GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Consumer and Regulatory Affairs

Office of the General Counsel



D.C. OFFICE OF ZONING
2004 MAY -6 PM 3:03

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

Re: Submission by Department of Consumer and Regulatory Affairs
BZA Appeal No 17127

Dear Chairman Griffis and Members of the Board:

On April 13, 2004, the Board of Zoning Adjustment heard the Appeal of the Nebraska Avenue Neighborhood Association, Appeal No. 17127, filed January 6, 2003. The Nebraska Avenue Neighborhood Association - 3G (NANA), represented by Anne Paige Chiapella, challenges all the permits issued by the Zoning Administrator (ZA) of the Department of Consumer and Regulatory Affairs (Department or DCRA) for the development of the assisted living facility called Sunrise Development. Sunrise Development is located at 5111 Connecticut Avenue, N.W., Washington, D.C. (Square 1989, Lot 162).

In response to the appeal, Sunrise Development filed a Motion to Dismiss alleging the appellant failed to raise any new issues on appeal and is barred by *res judicata* and collateral estoppel. The Department also argued the appeal must be dismissed. Following the hearing on April 13, 2004, the Board determined only two permits were at issue: (a) B454315 issued August 25, 2003; and (b) B456618 issued November 7, 2003. DCRA files this submission in support of Zoning Administrator's decision to issue both permits and urges the Board to deny the appeal.[1]/

The subject property is located in an R-2 and R-5-B Districts. The facility is completed and occupied pursuant to Certificate of Occupancy, No. 66771, issued December 5, 2003.

Background

The Sunrise Development is an assisted living facility located in the 5100 block of Connecticut Avenue, N.W. On March 8, 2001, DCRA issued Sunrise a building permit for a "seven story cast in place concrete structure containing assisted living residences

[1] / The Board set May 4, 2004 as the deadline for filing motions to dismiss the remaining two permits.

BZA
Case No. 17127
Exhibit No. 22

Board of Zoning Adjustment
District of Columbia
CASE NO. 17214
EXHIBIT NO. 22

(CBF, Housing for Handicapped as the term is defined by the Act) with underground parking." Over the next three years of construction, seven permits were issued for the project. At issue here, is Permit No. B454315, issued August 25, 2002, to revise the original permit (No. 435464 as to the seventh floor). The second permit at issue, No. B456618 issued on November 7, 2003, authorized revisions to floors 1 through 3, and the garage.[2]/

While the procedural facts of this matter are well known to the Board, a cursory review is relevant to the analysis of the two permits at issue. The ANC has filed two appeals and two motions for reconsideration of the denial of those appeals before the BZA (Appeals Nos. 16716 & 16879). Another appeal was taken by Ms. Chiapella before the Board of Appeals and Review (Docket No. 02-5872-BP), and yet another before the District of Columbia Court of Appeals. The Board denied the appeals and subsequent motions. The BAR also dismissed the ANC appeal as untimely. The D.C. Court of Appeals also dismissed the claim.

In each of the appeals, Ms. Chiappella alleged the same claims, principally: (a) the approved building permits and revisions violate the FAR requirements; (b) the building has an inadequate rear yard setback; (c) the height of the building exceeds the permitted height in the R-5-D zone; (d) parking; (e) improper approval for the roof structures plan; and (e) proposed facility fails to meet the applicable code and licensing requirements (i.e., certificate of occupancy). *See* Appeal No. 16716A and administrative errors alleged herein. The allegations presented herein, and noted above, were presented to the Board and decided in earlier decisions.

Argument

The Appellant, Ms. Chiapella, essentially contends the Board has not yet properly reviewed the decisions of Zoning Administrator (ZA) related to this project. Moreover, she contends the decisions are ripe for appeal. Both allegations are not well-grounded.

1. *Timeliness of Appeal.*

This appeal has been limited to two permits; (a) B454315, issued August 25, 2002 to revise the original permit (No. 435464) as to the seventh floor and, (b) B456618 issued August 25, 2003. Appellant reiterates her contentions that the two permits were issued in error because they violate the zoning requirements including rear yard, FAR, roof structure, building height, parking, operating with a certificate of occupancy, etc.[3]/ Pursuant to Zoning Commission Order No. 02-01, an appeal of a permit must be filed

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[2] / For a complete discussion of the revision permits, DCRA defers to the Sunrise submission supplementing its Motion to Dismiss, filed today.

[3] / At the April hearing, appellant conceded that she would not present any new arguments. Since the Board dismissed her challenges to the other permits, DCRA applied the arguments to the remaining two permits.

sixty days after the issuance. This appeal is untimely because it was filed on January 5, 2004, more than one and a half years after issuance of B454315, and four months after permit, B456618 was issued.

