On September 30, 1997, the District signed a "Stipulated Agreement" with the Justice Department agreeing to petition for a change to the Zoning Regulations by December 24, 1998, to eliminate this unequal treatment. The changes that are relevant in this case are the amendments to Section 330 of the Zoning Regulations which allowed CRFs for handicapped persons in the multi-family zone as a matter-of-right, so that such facilities are not subject to a greater level of regulation than that applicable to housing for non-handicapped persons. The Board concludes that based on the representations of the owner, the proposed assisted living facility will comply fully with the newly adopted Assisted Living Regulatory Act of 2000 and will provide residents with assistance in activities of daily living, such as eating, bathing, toileting and grooming. This particular facility will also serve individuals with cognitive impairment caused by Alzheimer's Disease. These residents clearly meet the definition of handicapped under the FFHAA and qualify as members of a protected class under the FFHAA 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).

Calculation of FAR. The Board concludes that the building's 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. The testimony demonstrates that the FAR computations

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correctly excluded a portion of the garage level of the building since only 11.9% of that level constitutes basement space. In determining the amount of the garage level that should count towards the building's FAR, the architect applied the well-established and long recognized "perimeter wall test." The owner's zoning expert discredited the Appellants' computation of FAR and demonstrated that several areas of the building that are not countable toward FAR were incorrectly included by the Appellants. The Board concludes that it has accorded ANC 3G the great weight to which it is entitled, but notes that it concludes that ANC 3G's FAR computations were demonstrated to be inaccurate in several respects.

Rear Yard Set back. The Board concludes that the proposed building fully complies with the rear yard setback requirement. The Board notes that while a typical square lot contains four sides, the subject lot is multi-sided and hence 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 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.

In contrast, the Board concludes that the Appellants have suggested an inappropriate interpretation of the rear yard requirement that is not logical, appropriate or reasonable and simply cannot be supported by the regulations. 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 unbuildable. 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. The Board concludes that it has accorded ANC 3G the great weight to which it is entitled, however, the ANC produced no persuasive evidence to discredit the testimony of the owner's zoning expert or the Chief of the Zoning Review Branch.

Penthouse. The Board concurs with, and precedent supports, the Zoning Administrator's interpretation of the portions of the Zoning Regulations addressing roof-top structures and longstanding precedent regarding 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 concludes that the post-hearing submission of the Chief of the Zoning Review Branch dated August 15, 2001, correctly notes 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 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. The Board also concludes that the building's FAR is below the maximum permitted FAR and that even if the elevator tower embellishment were counted toward FAR, the building would still

comply with the Zoning Regulations. 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. While the Board concludes that it has accorded ANC 3G the great weight to which it is entitled, the Board concludes that the ANC has not offered sufficient evidence to merit a reversal of the Zoning Administrator's ruling regarding this matter.

Regarding the referral to the Office of Planning described in Section 411.10, the Board concludes that the Office of the Zoning Administrator does not routinely refer roof plans to the Office of Planning. Further, the owner's zoning expert noted that such referral is made only when the roof structure does not comply with the regulations. Given past interpretation of this section by the Office of the Zoning Administrator, the failure to refer the subject plans does not constitute a violation of the Zoning Regulation.

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 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 since 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 NANA, the Board finds that these issues are outside the scope of the Board's review authority. The Zoning Act (D.C. Code Sec. 5-424(f) (2000)) provides for appeals to the BZA that are "based in whole or in part upon any zoning regulation or map." In implementing that provision of the Act, the Zoning Regulations (11 DCMR 3100.2) provide 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 are similarly outside of the scope of the Board's authority.

CONCLUSION

The Board concludes that the issuance of Building Permit No. B435464 by the Zoning Administrator of the Department of Consumer and Regulatory Affairs was

appropriate. The testimony establishes that the Zoning Administrator applied a high level of scrutiny to the review of this Building Permit Application, and that the Zoning Administrator's determination of compliance was in accordance with the plain language of the Zoning Regulations and consistent with past precedent of the District of Columbia. The Board concludes that the Appellants failed to prove, by a preponderance of the evidence, that the building permit was issued in error; and therefore, the appeal of the NANA is denied.

DECISION

In consideration of the Findings of Fact and Conclusions of Law contained in this order, the Board of Zoning Adjustment for the District of Columbia **ORDERS DENIAL** of this appeal of the Zoning Administrator's decision in the issuance of Building Permit No. B435464.

For the reasons stated above, the Board concludes that the Appellants have not met their burden, it is hereby **ORDERED** that the appeal be **DENIED**.

VOTE:

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

ATTESTED BY: _____
JERRILY KRESS

Document #: 1150022 v.4

ShawPittman LLP

Certificate of Service

I hereby certify that a copy of the foregoing response of the property owner to the August 15, 2001, submission of the Office of the Zoning Administrator to the Board of Zoning Adjustment and the Proposed Findings of Fact and Conclusions of Law, was delivered by hand on this 28th day of August, 2001, to the following:

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Paul A. Tummonds, Jr.

Document #: 1139169 v.4

Document #: 1139169 v.4

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

In Re: 5111 Connecticut Ave., N.W.	)	
Square 1989, New Lot 162	)	BZA Appeal No. 16716
Previous Lots 49-57 & 161	)	
	)	
Appeal of:	)	
	)	
Nebraska Avenue Neighborhood Association	)	
	)	
Advisory Neighborhood Commission 3G	)	

Proposed Findings of Fact
Submitted by ANC 3G

Advisory Neighborhood Commission 3G respectfully submits these proposed findings of fact in BZA Appeal No. 16716, an appeal of a decision by the Zoning Administrator to issue a building permit to Sunrise Assisted Living Facility to construct a building at 5111 Connecticut Avenue, N.W.

I. The 8th Floor Penthouse Does Not Comply with Applicable Zoning Requirements

1. All penthouses and mechanical equipment for the proposed Sunrise building are required to be placed in one enclosure. See 11 DCMR § 411.3.

2. A penthouse for mechanical equipment or an elevator on the proposed building is required to be set back from exterior walls a distance at least equal to its height above the roof upon which it is located. See 11 DCMR § 400.7.

3. A penthouse on the proposed building cannot exceed eighteen feet six inches (18 ft. 6 in.) in height above the roof upon which it is located. See 11 DCMR § 400.7.

4. The Zoning Administrator was required to submit roof plans for the proposed building to the Director of the Office of Planning for review and report before taking final action on the plans. See 11 DCMR § 411.10.

5. Sunrise's proposed building includes two penthouse-like structures on the 8th floor: one to house mechanical equipment and one to house elevator machinery. See NANA Volume I, page A-14 – Main roof plan.[1]

6. A 12-foot high roof structure along the perimeter of the eighth floor touches both penthouse-like structures but does not shelter, enclose, or cover them, or serve as a roof over them, as it is below the top of the structures. This non-utilitarian embellishment does not render the physically distinct and separate structures a single structure.

7. The elevator structure on Sunrise's proposed building is not set back from the exterior building walls; it is flush with the exterior building wall at the rear of the building.

8. The wall that encloses the elevator structure – and that is flush with the exterior building wall – is a functional wall that serves to enclose and support the elevator mechanical equipment structure. The wall is not an architectural embellishment.

[1] References are to the appendices filed by the Nebraska Avenue Neighborhood Association (NANA).

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9. Alternatively, to the extent the wall is considered to be an architectural embellishment, it is also a part of a penthouse-like structure whose location and siting on the building do not comply with applicable zoning regulations.

10. The actual height of the elevator structure on Sunrise's proposed building, as measured by the developer's submitted drawings, exceeds 20 feet. See NANA Volume II, page 9 – Longitudinal building section. See NANA Volume I, page A-4 – Rear elevation.

11. The Zoning Administrator did not submit Sunrise's proposed roof plans to the Director of the Office of Planning for review and report before taking final action on the plans.

II. The Zoning Administrator Erred in Calculating the Building Floor Area Ratio (FAR)

A. FAR Noncompliance – 8th Floor

12. The increased floor area ratio for penthouses, allowed by 11 DCMR § 411.7, does not apply to structures that do not comply with the requirements of 11 DCMR § 400.7.

13. For the reasons set out above, the 8th floor penthouse-like structures do not comply with the requirements of 11 DCMR § 400.7.

14. The 8th floor penthouse-like structures have a combined floor area of approximately 1,682 square feet. See ANC Report Attachment B – FAR calculations.

15. The Zoning Administrator should have but did not count the floor area of the 8th floor penthouse-like structures in calculating the building's FAR.

B. FAR Noncompliance – 3d Floor

16. In accordance with 11 DCMR § 199.1, FAR calculations must include the gross floor area of a building, including the area of outside balconies that project more than six feet from exterior walls, and also including enclosed living space used to shelter and enclose persons.

