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October 30, 2003

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By Hand Delivery

Mr. Geoffrey Griffis, Chairman
Board of Zoning Adjustment
441 4th Street, N.W.
Second Floor
Washington, DC 20001

Re: BZA Appeal No. 17043 - Stanton Park Neighborhood Association's Appeal of the Decision of the Zoning Administrator Regarding Issuance of Certificates of Occupancy Nos. 51289 and 51290 - Property Owner's Response to Appeal

Dear Chairman Griffis and Members of the Board:

Enclosed please find the Property Owner's response to the Stanton Park Neighborhood Association's above-mentioned appeal. If you have any questions, please feel free to call the undersigned at (202) 663-8873.

Respectfully submitted,

SHAW PITTMAN, LLP

By Paul A. Tummonds, Jr.

cc: See attached Certificate of Service

BZA
Case No. 17043
Exhibit No. 76

Board of Zoning Adjustment
District of Columbia
CASE NO. 17043
EXHIBIT NO. 76

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2003 a copy of the foregoing letter and materials was sent by hand delivery, to the following:

Advisory Neighborhood Commission
(ANC) 6C
c/o Robert Hall, Chairperson
240 Parker Street, N.E.
Washington, D.C. 20002

Advisory Neighborhood Commission
(ANC) 6A
c/o Joseph Fengler, Chairperson
815 F Street, N.E.
Washington, D.C. 20002

The Stanton Park Neighborhood
Association
c/o Monte Edwards
330 E Street, N.E.
Washington, D.C. 20002

DC Department of Consumer and
Regulatory Affairs
c/o Laura Gisolfi Gilbert
941 N. Capitol Street, N.E.
Suite 9400
Washington, D.C. 20002

Paul A. Tummonds, Jr.

Document #: 1359974 v.1

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

STANTON PARK NEIGHBORHOOD ASSOCIATION; APPELLANT

APPEAL NO. 17043
PUBLIC HEARING: NOVEMBER 4, 2003

STATEMENT OF CAPITOL HILL GROUP, PROPERTY OWNER, IN OPPOSITION TO THE APPEAL

I.
Introduction

The subject appeal was filed on May 23, 2003, by the Stanton Park Neighborhood Association ("**SPNA**" or "**Appellant**") and challenges the decision of the Zoning Administrator to approve the issuance of certificates of occupancy for the Capitol Hill Healthcare Group ("**Capitol Hill Nursing Center**") and the Capitol Hill Community Hospital ("**Capitol Hill Hospital**"), Lot 76, Square 895, known as 708 Massachusetts Avenue, N.E. and 700 Constitution Avenue, N.E. (the "**Subject Property**"). The certificates of occupancy in question, Certificate of Occupancy Nos. 51289 (for the Nursing Center) and 51290 (for the Hospital), were issued on March 26, 2003.

The owner of the Subject Property is the Capitol Hill Group ("**CHG**"). CHG leases portions of the facility located on the Subject Property to Capitol Hill Nursing Center and Capitol Hill Hospital. CHG fully supports the Zoning Administrator's decision to approve the certificates of occupancy. More specifically, CHG believes that the Zoning Administrator properly applied the relevant portions of the Zoning Regulations in determining that the applicable zoning requirements for the Subject Property had been satisfied, and in determining the number of parking spaces required for Capitol Hill Nursing Center. Accordingly, CHG requests that the appeal be denied, and the decisions of the Zoning Administrator be affirmed.

II.
Summary Response to Issues Raised By the Appellant

The Appellant contends that the Zoning Administrator's decision to approve the certificates of occupancy was erroneous for the two following reasons:

1. Prior decisions of the District of Columbia Board of Zoning Adjustment ("**BZA**" or "**Board**") governed the Subject Property's use and parking requirements, "which the Zoning Administrator was without authority to disregard"; and alternatively

2. "The Zoning Administrator improperly exercised his discretion to set the parking requirements for Certificate of Occupancy No. 51289 (regarding the Capitol Hill Nursing Center), a prerogative assigned by the Zoning Regulations exclusively to the BZA."

The arguments made by the Appellant do not support a reversal of the decision of the Zoning Administrator. This appeal should be rejected. As discussed in greater detail in Section V, both of the Appellant's arguments are flawed and are clearly contrary to recent decisions of the Board. The Zoning Administrator's decision to issue the certificates of occupancy was correct and is fully supported by the Zoning Regulations.

III.
List of Exhibits

The following exhibits are included in support of CHG's case and to establish that the certificates of occupancy were issued in full compliance with all zoning requirements:

Exhibit A	11 DCMR §199 – Definition of a Community-Based Residential Facility, Health Care Facility
Exhibit B	BZA Order No. 15542 – Dated August 16, 1991 – Approving Health Care Facility Use on the Subject Property
Exhibit C	BZA Order No. 16407 – Dated October 21, 1999 – Approving Additional Beds in the Health Care Facility
Exhibit D	11 DCMR §330.5 – Matter-of-Right Uses in the R-4 Zone District

Exhibit E	BZA Order No. 16716A – Dated October 12, 2001 – Addressing Issues Related to Matter-of-Right Use of an Assisted Living Facility (Sunrise) and the Calculation of the Required Number of Parking Spaces
Exhibit F	Affidavit of Henry Vaughn, Chief Financial Officer of the Capitol Hill Healthcare Group

IV.
History of Events Leading Up To the Appeal

Prior BZA Orders Regarding Nursing Facility Use on the Subject Property

The Subject Property is located in the R-5-D Zone District. Hospital use is permitted as a matter-of-right use in the R-4 and less restrictive zone districts (such as the R-5-D Zone District), thus the hospital use on the Subject Property is permitted as a matter-of-right and is not subject to BZA approval or any conditions imposed by the BZA. The nursing home use was first permitted on the Subject Property in 1991[1]. At that time, CBRFs of more than 16 persons were only permitted in the R-5 Zone District by special exception approval of the BZA. Pursuant to BZA Order No. 15542, decided on July 24, 1991 and dated August 16, 1991 (copy attached as Exhibit B), the BZA approved a health care facility with 130 beds and 250 full-time staff on the Subject Property. As a condition of approval, the BZA required that 176 parking spaces be provided on the Subject Property.

In 1999, an application was filed with the BZA to increase the number of beds in the nursing home to 162. Pursuant to Order No. 16407 (attached as Exhibit C), decided on February 3, 1999 and dated October 21, 1999, the BZA approved this increase of 32 beds with conditions that included the requirement of providing 276 parking spaces on the Subject Property.

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[1] The Zoning Regulations include skilled care facilities and intermediate nursing care facilities in the definition of a health care facility, a type of community based residential facility ("**CBRF**"). See 11 DCMR §199, attached as Exhibit A.

CHG's expert in land use and planning in that case was Ellen McCarthy, the current Deputy Director for Development Review and Historic Preservation of the Office of Planning. BZA Order No. 16407 states:

> Ms. McCarthy also testified that adding 32 beds to Applicant's facility would not adversely impact the integrity of the Zone Plan. She pointed out that, under the Zoning Regulations, a hospital, sanitarium or clinic is permitted as a matter of right in more restrictive R-4 zones. ***Ms. McCarthy added that a special exception will not even be required for a community based residential facility if a proposed Zoning Commission rule is approved and adopted. (Emphasis added.)*** BZA Order No. 16407 at p. 4, Exhibit C.

Amendment to the Zoning Regulations Regarding CBRF's that Provide Housing for the Handicapped

Subsequent to the BZA's decision in Order No. 16407, the District of Columbia Zoning Commission adopted an amendment to the Zoning Regulations regarding CBRFs, (an event that Ms. McCarthy's testimony above suggested might occur). Specifically, Zoning Commission Order No. 869, which became effective on April 30, 1999, made a community based residential facility that is intended to be operated as housing for persons with handicaps (as that term is defined under Section 3602(h) of the Fair Housing Act, as amended, 42 U.S.C. Section 3601 *et seq*), a permitted matter-of-right use in the R-4 and less restrictive zoning districts. See 11 DCMR §330.5(i), attached as Exhibit D. In furtherance of this determination, 11 DCMR § 330.5(i) contains language identical to the Fair Housing Act's definition of handicap: "a physical [sic.] mental impairment which substantially limits one or more of such person's major life activities." 32 U.S.C. § 3602.

Previous Decisions of the Office of the Zoning Administrator and the Board of Zoning Adjustment Regarding CBRF's that Provide Housing for the Handicapped

In a recent case before the BZA the issue of whether an assisted living facility satisfies the requirements of 11 DCMR §330.5(i) was raised and addressed. In BZA Appeal No. 16716A (involving an assisted living facility operated by Sunrise Assisted Living, LLC), copy attached as

Exhibit E, both the Office of the Zoning Administrator and the BZA determined that an assisted living facility is deemed to provide housing for the handicapped and thus satisfies the requirements of 11 DCMR §330.5(i). In BZA Appeal No. 16716A, the BZA concluded that:

> The proposed facility will assist residents in major life activities such as eating, bathing, toileting and grooming. This particular facility will also serve individuals with cognitive impairment caused by Alzheimer's disease. The Board concludes that the uses of the building, as described by Sunrise, are consistent with a community residence facility providing housing for the handicapped. Therefore, Sunrise'[s] proposed use is permitted as a matter-of-right in an R-5-D zone. BZA Appeal No. 16716A at p.12, Exhibit E.

Previous Decisions of the Office of the Zoning Administrator and the Board of Zoning Adjustment Regarding the Required Number of Parking Spaces for a CBRF that Provides Housing for the Handicapped

When the Zoning Commission adopted the above-described 1999 amendment to the Zoning Regulations regarding the CBRF matter-of-right use in the R-4 and less restrictive zoning districts (i.e. Zoning Commission Order No. 869), it failed to also amend the pertinent section of the Zoning Regulations regarding the number of parking spaces that are required to be provided by a CBRF that provides housing for the handicapped in the R-4 and less restrictive zoning districts. In such instances, where the Zoning Regulations do not state with specificity the number of required parking spaces for a particular use, the long standing practice of the Zoning Administrator's Office is to determine an appropriate similar use and apply those parking requirements.

