Government of the District of Columbia
OFFICE OF ZONING

Z.C. CASE NO.: 01-26/16716

As Secretary to the Zoning Commission, I herby certify that on JAN 11 2002 copies of this Z.C. Order No. 952 were mailed first class, postage prepaid or sent by inter-office government mail to the following:

1. Paige Chiapella, President
   Nebraska Avenue Neighborhood Assoc.
   5126 Nebraska Avenue, N.W.
   Washington, D.C. 20008

2. Maureen Dwyer, Esq.
   ShawPittman LLP
   2300 N Street, N.W.
   Washington, D.C. 20037-1128

3. Charlotte Parker, Esq.
   441 4th Street, N.W.
   Room 450
   Washington, D.C. 20001

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

5. Zoning Administrator
   DCRA
   941 North Capitol Street, N.E.
   Washington, D.C. 20002

6. Andrew Altman
   Office of Planning
   801 N. Capitol Street, N.E.
   4th Floor
   Washington, D.C. 20002

7. Alan Bergstein, Esq.
   Office of Corporation Counsel
   441 4th Street, N.W.
   6th Floor
   Washington, D.C. 20001

ATTESTED BY: Alberto P. Bastida

Alberto P. Bastida, AICP
Secretary to the Zoning Commission

441 4th Street, N.W., Suite 210-S, Washington, D.C. 20001
Tel: (202) 727-6311 • Fax: (202) 727-6072
E-Mail: zoning.info@dcoz.dcgov.org • Web Site: http://dcoz.dcgov.org/

ZONING COMMISSION
District of Columbia
Case No.01-26
EXHIBIT NO.19

Government of the District of Columbia
ZONING COMMISSION

ZONING COMMISSION ORDER NO. 952
Case No. 01-26/16716
(*Sua Sponte* Review of Board of Zoning Adjustment Appeal No. 16716A)
December 10, 2001

This decision and order arises from the *sua sponte* review by the Zoning Commission for the District of Columbia ("Commission") of an order adopted on October 12, 2001, by the Board of Zoning Adjustment ("Board") that denied an appeal (BZA Appeal No. 16716A) by the Nebraska Avenue Neighborhood Association ("appellant") of an administrative decision to issue a building permit for property owned by Sunrise Connecticut Avenue Assisted Living, LLP ("property owner"). The Zoning Commission timely decided on October 15, 2001, to invoke its *sua sponte* review authority, pursuant to 11 DCMR § 3128.1. As a result of its review of the record and the submission of the parties, as described below, the Commission reverses that portion of the Board's order concerning the setback of the elevator penthouse and sustains that portion of the order finding harmless error in the failure of the Zoning Administrator to refer the roof plans to the Office of Planning ("OP"). As explained below, no remand of the elevator penthouse issue is required.

PRELIMINARY MATTERS

The *sua sponte* review concerned two issues. The first issue reviewed was the Board's determination that the elevator tower located at the rear edge of the roof of the building was not subject to the setback requirements of § 400.7(b) of the Zoning Regulations (Title 11, DCMR) because it was enclosed in an "architectural embellishment." The second issue reviewed was the Board's determination that the failure of the Zoning Administrator to submit the roof plans to OP as required by § 411.10 of the Zoning Regulations.

The Commission sent a letter, dated October 22, 2001, notifying all parties that the Commission would accept into the record their recommendations regarding its *sua sponte* review.

On November 9, 2001, the property owner, represented by the law firm of Shaw Pittman, sent a letter addressing the two issues being reviewed by the Commission. Attached to the letter was a set of revised plans for the roof structure (Exhibit B) ("revised plans"). The letter also stated that the Department of Consumer and Regulatory Affairs ("DCRA") had reviewed the revised plans and confirmed that they present no zoning issues.

On November 9, 2001, the appellant submitted a statement in support of the Commission's *sua sponte* review.

On November 9, 2001, ANC 3G submitted a statement in support of the Commission's *sua sponte* review.

On November 15, 2001, the property owner submitted a letter detailing the reasons that portions of the appellant's November 9, 2001, letter should be stricken from the record.