17. The 3rd floor balcony projects more than 6 feet from the exterior walls of the building. See NANA Volume II, page 7 – 3d floor plan.

18. The 3rd floor balcony is fully enclosed by masonry walls, lattice walls, and a lattice roof and is to be used for the shelter and enclosure of persons residing in the building. See NANA Volume I, page A-2 – Front elevation.

19. The 3rd floor balcony has a floor area of approximately 940 square feet. See ANC Report Attachment B – FAR calculations.

20. The Zoning Administrator should have but did not count the floor area of the 3rd floor balcony in calculating the building's FAR.

C. FAR Noncompliance – Basement

21. In accordance with 11 DCMR § 199.1, FAR calculations must include the gross floor area of a basement, meaning that portion of a story the ceiling of which is four feet or more above the adjacent finished grade.

22. The developer's building plans do not indicate any ceiling in the basement level. It was unreasonable and erroneous for the Zoning Administrator to assume the building would include a ceiling at the basement level.

23. The first floor elevation is 304.18 feet above sea level. See NANA Volume I, page A-5 – Grading plan.

24. Subtracting one foot for the first floor slab, the basement level ceiling height is approximately 303 feet above sea level.

25. Approximately 170 feet of the basement perimeter is at a height of 299 feet above sea level, which means that the corresponding ceiling height is more than four feet above the adjacent finished grade. Even if the building includes a basement ceiling, close to 170 feet of the basement perimeter has a corresponding ceiling height more than four feet above the adjacent finished grade.

26. The building plans show a cement patio and a retaining wall resembling a planter box at the rear of the building adjacent to the basement level. These building structures do not alter the finished grade of that area of the property. See NANA Volume II, pages 8-10 – Cross-section.

27. The entire basement perimeter is approximately 540 feet, and the basement level has a floor area of approximately 16,054 square feet.

28. The Zoning Administrator included only 2,180 square feet for the basement floor area in calculating the building's FAR.

29. The Zoning Administrator should have included approximately 5,057 square feet for the basement floor area (170 divided by 540, or 31.5%) in calculating the building's FAR. See ANC Report, Attachment B – FAR calculations

D. FAR Noncompliance – Summary

30. The building's gross floor area includes approximately 5,057 square feet for the basement floor area, 1,682 square feet for the 8th floor structures, and 940 square feet for the 3rd floor balcony. See ANC Report, Attachment B – FAR calculations.

31. The building's total gross floor area is approximately 86, 369 square feet. The gross area of the building lot is approximately 23,107.51 square feet.

32. The building FAR is 3.74 (86,369 divided by 23,107), which exceeds the maximum FAR of 3.5 permitted in this zoning district. See ANC Report, Attachment B – FAR calculations.

33. The Zoning Administrator erred by including only 2,180 square feet for the basement floor area in calculating the building's FAR, and by failing to include any floor area for the 8th floor structures and the 3rd floor balcony.

34. The Zoning Administrator erred by calculating the building gross floor area as 80,870 square feet and by calculating the building's FAR as 3.49.

III. The Building Exceeds the Maximum Building Height in this Zoning District

35. The maximum building height permitted in this zoning district is 90 feet from the curb at the middle front of the building to the highest point of the building roof. See 11 DCMR §§ 199.1 and 400.1.

36. The curb at the middle front of the building is approximately 302.5 feet above sea level. See NANA Volume I, page A-5 – Grading plan.

37. The height of the building is approximately 96 feet above the 303.25 foot first floor slab measurement shown on the Longitudinal building section. Therefore, the height of the building is approximately 97 feet above the 302.5 foot level of the curb at the middle front of the building. See NANA Volume II, page 9 – Longitudinal building section.

IV. The Zoning Administrator Erred in Designating the Rear and Side Property Lines

38. Sunrise's proposed building fronts on Connecticut Ave., N.W. It does not front on Chevy Chase Parkway.

39. The rear property line of the building is the full width of the lot, extending from the side property line on the south side along the entire length of the rear alley and alley stub. The rear property line is roughly parallel to and the same length as the front property line along Connecticut Ave. See NANA Volume I, page A-1 – Site plan; NANA Volume I, page A-5 – Grading plan.

40. The building does not have the required setback along a portion of the rear property line abutting the alley stub.

41. The north side property line of the building extends along Chevy Chase Parkway, along the side lot facing Chevy Chase Parkway, and along a small portion of the main alley before it intersects the alley stub. See NANA Volume I, page A-1 – Site plan; NANA Volume I, page A-5 – Grading plan.

42. Alternatively, and to the extent the north side property line is considered to include the property line abutting the alley stub, the building does not have the required setback along the portion of the side property line abutting the alley stub.

43. The Zoning Administrator erred in designating the building's rear property line as extending along the main alley but not the alley stub, which is a portion of the property perimeter less than half the full width of the lot.

44. The Zoning Administrator erred in designating the building's north side property line as extending along the entire alley stub, a portion of the main alley, and the side lot facing Chevy Chase Parkway, which is a portion of the property consisting of seven segments and including four 90 degree turns.

45. The Zoning Administrator erred in issuing a building permit for a proposed building that does not meet the required rear and side yard setback requirements.

V. The Zoning District Applicable to this Property is R-5-B, Not R-5-D

46. Sunrise did not file a complete and sufficient building application in July of 2000. Missing from the application were a specification of the building's intended use and an indication of the distance of the penthouse structures to all edges of the main roof. See NANA Volume I, page E1 – D.C. Plan Correction List; NANA Volume I, page E2 – D.C. Letter re building permit application deficiencies. See NANA Volume I, page D-1 – Initial building permit application.

47. Officials in the Building and Land Regulation Administration identified several material deficiencies in Sunrise's building permit application. See NANA Volume I, page E-1 – Plan correction list; NANA Volume I, page E-2 – DCRA letter.

48. Sunrise filed a revised building permit application on February 5, 2001. The revised application contained materially different information than had been included in the initial application. See NANA Volume I, page E-6 – Revised building permit application.

49. Sunrise's revised building permit application was filed after the Zoning Commission had set down for a hearing on October 16, 2000 a petition to rezone the property from R-5-D to R-5-A or R-5-B. See NANA Volume II, page 22 – Time line of proposed use of the building.

50. The zoning classification applicable to Sunrise's proposed building is R-5-B, which is the zoning classification for the property determined by the final decision of the Zoning Commission. Sunrise may carry out work authorized by the permit only in accordance with the requirements of the R-5-B zoning classification.

51. The building permit issued is for a proposed building that does not comply with the R-5-B zoning classification. The proposed building height and FAR exceed the maximum levels for an R-5-B zone.

52. The Zoning Administrator erred in issuing the building permit for Sunrise's proposed building.

Respectfully submitted
ANC 3G

MEMORANDUM

To: Board of Zoning Adjustment
Date: August 30, 2001
Case No. **16716**
From: Page Chiapella
Nebraska Avenue Neighborhood Association

Re: New substantive material submitted by Intervenor on August 28, 2001

On August 28, 2001, the Intervenor submitted to the BZA new partial plans for the project at 5111 Connecticut Ave, NW. These plans are substantially different from the ones submitted to DCRA, as noted below, and have not been approved by DCRA. If these plans are to be accepted into the record as support for not enforcing the mandatory roof structure setback and height limitations, the Nebraska Avenue Neighborhood Association (NANA) requests that the BZA hold a public hearing to allow cross-examination on these new materials.

Continuing presentation of changing and inconsistent plans by the Intervenor documents the Appellant's contentions that (1) the Zoning Administrators who signed agreement to the "precertification letters[1]" were not necessarily presented with final plans (footprint, structure or use) and (2) the plans submitted on July 10, 2000, were not substantially complete and in their final form. NANA requests that the requirements of 11 DCMR be enforced and not be bypassed based on the "precertification letters" and newly contrived plans.