The issue of determining the required number of parking spaces for a CBRF that provides housing for the handicapped was also raised in the Sunrise case. In that case, the Office of the Zoning Administrator determined that an appropriate ratio of parking spaces for an assisted living facility was the ratio that is required for publicly assisted housing for the elderly (i.e., one parking space for every six dwelling units). Alternatively, in the Sunrise case, the former Chief of the Zoning Review Branch applied a more restrictive interpretation and determined that the

appropriate parking ratio to apply would be the same as for a rooming or boarding house, which requires one parking space plus one parking space for every 5 rooming units. See Exhibit E, p. 10. Ultimately, the BZA concluded:

> "[T]he Zoning Administrator correctly determined the applicable parking and loading requirements, and that a ruling from the Zoning Administrator was necessary because the regulations do not set forth specific parking and loading ratios for a community residence facility in the R-5-D zone." BZA Order No. 16716A at p. 15, Exhibit E.

V.
Detailed Response to Zoning Issues Raised by the Appellant

The Appellant's burden of proof is to show by a preponderance of the evidence that the certificates of occupancy were issued in error because they will result in a violation of the Zoning Regulations. Accordingly, there is a strong presumption of the validity of the certificates of occupancy and the BZA can overturn the Zoning Administrator's decision only if there is strong evidence of an error. In this case, Appellant has failed to meet their burden of proof.

A. The certificate of occupancy issued for the Capitol Hill Hospital was proper and the Appellant has not provided any evidence to refute the validity of the certificate of occupancy.

While the Appellant requests the denial of both certificates of occupancy issued to CHG on March 26, 2003, it has not provided any credible argument or evidence as to why the certificate of occupancy issued to the Capitol Hill Hospital is invalid. The hospital use on the Subject Property has always been a matter-of-right use and was never subject to BZA approval or BZA imposed conditions on its operation. Since hospital use is permitted as a matter-of-right on the Subject Property[2] and the Appellant has not produced any evidence as to why the certificate of occupancy for the Capitol Hill Hospital should be revoked, the appeal should be

[2] See 11 DCMR § 330.5 (f), attached as Exhibit D, which lists "Hospital, sanitarium, or clinic for humans" as matter-of-right uses in the R-4 Zone District.

denied and the Zoning Administrator's decision to issue Certificate of Occupancy No. 51290 should be affirmed.

B. The Zoning Administrator was correct in determining that the nursing facility is a facility that provides housing for the handicapped and is a matter-of-right use on the Subject Property not subject to any conditions of previous orders of the BZA; and thus, was correct in his issuance of Certificate of Occupancy No. 51289.

The Zoning Administrator's determination that the Capitol Nursing Center provides housing for the handicapped is entirely correct and is an appropriate interpretation of the applicability of 11 DCMR §330.5(i) to the facts of this case. Such an interpretation is in accordance with the Board's ruling in the Sunrise case. Pursuant to 11 DCMR § 330.5(i), CHG submits that as a nursing home Capitol Hill Nursing Center provides housing for the handicapped, as its residents certainly have physical and/or mental impairments that substantially limit one or more of their major life activities and it is therefore permitted to operate as a matter-of-right use, without any conditions of BZA approval, just as any other matter-of-right use is permitted in the R-5-D Zone District.

As previously mentioned, this Board has already determined in the Sunrise case that an assisted living facility is a facility that provides housing for the handicapped. It is common practice for a resident of an assisted living facility to be moved to a nursing home when that person becomes unable to perform major life activities and needs a degree of medical care and attention than can not be provided at an assisted living facility. Since the Office of the Zoning Administrator and the BZA have determined that an assisted living facility is a community based residential facility that provides housing for the handicapped it is readily apparent that a nursing home, which provides care for individuals with a greater degree of impairment in satisfying one's major life activities, should also be deemed to be a community based residential facility that provides housing for the handicapped. Attached as Exhibit F is an affidavit of Henry

Vaughn, Chief Financial Officer for the Capitol Hill Healthcare Group, which includes the following statements:

4. The Nursing Center houses residents with physical and mental disabilities such as stroke patients, patients with respiratory problems, amputees, and patients with Alzheimer's disease, as well as elderly residents that are no longer able to live independently.
5. The Nursing Center provides 24-hour medical attention to its residents. All of the Nursing Center's residents require assistance in performing one or more of their major life activities, including but not limited to, eating, bathing, dressing, getting out of bed, taking medication, etc.
6. The Nursing Center is a residential facility that provides treatment, rehabilitation, assistance and/or supervision to all of its residents in their daily life activities.

Therefore, Capitol Hill Nursing Center fully satisfies the requirements of 11 DCMR §330.5(i) and should permitted to conduct its operations on the Subject Property as a matter-of-right. Moreover, all of the conditions included in BZA Order Nos. 15542 and 16407 that previously applied to the use of the nursing home use are no longer applicable. The Zoning Administrator's decision to issue a certificate of occupancy for Capitol Hill Nursing Center was based on this correct interpretation of the Zoning Regulations and is entirely consistent with the Board's previous decision in the Sunrise case. Such a determination by the Office of the Zoning Administrator is clearly within the powers granted to that office. Therefore, the request to revoke the certificate of occupancy for Capitol Hill Nursing Center should be denied and the Zoning Administrator's decision to issue Certificate of Occupancy No. 51289 should be affirmed.

C. The Office of the Zoning Administrator has the authority to determine the required number of parking spaces for the nursing facility and the Zoning Administrator's determination of the required number of parking spaces was appropriate and consistent with previous decisions of the Office of the Zoning Administrator and the Board of Zoning Adjustment.

The Office of the Zoning Administrator has the authority to determine the required number of parking spaces for a CBRF that provides housing for the handicapped. In its statement in support of the appeal, the Appellant contends that:

> "the Zoning Administrator was without authority to set parking requirements for the newly issued certificates of occupancy. According to the schedule set forth at 11 DCMR 2101.1, the minimum parking requirements in a residential district are
>
> - for a hospital, 1 for each bed,
> - for a community-based residential facility housing 16 or more persons, as determined by the BZA (emphasis added)
>
> Thus, the Zoning Regulations on their face delegate authority in the latter case strictly to the BZA."
> See Appellant's Statement of Appeal at p.4.

The Appellant's argument is incorrect. If adopted, Appellant's argument would make the Zoning Commission's decision in Order No. 869 and the entirety of 11 DCMR 330.5(i) of no force and effect, because every CBRF that provides housing for the handicapped would be required to go before the BZA to determine the required number of parking spaces. Such an interpretation of the Zoning Regulations would in effect void the Zoning Commission's clear intent to make such use a matter-of-right use. If the Appellant's argument ~~was~~ adopted, it would result in the absurd situation of allowing Capitol Hill Nursing Center to operate as a matter-of-right, however, before it could begin such matter-of-right use, it would need to receive a determination from the BZA as to the required number of parking spaces. The BZA's decision in the Sunrise case, however, noted that it was entirely appropriate for the Zoning Administrator to make the determination as to the required number of parking spaces for a CBRF that provides housing for the handicapped. That same conclusion should be followed in this case.

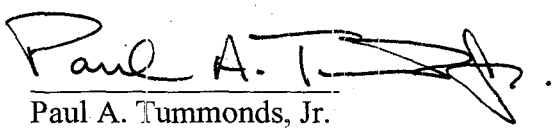
In the present case, the Zoning Administrator was presented information that 117 people permanently reside at the nursing home, and the Zoning Administrator determined that CHG is

required to provide 25 parking spaces at the Subject Property for use by the Capitol Hill Nursing Center. The Zoning Administrator followed a more restrictive interpretation, that the nursing home is required to provide parking spaces commensurate with a rooming or boarding house (one parking space plus one for each five rooming units), than what was ultimately adopted by the Board in the Sunrise case[3]. For all of these reasons, the Zoning Administrator's decision in this case was entirely appropriate and consistent with past interpretations of the Office of the Zoning Administrator, the Zoning Review Branch of the Building and Land Regulation Administration of the D.C. Department of Consumer and Regulatory Affairs, and the Board of Zoning Adjustment. Therefore, the appeal should be denied, and the decisions of the Zoning Administrator affirmed.

VI.
Conclusion

For the above-mentioned reasons, CHG respectfully requests that the Board deny the appeal and affirm the decisions of the Zoning Administrator in full.

Respectfully submitted,



Paul A. Tummonds, Jr.

October 30, 2003

Document #: 1339455 v.2

[3] It should also be noted that the parking garage utilized by the Capitol Hill Nursing Center and the Capitol Hill Hospital typically has 50 – 70 parking spaces available on a daily basis. See Exhibit F, affidavit of Henry Vaughn.

A

Community-based residential facility - a residential facility for persons who have a common need for treatment, rehabilitation, assistance, or supervision in their daily living. This definition includes, but is not limited to, facilities covered by D.C. Law 2-35, The Community Residence Facilities Licensure Act of 1977, and facilities formerly known as convalescent or nursing home, residential halfway house or social service center, philanthropic or eleemosynary institution, and personal care home.

If an establishment is a community-based residential facility as defined in this section, it shall not be deemed to constitute any other use permitted under the authority of these regulations. A community-based residential facility may include separate living quarters for resident supervisors and their families. All community-based residential facilities shall be included in one (1) or more of the following subcategories:

(a) **Adult rehabilitation home** - a facility providing residential care for one (1) or more individuals sixteen (16) years of age or older who are charged by the United States Attorney with a felony offense, or any individual twenty-one (21) years of age or older, under pre-trial detention or sentenced court orders;

(b) **Community residence facility** - a facility that meets the definition for and is licensed as a community residence facility under the Health Care Facilities and Community Residence Facilities Regulations, 22 DCMR §3099.1, as that definition may be amended from time to time;

(c) **Emergency shelter** - a facility providing temporary housing for one (1) or more individuals who are otherwise homeless and who are not in need of a long-term sheltered living arrangement, as that arrangement is defined in the Health Care Facilities and Community Residence Regulations, 22 DCMR 3099.1;

(d) **Health care facility** - a facility that meets the definition for and is licensed as a skilled care facility or intermediate nursing care facility under the Health Care Facilities and Community Residence Regulations, 22 DCMR 3099.1, as those definitions may be amended from time to time;

(e) **Substance abusers home** - a community residence facility that offers a sheltered living arrangement, as that arrangement is defined in the Health Care Facilities and Community Residence Facilities Regulations of the District of Columbia, 22 DCMR §3099.1, for one (1) or more individuals diagnosed by a medical doctor as abusers of alcohol, drugs, or other controlled substances;

(f) **Youth rehabilitation home** - a facility providing residential care for one (1) or more individuals less than twenty-one (21) years of age who have been detained or committed by a court pursuant to their involvement in the commission of an act designated as an offense under the law of the District of Columbia, or of a state if the act occurred in a state, or under federal law. The facility shall not house persons sixteen (16) years of age or older who are charged by the United States Attorney with a felony offense; or

(g) **Youth residential care home** - a facility providing safe, hygienic, sheltered living arrangements for one (1) or more individuals less than eighteen (18) years of age, not related by blood, adoption, or marriage to the operator of the facility, who are

B

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 15542 of Capitol Hill Hospital, pursuant to 11 DCMR 3108.1, for a special exception under Section 359 to establish a health care facility with 130 beds and 250 full-time staff, basement through sixth floors, in an R-5-C District at premises 708 Massachusetts Avenue, N.E., (Square 895, Lot 76).

