood Association ("NANA") received by the Office of Zoning on November 22, 2002 (see attached first page of the NANA filing) which requests reconsideration of the Board of Zoning Adjustment's ("BZA or Board") Dismissal of BZA Appeal No. 16879 and a motion for a further hearing in that case. Since the motions for reconsideration and for an additional hearing do not satisfy the filing requirements of 11 DCMR §§ 3126.2 and 3110.3, the Office of Zoning should return these to NANA.

The Order in BZA Appeal No. 16879 was finalized and signed on November 8, 2002 and was mailed to all parties on November 8, 2002, (See attached certificate of service from the Office of Zoning.) Pursuant to 11 DCMR §§ 3126.2, any party may file a motion for reconsideration of the Board's decision within 10 days of the date of issuance of the written order. In addition, 11 DCMR § 3110.3 provides that whenever service of a decision of the Board is made by mail to a party to the case, three days are added to the prescribed period.

Therefore, NANA was required to file its motions for reconsideration and request for a hearing by November 21, 2002, which is 13 days after the date the Board's decision in BZA Appeal No. 16879 was mailed to NANA. Since the motions were filed after that deadline, the Office of Zoning should return the motions since they were not filed in a timely manner. The Zoning Regulations do not include different filing deadlines depending on whether an applicant, appellant, or party is a community organization, a non-profit organization or a for-profit entity. The Zoning Regulations should be applied consistently to all applicants, appellants, or parties.

Based on its significant history of appeals to the Board in this case, NANA should have been fully aware of the clear filing deadlines. NANA not only missed the deadline but failed to provide a basis for the Board's waiver of that deadline. As a result, the Board is entirely without a basis for a waiver and must return these motions.

For the foregoing reasons, we believe that it is imperative to the integrity of the Zoning Regulations that NANA be held to the same filing requirements as all other applicants, appellants,

and parties that appear before the Board. Therefore, the Office of Zoning should return the motions filed on November 22, 2002 to NANA.

Respectfully submitted,

Maureen E. Dwyer

Allison C. Prince

Paul A. Tummonds

Attachments

Government of the District of Columbia
OFFICE OF ZONING

May 2, 2002

Anne Page Chiapella
President
Nebraska Avenue Neighborhood Association
5126 Nebraska Avenue, N.W.
Washington, D.C. 20008

Joseph Bishop, ANC 3G
3210 Chestnut Street, N.W.
Washington, D.C. 20015

Marilyn Holmes, ANC 3G
3700 Military Road, N.W.
Washington, D.C. 20015

Re: BZA Appeal No. 16879 by Nebraska Avenue Neighborhood Association for Property Located at 5111 Connecticut Avenue (Square 1989, Lot 161)

Dear Ms. Chiapella, Ms. Holmes and Mr. Bishop:

You are hereby notified to appear before the Board of Zoning Adjustment on Tuesday, June 18, 2002, at 441 4th Street, N.W., Suite 220, Washington, D.C., 20001 for a public hearing concerning the following appeal:

> **Appeal 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. B435464 (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).

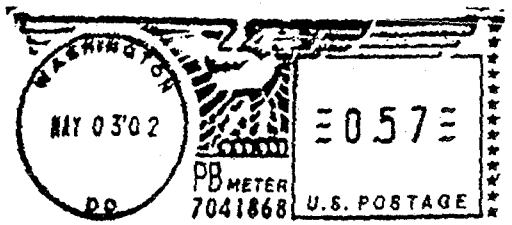
This case is in Advisory Neighborhood Commission 3G. Cases in this area will be heard between 1:00 p.m. and 6:00 p.m. All cases will be heard in the order listed on the public hearing agenda.

You should be aware that items may be submitted to the Board by other individuals, organizations, and government agencies both in support of and in opposition to your appeal. Approximately one week prior to the public hearing, you should review the file in your appeal so that you are prepared to respond to any issues that may be raised regarding your appeal. Further, if you are not clear about what information you must present to the Board in support of your appeal, please contact the Office of Zoning as soon as possible.

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF ZONING
441 4TH STREET, N.W. SUITE 210
WASHINGTON, D.C. 20001

OFFICIAL BUSINESS
PENALTY FOR MISUSE



#65A

Dr. Anne P. Chiapella, President
Nebraska Avenue Neighborhood Association
5126 Nebraska Avenue, N.W.
Washington, D.C. 20008

15879

20008+2047 01

Certificate of Service

I hereby certify that I have caused a true copy of the foregoing Motion for Expedited Order to Remand to be mailed, first-class, postage-prepaid, on this 20th day of December, 2002, to:

Anne Page Chiapella
Nebraska Avenue Neighborhood Association
5126 Nebraska Avenue, N.W.
Washington, D.C. 20008

Maureen E. Dwyer, Esquire
Paul A. Tummonds, Jr., Esquire
Shaw Pittman
1600 N Street, N.W.
Washington, D.C. 20037

A copy of this motion was also sent by facsimile ((202) 663-8007) today to Mr. Tummonds.

Donna M. Murasky
Senior Litigation Counsel

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JAN 7 2003
DISTRICT OF COLUMBIA
COURT OF APPEALS

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

Nebraska Avenue Neighborhood Association and Anne Page Chiapella, Petitioners,	)	
v.	)	No. 02-AA-1368
District of Columbia Board of Zoning Adjustment, Respondent.	)	

JAN 7 2003

ORIGINAL

REPLY TO OPPOSITION TO CONTESTED MOTION
FOR AN EXPEDITED ORDER TO REMAND
TO THE BOARD OF ZONING APPEALS

In reply to the Opposition of the Intervenor, the Board of Zoning Adjustment has two points. First, the point of the Board's motion is to permit it to make a decision on a matter -- a motion seeking an express construction of time computations under its rules and, in the alternative, a waiver – which is now on its calendar for January 7. However, without a remand from this Court, the Board will not have jurisdiction of this matter. Second, as this Court recognized in *Wallace v. Warehouse Employees Union # 730*, 482 A.2d 801 (D.C. 1984), it is permissible to construe language similar to that in the Board's rules as establishing two separate periods of time for calculating a filing deadline when service is by mail. In that case, the Court calculated the filing period first and then the mailing period and ruled that a motion was timely when it would have been untimely had the two periods been combined into one. Here, had the mailing period been counted first and separately, petitioners' motion for reconsideration by the Board would have been timely.

In short, the Board should be permitted to construe expeditiously its own rules in the first instance. This Court cannot review a decision that the Board is precluded from making.

Respectfully submitted,

Arabella W. Teal
Interim Corporation Counsel

Charles L. Reischel
Deputy Corporation Counsel
Appellate Division

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Certificate of Service

I hereby certify that I have caused a true copy of the foregoing Reply to Opposition to Motion for Expedited Order to Remand to be mailed, first-class, postage-prepaid, on this 2nd day of January, 2003, to:

Anne Page Chiapella
Nebraska Avenue Neighborhood Association
5126 Nebraska Avenue, N.W.
Washington, D.C. 20008

Maureen E. Dwyer, Esquire
Paul A. Tummonds, Jr., Esquire
Shaw Pittman
1600 N Street, N.W.
Washington, D.C. 20037

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