2. *Conclusive Effect of Prior Decisions*

Petitioner notes the revision permits are intertwined with the original permit issued on this project. DCRA agrees. In this regard, denial of the petitioner's challenge to the earlier permits gives rises to the preclusive effect of that decision. A brief review is helpful. The first appeal filed against this project was filed by petitioner on March 16, 2001. It challenged the ZA's decision to approve the original permit B435464. After a public hearing and numerous filings, the Board denied the appeal, affirming the ZA's approval of the permit. Appeal No. 16716A, dated October 12, 2001. In that appeal, appellant cited allegations identical to the ones noted above.

Petitioner sought reconsideration of the denial, alleging the Board, "erred, and the record did not support the Board's decision and the Board's Order contained material inconsistencies and factual errors and omissions." Appeal No. 16716B. On January 2, 2002, the Board denied the motions for reconsideration. (The association and ANC filed separate motions.)

Undaunted, NANA filed another appeal with BZA challenging the issuance of a revision permit (No. B442149) and the original permit. The appeal was based on the same reasons noted above. The appeal was dismissed and the Board concluded the revisions were compliant. Thereafter, a motion for reconsideration was filed alleging error by the Board. Before the Board could issue a decision, NANA filed yet another appeal on the same project challenging the approval of additional revisions to the original permit, including the wall test. In its denial, the Board noted,

> "[w]hile NANA may continue its relentless effort to challenge what the Board continues to find to be a lawful structure and use; the Board is not compelled to treat NANA's tactical miscalculation as good cause."

Appeal No. 16879-A, pg. 5 (May 27, 2003).

Issue preclusion or the doctrines of res judicata and collateral estoppel are applicable here. In two key cases before the District of Columbia Court of Appeals, the Court decided that subsequent cases before the BZA which raise the same issue must be precluded

> "Once a claim has been finally adjudicated, the doctrine of claim preclusion, or res judicata, prevents the same parties from relitigating the same claim,

> including any issue that either was or might have been raised in the first proceeding, and the doctrine of issue preclusion prevents the same parties from relitigating an issue actually decided in a previous, final adjudication, whether on the same or a different claim."

Id., *Rhema Christian Center v. District of Columbia Board of Zoning Adjustment*, 515 A.2d 189, 193 (D.C. 1986).[4]/

On this point, DCRA concurs with Sunrise and its analysis of material circumstances.

3. *Admissions by Appellant.*

Finally, appellant has relinquished the basis of her allegations; the non-compliance of the project. As noted above, the Board restricted appellant's challenge to two permits, both revisions. The first, No. B454315 (revising No. 435464 as to the seventh floor), deals with the removal of rooftop gables, and the second, No. B456618 (No. 435464 as to the 1-3 floors and the garage), focuses on the removal of the trash enclosure to the back and rear yard dimensions.[5]/ Appellant's arguments, in keeping with her earlier appeals, are supported by the allegations previously raised and decided.. In this filing, however, Ms. Chiapella argues the project is noncompliant with the zoning regulations. At the same time, she also contends the issuance of the revision permits brought the project into compliance. Indeed, her admission invalidates any reason for this appeal. The lack of evidence to support Ms. Chiapella's claims is underscored by her failure to articulate a basis for her objections. No specific allegations are detailed in her filing and no information is provided to suggest the ZA's determinations are invalid. To the contrary, Ms. Chiapella, acknowledges that "the structural and architectural integrity of the building in permit applications were not complete until the final permit (B445618, 11.07.030 was issued . . . this system was not architecturally and structurally intact until issuance of the final permit." NANA's appeal, pg. 8. Given the petitioner concedes the permits **are** compliant with the zoning regulations, NANA has no basis for an appeal.

Respectfully submitted,

Lisa A. Bell

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[4]/ As a preliminary matter, the doctrine of preclusion applies to judicial proceedings. Accordingly, a threshold inquiry is whether the initial proceedings were the equivalent of a judicial proceeding. In our opinion, the BZA as n adjudicatory body conducts such a proceeding. See D.C. Code §1-1501 (2004), *et seq.*, *see also, Rhema*, 515 A.2d 1989.

[5]/ For a more thorough explanation of the revision permits, DCRA defers to Sunrise pleadings filed herein.

Certificate of Service

I hereby certify that on May 4, 2004, a copy of the foregoing letter was mailed first class, postage prepaid, and by facsimile, to the following:

Anne Paige Chiapella
President, Nebraska Avenue Neighborhood
Association
5126 Nebraska Avenue, N.W.
Washington, D.C. 20015

Paul Thumonds, Esquire
Allison Prince, Esquire
Shaw Pittman
2300 N Street, N.W.
Washington, D.C. 20037-1128

Robert Gordon, Chairman, ANC 3/4G
3711 Military Road, N.W.
Washington, D.C. 20015

Lisa A. Bell, Esquire

APPENDIX B

LEGEND

1. Open Porch, 12 ft tall measured from adjacent grade
   Setback from rear lot line = 18 ft.
2. Stairs from main floor to ground level
3. Garage entrances **with required 34 ft. setback**
4. Storage (trash) room, 95 square feet
   10 ft. tall from adj. grade.
   Setback from rear lot line = 24 ft..
5. Retaining wall

M..
5-2

DISTRICT OF COLUMBIA GOVERNMENT

Office of the Surveyor

Wall Report for SQUARE 1989 LOT 162

Scale: 1 inch = 40 ' feet Recorded in Book 194 Page 37

S.O. SEAL S.O. Receipt No. S-05068

Received by [signature]
Surveyor, D.C.