HEARING DATE: July 24, 1991
DECISION DATE: July 24, 1991 (Bench Decision)

SUMMARY ORDER

The Board duly provided timely notice of public hearing on this application, by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 6A and to owners of property within 200 feet of the site.

The site of the application is located in ANC 6A. ANC 6A, which is automatically a party to the application, by letter dated July 18, 1991, submitted written issues and conerns in support of the application.

As directed by 11 DCMR 3324.2, the Board has required the applicant to satisfy the burden of proving the elements which are necessary to establish the case for a special exception pursuant to 11 DCMR 359. No person or entity appeared at the public hearing in opposition to the application or otherwise requested to participate as a party in opposition to this proceeding. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board, the Board concludes that the applicant has met the burden of proof, pursuant to 11 DCMR 3108, and that the requested relief can be granted as in harmony with the general purpose and intent of the Zoning Regulations and map and will not tend to affect adversely the use of neighboring property in accordance with said Zoning Regulations and maps. It is therefore ORDERED that the application is GRANTED, SUBJECT to the following CONDITIONS:

1. The facility shall comply with final conditions specified by the District of Columbia State Health Planning and Development Agency Certificate of Need.

2. The applicant shall provide 176 on site, screened parking spaces for employess, residents, and visitors with preference for employees to occupy free parking in the underground garage in the same square.

3. The applicant shall cease using the 7th Street entrance for loading/unloading ambulances and reopen the 8th Street entrance prior to operating as a long term care facility.

4. The applicant shall not have retail operations other than what is required by the Public Health Regulations for the convenience of the occupants.

5. The applicant shall not rent office space to physicians not associated with the operation of the facility.

Pursuant to 11 DCMR 3301.1, the Board has determined to waive the requirement of 11 DCMR 3331.3 that the order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party, and is not prohibited by law.

VOTE: 3-0 (Charles R. Norris, Paula L. Jewell and Carrie L. Thornhill to grant; Sheri M. Pruitt and William L. Ensign not present, not voting).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: _____
EDWARD L. CURRY
Executive Director

FINAL DATE OF ORDER: AUG 16 1991

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHT ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF SIX MONTHS AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

15542Order/SS/bhs

C

10/21/99

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 16407 of Capitol Hill Group pursuant to 11 D.C.M.R.§ 3108.1 for a special exception under Section 359 for opening an additional 32 beds in an existing nursing facility at 700 Constitution Avenue, N.E. (Square 865, Lot 76).

HEARING DATE: January 6, 1999
DECISION DATE: February 3, 1999

ORDER

STATEMENT OF PROCEEDINGS AND EVIDENCE:

1. The property that is the subject of this application is located at 700 Constitution Avenue, N.E. and fills most of square 865. The lot number is 76. The site is bounded by Constitution Avenue and Massachusetts Avenue on the south, 7th Street on the west, C Street on the north and 8th Street on the east. It immediately abuts St. James Church. The site is zoned R-5-D.

2. The subject application was filed on September 23, 1998, on behalf of Capitol Hill Group d/b/a MedLINK Nursing Center at Capitol Hill ("Applicant" or "MedLINK") for a special exception pursuant to 11 D.C.M.R. § 3108.1. Specifically, Applicant requests approval under Section 359 for opening an additional 32 beds at its existing nursing facility located at the subject premises. On July 24, 1991, the Board of Zoning Adjustment ("Board"or "BZA"), in Application No. 15542, granted a special exception for the operation of 130 beds currently in service.[1] This application seeks a modification of that order, to permit an additional 32 beds.

3. Under Section 359 of the Zoning Regulations (11 D.C.M.R.), the Board may approve a special exception for an additional 32 beds at Applicant's facility provided that Applicant meets the conditions specified at Section 3108 and Sections 358.2 through 358.7.

4. Section 3108 provides that a special exception should be granted if the proposed project is in harmony with the Zone Plan and Zone Maps and is not likely to adversely affect the use of neighboring property.

5. Sections 358.2 through 358.7 provide that a special exception should be granted if (1) no other property in the same square contains a community based residential facility for seven or more persons, (2) no other property within a radius of five hundred feet from any portion of the subject property contains a community based residential facility for seven or more persons, (3) adequate, appropriately located and screened off-street parking is provided to meet the needs of

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[1] The previous BZA case listed the facility's address as 708 Massachusetts Avenue.

occupants, employees and visitors to the facility, (4) Applicant's facility meets all applicable code and licensing requirements and (5) Applicant's facility will not have an adverse impact on the neighborhood due to traffic, noise, operations or the number of similar facilities in the area. Additionally, the Board may approve more than one community based residential facility in a square or within five hundred feet if the Board finds that the cumulative effect of the facilities will not have an adverse impact on the neighborhood because of traffic, noise or operations.

6. A hearing on this matter was held on January 6, 1999. At the hearing, Ms. Linda Grigsby, Applicant's Director of External Affairs, testified that the subject site has long been used as a site for medical facilities, including the Capitol Hill Hospital, which operated with approximately 250 beds. Ms. Grigsby also explained that Applicant provides many community services, including flu shots, health screenings, wellness programs, healthy lifestyle courses and exercise classes. Ms. Grigsby stated that Applicant notifies area residents about the services through the MedLINK Newsletter which is sent to all mailing addresses within zip codes 20001, 20002 and 20003. The newsletter is also inserted into copies of the Washington Post. Ms. Grigsby further explained that Applicant's property is monitored daily to ensure that it is free of litter and Applicant's security personnel patrol the site every hour and a half.

7. Additionally, Ms. Grigsby testified that Applicant permits parishioners from three nearby churches to park in Applicant's parking lots when parishioners attend church services or events. This includes parishioners from neighboring St. James Church with whom Applicant's predecessor entered into an agreement to provide parking in return for the closing of the alley that was located between the two properties. She testified that the hospital had been unaware of any dissatisfaction with the parking arrangement until immediately before a December 14, 1998, meeting of the Advisory Neighborhood Commission, when the pastor of St. James Church had sent a letter to that effect. Ms. Grigsby indicated that, since that time, the Chief Executive Officer of MedLINK had been attempting to set up a meeting to resolve the matter, but despite such efforts, had not been able to contact the pastor. Ms. Grigsby also stated that many of Applicant's employees rely on public transportation rather than drive vehicles to work.

8. Mr. John Lunsford, Applicant's General Counsel, testified that adding 32 beds to Applicant's operations would bring the total up to 162 beds, which is the number permitted by Applicant's Certificate of Need as issued by the State Health Planning and Development Agency ("SHPDA"). Additionally, Mr. Lunsford stated that Applicant currently has a waiting list of patients seeking care from its facility and that many of its patients rely on Medicare and Medicaid to obtain such care.

9. Mr. Lunsford further testified that Applicant anticipates hiring only 40 additional employees, spread out over three shifts per day, to accommodate patients assigned to the additional 32 beds. This increase in employees is small compared to the existing staff of 302 employees at the facility, the majority of which are residents of the District of Columbia. Additionally, since many of the employees rely on public transportation, there should not be any adverse impact on traffic.

10. Mr. Lunsford also stated that Applicant planned to open an underground garage that will add 144 parking spaces to the existing 132 spaces for a total of 276, which will be more than enough parking spaces to serve employees, doctors and visitors.[2]

11. Ms. Ellen McCarthy, an expert in land use and urban planning, testified on behalf of Applicant. Ms. McCarthy explained that an increase of 32 beds at Applicant's facility constituted a minor change and would meet an important community need for long-term care services. In fact, Ms. McCarthy pointed out that a change from 130 to 162 beds represented less than a 25% increase in patients and is consistent with Applicant's Certificate of Need. Ms. McCarthy also stated that a large percent of the individuals receiving health care from Applicant depend on Medicare and Medicaid in order to obtain such care.

12. According to Ms. McCarthy, adding 32 beds to Applicant's facility would not adversely impact adjacent property owners. Specifically, there is a long history of hospital use at the subject site. Moreover, Capitol Hill Hospital, the previous hospital at the site, involved a greater intensity of use than that proposed by Applicant, since it had operated with up to 250 beds and was an acute care facility. Ms. McCarthy also testified that adding 32 beds would have no impact on the residential character of the neighborhood since Applicant's proposal required no increase in the physical size of the facility or modification to the exterior of the structure. Moreover, the proposed use is, in fact, a residential use of the property.

13. Additionally, Ms. McCarthy stated that adding 32 beds to the facility would not adversely impact traffic or parking in the neighborhood. According to Ms. McCarthy, skilled nursing care facilities generate low amounts of traffic, and with the increase in staff at only 40 positions spread over three shifts per day there would only be 140 to 150 employees at the site at any given time. Ms. McCarthy concluded that the 276 parking spaces would be more than enough to accommodate the facility's employees and visitors. Ms. McCarthy also explained that the underground parking facility had not been used to date because there had been no requirement for the additional parking spaces. She stated that ample parking had been provided continuously for Applicant's employees and visitors and that area residents had never complained about such employees or visitors parking on the street or using scarce public parking spaces.

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[2] Mr. Lunsford also explained that even though Applicant has not complied with the Board's 1991 order directing Applicant to provide 176 parking spaces, Applicant has continuously provided ample parking to serve the needs of employees, residents, visitors and parishioners. Mr. Lunsford further stated that the underground garage would be open by February 1, 1999. Additionally, in accordance with the Board's request, a certificate of occupancy for the garage was filed with the Office of the Board of Zoning Adjustment on January 15, 1999. Prior to that date, Applicant had no authorization from the District of Columbia Government to utilize the garage.