Substantive changes include but are not limited to the following:

1. Extension of the rear of the main building at the elevator lobby, on floors 2 through 7. Note that rear-most the elevator which was next to the rear wall is now removed from the rear wall by several feet. Note also that this new extension should be included in FAR. (Compare with Appellant's submission, 7/3/01, Appendix A, pp 4, 7-13: Rear Elevation, 1st-7th floors; 7/10/01 submission, pp. 7 & 8: 3rd and 7th floors)

2. Conversion of the 7th floor "balcony" to include it in the main building; (Compare with Appellant's submission, 7/3/01, Appendix A, p. 4-- Rear Elevation; Appellant's submission, 7/10/01, p 8-- 7th floor)

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[1] "Precertification letters:" letters addressed to Gladys Hicks, dated 12/15/98 and 3/8/99 and Michael Johnson, dated 5/16/00. Initial building permit applied for on 7/10/00. (Appellant's submission, 7/3/01, Appendix G and Appendix D)

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3. Addition of 10 foot high semi-freestanding wall to the rear of the elevator penthouse; (Compare with Appellant's submission, 7/3/01, Appendix A, p.4--Rear Elevation)

4. Added roof supports under the penthouse attic roof. On the original plans, this roof and all other "non-mansard" type roofs are not shown to have this "support;" (Compare with Appellant's submission, 7/10/01, pp 9-11--building sections)

5. Addition of what appears to b a concrete slab on the floor of the penthouse attic. (Compare with Appellant's submission, 7/10/01, p 9-- Longitudinal section)

6. Retraction edge of the elevator penthouse roof to the inside of the exterior wall and addition of what appear to be gutters. On the original plans, roofs all extend outside the exterior walls and have no gutters. (Compare with Appellant's submission, 7/3/01, pp.-5-- Elevations; Appellant's submission, 7/10/01, pp 9-11--building sections)

Nebraska Avenue Neighborhood Association
BZA Case No. 16716

Findings of Fact: Conclusions of Law and Opinion

The Board of Zoning Adjustment has jurisdiction to hear this appeal and render a decision and order pursuant to D.C. Code Section 5/424(f). In considering an application for a building permit, the Zoning Administrator is required to determine whether the plans for the proposed building meet the requirements of the Zoning Regulations. The Board may reverse the decision of the Zoning Administrator if the plans for the proposed building are not fully compliant with the requirements of the Zoning Regulations as shown by the preponderance of the evidence. The burden of proof rests with the appellant. (11 DCMR §3101.7) The guidelines in determining its decision relate to the Zoning Regulations themselves and include that:

(a) The Board of Zoning not exceed its prerogatives and thus in effect change the zoning;

(b) The Board of Zoning not violate a basic policy of the Zoning Commission, as expressed in the Zoning Regulations. (11 DCMR §3103.8)

The Board finds that:

(1) The height of the building does not comply with Zoning Regulations. The height of the building, including the vertical distance measured from the level of the curb opposite the middle of the front of the building to the highest point of the roof or parapet is over that allowed in an R-5-D District. The highest point of the roof, as presented by both the Appellants and Intervener, is over the elevator penthouse. This height exceeds 90 feet. The height of the building does not comply with Zoning Regulations.

(2) The roof structures are not setback from the exterior walls of the building, as is mandatory. The height of the roof structures exceed the mandatory height limit of 18 feet, 6 inches. The structures do not meet the mandatory single structure requirement. The roof plan was not submitted to the Office of Planning, as is mandatory. (11 DCMR §§400.7, 411.3 and 411.10) The roof structures do not comply with Zoning Regulations.

(3) The rear yard has a mandatory requirement to extend across the full width of the lot (11 DCMR §199.1: Yard). The rear yard has a mandatory minimum depth of 4 inches per foot of vertical distance from the mean finished grade at the middle of the rear of the structure to the highest point of the main roof or parapet wall, but not less than 15 feet. (11DCMR §404.1) The distance from the rear of the structure to the rear of the lot has been shown to vary from 0 to 34 feet. The rear yard setback does not comply with Zoning Regulations.

(4) The calculation of the basement portion of the basement/cellar level of the structure improperly excluded a large portion of the rear wall of the structure. Inclusion of the basement brings the FAR over the R-5-D limit of 3.5. (11 DCMR 402.4) Other portions of the structure, each of which individually bring the FAR over the mandatory 3.5 limit, have also been improperly excluded from the FAR, including a third story balcony and the roof structures. Attic and porch areas of the structure have also been excluded improperly. (11 DCMR 199.1: FAR, Gross floor area) The FAR is greater than allowed in an R-5-D zone district and does not comply with Zoning Regulations.

(5) The SCHEDULE OF REQUIREMENTS FOR PARKING SPACES (11 DCMR §2101.1) The parking requirement is determined by use, District, and size. The claimed use of the structure is a Community based residential facility. The District (at the time of the application) was R-5-D. The claimed size of the facility is 130 residents, 102 units. The mandatory requirement for such a facility housing 16 or more persons is "As determined by the BZA." The determination of requirements for parking spaces does not comply with Zoning Regulations.

(6) No application for a building permit for a building or structure to be erected on or after May 12, 1958, shall be approved unless there is included with the plans for the building or structure a loading plan showing the location, dimensions, and grades of all loading berths, loading platforms and service/delivery loading spaces and approaches thereto in accordance with the provisions fo this chapter. (11 DCMR §§ 2200.2, 3201) The mandatory loading plan was not included with the application for the building permit. The Chief of the Zoning Review Branch testified that he did not send detailed plans (such as the curb cuts and driveway openings) to the Department of Public Works, as required by 11 DCMR §2204.13(e). In addition, the Appellant's exhibits show that the loading dock does not have unobstructed access to the building as required. (11 DCMR §2203.2) The off-street loading requirements do not comply with Zoning Regulations.

(7) The claimed use of the facility on the February 5, 2001 revised application is a community-based residential facility serving the handicapped, as that term is defined by the Fair Housing Act. The application is claimed as matter-of-right use for R-4 zone distr5icts and higher under 11 DCMR §330.5(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)

The Board finds that:

(1) The Zoning Administrator did not make the mandatory determination of the intended

use of the building but relied on a letter that claimed that use. The letter was signed in December, 1999, by a previous employee who did not see the instant application. The stated use changed several times between the December 1999 letter and the revised application, February 5, 2001, which claimed the matter-of-right use under 11 DCMR §330.5(i). A matter-of-right use has not been determined by the Zoning Administrator as is required under 330.5(I).

(2) The facility occupies a lot which is situated in both R-2 and R-5-D zone districts. The R-2 lot is included as an integral part of this development. Various plans show loading dock, trash, handicap ramp/loading ramp, continuation of retaining walls, and garden for use of the residents to be located on this lot. Under 11 DCMR §§ 303 and 2514.2, the stated use as a community residence facility housing 130 residents is not a matter-of-right use in an R-2 district and must obtain a special exception from the Board of Zoning Adjustment.

The application does not comply with a matter-of-right use in for a R-2/R-5-D zoned property.

(8) 11 DCMR §3204 states that the application shall be complete for purposes of evaluation in order to hold vesting rights.

To hold vesting under a given zoning district, an application, an application shall be accompanied by the plans and other information required by §3202.2, which are sufficiently complete to permit processing without substantial change or deviation, and by any other plans and information which are required to permit complete review of the entire application under any applicable District of Columbia regulations. (§3202.5) And §3202.2 mandates:
To determine compliance with the provisions of this title, each application for a building permit shall be accompanied by any of the following that is deemed necessary:

(a) Scaled drawings showing the following:

(1) The exact shape, topography, and dimensions of the lot to be build upon;

(2) The plan, elevation, and location by dimensions of all existing and proposed structures, and the proposed use of those structures;

(3) The parking and loading plans and the basis for computation of those plans; and

(4) Other information necessary to determine compliance with these regulations; and

(b) An official building plat, in duplicate, prepared by the Surveyor of the District of

Columbia, upon which the Applicant shall indicate in ink and to the same scale dimensions of the following;

(1) All existing and proposed structures;

(2) The number, size, and shape of all open parking spaces, open loading berths, and approaches to all parking and loading facilities, and

(3) Other information necessary to determine compliance with the provisions of this title.

A Set Down hearing by the Zoning Commission for a zone district classification amendment which included the subject property occurred on October 16, 2000. A claimed matter-of-right use was not supplied until a revised building permit application was filed on February; 5, 2001. Other mandatary information missing from the application included delivery and loading plans and the basis for computation of those plans; and basis for computing parking requirements. At this time, there was a pending proceeding before the Zoning Commission to consider an amendment of the zone district classification of the site of the proposed construction from R-5-D to R-3. In such case, any work authorized by the permit may be carried to completion, only in accordance with the zone district classification of the site pursuant to the final decision of the Zoning Commission in the proceeding, or in accordance with the most restrictive zone district classification being considered for the site. (§3202.5(b) As the application was not complete as required for evaluation before a Set Down hearing for the amendment of the zone district, this application is not vested in the higher density zone (R-5-D) in effect before the Set Down hearing.

CONCLUSION

The Board concludes that the Building Permit No. B435464 issued by the Zoning Administrator of the Department of Consumer and Regulatory Affairs is not in compliance with the Zoning Regulations and was issued in error. It is hereby ORDERED that the appeal be SUSTAINED.