Date: June 5, 2003

REGISTERED LAND SURVEYOR'S CERT

I certify that the wall locations shown hereon have been determined by me, under my direction, in accordance with Chapter 28, of Title 10 DCMR, and I have not engaged in the construction layout on this site.

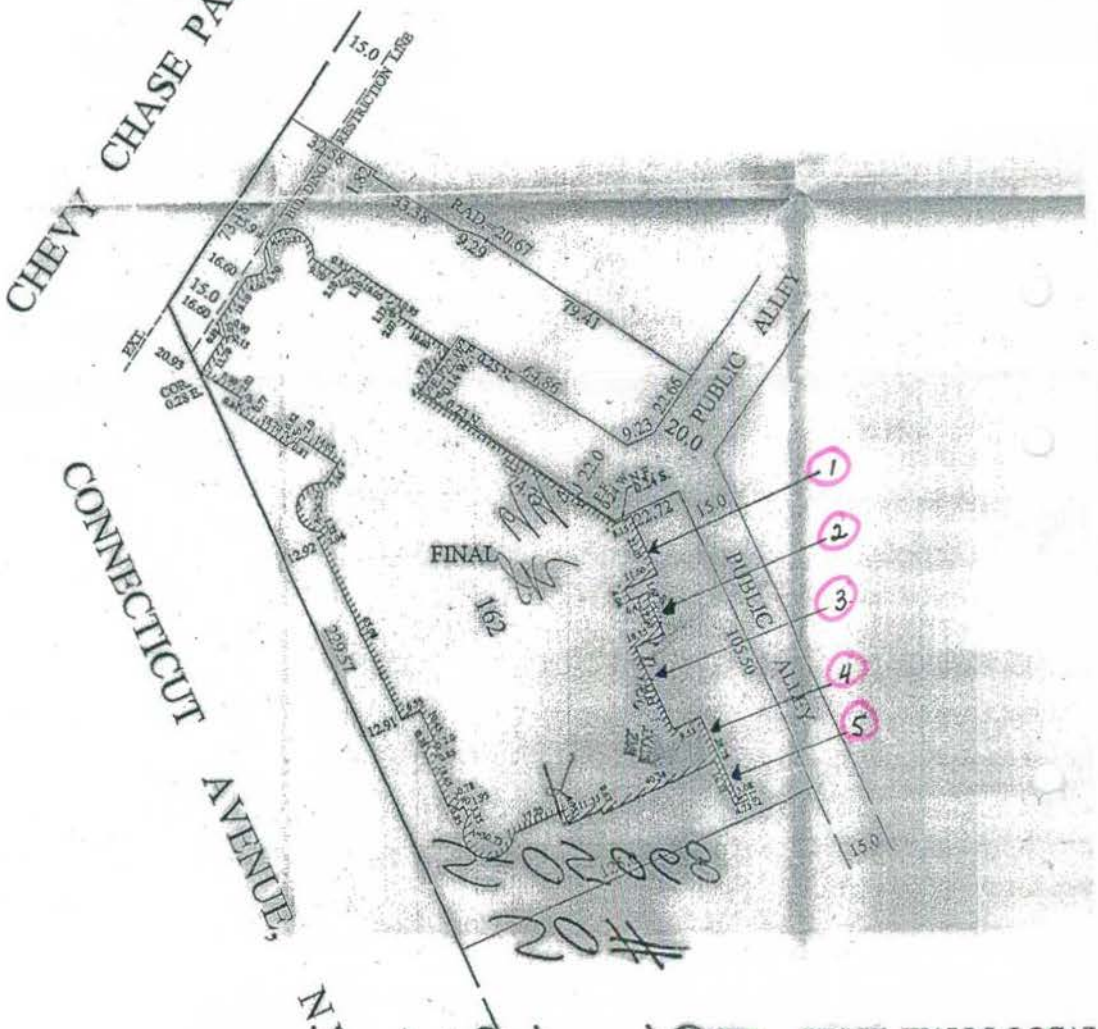
[signature]
Signature

5-27-03
Date

DISTRICT OF COLUMBIA GOVERNMENT
OFFICE OF THE SURVEYOR

DISTRICT OF MICHAEL No.9 REGIST LA SU

WALL TEST REPORT



BRICK WALLS LOCAT

APPENDIX C

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Consumer and Regulatory Affairs

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