14. Ms. McCarthy also testified that adding 32 beds to Applicant's facility would not adversely impact the integrity of the Zone Plan. She pointed out that, under the Zoning Regulations, a hospital, sanitarium or clinic is permitted as a matter of right in more restrictive R-4 zones. Ms. McCarthy added that a special exception will not even be required for a community based residential facility if a proposed Zoning Commission rule is approved and adopted. Additionally, there are no other residential uses on Square 865. Ms. McCarthy further testified that the Generalized Land Use Map designates the subject site as moderate density residential and it is immediately adjacent to a mixed-use, moderate density residential / low density commercial area along 8th Street, N.E.

15. Ms. McCarthy also outlined Applicant's efforts to discuss any concerns that area residents may have had regarding Applicant's request for a special exception. For instance, Ms. McCarthy explained that Applicant's representatives addressed three meetings held by Advisory Neighborhood Commission ("ANC") 6A. These meetings were held on November 5, December 3 and December 14, 1998. Ms. McCarthy also described Applicant's efforts to share information regarding the proposal with the Stanton Park community organization and Ward 6 Council member, Ms. Ambrose.

16. ANC 6A submitted a letter to the Board which indicated that its Zoning and Licensing Committee had unanimously agreed to support the application, with three conditions, at its December 14 meeting. Because the ANC had no quorum, it could not officially adopt the committee's recommendation.

17. At the hearing, commissioners from ANC 6A testified that the ANC supported the Application. Its conditions included continued availability of parking spaces for St. James parishioners and assurances that Applicant would continue to empty its exterior trash barrels regularly. Commissioners Daniel Pernell and Gregory Ferrell acknowledged that they were present at a December 14, 1998, meeting held by the ANC 6A Zoning and Licensing Committee and that during the meeting the committee unanimously approved Commissioner Pernell's motion to endorse Applicant's request for a special exception.

18. Ms. Karen Wirt, a neighborhood resident and former Commissioner of ANC 6A, testified in support of Applicant. Ms. Wirt stated that Applicant has been a good neighbor to the area residents, provided many services to the community and maintained its property. She also stated that Applicant provided a vital service by operating a long-term care facility and should be allowed to add 32 beds to its operations.

19. Two neighbors appeared in opposition to the application. Although he did not complain specifically about any litter or unsafe conditions at the subject site, Mr. Ronald Nelson stated that he has never personally witnessed trash pick-up or security patrols. Mr. Nelson also stated that he has never seen any publications regarding the exercise and health programs that Applicant

offers to area residents. Mr. William Silagi was concerned that Applicant had not provided the number of parking spaces required under the 1991 Board order and that Applicant had inadvertently operated for a short period with a few more beds than was permitted under the 1991 order.

PROPOSED FINDINGS OF FACT:

1. Applicant has previously been granted a special exception under Section 359 to establish a health care facility with 130 beds at the subject premises.

2. Applicant must obtain a special exception to add 32 beds to its existing health care facility.

3. Increasing the number of beds will not require any changes to the exterior of the structure or increase the physical size of the facility.

4. No other property in the same square as Applicant's facility contains a community based residential facility of seven or more persons.

5. No known property within a radius of five hundred feet from any portion of Applicant's facility contains a community based residential facility for seven or more persons.

6. Applicant is providing adequate, appropriately located and screened off-street parking for the needs of occupants, employees and visitors to the facility.

7. Applicant's facility meets all applicable code and licensing requirements.

8. Applicant's facility will not have an adverse impact on the neighborhood due to traffic, noise, operations or the number of similar facilities in the area.

9. The addition of 32 beds to Applicant's facility is in harmony with the Zone Plan and Zone Maps and is not likely to adversely affect the use of neighboring property.

CONCLUSIONS OF LAW AND OPINION:

Applicant seeks a special exception in order to add 32 beds to its existing nursing facility at 700 Constitution Avenue, N.E. The Zoning Regulations provide that the Board may grant special exceptions as follows:

Pursuant to authority contained in the Zoning Act of June 20, 1938 (52 Stat. 797), as amended, the Board is authorized to grant special exceptions, as provided in this title where, in the judgement of the Board, those special exceptions will be in harmony with the general

purpose and intent of the Zoning Regulations and Maps and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps, subject in each case to the special conditions specified in title 11 D.C.M.R. § 3108.1

Therefore, the Board's discretion in deciding Applicant's request for a special exception is limited to determining whether Applicant's request complies with the requirements enumerated in the particular regulation pursuant to which the exception is sought. If Applicant has met its burden, the Board ordinarily must grant the application. *First Baptist Church of Washington v. District of Columbia Board of Zoning Adjustment*, 432 A.2d 695, 698 (D.C. 1981); *Stewart v. District of Columbia Board of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973).

MedLINK thus has the burden of demonstrating that its request addresses the issues set forth at sections 359 and 3108.1 of the Zoning Regulations. Generally, MedLINK must show that (1) the use, height, bulk, and design are in harmony with existing uses and structures on neighboring property; (2) ample parking space is provided; and (3) the use will not create dangerous or other objectionable traffic conditions.

Based on the testimony and evidence presented at the hearing, MedLINK has met its burden. Adding 32 beds at its nursing facility will not change the use, height, bulk or design of the structure, which was previously approved by the Board in 1991. Moreover, Applicant's parking facilities provide ample parking spaces for occupants, employees and visitors and the proposal will not create dangerous or other objectionable traffic conditions. The Board has further determined that Applicant's request complies with the requirements enumerated at section 359.

The proposed expansion of the facility is also consistent with the Zoning Regulations and the Zoning Map. Hospitals are permitted as a matter of right, not only in R-5-D districts, but in more restrictive R-4 districts as well. It is only because the nursing facility in this matter is considered a community-based residential facility that a special exception is required. More importantly, however, Applicant's proposed use is a residential use and it is consistent with the site's zoning. Additionally, the increase in the number of nursing facility beds meets an important need in the District as it provides long-term care to those who require it. The facility is also accessible to those who must depend financially on either Medicare or Medicaid, and as there is a waiting list at the facility, the expansion will enable Applicant to serve those who are waiting for such care.

The Applicant has also demonstrated that the increase in beds will not adversely affect the neighborhood. Special exceptions are expressly provided for in the Zoning Regulations, *see Stewart, supra,* 305 A.2d at 518, and the Board's function in this instance is simply to determine whether a reasonable accommodation has been made between Applicant and the neighbors, which does not interfere with the legitimate interests of the latter. *Glenbrook Road v. District of Columbia Board of Zoning Adjustment,* 605 A.2d 22, 32 (D.C. 1992), *citing Cornell University v. Bagnardi,* 68 N.Y.2d 583, 589, 503 N.E.2d 509, 511, 510 N.Y.S.2d 861, 866 (1986).

The Zoning Regulations require only that Applicant demonstrate that it is not *likely* that the proposed expansion of service will make the facility objectionable to neighboring properties. Further, the Board may grant a special exception for health care facilities in residential and special purpose districts "where in the judgment of the Board, those special exceptions will be in harmony with the general purpose and intent of the zoning regulations and maps and will not tend to affect adversely the use of neighboring property...." *Levy v. Board of Zoning Adjustment,* 570 A.2d 739, 742 (D.C. 1990) (quoting 11 D.C.M.R. § 3108.1). *See Rose Lees Hardy Home and School Association v. District of Columbia Board of Zoning Adjustment,* 324 A.2d 701, 706 (D.C. 1974). "[T]he applicant is not charged with considering every option that any party in opposition might conceptualize...." *Don't Tear It Down, Inc. v. District of Columbia Dept. of Housing and Community Dev.,* 428 A.2d 369, 379 (D.C. 1981).

The proposal by MedLINK accommodates the reasonable concerns of the residents and otherwise meets the requirements for a special exception. Many or most of those who own property neighboring the facility agree with MedLINK.

The only areas which might have the potential to provide an adverse impact are parking and traffic disruption. No increase in the physical size of the facility and no modification to the exterior of the structure will occur. As to the issue of traffic, since all of the increased beds are nursing facility beds the patients are not expected to be driving motor vehicles. Moreover, the addition of 40 full-time employees will generate only a nominal increase in traffic, especially since a large number of employees use public transportation.

With regard to parking, MedLINK's parking facilities, providing a total of 276 parking spaces, is more than adequate to serve the needs of the facility's occupants, employees and visitors.

Based upon the record before the Board, the Board finds that Applicant has met the burden of proof, pursuant to 11 D.C.M.R. 3108, and that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map. The Board further finds that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Map. It is therefore **ORDERED** that the application be **GRANTED, SUBJECT** to the following **CONDITIONS:**

1. Approval shall be for a period of ten years from the final date of this order.

2. The Applicant must provide 162 beds.

3. The number of employees shall not exceed 340.

4. The Applicant must provide 276 off-street parking spaces.

5. The Applicant must meet four (4) times per year with ANC 6A and other concerned neighbors.

6. The Applicant must keep the subject site and surrounding property clear of trash as needed.

VOTE: **3-0** (Betty King, Sheila Cross Reid and Jerry Gilreath to grant).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director

Final Date of Order: OCT 21 1999

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

UNDER 11 DCMR SUBSECTION 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT.

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF TWO YEARS AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

ord16407/POH

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO.: 16407

As Director of the Office of Zoning, I certify and attest that on OCT 21 1999 a copy of the order entered on that date in this matter was mailed first class, postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

Richard B. Nettler, Esquire
1801 K Street, NW, Suite 1200
Washington. D.C. 20006

Daniel M. Pernell, III, Chairperson
Advisory Neighborhood Commission 6A
St. James Parish Church
1132 4th Street, NE
Washington, D.C. 20002

Linda M. Grigsby, Director of External Affairs
MedLINK Nursing Center at Capitol Hill
700 Constitution Avenue, NE
Washington, D.C. 20002

Attested by: _____
JERRILY R. KRESS, FAIA
Director

Date: OCT 21 1999

Attest/O-16407 /POH

D

SOURCE: §3103.5 of Regulations effective May 12, 1958.