ShawPittman LLP
A Limited Liability Partnership Including Professional Corporations

MAUREEN E. DWYER
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August 31, 2001

By Facsimile

Sheila Cross Reid
Chairperson
District of Columbia Board of Zoning Adjustment
441 Fourth Street, N.W.
Suite 210-S
Washington, DC 20001

Re: BZA Appeal No. 16716

Dear Ms. Reid and Members of the Board:

Sunrise Assisted Living, owner of the property which is the subject of the above referenced appeal, strongly objects to including in the record the latest filing by the Nebraska Neighborhood Association ("NANA"). Sunrise requests that NANA's filing be stricken from the record or, in the alternative, that the illustrative exhibit filed by Sunrise on August 28 (which is the subject of NANA's filing) be stricken from the record. This case is ready for decision. Specifically, Sunrise submits:

1. The record in this case was closed at the conclusion of the hearing, with the exception of specific, limited, information. All of that information was filed in the record by August 28, and the record was officially closed. Accordingly, the materials filed by NANA should be returned to them and not accepted into the record.

2 In its filing, NANA attempts to raise issues concerning what they perceive to be discrepancies between the illustrative penthouse exhibit filed by Sunrise on August 28 and the building permit plans which are the subject of the appeal. The exhibit filed by Sunrise was simply an illustrative detail of the elevator penthouse and was intended to be helpful. Since this illustrative exhibit is confusing to the appellant, then Sunrise requests that it be stricken from the record.

3. Sunrise stands by the permit plans which were reviewed and approved by the city, and the BZA's decision will be based on the 178 pages of permit drawings.

BZA
Case No. 16716
Exhibit No. 54

ShawPittman LLP

In summary, Sunrise requests that the Board make its decision based solely on the permit plans which accompanied the building permit which is the subject of the appeal. Sunrise is not requesting any changes to these permit drawings and believes that these drawings and the extensive expert testimony of record demonstrate that it is fully entitled to the building permit which was correctly reviewed, approved, and issued by the city.

Respectfully submitted,

SHAW PITTMAN

By _____
Maureen E. Dwyer

By _____
Allison C. Prince

By _____
Paul A. Tummonds

cc: All Parties

Document #: 1159093 v.1

ShawPittman LLP

A Limited Liability Partnership including Professional Corporations

FAX COVER PAGE

FROM: Maureen E. Dwyer

DATE: August 31, 2001

TOTAL PAGES (INCLUDING COVER): 3

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Please deliver to the following people in your organization

NAME	ORGANIZATION	PHONE #	FAX #
Jerrily Kress	Board of Zoning Adjustment		(202) 727-6072

TEXT:

Our response to NANA. (Please note that we were not even served a copy of their filing!)

If you do not receive all pages, please call 202.663.8613

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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

BZA Case No. 16716A Exhibit No. 55

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
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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
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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
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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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Office of Zoning

BZA APPEAL NO. 16716A

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BZA
Case No. 16716A
Exhibit No. 56

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

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

In Re: 5111 Connecticut Ave., N.W. Square 1989, New Lot 162 Previous Lots 49-57 & 161	)	BZA Appeal No. 16716
Appeal of:	)	
Nebraska Avenue Neighborhood Association	)	
Advisory Neighborhood Commission 3G	)	

GOVERNMENT OF THE DISTRICT OF COLUMBIA
SEP 25 PM 3:41

Motion for Reconsideration
Submitted by ANC 3G

Advisory Neighborhood Commission 3G respectfully submits this motion for reconsideration of the Decision and Order dated October 12, 2001, in BZA Appeal No. 16716, an appeal of a decision by the Zoning Administrator to issue a building permit to Sunrise Assisted Living Facility to construct a building at 5111 Connecticut Avenue, N.W. As grounds for this motion, ANC 3G contends that the decision contains material inconsistencies and factual errors and omissions. As a consequence, the findings and conclusions are not supported by the record. Our specific assertions of error are summarized below.

ELEVATOR PENTHOUSE

(1) The findings concerning the elevator penthouse structures are materially inconsistent in that they make contradictory findings as to the nature of the rooftop structure housing the elevator machinery.

> Findings 26 and 49 indicate that this rooftop structure is a penthouse. In accordance with these findings, the decision concludes that the penthouse qualifies for the excess FAR for penthouses (Finding 26) and is not subject to the building height limitation (Finding 49). Further, Findings 53 and 54 assert that the elevator penthouse meets the requirement of 11 DCMR § 411.3 concerning placement of penthouses within a single enclosure.
>
> In direct contradiction, Finding 56 concludes that the rooftop structures are not penthouses at all but that the elevator equipment is instead an elevator tower housed within an "architectural embellishment." In addition, Findings 56 and 60 assert that the elevator penthouse is not subject to the penthouse setback requirement of 11 DCMR § 400.7.

BZA
Case No. 16716
Exhibit No. 57

(2) The "architectural embellishment" said to contain the elevator penthouse is also described in materially contradictory fashion.

In some findings the architectural embellishment is said not to constitute usable space (Finding 28) and not to constitute habitable space (Finding 50).

In other findings it is conceded that the architectural embellishment has a functional use of housing mechanical equipment (Finding 57), has a dual function (Finding 58), and has a "functional duality" (Finding 62).

A structure that is used for functional purposes and that is conceded to have more than a purely decorative function cannot properly be considered an architectural embellishment within the meaning of the zoning code.

(3) The decision erroneously relies on previous errors made by the Zoning Administrator.

As support for the erroneous conclusion that the elevator penthouse need not comply with some of the penthouse requirements in 11 DCMR § 411, the decision relies on similar rulings by the Zoning Administrator wherein architectural embellishments housing mechanical equipment were not set back from the edge of the roof, as required by 11 DCMR § 411 (Finding 59).

Previous errors by the Zoning Administrator cannot support the BZA's approval of an error in the instant case. Indeed, this pattern of repeated errors in rulings by the Zoning Administrator (none of which, apparently, was previously challenged) argues not for a continuation of mistakes but for an emphatic reversal by the BZA. The BZA should correct the Zoning Administrator's erroneous interpretation and application of these zoning code provisions.

FAR NONCOMPLIANCE – BASEMENT

(4) The decision contains erroneous conclusions concerning the inclusion of a ceiling at the basement level of the building.

Findings 30 and 33 indicate that only 11.9 percent of the lower level constitutes basement space (Finding 30) and that the percentage of basement space calculated by the ANC was incorrect (Finding 33). Further, Finding 33 states that the ANC incorrectly measured from adjacent finished grade to the underside of the slab rather than to the finished ceiling.

Nothing in the building plans submitted to the Zoning Administrator shows a basement ceiling in the lower level. To the contrary, the Longitudinal Building Section included in the record (NANA Volume II, Page 9) clearly shows ceilings on every floor except the basement level.

It was unreasonable and erroneous for the Zoning Administrator to assume the building would include a ceiling at the basement level in the absence of any indication on the building plans that the basement level would include a ceiling and in view of the fact that the inclusion of a ceiling on a basement level is an unnecessary expense that almost all builders choose to forego.

Although an expert witness for Sunrise referred to a basement ceiling, he failed to indicate anywhere on the plans the existence of a ceiling or provide any other basis for his assertion, which constitutes mere speculation. Moreover, this oral testimony was not available to the Zoning Administrator to serve as a basis for measuring the basement perimeter and calculating the building's FAR. It is also telling that neither Sunrise's own architect nor its vice president, both of whom testified under oath, stated that the basement level includes a ceiling.

(5) Taking into account a hypothetical ceiling at the basement level, the building mass still exceeds the 3.5 FAR limit.

Even assuming (contrary to the building plans) that a ceiling were built at the basement level, a substantial portion of the lower level perimeter would still qualify as basement space within the meaning of the zoning code. The grading plan clearly indicates that approximately 20 to 25 percent of the perimeter – not 11.9 percent as asserted by Sunrise and assumed by the Zoning Administrator – is more than four feet above the adjacent finished grade.

Even assuming a hypothetical ceiling, the basement floor area would be 3,000 to 4,000 square feet, not the 2,180 square feet assumed by the Zoning Administrator. Adding the minimal 820 square feet (3000 minus 2,180) to the building mass assumed by the Zoning Administrator (80,870) results in a FAR of 3.54, in excess of the maximum 3.5 (81,690 divided by 23,107 = 3.54).

REAR YARD SETBACK

(6) The decision erroneously denied the existence of an ANC report in this case and ignored the specific factual findings made by the ANC.

The section on page 3 of the decision headed ANC Report states, erroneously, "There is no ANC report in this case."

ANC 3G submitted an ANC report in a letter dated June 25, 2001, to the BZA. The ANC 3G report included a specific factual finding that the rear property line for this building lot "extends along the entire elngthy of the rear alley and alley stub, roughly parallel to and the same length as the front property line along Connecticut Avenue, which extends to the corner with Chevy Chase Parkway."