On November 16, 2001, the appellant submitted a letter objecting to the submission of the revised plans.

On November 19, 2001, the appellant submitted a letter urging that its November 9, 2001, letter be admitted into the record.

The Commission notes that motions from the parties are not appropriate in a *sua sponte* review. The November 9, 2001, letter from the appellant was therefore admitted into the record in its entirety.

At its regularly scheduled meeting of November 19, 2001, the Commission indicated, through consensus, its inclination to reverse the part of the Board's decision concerning the setback of the elevator tower. The Commission also indicated that it had reviewed the revised roof plans submitted by the property owner and preliminarily concluded that the revised plans complied with the applicable zoning regulations. The Commission encouraged the applicant to file the plans with DCRA.

On November 21, 2001, the Commission sent the parties a letter notifying them that, pursuant to § 3128.3, the Commission was affording the parties an opportunity to submit memoranda in support of, or in opposition to, the Board's actions being reviewed. The Commission stated that all previously submitted memoranda regarding the Board's actions would be considered. The Commission further stated that it would accept from the parties any comments or supplementary comments concerning whether the revised plans conformed to the requirements of the Zoning Regulations. The comments were due by noon, November 30, 2001.

On November 30, 2001, at 10:55 a.m., the Commission received a statement by ANC 3G opposing approval of the revised plans. In support of its position, the ANC stated that the roof structure did not comply with proposed regulations set down before the applicant filed for a building permit.

On November 30, 2001, at 12:33 p.m., the Commission also received a letter from the property owner's attorneys. Because the submission was received after the close of the record, and because it does not respond to the request of the Commission for comments on the Board's action or the revised plans, the submission was not admitted into the record.

On December 3, 2001, the appellant submitted a letter discussing its objections to the revised roof plans. Because this letter was not submitted before the close of the record, it was not considered.

DECISION

The Commission conducted this *sua sponte* review pursuant to 11 DCMR § 3128. Specifically, § 3128.7(b) provides that the Commission may exercise its *sua sponte* review authority, "Where it appears that a basic policy of the Zoning Commission, as expressed in the Zoning Regulations, has been violated as a result of any action by the Board [of Zoning Adjustment]."

The Commission's s*ua sponte* review in this case concerned two issues: 1) the Board's determination that the elevator tower located at the rear edge of the roof of the building was not subject to the setback requirements of 400.7(b) because it was enclosed in an "architectural embellishment"; and 2) the Board's determination that the failure of the Zoning Administrator to submit the roof plans to OP was harmless error. The Commission has considered all properly submitted comments. With respect to the first issue, the Commission reverses the Board's decision.[1] With respect to the second issue, the Commission sustains the Board's finding of harmless error.

Section 400 of Title 11, DCMR, governs building heights in Residential Zone Districts. Subsection 400.7 specifically governs rooftop housing for mechanical equipment and stairway and elevator penthouses. It provides that such any such rooftop addition shall: a) meet the requirements of § 411 (Roof Structures); b) be set back from all exterior walls a distance at least equal to its height above the roof; and c) not exceed eighteen feet six inches in height above the roof.

During the appeal before the Board, the Chief of the Zoning Review Branch of DCRA reiterated the Zoning Administrator's earlier conclusion that the roof tower containing the elevator and other mechanical equipment for the subject building was an "architectural embellishment" and, therefore, not subject to the setback requirements of § 400.7(b). This section authorizes no exemptions from its requirements for architectural embellishments nor is that term defined in the regulations. The appellant argued that the elevator tower cannot qualify as an architectural embellishment and should be subject to the setback requirements of § 400.7(b) for elevator penthouses. The Board, relying upon past practice of the Zoning Administrator, agreed with the property owner and the Zoning Administrator and found that the elevator tower fully complied with the Zoning Regulations.

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[1] The Commission would like to make it clear that its s*ua sponte* review concerned the elevator structure and not the stairwell structure. The Commission nevertheless notes that a stairway penthouse was referenced as a ground for appeal but does not appear to have been specifically discussed in the Board's Order. If this issue was raised in the hearing, the Board is encouraged to elaborate its discussion of the issue in any order granting or denying the pending motions for reconsideration.