322 USES SUBJECT TO BZA APPROVAL: GENERAL (R-3)

322.1 Any use permitted in R-2 districts under §§302 through 306 shall be permitted in an R-3 District if approved by the Board of Zoning Adjustment in accordance with the conditions specified in §3108 of chapter 31 of this title.

SOURCE: §3103.4 of Regulations effective May 12, 1958.

323 - 329 [RESERVED]

330 R-4 DISTRICTS: GENERAL PROVISIONS

330.1 The R-4 district is designed to include those areas now developed primarily with row dwellings, but within which there have been a substantial number of conversions of the dwellings into dwellings for two (2) or more families.

330.2 Very little vacant land shall be included within the R-4 district, since its primary purpose shall be the stabilization of remaining one-family dwellings.

330.3 The R-4 District shall not be an apartment house district as contemplated under the General Residence (R-5) districts, since the conversion of existing structures shall be controlled by a minimum lot area per family requirement.

330.4 Except as provided in chapters 20 through 25 of this title, in an R-4 district, no building or premises shall be used and no building shall be erected or altered that is arranged, intended, or designed to be used except for one (1) or more of the uses listed in §§330 through 349.

330.5 The following uses shall be permitted as a matter of right in an R-4 district:

(a) Any use permitted in R-3 districts under §320.3 of this chapter:

(b) Flat;

(c) The conversion of a building or other structure existing before May 12, 1958, to an apartment house as limited by §§350.4(c) and 401.3;

(d) Child development center and/or elderly day care center; provided that the center shall be limited to no more than sixteen individuals;

(e) Child/elderly development center located in a building that was built as a church and that has been used continuously as a church since it was built; Provided, that all of the play space required for the center by the licensing regulations shall be located on the same lot on which the center is located;

(f) Hospital, sanitarium, or clinic for humans;

(g) Private Club, lodge, fraternity house, sorority house, or dormitory, except where the use is a service customarily carried on as a business;

(h) Museum; and

(i) Community based residential facility; Provided, that notwithstanding any provision in this title to the contrary, the Zoning Administrator has determined that such community based facility, which otherwise complies with the zoning requirements of this title that are of general and uniform applicability to all matter of right uses in an R-4 District, is intended to be operated as housing for the handicapped as that term is defined under Section 3602 (h) of the Fair Housing Act, as amended, 42 U.S.C. Section 3601 et seq. (1955). Section 802 of the FHAA defines handicap as follows:

(h) "Handicap" means, with respect to a person-

(1) A physical mental impairment which substantially limits one or more of such person's major life activities.

(2) A record of having such an impairment, or being regarded as having such an impairment, but such terms does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substance Act (21 U.S.C. 802)).

330.6 A rooming or boarding house shall be permitted as a matter-of-right in an R-4 District; Provided that the following requirements are met:

(a) Accommodations are not provided to transient guests who stay ninety (90) days or less at the premises, or guests whose occupancies would be subject to the tax imposed by the District of Columbia Hotel Occupancy and Surtax on Corporations and Unincorporated Business Tax Act of 1977;

(b) No sign is displayed on the premises;

(c) No advertisement is displayed or published on or off the premises holding out the establishment to be a hotel, motel, inn, hostel, bed and breakfast, private club, tourist home, guest house, or other transient accommodation;

E

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Office of Zoning

Appeal No. 16716A 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. B435464) on March 3, 2001, to Sunny and Louis Reyes *et al.* to permit the construction of a 102-unit handicapped assisted-living-apartment residence in an R-2 and R-5-D District at premises 5111, 5113, 5117, 5119, 5121, 5123, and 5125 Connecticut Avenue, N.W., and 5201, 5203, and 5205 Chevy Chase Parkway, N.W. (Square 1989, Lots 49-57 and 161).

HEARING DATES: July 17, 2001; August 3, 2001

DECISION DATES: September 4, 2001; October 2, 2001

DECISION AND ORDER

This appeal was filed on March 16, 2001, by the Nebraska Avenue Neighborhood Association (NANA) challenging on various grounds the Zoning Administrator's decision to approve the issue of Building Permit No. B435464, to Sunrise Assisted Living LLC to construct the 7-story Sunrise Assisted Living facility at 5111 Connecticut Avenue, N.W. After a public hearing, the Board denied the appeal, affirming the Zoning Administrator's approval of the permit.

PRELIMINARY AND PROCEDURAL MATTERS

Parties. The co-appellants in this case are the Nebraska Avenue Neighborhood Association, represented at the hearing by its President, Dr. Anne Page Chiapella, and Advisory Neighborhood Commission ("ANC") 3G, represented at the hearing by Marilyn Holmes, Esq., Commissioner of ANC Single Member District (SMD) 3G-07. The subject property is located within the area served by ANC 3G. As indicated by its letters dated April 9, 2001 (Ex. 16) and June 25, 2001 (Ex. 29), ANC 3G joined in this appeal with NANA in challenging the Zoning Administrator's decision.

Toye Bello, from the Department of Consumer and Regulatory Affairs, Zoning Review Branch, appeared on behalf of the Zoning Administrator. The Office of the Corporation Counsel represented the Zoning Administrator.

When the building permit application was filed on July 10, 2000, the subject property was owned by a number of individual property owners and Sunrise Connecticut Avenue Assisted

Living LLC (hereinafter "Sunrise" or "owner"). Subsequent to the issuance of the building permit on March 8, 2001, Sunrise completed its purchase of all of the subject property. As the owner of the property that is the subject of this appeal, Sunrise is automatically a party in this appeal pursuant to 11 DCMR § 3199.1. Sunrise is represented by ShawPittman LLP.

Notice of Appeal and Notice of Public Hearing. By memoranda dated March 26, 2001, the Office of Zoning advised Sunny and Louis Reyes, ANC 3G, the Zoning Administrator, the ANC Commissioner for the single-member district within which the property is located, the Ward 3 council member, the D.C. Office of Planning, and the Office of the Corporation Counsel of the filing of the appeal.

The Board scheduled a public hearing on the appeal for July 17, 2001. Pursuant to 11 DCMR § 3112.14, the Office of Zoning, on May 31, 2001, mailed ANC 3G, NANA, and the Zoning Administrator notice of hearing. Notice of hearing was also published in the *D.C. Register* on June 1, 2001, at 48 DCR 4898-99.

On May 7, 2001, Sunrise filed a motion to recuse Board Member Anne Renshaw. On July 10, 2001, after reviewing the motion and the responses thereto and debating the matter in a public meeting, four members of the Board requested that Member Renshaw voluntarily recuse herself. When Ms. Renshaw refused to recuse herself, the Board voted 4-1-0 to recuse her. An Order evidencing this decision was mailed to all parties to this appeal on July 26, 2001. No challenge of that order has been filed.

On July 16, 2001, NANA filed a request for clarification of the status of Sunrise as the property owner, a request to strike from the record a portion of the Property Owner's Statement and a motion for the participation of four Board Members requesting that the Board not proceed with the hearing with fewer than four Board members participating. After confirming the Board's right to consider any application or appeal with a quorum of three members, the Board noted that the request was moot since four members were in attendance. Further, the Board confirmed that Sunrise is the owner of all the property that is the subject of the appeal and that there was no basis for striking a portion of the Property Owner's Statement.

Appellants' Case. The Appellants raised eight issues on appeal that they assert constitute error on the part of the Zoning Administrator, and which form the basis for their argument that the building permit should be revoked. The issues are:

(a) the building permit application was not complete before the Zoning Commission setdown date for the rezoning of the property;
(b) incomplete and inaccurate information on the Building Permit Application materials invalidates these forms;
(c) the approved building violates the FAR requirements;
(d) the building has an inadequate rear yard setback;
(e) the height of the building exceeds the permitted height in the R-5-D zone;
(f) the housing for the mechanical equipment and the elevator penthouse is improper;
(g) the parking spaces and loading areas are inappropriate;
(h) the plans were not referred to the Office of Planning (OP) for review and report before final approval of the roof structures plan; and

(i) the proposed facility does not meet all applicable code and licensing requirements of 22 DCMR 3242 and 3257.

Zoning Administrator's Case. Mr. Bello, Chief of the Zoning Review Branch, testified about the components of a complete building permit application and discussed the plan review process. He described the use of architectural embellishments and their application to the roof structures here, the FAR calculations for the cited areas of the building, and the judgments required due to the uniquely shaped lot. Mr. Bello described the Zoning Administrator's practices regarding application intake, application amendments, plan referral to OP, building height measurements, and uniform treatment of community-based residential facilities under the Regulations.

Property Owner's Case. Sunrise presented testimony from Sean Ambrose, its Vice President for Development. Sunrise also called two expert witnesses, one in architecture, Steve Ruiz the project architect, and one in building and zoning regulatory matters, Armando Laurenco. Messrs. Ambrose and Ruiz testified about consultations with the Zoning Administrator pre-application and plan changes requested by the Zoning Administrator during the application review process. Sunrise, through counsel, objected to the appellants' testimony and argument regarding the Building Code and Department of Health as outside the jurisdiction of the Board.

Public Agency Reports. There are no public agency reports in this case.

ANC Report. There is no ANC report in this case. ANC 3G presented testimony and argument at the hearing.

Closing of the Record. The record closed at the conclusion of the August 3, 2001 hearing, with the exception of an e-mail from OP related to the referral regarding 11 DCMR §411.10 and Mr. Bello's additional response to elevator machine room setback and documentation establishing when the application was actually accepted for intake.

When submitting its proposed findings of facts and conclusions of law, Sunrise attached a drawing illustrating the penthouse. NANA filed a memorandum requesting a public hearing to permit additional cross-examination on the exhibit. Sunrise then moved to strike the memorandum or to withdraw the exhibit. The Board declined to accept the drawing and ordered it stricken from the record. *See* 11 DCMR §§3121.5, 3121.9.

Decision Meeting. At its decision meeting on September 4, 2001, the Board, voting 4-0-1, with Member Renshaw not voting, denied the appeal in all aspects, except for the structure plan not reviewed by the Office of Planning and the stair and elevator/penthouse setback requirements. The Board, voting 3-1-1, with Member Renshaw not voting, denied the appeal based on roof structure not being reviewed by the Office of Planning. The Board, voting 3-1-1, with Member Renshaw not voting, moved to deny the appeal regarding the stair and elevator penthouse setbacks and locations adjacent to exterior walls.