(7) The decision fails to accord the findings of ANC 3G the statutorily required "great weight" to which they are entitled.

The Zoning Administrator implicitly found that the rear property line consisted of one short, straight segment extending less than half the full width of the lot. In contrast, the Zoning Administrator implicitly found that the north side property line consisted of seven distinct segments and four 90-degree turns.

These findings are in complete contradiction to the findings of ANC 3G as to the rear property line of this lot and are, on their face, unreasonable. If the ANC's findings are given great weight, as required, the unreasonable determinations of the Zoning Administrator must be set aside and the permit revoked for failure to provide an adequate rear yard setback along the full width of the rear property line.

(8) The BZA decision also ignores the erroneous assessment by the Zoning Administrator as to the side yard setback requirement.

The BZA decision makes no finding as to the north side property line but instead notes only that the building's north wall extends along the boundary line separating the R-5-D and R-2 lots (Finding 43). The decision thus ignores the fact that the north side property line is on the eastern edge of the R-2 lot. As a consequence, a portion of the building is on the north side property line while other portions of the building are set back from the north property line.

Although no side yard is required in and R-5-D zone, where one is provided it must meet minimum setback requirements along its full extent (Finding 37). The BZA decision ignores the fact that north side yard for this property fails to satisfy this zoning code requirement.

For the foregoing reasons, ANC 3G respectfully urges the BZA to correct these errors and inconsistencies, to issue a revised decision reflecting the actual facts in the record of this matter, and to revoke the building permit erroneously issued by the Zoning Administrator.

Respectfully submitted,

Joseph L. Bishop

Joseph L. Bishop
Vice Chair, ANC 3G

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

District of Columbia Board of Zoning Adjustment
Room 210
441 4th Street, N.W.
Washington, D.C. 20001

October 25, 2001

RE: BZA Appeal No. 16716
5111 Connecticut Avenue, N.W.
Request for Re-review/Further Hearing

Dear Members of the Board:

On behalf of the Nebraska Avenue Neighborhood Association (NANA), an Appellant in the above referenced appeal, this is a request for the Board to re-review, reopen the record and require further hearing on designated issues, as provided in 11 DCMR §3126.2. The instant appeal challenges the issuance of building permit No B435363 to build a community residence facility on this property. The appeal was heard on August 3, 2001. The Board voted to deny the appeal at a public meeting held on Sept 4, 2001 and not to re-review the appeal on October 2, 2001. The order was issued on October 12, 2001 and received by NANA on October 15, 2001.

I. As grounds for further review, reopening the record and/or rehearing, this Appellant states as follows:

A. We have carefully reviewed the record in this case, including transcripts of the public hearings and public meetings at which the case was decided. The record reflects that the Board erroneously :

(1) relied and based its decision on new evidence provided after the public hearing which was not available to Appellants for cross-examination;

BZA
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Exhibit No. 58

(2) relied for its decision on erroneous information and testimony, unsubstantiated by evidence, provided by the Office of the Zoning Administrator (OZA) and the Intervener, and shown to be erroneous by evidence from official DCRA files (Testimony Aug 3) which was accepted into the record for case No. 16716;

(3) relied on erroneous interpretations of 11 DCMR presented by the OZA and the Intervener;

(4) relied on claimed "DCRA precedence," for which the city did not present evidence that could be evaluated by the appellants, instead of basing determinations on 11 DCMR;

(5) relied on exhibits provided by the Intervener which were prepared in July, 2001, after issuance of the permit, are not included in DCRA official files, and are in conflict with material in official DCRA files associated with the instant building permit application;

B. We are referencing and submitting new evidence added to the DCRA records for the subject development and which could not reasonably have been presented at the August 3, 2001 hearing.

II. The following briefly summarized the inherent errors in the hearing and decision-making process. Evidence which comprises copies of official DCRA records for building permit application No. 590AA, which was approved and led to Permit No. 16716, will be referred to as "DCRA records."

A. Limitation of basement contribution to FAR by claimed ceiling in the lower level (parking garage). The Intervenor's witness, Mr. Laurenco, testified that there is a ceiling in the basement, 4 feet below the lower surface of the 1st floor slab. The Board accepted existence of this ceiling as reason to deny the Appellants calculation of additional FAR contributed by the basement. This additional FAR contributed by the ground level put the FAR over the 3.5 limit for an R-5-D district. In fact, DCRA records, which show all ceilings at all levels of the building, demonstrate that there is no ceiling in the basement (Exhibit 42: building sections). The OZA failed to provide evidence that the plans show that there is in fact said ceiling in the basement/cellar level and that OZA calculations of the FAR reflect said ceiling. All the information the OZA provided to the Appellants contradicts that finding. Lacking said ceiling, the lower level basement contributes substantially more than required to bring the FAR above 3.5.

B. The main roof contains two structures including an elevator penthouse and combined stair penthouse and utility room. Parties agree that these structures are not set back from the exterior wall. Both the OZA testified that this is required of roof structures (Testimony,August 3, 2001). In new information contained in a letter from OZA to the BZA dated Aug.15, 2001, the OZA reversed its view and relied upon "prededence" to override 11 DCMR 400.7. Three District of Columbia addresses were cited as evidence of the "precedence of this doctrine" that the elevator penthouse is not subject to the setback requirements of Section 400.7(b) (Exhibit 49). The OZA failed to demonstrate the relevance of these three properties and did not present evidence that would demonstrate how these examples would relate to the building permit that is the subject of the instant appeal. The Appellant is entitled to review and cross examine on this new information on which the BZA relied for its Decision.

C. The OZA did not refer roof structure plans to the Office of Planning (OP), as mandatory by11 DCMR §411. It was also claimed that the OZA has not done that for several years (the period after the time Mr. Laurenco was Acting Zoning Adminsitrator) and has an agreement with OP not to do that. The OZA erred in not submitting roof structure plans to the OP and did not substantiate its testimony with documentation presented from the OP. The current OZA has failed to substantiate its own practice.

D. The OZA states that for corner lots, different streets may be used as front for the purpose of determining height versus determining building front. The OZA cites the existence of a standing BZA opinion to that effect (Testimony, page 173). The OZA, however, erred in interpreting that both Connecticut Ave. and Chevy Chase Parkway may be the front of the lot for purpose of determining building front (Testimony, page 172). That interpretation does not follow from the opinion allowing use of one street to measure height and another street as the front of the building. The OZA has failed to present evidence of BZA opinion relating to the interpretation in the instant case. The OZA's determination of the rear year setback is based on the interpretation that the building front for corner lots may be on two streets. This interpretation illogical result--lack of consistency in ability to interpret the rear of lots and/or structures.

III. Additional new Information:
On 9/27/2000, the **OZA assigned a new zoning district of R-5-D to the R-2 portion (former Lot No. 161) of the plat for the new subdivision (Lot 162)** which incorporates the previous Lots 49-57 and 161 into Lot 162. This effectively gives the entire new Lot 162 an R-5-D designation (copy attached). It is therefore unclear how the OZA evaluated the zoning district of the building permit application when approving the subject permit, if he believed the entire lot was zoned R-5-D. The OZA has not provided evidence of its specific method of evaluating the FAR for the basement (for example) to resolve this issue.

The OZA's references to use of CAD software and the perimeter method (testimony August 3, 2001) does not substantiate the method of calculating basement contribution to FAR. The OZA's attested to percentage (11.9%) does not agree with those in DCRA records (Exhibit No. 42). The OZA failed to present and justify the basis of its evaluation of FAR actually used in passing the permit of the instant appeal, especially in light of the OZA action to sign off on the lot as entirely R-5-D zoning district.

IV. The impact of changing the interpretion of the Zoning Regulations on future development throughout the District of Columbia: The Board must be cognizant of the effect of its ruling on the application on the Zoning Regulations across the city. For example, there are vast numbers of corner lots bordering on two streets for which there would be great confusion when both streets are defined as the front of the lot and building. The standing BZA opinion regarding the different fronts for the purpose of determining height and front of the building does not cover this situation. This decision sets a new precedent.

V. Impact of the OZA incorrectly assigning new zoning districts to plats for new subdivisions: The board must also be cognizant of the effect of the OZA assigning new zoning district to plats prepared by DCRA. The information on certified copies the official plat from the surveyor's office is what zoning officials rely on in evaluating compliance with zoning regulations. The BZA would be setting new precedent by allowing or even appearing to allow OZA reliance on such documents in evaluating zoning compliance.

We therefore request the BZA to review, reopen the record, and schedule further hearing on the application, pursuant to 11 DCMR §3126.2. We believe that the following 3 issues are areas which the Board should address further through additional testimony and reevaluation:

1. FAR;
2. Roof structures, (setbacks and plan referral);
3. Rear yard setback.

Such hearing and reevaluation should address these issues in order for the Board to assess whether its present decision should stand.