The Commission finds that the Board and the Zoning Administrator erred in concluding that the elevator tower is an architectural embellishment and is therefore not subject to the setback requirements of § 400.7(b). The Commission agrees that it is a reasonable interpretation of the Zoning Regulations to exempt architectural embellishments from the setback requirements of § 400.7. However, the Commission finds that the elevator tower in question does not qualify as such an embellishment. The structure serves no other purpose than to house elevator and mechanical equipment. It is not otherwise enclosed in an architectural feature of the building. It is instead distinguishable and set apart from the remainder of the building. To conclude that it is an architectural embellishment is therefore to ignore its purpose. Almost any functional enclosure of mechanical equipment could then fall into this exemption and thus make a nullity of § 400.7(b).

In addition, the Zoning Administrator's interpretation of the Zoning Regulations was inconsistent. Section 411 of the Zoning Regulations governs roof structures for buildings in Residence (R) Districts. Subsection 411.7 allows an additional .37 FAR for mechanical, stairway, and elevator penthouses. The main purpose of that subsection is to accommodate protrusions from a building's roof that, do not affect the overall aesthetic impact of a building. The Zoning Administrator determined that because of the presence of the elevator tower, the applicant was entitled to this additional FAR. However, as noted above, the Zoning Administrator also found that § 400.7 did not apply because the structure was not an elevator penthouse but was instead an "architectural embellishment." This alternating characterization of the elevator tower does not represent a reasonable interpretation of the Zoning Regulations.

The property owner argued, and the Board found, that the Zoning Administrator has consistently applied the Zoning Regulations in the same manner that they were applied here and that such an interpretation should therefore prevail. While the administrative precedent may be longstanding, this in no way can excuse an unsupportable interpretation. To find otherwise would be to ignore the paramount right of the public to have its zoning regulations enforced. *See Goto v. District of Columbia,* 423 A.2d 917 (D.C. 1980); *Jackson v. Kenai Peninsula Borough*, 733 P.2d 1038 (Al. 1987); *Weik v. Dist. of Columbia Bd. of Zoning Adjustment*, 383 A.2d 7, 13 (D.C. 1978); 73 ALR4th 857. A public employee charged with enforcing the Zoning Regulations, including the Zoning Administrator, lacks authority to waive those regulations. *See Weik* at 13.

In order to make the issue of the Zoning Administrator's treatment of the elevator structure moot, the property owner submitted revised roof plans on November 9, 2001. At its November 19, 2001, meeting, the Commission encouraged the property owner to formally submit these plans to the Zoning Administrator as a minor modification to the approved plans. The Commission also opened the record to accept comments on whether these revised plans complied with the Zoning Regulations.

After careful review of all the comments and architectural drawings that were properly submitted, the Commission was unable to ascertain with precision whether the revised roof plans complied with the Zoning Regulations. This should not be viewed as a finding that the plans are in any way deficient or contrary to the Zoning Regulations. Rather, it is the acknowledgement that more detailed information would be needed for the Commission to make such a

determination of compliance. The Commission instead anticipates that the Zoning Administrator will be in a better position to make this determination.

The "set down rule" indicates that, if a building permit application is filed prior to the Commission's decision to hear a map amendment, the application may be processed under existing zoning (11 DCMR § 3202.5(a)). Application for the building permit (No. B435464) for the subject property was made before the Commission made decided to set down Zoning Commission Case No. 00-23P, which would downzone the subject property and other properties nearby. The revised plans submitted are detailed enough to enable the Commission to conclude that they represent only a minor change to the roof structure and can therefore be categorized as a minor modification of the plans approved by the Zoning Administrator. It follows that DCRA should continue to process this application under the zoning that existed before the proposed zoning was set down and that the concerns of the ANC 3G in this regard are without merit.