Motion for Reconsideration. At the Board's October 2, 2001 public meeting, Zoning Commission member Carol J. Mitten requested that the Board reconsider its September 4, 2001 votes on the roof structure review by the Office of Planning and the stair and elevator penthouse setbacks. Ms. Mitten, who heard the Appeal but submitted her vote by proxy at the September meeting, wished to present her reasons for her vote and her request for reconsideration to the Board in person. After discussion, the Board voted 2-2-1, with Member Renshaw not voting, and the motion for reconsideration of the Board's previous votes failed for want of a majority.

FINDINGS OF FACT

The Subject Property

1. The property that is the subject of the appeal is located at 5111, 5113, 5117, 5119, 5121, 5123, and 5125 Connecticut Avenue, N.W., and 5201, 5203, and 5205 Chevy Chase Parkway, N.W., Square 1989, Lots 49-57 and 161, in an R-5-D District.

2. The property is an irregularly shaped lot that includes frontage on Connecticut Avenue, N.W. and Chevy Chase Parkway, N.W.

Pre-Application Rulings and Building Permit Application Intake and Review

3. On October 15, 1998, Sunrise met with then Deputy Zoning Administrator, Gladys Hicks, to discuss the proposed use of the property as an assisted living facility. On December 17, 1998, Sunrise received written confirmation from Ms. Hicks that the proposed assisted living use would be permitted as a matter of right, once the proposed amendments to the Zoning Regulations were adopted regarding housing for the handicapped.[1] Sunrise received additional confirmation from Ms. Hicks on March 8, 1999, regarding the number of required parking spaces and loading berths for the assisted living facility. (Record Exhibit ("Exh.") 34, p. 5.)

4. The Appellants became aware of Sunrise's development plans early in the process. The ANC and the community opposed the alley closing application filed by Sunrise on August 2, 1999, to close the alley stub in Square 1989 adjacent to the subject property.

5. As a result of this opposition, Sunrise abandoned the alley closing application and pursued a building design that did not require closure of the alley. (Exh. 34, p. 6.)

6. On May 2, 2000, Sunrise met with the current Zoning Administrator, Michael Johnson, to review the matter-of-right zoning requirements for the proposed building, including height, rear yard setback, side yard setback and court determinations. On July 8, 2000, Michael Johnson provided written confirmation of the appropriate development parameters for the proposed assisted living facility on the site. (Exh. 34, pp. 6-7.)

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[1] The D.C. Zoning Commission adopted these amendments to the Zoning Regulations in Zoning Commission Order No. 869, which became effective on April 30, 1999.

7. On July 10, 2000, Sunrise filed a building permit application with the Building and Land Regulation Administration ("BLRA") of the Department of Consumer and Regulatory Affairs ("DCRA"). The detailed working drawings that were filed with the application included 178 pages and showed the construction of an assisted living facility for seniors. (Exh. 34, p. 7.)

8. Among other information the submission contained scaled drawings that showed the lot's exact shape, topography and dimensions; the plan, elevation, location and dimensions of existing and proposed structures and the proposed use; parking and loading plans; and building plats required by 11 DCMR §3202. The building permit application filed on July 10, 2000 was complete.

9. DCRA accepted a filing fee and issued a receipt on July 10, 2000. DCRA will only accept a filing fee for a building permit application that the intake officials at the Permit Review Branch deem complete.[2]

10. The building permit application correctly referred to the proposed use as an assisted living facility.

11. Internal notes made on the building permit application by the permit intake personnel did not invalidate the initial filing date or in any way affect the owner's representation of the proposed use.

12. During its October 16, 2000 public meeting, the Zoning Commission set down for hearing a proposed map amendment that would downzone the subject property from R-5-D to R-3.

13. By virtue of 11 DCMR §3202.5, the property owner had to file a complete building permit application by October 16, 2000, in order to allow the processing of the building under the R-5-D zoning.

14. Once plans are filed, it is common for the permit reviewers to comment or make notations on the plans, require plan clarification, additional drawings or plan modifications to address specific issues.

15. DCRA reviewed the application and the detailed working drawings for eight months. During the review process, DCRA required Sunrise to amend or supplement portions of its plans. The adjustments associated with this building permit application were typical of the building permit review process.

16. During the review process, the Zoning Administrator did not specifically refer the roof structure plans to the Director of the Office of Planning for review and report as required by 11 DCMR §411.10.

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[2] Except where otherwise noted, the findings of facts stated herein are based upon the testimony of Toye Bello, Sean Ambrose, Steve Ruiz and Armando Laurenco and the evidence admitted in the record in the course of that testimony.

17. The Office of the Zoning Administrator has not made a specific referral of roof plans to the Office of Planning for several years.

18. Sunrise submitted a revised building permit application in February 2001.

19. Building Permit No. B43564 was issued on March 8, 2001, authorizing the construction of a "seven story cast in place concrete structure containing assisted living residences (CRF, housing for the handicapped as the term is defined by the Fair Housing Act) with undergrd parking." (Exh. 6.)

Matter-of-Right Use

20. A community residence facility intended to be operated as housing for persons with handicaps is permitted as a matter-of-right in the R-5-D zone pursuant to 11 DCMR §330.5(i) which permits a community based residential facility as a matter-of-right in the R-4 and higher zone districts provided that the Zoning Administrator determines that the community based facility, otherwise complies with the zoning requirements of Title 11 that are of general and uniform applicability to all matter of right uses in an R-4 district, and is intended to be operated as housing for persons with handicaps.

21. The Sunrise facility, as described, is a community residence facility.

22. The Appellants did not challenge the determination that the facility would provide housing for the handicapped.

23. The proposed facility, as a community residence facility that provides housing for the handicapped, is permitted as a matter-of-right use on the property given its R-5-D zoning.

Floor Area Ratio ("FAR") Calculations

24. FAR for the building was calculated correctly in that the gross floor area calculations included all the portions of the building that are to be counted pursuant to the definition of gross floor area and correctly excluded the areas for which the Zoning Regulations specifically provide exemptions. For example, ventilation and utility shafts and rooftop terraces are excluded, but interior balconies are included.

25. The third floor roof terrace is excluded from FAR because it does not constitute habitable space; it is not fully enclosed. The terrace's columns are not exterior walls, there is no permanent roof, and the space is open to the elements.

26. The building has only seven stories. The eighth level consists only of roof structures, housing for mechanical equipment, stairway and elevator penthouses, described 11 DCMR §411.1 and therefore is not a story within the meaning of 11 DCMR §199.1. The penthouses qualify for the excess FAR that is allowed penthouses under 11 DCMR §411.7.

27. Floors or levels in roof structures that are less than six feet and six inches in height are excluded from FAR. The mechanical room on the roof was correctly excluded from the building's FAR calculation.

28. The architectural embellishments above the roof's parapet line do not constitute usable space and therefore are excluded from FAR.

29. The Zoning Administrator uses a perimeter calculation to determine the ratio of gross floor area that would constitute a basement by applying the definition of basement or cellar and prorating the amount of square footage that is devoted to each function. Testimony of Bello.

30. The portion of the building's lower level that qualifies as basement was correctly counted and included in the building's FAR. The FAR computations correctly excluded a portion of the garage level of the building because only 11.9% of that level constitutes basement space as defined in 11 DCMR §199.1.

31. FAR calculations were based only on the lot area of the R-5-D portion of the split-zoned site.

32. The building's FAR of 3.47 fully complies with the 3.5 limit applicable in the R-5-D zone.

33. Appellants' FAR computations were erroneous in many respects. The computations improperly included rooftop penthouses. The rooftop terrace over the low roof of the second floor was improperly counted toward FAR as if it were an exterior balcony. The appellants did not apply the perimeter wall computation correctly in determining the gross floor area of the lower level of the building in that they incorrectly measured from adjacent finished grade to the underside of the slab rather than the finished ceiling. This error resulted in an overstatement of the basement area and, accordingly, an overstatement of gross floor area.

Rear Yard and Side Yard

34. The property is on a corner lot with a highly unusual configuration.

35. Corner lots, by definition, have more than one front. Once the property owner chooses the front, for purposes of determining yards, the rear yard is designated as the yard opposite the chosen front.

36. For a corner lot, "the depth of rear yard may be measured from the center line of the street abutting the lot at the rear of the structure." 11 DCMR §404.2.

37. A side yard is not required in an R-5-D district, but if one is provided, it must be at least three inches wide per foot of height of the building, but no less than eight feet wide. 11 DCMR §405.6.

38. In the case of unusually shaped lots, the Zoning Administrator must make a judgment call. The side and rear yard computations were determined appropriately given the highly unusual configuration of the lot.

39. The Zoning Administrator correctly determined that Connecticut Avenue and Chevy Chase Parkway were the fronts and the portion of the lot east of the building, abutting the north-south rear alley that runs roughly parallel to Connecticut Avenue and Chevy Chase Parkway, was the rear.

40. Given the Zoning Administrator's interpretation, the rear yard depth of 34 feet was correctly measured as the depth of the yard located between the rear building line and the north-south alley.

41. The manner in which the rear yard was computed for this irregularly configured lot was reasonable and consistent with the longstanding interpretation of the Zoning Regulations by the Office of the Zoning Administrator and does not yield an unnatural result.

42. The Zoning Administrator correctly determined that the south side yard was the portion of the lot that abutted the building on the south at 5109 Connecticut Avenue.

43. The building's north wall continues to the building restriction line on the north that coincides with the boundary line separating the R-5-D and R-2 zones. The Zoning Administrator determined that no side yard is required on the north side.

44. There is an extremely generous open space between the proposed building and the residential properties to the north because the entire R-2 zoned portion of the site will contain no building area.

45. The Zoning Administrator's ruling yielded an appropriate and natural result because it will ensure ample open space surrounding the building, consistent with the intent of the Zoning Regulations.

Building Height

46. The building height is the vertical distance between the level of the curb opposite the middle of the front of the building to the highest point of the roof or parapet. 11 DCMR §199.1.

47. The building height was 83 feet, which is seven feet less than the maximum permitted height of 90 feet in the R-5-D zone.

48. Accurate measurement of height under the Zoning Regulations requires the correct classification of the architectural and structural features that are permitted on rooftops. In determining the height of the subject building, the height was measured to the top of the three-foot parapet. 11 DCMR §199.1.

49. The roof contains several structures that do not count toward the determination of the height of the building under 11 DCMR §400.8. These structures include a mechanical penthouse that houses mechanical equipment, a stairway and an elevator machine room.