Yours truly,

Anne Page Chiapella

Anne Page Chiapella, Ph.D.
President, Nebraska Ave. Neighbor Assn.

Attachments: Copy of new subdivision plat
List of errors

Cc: Michael Johnson (Zoning Administrator)
Marueen Dwyer (for Sunrise)
ANC-3G

The undersigned certify that they are owners in fee simple of the property to be subdivided and are in peaceful occupation thereof; that there [illegible] no pending suits or actions that affect title [illegible] property; that parties to any deeds of trust have hereon [illegible] their assent; and that there are no int[illegible] r claims affecting title to the property other than such dee[illegible]ust. The undersigned hereby combine [illegible],9 thru 57, Square 1989 (Book 77 Page 79) and Lot 161, Square 1989 (Book 170 Page 26) into one Lot and request that this subdivision be recorded in the Office of the Surveyor of the District of Columbia.

WITNESSES	OWNERS
	SUNRISE CONNECTICUT AVENUE ASSISTED LIVING, LLC BY: SUNRISE DEVELOPMENT, INC,ITS SOLE MEMBER
	HARLEY D. COOK - EXECUTIVE VICE PRESIDENT
	SEAN P. M. AMBROSE - VICE PRESIDENT
	LOUIS REYES
	SUNNY REYES
	DIANA W. McKINNEY
	HELEN K. DYER
	WILLIAM R. DYER

Subscribed and sworn before me this 13th day of September 20 00

Notary Public

My Commission Expires

Melanie A. Fonse
Notary Public
Commonwealth of Virginia
My Commission Expires Nov. 30, 2002

NUMBER OF TRUSTS: 0

ASSENT BY TRUSTEES:

SURVEYOR'S OFFICE, D.C.

Made for: WILKES, ARTIS, REDRICK & LANE

Drawn by: L.E.S. Checked by: F.S.

Record and computations by: F. SLEEM

Recorded at: 8:55 AM September 29 2000

Recorded in Book 194 Page 37 S.O. 9878

Scale: 1 inch = 30 feet File No.

DEPARTMENT OF FINANCE AND RE

9/

I certify that the following statements relating to this subdivisi

1 Ownership agrees with our records: 9/25

2 Real estate taxes are paid to: 9/31

3 There are no unpaid assessments: 9/25/0

Associate Director, Office of Real P

I acknowledge for the owners that this is not a tax certificate by D.C. Code Section 47-405.

DEPARTMENT OF CONSUMER AND REGULATORY A

9/27

I certify that this subdivision complies with all applicable provisions o Zoning Regulation of the District of Columbia.

Zoning District: R-5-D

DCRA Zoning Administr

27 Sept

N/a
HISTORIC PRESERVATION

OFFICE OF THE SURVEYOR

September 29

I certify that this plat is correct and is hereby recorded.

Surveyor, D.C.

ERRORS IN PROCESSING 590AA

DCRA/OZA committed numerous errors which speak to the reliability of the review process for Building Permit Application No. 590AA. Errors are documented in Exhibit 28, Appendix D–Application 590AA, or as otherwise noted. Errors include:

- Acceptance of the application and fee without clearance to file plans, including Zoning
- Acceptance of the application for processing without a 11 DCMR-approved use designation . Note that the application was not approved by zoning officials until after resubmission, Feb. 5, 2001.
- Accepting the application without the required plat (Exhibit 48)
- Assigning wrong zoning district (R-5-E) on the initial application
- Accepting application with crossed out and altered information
- Assigning wrong zoning district on new subdivision plat (attachment)
- Accepting Environmental Screening Impact Form with obviously inaccurate information (Exhibit 28, Appendix F)
- Not requiring applicant to answer all Plan Correction List Items (Exhibit 48, Appendix E, page 1: 11-16-01: Show penthouse setback)
- Fire Prevention Plan Review approval of plan lacking 2 required emergency exits (Exhibit 28, Appendix E, page 6: Revised 590-AA application)
- Structural Eng. approval of plan lacking 2 required emergency exits (Exhibit 28, Appendix E, page 6: Revised 590-AA application)

Chevy Chase
Advisory Neighborhood Commission 3G
MAILING ADDRESS: P.O. BOX 6252 Northwest Station Washington, DC 20015

CHEVY CHASE OFFICE
5601 Connecticut Ave. NW
Washington, DC 20015
(202) 363-5803
FAX (202) 686-4366
E-Mail uppernwdc@juno.com

Certificate of Service

I herby certify that a copy of the ANC 3G Motion for Reconsideration, dated October 24, 2001, BZA appeal No 16716 was sent by first class mail as follows:

Thursday October 25, 2001 to:

Ms. Maureen E. Dwyer
Shaw Pittman
2300 N Street, NW
Washington DC 20037-1128 FAX 663-8007

Saturday, October 27, 2001 to:

Zoning Administrator
Department of Consumer and Regulatory Affairs
Building and Land Regulation Administration
941 North Capital Street, NE, Suite 2000
Washington DC 20009 FAX 442-4871

Allen E. Beach
Secretary
ANC 3G

October 29, 2001

Cc: Office of Zoning FAX 727-6072

16716

Government of the District of Columbia

OFFICE OF ZONING

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

October 26, 2001

Joseph L. Bishop
Vice Chairman
Advisory Neighborhood Commission 3G
Chevy Chase Community Center
P.O. Box 6252
Washington, D.C. 20015

Marilyn Holmes
Single Member District Commissioner 3G 07
Advisory Neighborhood Commission 3G
3700 Military Road, N.W.
Washington, D.C. 20015

Re: BZA Appeal No. 16716 (Sunrise) Motion for Reconsideration

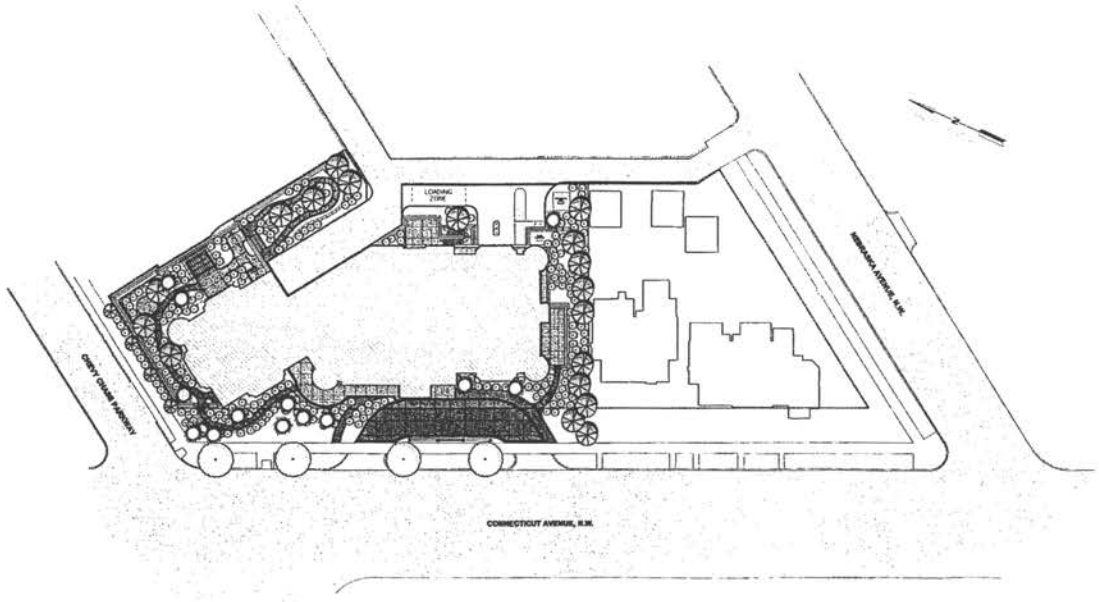
Dear Vice Chairman Bishop and Commissioner Holmes:

The Office of Zoning is in receipt of the Motion for Reconsideration filed on October 25, 2001, by Advisory Neighborhood Commission 3G in the above-referenced matter. This letter is to advise you that the ANC must serve the other parties (Sunrise attorneys and the Zoning Administrator) in this matter and provide a certificate of service to this office in order for the motion to be considered by the Board of Zoning Adjustment at its public meeting on November 6, 2001.

Please call the Office of Zoning on (202) 727-6311, if you have any questions or require further assistance in this matter.