As for the second issue being reviewed in this decision, § 411.10 of the Zoning Regulations requires that roof plans be submitted to OP. OP has 15 days to comment on these plans, unless the parties agree to a different time period. The Zoning Administrator is under no obligation to abide by any recommendation made by OP. The roof plans originally submitted to the Zoning Administrator were never sent to OP. The Commission notes, however, that the Board indicated its satisfaction with the roof plans. Although the Commission now disagrees with the Board with respect to the setback of the elevator tower, that disagreement does not alter the logic of the Board's position that it served no purpose to remand the plans back to the Zoning Administrator so that OP could comment on an issue already resolved by the Board. Therefore, the Commission sustains the Board's decision with respect to this issue.

Nevertheless, the Commission anticipates that the Zoning Administrator will submit any revised roof plans to the Office of Planning, as required by § 411.10. If that is done, the issue becomes moot. However, the Commission sees no compelling reason as to why the Zoning Administrator may not proceed with these or other plans if OP fails to submit its comments within the 15 days provided.

The Commission rarely invokes is authority to review Board orders. It did not do so here because of the proposed use of this building, which is clearly a matter of right and vested, or because of the minor technical flaw in the roof plan submitted. The Commission undertook this *sua sponte* review because of the Zoning Administrator's unilateral creation of an exemption to the Zoning Regulations without notice to the public or this body, and the Board's acceptance of the exemption's legitimacy, simply because it had been granted so many times before.

The functions of the Zoning Division are stated in Part F of Reorganization Order No. 55 (June 30, 1953). One of the most important of these functions is that the Zoning Division:

> 5. Upon the basis of experience in the administration and enforcement of the Zoning Regulations or upon observation of defects in them, may propose changes in the regulations and maps.

Thus, if the Zoning Division believed that an exemption to the setback requirement for elevator penthouses was warranted, it should have suggested an amendment for the Commission's consideration. Similarly, if the Zoning Division believed that referring roof plans to OP delayed its processes, it could have requested the elimination of the requirement. The Commission would then have had an opportunity to decide the merits of these proposals based upon input from the public, OP, and any Advisory Neighborhood Commission which chose to comment. Instead, without public notice or comment, the Zoning Division, through practice, established a *de facto* exemption rule for roof structures and constructively repealed the roof plan referral rule by routinely ignoring it. The Commission encourages the Zoning Administrator to address issues of this kind by submitting proposed rules for the Commission consideration, so that other projects are not unduly delayed, as this one has been.

Based upon the foregoing, the Commission *reverses* the Board's Order to the extent it held that the setback provisions of 11 DCMR § 400.7 were not applicable to the elevator penthouse of the proposed structure. The Commission *sustains* the Board's finding of harmless error with respect to the Zoning Administrator's failure to refer the roof plans to OP. Because the applicant, with the encouragement of the Commission, has filed new roof plans with DCRA, it serves no purpose to remand the issue back to the Board. The new plans filed by the applicant are clearly intended to supercede the plans under appeal. Thus, the elevator penthouse issue has been rendered moot with respect to this appeal. The remainder of the Board's order remains unchanged and may now take effect, subject to any action the Board may take with respect to the pending motion for reconsideration.

No motions to reconsider this decision may be submitted. The Zoning Commission is only authorized to decide motions to reconsider filed by parties to contested cases heard under § 3022 of its rules of practice and procedure. 11 DCMR § 3029.5. *Sua sponte* reviews concern contested cases that were heard by the Board pursuant to Chapter 31. Any motion to reconsider this decision will be rejected for filing by the Office of Zoning or, if inadvertently filed, will be returned to the person submitting the motion. Any person receiving such a motion should disregard it.

So ordered.

The Commission, on December 10, 2001, voted to **REVERSE** in part and **SUSTAIN** in part the Board's decision and to adopt this order on a vote of **4-0-1** (Carol J. Mitten, Anthony J. Hood, John G. Parsons, and Peter G. May in favor; James H. Hannaham, not present, not voting).

In accordance with the provisions of 11 DCMR 3028, this order shall become final and effective upon publication in the D.C. Register on JAN 11 2002.

CAROL J. MITTEN
Chairman
Zoning Commission

JERRILY R. KRESS, FAIA
Director
Office of Zoning