50. Architectural embellishments above the parapet line do not constitute habitable space and are not counted toward the building's height. 11 DCMR §199.1; Testimony of Bello. These embellishments include towers such as the one that houses the elevator equipment which is capped with a purely decorative peaked roof element as well as the other architectural embellishments that simulate the look of a mansard roof around the building's perimeter.

51. The Zoning Administrator correctly determined that the height of the building was in compliance with the Zoning Regulations and followed standard review procedures that had been used in cases since 1958.

52. The Appellants were unable to refute the accuracy of the datum points that formed the basis of the measurement of the building height.

Elevator Penthouse and Rooftop Mechanical Equipment

53. The architectural embellishments and penthouse elements were correctly excluded from both the height and FAR computations.

54. The Chief of the Zoning Review Branch correctly determined that the mansard roof-like structure that wraps around the perimeter of the building serves as an enclosure of the entire penthouse under 11 DCMR §411.3.

55. The roof plan meets the requirement that penthouses and mechanical equipment be placed within a single enclosure.

56. The Chief of the Zoning Review Branch correctly determined that the elevator tower located at the rear edge of the roof of the building was located within an architectural embellishment and accordingly was not subject to the penthouse setback requirement.

57. There is no prohibition against including mechanical equipment within an architectural embellishment.

58. The Zoning Review Branch regularly approves tower elements and architectural embellishments that are not set back from the exterior face of the building when they are incorporated with any other architectural element for dual functions and are not designed to gain additional habitable space.

59. The same doctrine was applied by the Zoning Administrator in approving similar designs in which architectural embellishments that are not set back from the edge of the roof include mechanical equipment at 2590 L Street, N.W., 1725 I Street, N.W., and 1818 H Street, N.W.

60. The enclosing façade of the elevator penthouse was deemed to be an architectural embellishment designed for the predominant purpose of architectural uniformity of the roof plan and therefore, not subject to the setback requirements of 11 DCMR § 400.7(b).

61. The determination that the façade was an architectural embellishment is consistent with a previous design in which the architectural embellishment was proposed as an extension of a façade or curtain wall above the main roofline to conceal mechanical equipment behind the wall.

62. The Zoning Regulations are silent on the issue of the amount of functionality that is permitted for an architectural embellishment. Architectural embellishments cannot be used to provide habitable space; but there is no prohibition of the functional duality afforded by locating mechanical equipment in an architectural embellishment.

63. The decision to include the elevator enclosure in the excess FAR allowed penthouses is logical given the roof plan proposal, which was designed to create uniformity with the mansard and turret roofs on other portions of the building, and the function of the penthouse enclosure.

64. The Office of Planning made no comments as to any negative impact of the roof structure on neighboring properties although it received notice of the appeal and had access to the plans.

Parking and Loading

65. The plans meet the parking requirement the Zoning Administrator applied to the proposed use.

66. The Zoning Regulations do not explicitly establish a ratio of required parking spaces for community residence facilities in the R-5-D zone. The Zoning Administrator applied the ratio applicable to publicly assisted housing for the elderly because the Regulations do not provide a parking ratio for the proposed use.

67. In reviewing the permit application, the Chief of the Zoning Review Branch applied an even more restrictive standard, that for a rooming house or a boarding house. The project also satisfied the more restrictive requirements for a rooming or boarding house. The plans provide for 31 parking spaces.

68. The proposed loading dock and berth fully satisfy the requirements of the Zoning Regulations.

69. The convenience of use or the exact manner in which the loading facilities will function is beyond the purview of the review of the Zoning Administrator.

70. The approved plans adequately depict the location of the loading berth, loading platform and service delivery space. The plans show that the loading platform is contiguous to the loading berth and that there is unobstructed access from the berth to the platform.

71. The Zoning Regulations do not provide a ratio for loading spaces. The Zoning Administrator correctly applied the ratio required for any other use in all districts.

Licensing Requirements of 22 DCMR 3242 and 3257

72. Such licensing issues are issues that are beyond the scope of this appeal because they fall within the jurisdiction and expertise of the Department of Health.

Referral of Roof Plans to the Office of Planning

73. See Findings of Fact 16 and 17.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized under §8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended; D.C. Code, 2001 Ed. §6-641.07(g)(1) (2001)) ("Zoning Act"), to hear and decide appeals where it is alleged by an appellant that an administrative officer erred in any administrative decision based in whole or in part upon any Zoning Regulation or Zoning Map. This appeal is properly before the Board pursuant to 11 DCMR §§ 3100.2, 3101.5, and 3200.2. The notice requirements of 11 DCMR §3112 for the public hearing on the appeal have been met.

The appellants, NANA and ANC 3G, appeal the decision of the Zoning Administrator to approve the issuance of a building permit for a seven-story building to permit the construction of a 102-unit handicapped assisted-living-apartment residence on a variety of procedural and substantive grounds.

Complete Building Permit Application

In order to vest its rights under the R-5-D zoning, pursuant to 11 DCMR §3202.5, Sunrise had to file a complete Building Permit Application prior to October 16, 2000, the date upon which the Zoning Commission set down the application to down zone the site for public hearing. Based on the evidence submitted by the property owner, the testimony of the Chief of the Zoning Review Branch, and evidence in the record including a receipt for the payment of a filing fee on July 10, 2000, the Board concludes that the property owner filed a complete Building Permit Application on July 10, 2000, well in advance of the October setdown date for the rezoning of the property.

Matter-of-Right Use

Historically, the Zoning Regulations have treated assisted living facilities as a type of community based residence facility. 11 DCMR §199.1. The owner's property is located in an R-5-D zone. The Board notes that housing for the handicapped is clearly permitted as a matter of right use in an R-4 District under 11 DCMR §330.5(i), which states:

> Community based residential facility; Provided that notwithstanding any provision in this title to the contrary, the Zoning Administrator has determined that such community based facility, which otherwise complies with the zoning requirements of this title that are of general and uniform applicability to all matter of right uses in an R-4 District, is intended to be operated as housing for persons with handicaps. For purposes of this subsection, a "handicap" means, with respect to a person, a physical or mental impairment which substantially limits one or more of such person's major life activities, or a record of having, or being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance.

The Board concludes that the Zoning Administrator applied general and uniform zoning requirements applicable to multi-family residences in an R-4 District, such as parking requirements, in his review of the application for a building permit. There is no evidence in this case that the proposed building does not otherwise satisfy the zoning requirements for a multi-family residence in an R-4 or R-5 District. Community residential facilities for handicapped persons in the multi-family districts are not subject to a greater level of regulation than that applicable to housing for non-handicapped persons.

Appellants presented no evidence that the proposed building is not intended to provide housing for "handicapped" residents within the meaning of Section 330.5(i). Finding of Fact ("FF") 22. Based upon its testimony, Sunrise plans to serve residents who meet the definition of handicapped under the Federal Fair Housing Amendments Act and qualify as members of a protected class under the act by virtue of having "a physical or mental impairment which substantially limits one or more of such person's major life activities." 42 U.S.C. § 3602(h); *see, e.g., Hovson's, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 and n. 3 (U.S. Ct. App. 1996); *Assisted Living Associates of Morristown, LLC v. Morristown Township*, 996 F.Supp. 409, 435 (D.N.J. 1998). The proposed facility will assist residents in major life activities such as eating, bathing, toileting and grooming. This particular facility will also serve individuals with cognitive impairment caused by Alzheimer's Disease. The Board concludes that the uses of the building, described by Sunrise, are consistent with a community residence facility providing housing for the handicapped. Therefore, Sunrise' proposed use is permitted as a matter-of-right in an R-5-D zone.

Floor Area Ratio ("FAR") Calculations

The Board concludes that FAR has been properly calculated and fully complies with the 3.5 FAR limit applicable in the R-5-D zone. The testimony of record from the architect and the owner's zoning expert demonstrates that the FAR was based on a careful evaluation of gross floor area contained in the regulations. In determining the amount of the garage level that should count towards the building's FAR, Sunrise applied the well-established and long recognized "perimeter wall test." The owner's zoning expert demonstrated to the Board's satisfaction that several areas of the building that are not countable toward FAR were incorrectly included by the Appellants.

Rear Yard and Side Yard

The Board concludes that the proposed building fully complies with the rear yard setback requirement of 11 DCMR §404.1. The Board notes that the subject lot has more than the usual four sides and hence its shape is highly irregular. Further, an alley stub protrudes into the lot at an angle. The Board concludes that in considering the lot's unusual configuration, the Zoning Administrator correctly determined that Connecticut Avenue was designated the front, and that the portion of the lot abutting the north-south alley to the rear, running roughly parallel to Connecticut Avenue was the rear. The Board concludes that the ruling of the Zoning Administrator yields a logical and natural result that is consistent with the intent and meaning of the Zoning Regulations.

The Board is also constrained to conclude that the Appellants' interpretation of the rear yard requirement is not supported by the regulations and would produce illogical results. The portion of the building that abuts the alley stub cannot be considered the "rear line of the building" and such a determination would render a disproportionately large portion of the lot not buildable. The Board concludes that the building, as proposed, provides significant open space and ample light and air to adjacent properties consistent with the intent of the yard requirements.

Building Height

The Board concludes that the Chief of the Zoning Review Branch and the owner's zoning expert have demonstrated that the building height was measured properly and that, at 83 feet, the height is well below the allowable 90-foot height limit in the R-5-D zone. The Chief of the Zoning Review Branch and the owner's zoning expert also demonstrated that architectural embellishments and penthouses do not count toward the building height, therefore they were correctly excluded from the building's height computation. The Board further notes that the 83-foot building height was conservatively measured to the parapet line of the tower element which contains the elevator machine equipment, while the Zoning Regulations would permit the measurement to be taken at a lower point, the roof itself, thus resulting in an even lower height for the building. The Board also notes that, while a portion of the building consists of seven stories, the southern portion of the building steps down to only six stories. The Appellants produced no evidence to demonstrate that the height of the building was measured incorrectly.