Sincerely,

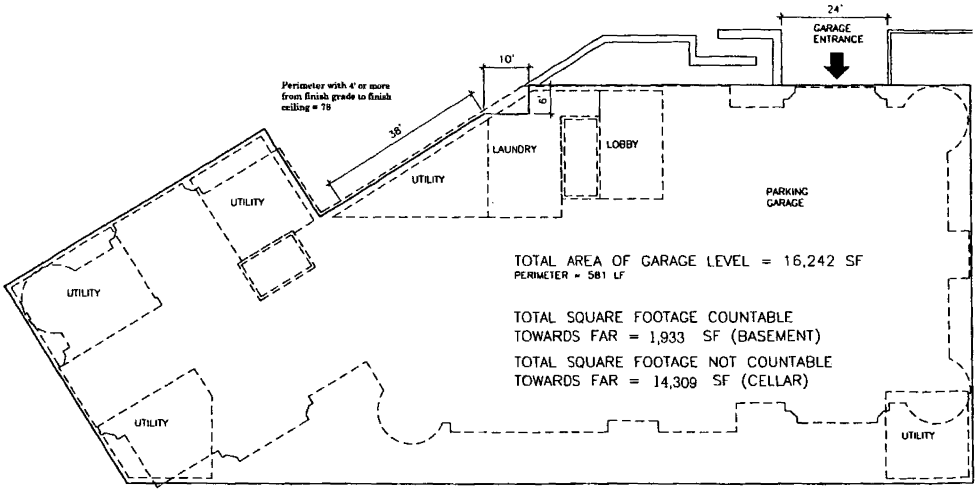
JERRILY R. KRESS, FAIA
Director



SUNRISE
CHEVY CHASE, WASHINGTON, DC

GREEN SPACE PLAN

1"=20'-0"



78 L.F. / 655 L.F. = 11.9%
16,242 SF x 0.119 = 1,933 SF

5111 CONNECTICUT AVENUE

GARAGE LEVEL PLAN

SUNRISE
CONNECTICUT AVENUE, WASHINGTON, DC

1/8"=1'-0"

ShawPittman LLP

A Limited Liability Partnership Including Professional Corporations

November 5, 2001

BY HAND DELIVERY

Mr. Geoff Griffis, Chairman
District of Columbia Board of Zoning Adjustment
441 4th Street, N.W., Suite 210
Washington, D.C. 20001

Re: Sunrise Connecticut Avenue Assisted Living LLC
5111 Connecticut Avenue, N.W. - BZA Appeal No. 16716
Opposition to Motions for Reconsideration

Dear Mr. Griffis and Members of the Board

Sunrise Connecticut Avenue Assisted LLC ("Sunrise") opposes the Nebraska Avenue Neighborhood Association ("NANA") request for re-review, reopening of the record and further hearings dated October 25, 2001 and Advisory Neighborhood Commission ("ANC") 3G's Motion for Reconsideration filed with the Board of Zoning Adjustment ("Board") on October 25, 2001. None of the issues warrants reconsideration or rehearing. Sunrise's response to these issues are briefly summarized here and addressed in greater detail below.

- **FAR CALCULATION** - The Office of the Zoning Administrator had all relevant information regarding the building, including the inclusion of plans that show a ceiling on the basement level, necessary to make a proper calculation of the building's FAR. The Office of the Zoning Administrator and the Board of Zoning Adjustment ("Board") correctly concluded that the building's FAR satisfies the requirements of the Zoning Regulations for the R-5-D District.

- **ROOF STRUCTURES AND REFERRAL TO OFFICE OF PLANNING** – NANA had an opportunity to respond to the information provided by the Zoning Administrator regarding the architectural embellishments on the roof and did not. The Board's order clearly and comprehensively outlines the basis for its agreement with the Zoning Administrator's approval of the building's roof structures.

- **REAR AND SIDE YARD SETBACK** – The Board has received a great deal of information regarding these issues and the Board's order reflects a thorough analysis of the arguments raised by NANA and the ANC and the Board properly supported the Zoning Administrator's decision.

16716
62

2300 N Street, NW Washington, DC 20037-1128 | 202.663.8000 Fax: 202.663.8007 | www.shawpittman.com | Washington, DC Northern Virginia New York Los Angeles London

None of the arguments made in NANA's or ANC 3G's requests for reconsideration and additional hearings provide an appropriate basis for reversing the Board's previous decision in this case. Accordingly, the Board should deny the motions for reconsideration and rehearings.

RESPONSE TO NANA REQUEST FOR RE-REVIEW, REOPENING OF THE RECORD AND FURTHER HEARING ON DESIGNATED ISSUES

All of the issues raised by NANA were fully reviewed by the Board and appropriately addressed in its order in BZA Appeal No. 16716A. Moreover, NANA's request for a rehearing should be denied as NANA has not satisfied the requirements of 11 DCMR §3126.6. This Section of the Zoning Regulations requires that:

> No request for a rehearing shall be considered by the Board unless new evidence is submitted *which could not reasonably have been presented at the original hearing.* (Emphasis added.)

NANA has failed to offer any grounds for the new hearing that it has requested. It has failed to offer any new evidence or explain why it was unable to present such evidence at the public hearing in this case on August 3, 2001. Accordingly, NANA's request for a rehearing should be denied.

A. Floor Area Ratio ("FAR") Calculation

NANA ARGUMENT

NANA claims that the building permit plans submitted by the property owner to DCRA did not depict a ceiling in the basement level and thus the basement FAR calculations and total building FAR calculations were erroneous.

SUNRISE RESPONSE

NANA's assumption that the Zoning Administrator did not have all of the information that was necessary to make an accurate calculation of the building's FAR is incorrect. The building permit plans submitted to DCRA include a series of ceiling plans that are included in the 600 level sheets of the building permit application submission, rather than the building section plans.

The Board had before it a significant amount of information regarding the issue of whether the building satisfies the FAR limits for the R-5-D zone. The Board's order ultimately includes 10 findings of fact regarding this issue and in its Conclusions of Law and Opinion, the Board "concludes that the FAR has been properly calculated and fully complies with the 3.5 FAR limit applicable in the R-5-D zone." There is no need for the Board to re-review the

information in the record of this case regarding the FAR calculation. The Board made a correct an appropriate determination based on all relevant information.

B. Elevator Penthouse and Rooftop Mechanical Equipment; Roof Plan Referral to the Office of Planning

NANA ARGUMENT

NANA is concerned with the fact that the Office of the Zoning Administrator made reference to other buildings in the District of Columbia that had similar architectural embellishments on their roofs. NANA requests that the Board reopen the record to "entitle [NANA] to review and cross examine on this new information on which the BZA relied for its Decision."

SUNRISE RESPONSE

The Board accepted and heard extensive written and oral testimony on the subject of the elevator penthouse and rooftop mechanical equipment. In its Conclusions of Law and Opinion the Board agreed with the interpretations of the Chief of the Zoning Review Branch of DCRA and the Zoning Administrator regarding the appropriateness of the architectural embellishments and rooftop structures on the building.

There is no need for the Board to reopen the record and allow cross-examination on this issue. NANA was already given the opportunity to respond to the Zoning Administrator's submission (dated August 15, 2001) but did not respond to this submission prior to the closing of the record on August 28, 2001. NANA's request to reopen the record to allow cross-examination on this issue should be denied as it has already been given the opportunity to address this issue before the Board.

The Board previously determined that the failure of DCRA to refer the roof plans to the Office of Planning was mere harmless error and does not provide substantive grounds to revoke the building permit. The October 25, 2001 submission of NANA does not include any new or compelling evidence on this issue. Therefore, the Board should uphold its previous determination on this issue and should not grant the request for a new hearing.

C. Rear Yard Setback

NANA ARGUMENT

NANA argued that the Office of the Zoning Administrator made an erroneous decision when it determined both Connecticut Avenue and Chevy Chase Parkway to be the front of the building and thus the Zoning Administrator's decision regarding the rear yard setback of the building was also incorrect.

SUNRISE RESPONSE

NANA's arguments regarding the determination of the front of the building are confused, convoluted and provide no rationale for the Board to reverse its previous determination on this issue. The Board's order includes 12 Findings of Fact regarding the appropriateness of the Zoning Administrator's decisions regarding the rear and side yards for the project. The Board's Conclusions of Law state 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. NANA's request for additional hearings on this issue should be denied.

D. Additional New Information – Surveyor's Plat

NANA ARGUMENT

NANA's October 25, 2001 submission includes additional information that was not previously entered into the record of this case. NANA proposes to introduce into the record of this case a copy of the surveyor's plat for Lot 162, which includes the entire site.

SUNRISE RESPONSE

This evidence should be stricken from the record, as the record in this case was closed on August 28, 2001. Similarly, this information should not be used to grant a new hearing in this case as the Zoning Regulations clearly state that new evidence can only be used if it could not have reasonably been presented at the original public hearing. (See 11 DCMR §3126.6, quoted above).