Elevator Penthouse and Rooftop Mechanical Equipment

The Board concurs with, and longstanding administrative precedent supports, the Zoning Administrator's interpretation of the portions of the Zoning Regulations addressing rooftop structures and architectural embellishments. Accordingly, the Board concludes that the penthouse and architectural embellishments associated with the proposed building fully comply with the Zoning Regulations. The testimony of the Chief of the Zoning Review Branch and post-hearing submission on this issue provide compelling evidence that architectural embellishments do not count toward building height and are not subject to the penthouse setback requirements. The Board agrees with the testimony of the Chief of the Zoning Review Branch and his conclusion that the elevator tower located at the rear edge of the roof of the building was correctly designated as an architectural embellishment, and accordingly is not subject to the penthouse setback requirements.

The Board agrees with the Zoning Administrator and therefore concludes that there is no prohibition against including mechanical equipment within an architectural embellishment and that there is ample precedent for this issue in other recently approved buildings in the District of Columbia. The Board concludes that the Office of the Zoning Administrator regularly approves tower elements as architectural embellishments that are not set back from the exterior face of the building. The practice represents a reasonable interpretation of the Zoning Regulations. The Board also concludes that the mansard roof-like structure that wraps around the perimeter of the building acts as an enclosure of the entire penthouse as required by the regulations. Accordingly, the roof plan meets the requirement for having a single penthouse enclosure. Further, the Board notes that the building height was measured to the parapet at the top of the stair tower, while the regulations do not require measurement to that point.

The Board concludes that the Appellants have not successfully refuted the Zoning Administrator's interpretation of the penthouse requirements and the longstanding interpretation of the treatment of architectural embellishments. While the Appellants argued that the elevator tower embellishment constitutes an eighth story, the Board concludes that the Chief of the Zoning Review Branch demonstrated that such an element does not meet the definition of a story.

Failure to Refer Roof Plans to the Office of Planning

Section 411.10 of the Zoning Regulations provides that:

> Before taking final action on a roof structure plan, the Zoning Administrator shall have submitted the plan to the Director of the Office of Planning for review and report. The report shall be returned within fifteen (15) days of the date of submission unless a different period has been provided by mutual agreement of all parties involved.

There is no dispute that the Zoning Administrator failed to make this referral. Instead, it was pointed out to the Board that Office of the Zoning Administrator does not routinely make such referrals. The customary violation of a zoning regulation does not repeal the provision. Thus, the Zoning Administrator's failure to refer the subject plans violated the specific roof referral requirement set forth in the Zoning Regulations.

However, in this instance, the Board does not believe that this single violation justifies revocation of the permit issued here. Based upon its review of the record, the Board has found no substantive grounds for revoking the permit. During the course of this hearing, the Board could have requested the input from the Office of Planning with respect to the roof structure plans (*see,* D.C. Official Code §6-626.04 (2001), but did not do so. OP's only statement on the issue was an email stating that it does not customarily review such plans. Even if the Board remanded the permit for the purpose of a referral, OP's views would not be binding on the Zoning Administrator. Thus, a referral could very well accomplish nothing but delay. Given the fact that the Board has concluded that issuance of the building permit was consistent with the substantive requirements of the Zoning Regulations, the administration of those regulations is

not furthered by having the Office of Planning make non-binding recommendations with respect to matters already decided in this Order.

Parking and Loading

The Board concludes that the building permit drawings correctly show fully compliant loading facilities. In addition the plans include 31 parking spaces, which exceed the number required for comparable uses under the regulations. The Board concludes that the Zoning Administrator correctly determined the applicable parking and loading requirements, and that a ruling from the Zoning Administrator was necessary because the regulations do not set forth specific parking and loading ratios for a community residence facility in the R-5-D zone. The Board concludes that the loading facilities provide unobstructed access as required under the Zoning Regulations.

The Board concludes that the Appellants offered no persuasive evidence to merit a reversal of the Zoning Administrator's ruling on this issue.

Non-Zoning Issues

With regard to the non-zoning issues raised by the appellants, the Board finds that these issues are outside the scope of the Board's review authority. Section 8 of the Zoning Act provides for appeals to the BZA that are "based in whole or in part upon any zoning regulation or map." In implementing §8 of that act, 11 DCMR §3100.2 provides that the BZA may "hear and decide appeals where it is alleged by the Appellants that there is error in any order, requirement, decision, determination, or refusal made by any administrative officer or body, including the Mayor, in the administration or enforcement of this Title." The BZA has consistently confirmed that interpretation on many occasions. Accordingly, the allegations brought by NANA that DCRA officials failed to address external agency concerns and did not provide full access to DCRA records are not zoning matters and are not properly before the Board. Similarly, any and all issues related to the licensing of assisted living facilities by the Department of Health and other District agencies are similarly outside of the scope of the Board's authority.

The Board is required under D.C. Official Code §1-309.10(d)(3)(A) (2001) to give "great weight" to the affected ANC's recommendations. Under D.C. Official Code §1-309.10 (d)(3)(B) (2001), the Board must articulate with particularity and precision the reasons why the ANC does or does not offer persuasive advice under the circumstances and make specific findings and conclusions with respect to each of the ANC's issues and concerns. The ANC presented no report in this matter, but joined with the appellant in presenting its legal arguments. The Board has addressed each of the issues raised by the appellants and the ANC, and explained, in each instance, why it agreed or disagreed with the specific positions taken by these parties. The Board thus gave great weight to the issues and concerns raised by the ANC in this appeal.

Motion for Reconsideration – The Effect of a Tie Vote

Under §8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 799, as amended; D.C. Code, 2001 Ed. §6-641.07(h)), "The concurring vote of not less than a full majority of the members of the Board shall be necessary for any decision or order." The Board's Rules of Practice and Procedure likewise provide in 11 DCMR §315.2 that "The concurring vote of at least a full majority of the Board shall be necessary for any decision." Because the Board is composed of five members, a decision to grant Ms. Mitten's Motion for Reconsideration requires at least three affirmative votes.

A tie vote occurs when 50 percent of a body votes in favor of a motion and 50 percent votes against the motion. If there is no way to break a tie vote, the motion is lost. A tie vote that is not broken by a subsequent vote thus operates to deny the relief that was the subject of the motion. *See Morrison v. District of Columbia Bd. of Zoning Adjustment,* 422 A.2d 347, 349 n.5 (D.C. 1980) (tie votes); *see also Hubbard v. District of Columbia Bd. of Zoning Adjustment,* 366 A.2d 427, 428 (D.C. 1976) (failure to achieve super-majority vote tantamount to denial of motion for rehearing). In this case, there is no way to break the tie because the Board's fifth member is recused from this Appeal. Accordingly, the motion for reconsideration is deemed denied.

CONCLUSION

For the reasons stated above, the Board concludes that the appellants have not met their burden of proving by a preponderance of the evidence that the Zoning Administrator erred in approving the issuance of the building permit because the building plans do not conform in all respects to the applicable Zoning Regulations. It is hereby **ORDERED** that the appeal of the issuance of Building Permit Number B435464 filed by the Nebraska Avenue Neighborhood Association and joined by Advisory Neighborhood Commission 3G is **DENIED.**

VOTE: 4 – 0 - 1 (Sheila Cross Reid, Carol J. Mitten, Geoffrey H. Griffis, and David W. Levy to deny appeal in all aspects, except for the structure plan not reviewed by the Office of Planning and the stair and elevator/penthouse setback requirements; Anne M. Renshaw, not voting, recused).

VOTE: 3 – 1 - 1 (Sheila Cross Reid, Geoffrey H. Griffis, and David W. Levy to deny the appeal based on roof structure not being reviewed by the Office of Planning; Carol J. Mitten, opposed; Anne M. Renshaw, not voting, recused).

VOTE: 3 – 1 - 1 (Sheila Cross Reid, Geoffrey H, Griffis, and David W. Levy to deny the appeal regarding the stair and elevator penthouse setbacks and locations adjacent to exterior walls; Carol J. Mitten, opposed; Anne M. Renshaw, not voting, recused).

VOTE: 2 – 2 - 1 (Carol J. Mitten and David W. Levy to grant the motion for reconsideration of the Board's decisions (i) to deny the appeal based on roof structure not being reviewed by the Office of Planning and (ii) the stair and elevator penthouse setbacks and locations adjacent to exterior walls; Sheila Cross Reid and Geoffrey H. Griffis, opposed; Anne M. Renshaw, not voting, recused).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member approved the issuance of this Order.

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

DATE OF ORDER: OCT 12 2001

AB/PY

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Office of Zoning

BZA APPEAL NO. 16716A

As Director of the Office of Zoning, I hereby certify and attest that on OCT 12 2001 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
ShawPittman
2300 N Street, N.W.
Washington, DC 20037-1128

Michael Johnson, 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

F

AFFIDAVIT OF HENRY J. VAUGHN

)
DISTRICT OF COLUMBIA)
)

Henry J. Vaughn, being duly sworn, deposes and says:

1. I am the Chief Financial Officer for Capitol Hill Healthcare Group, d/b/a Capitol Hill Nursing Center (the "Nursing Center"), which maintain offices at 700 Constitution Avenue, N.E., Washington, D.C. 20002.

2. This affidavit is submitted in response to letter, dated March 18, 2003, of Robert Kelly, the Zoning Administrator of the District of Columbia.

3. I have been the Chief Financial Officer for the Nursing Center for over two years.

4. The Nursing Center houses residents with physical and mental disabilities such as stroke patients, patients with respiratory problems, amputees, and patients with Alzheimer's disease, as well as elderly residents that are no longer able to live independently.

5. The Nursing Center provides 24-hour medical attention to its residents. All of the Nursing Center's residents require assistance in performing one or more of their major life activities, including but not limited to, eating, bathing, dressing, getting out of bed, taking medication, etc.

6. The Nursing Center is a residential facility that provides treatment, rehabilitation, assistance and/or supervision to all of its residents in their daily life activities.

7. On average, residents of the Nursing Center will reside at the Nursing Center for 11 months. After which they typically move on to a facility that provides a greater degree of care, or they expire. However, we also have residents of the Nursing Center that have lived in

the facility for a number of years. Currently, there are 48 residents who have been living in the Nursing Center for more than one year.

8. On a daily basis, only 30-35 visitors come to the Nursing Center to visit residents of the facility.

9. At the present time, the parking garage utilized by the Nursing Center typically has approximately 50-70 parking spaces that are not used on a daily basis.

Henry J. Vaughn

Sworn to before me this
26 day of March, 2003

Notary Public

State of Maryland
My Commission Expires Dec. 1, 2006