The information included in the surveyor's plat was available to NANA for more than 10 months prior to the August 3, 2001 public hearing in this case. NANA did not present this information to the Board while the record in this case was open, and it has not made any argument as to why this information could not have reasonably been presented to the Board at the August 3, 2001 public hearing. NANA has once again failed to satisfy the Zoning Regulations requirements for granting a rehearing of this case.

ANC 3G MOTION FOR RECONSIDERATION

ANC 3G's Motion for Reconsideration does not include any compelling or new evidence that warrants a reversal of the Board's previous decision in this case. The Board should reject the ANC's motion for the reasons outlined below.

A. Elevator Penthouse

ANC ARGUMENT

The ANC's Motion for Reconsideration claims that the Board's findings are materially inconsistent and contradictory in regards to the elevator penthouse and roof structures on the building. The ANC also reiterates its argument that an architectural embellishment can not have a functional purpose.

SUNRISE RESPONSE

The Board's Findings of Fact and Conclusions of Law are entirely consistent and well-reasoned. The ANC fails to comprehend that the roof structures that are located on this building include both architectural embellishments and a single penthouse structure as permitted by the Zoning Regulations. The issue of whether an architectural embellishment can also have a functional purpose was thoroughly presented to the Board and addressed by the Office of the Zoning Administrator in its submission to the Board on August 15, 2001. The Board had substantial and substantive information before it when it made its decision on this issue. There is no reason for the Board to reverse its previous decision on this issue.

B. FAR Non-Compliance – Basement

ANC ARGUMENT

The ANC claims that the building permit drawings did not depict a ceiling in the basement level of the building and thus the calculation of the building's FAR was incorrect.

PROPERTY OWNER RESPONSE

As previously discussed, the building permit plans submitted to DCRA include a series of ceiling plans that are included in the 600 level sheets of the building permit application submission. During the public hearing process, the Office of the Zoning Administrator, the property owner's architect and the property owner's zoning expert all testified that the FAR calculations for the building were properly made and that the building fully conforms with the FAR limitations of the R-5-D. The Board should affirm its previous decision on this issue.

C. Failure to Give Great Weight to the ANC's Position

ANC ARGUMENT

The ANC claims that the Board failed to give the findings of ANC 3G the statutorily required "great weight" to which they are entitled.

SUNRISE RESPONSE

The ANC makes this argument in part by quoting only a portion of the Board's order. The ANC's Motion for Reconsideration states: "The section on page 3 of the decision headed ANC Report states, erroneously, 'There is no ANC report in this case.'" (ANC 3G Motion for Reconsideration at page 3.). Interestingly, the ANC's Motion fails to include the next sentence of the Board's order which states: "ANC 3G presented testimony and argument at the hearing." (BZA Appeal No. 16716A at page 3). The ANC's position that the Board failed to give great weight to the ANC's views in this appeal is absurd. The Board was well aware of the ANC's position in this case, as it noted on the very first page of the Order that the ANC was a party to the appeal.

The Board's order in this case clearly gave "great weight" to the ANC's position. The District of Columbia Court of Appeals has determined that: "The BZA is . . . required to give 'great weight' to the concerns of Advisory Neighborhood Commissions," the Court explained that the agency may ultimately accept or reject the ANC's views:

> An agency must elaborate, with precision, its response to the ANC issues and concerns . . . . [T]he agency must articulate why the particular ANC itself, given its vantage point, does—or does not—offer persuasive advice under the circumstances . . . . [W]e believe that 'great weight' implies explicit reference to each ANC issue and concern as such, as well as the specific findings and conclusions with respect to each.

Glenbrook Rd. Ass'n, 605 A.2d at 34 (quoting Kopff v. D.C. Alcoholic Beverage Control Board, 38 A.2d 1372, 1384 (D.C. 1977). The BZA "is not obliged to follow the ANC's recommendations or adopt its views." Draude v. District of Columbia Board of Zoning Adjustment, 582 A.2d 949, 953 (D.C. 1993).

The BZA's order in this case fully satisfies the legal requirements established by the District of Columbia Court of Appeals. The Board's 17-page order, includes 73 Findings of Fact, and Conclusions of Law that detail its reasoning and decision on each of the issues raised by the ANC. Moreover, the order includes the following language:

> 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. (BZA Appeal No. 16716A at p. 15).

The Board gave the ANC's positions the statutorily required "great weight" and the ANC's motion for reconsideration on this issue should be denied.

D. Rear and Side Yard Setback

ANC ARGUMENT

The ANC's arguments regarding the building's rear and side yard's are mere recitations of the arguments that were made during the public hearing and were included in the record of this case.

SUNRISE RESPONSE

The Board's order includes 12 Findings of Fact regarding the appropriateness of the Zoning Administrator's decisions regarding the rear and side yards for the project. The Board's Conclusions of Law state 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 ANC's arguments should be denied and the Board should affirm its previous decision on this issue.

CONCLUSION

The Board's decision evidenced in BZA Appeal No. 16716A clearly and thoroughly outlines the reasoning for its decision to deny the appeal of NANA and ANC 3G. We respectfully request that the Board deny these requests so that the Sunrise can proceed with its development of this project.

Very truly yours,

Maureen E. Dwyer

Allison C. Prince

Paul A. Tummonds, Jr.

cc: See attached Certificate of Service

Certificate of Service

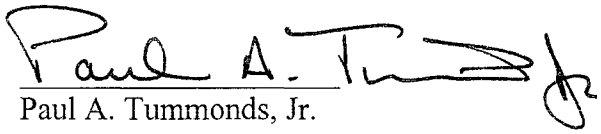
I hereby certify that a copy of the foregoing Opposition to Motions for Reconsideration, was delivered by hand on this 5th day of November, 2001, to the following:

Anne Paige Chiapella
President, Nebraska Avenue Neighborhood Association
5126 Nebraska Avenue, NW
Washington, DC 20015

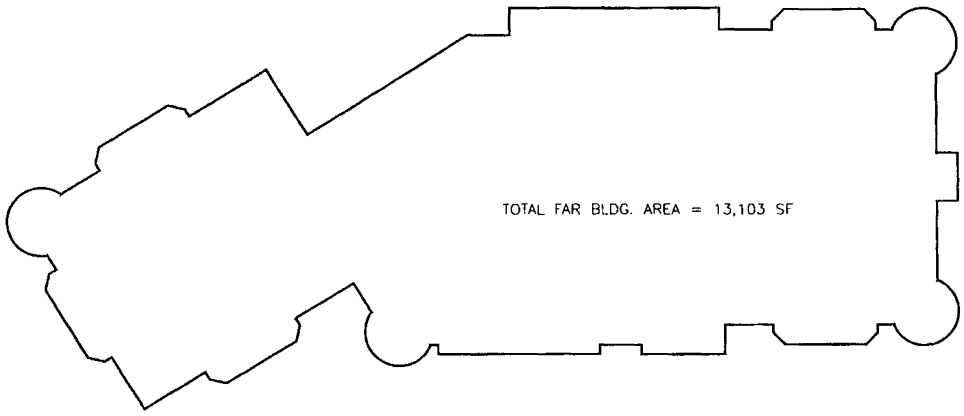
Joseph Bishop, ANC 3G
3210 Chestnut Street, NW
Washington, DC 20015

Marilyn Holmes, ANC 3G
3700 Military Road, NW
Washington, DC 20015

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



Paul A. Tummonds, Jr.

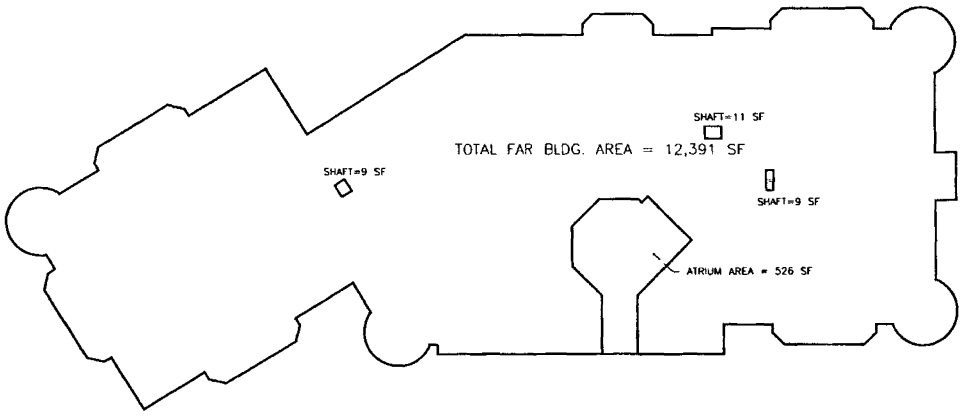


5111 CONNECTICUT AVENUE

1ST FLOOR PLAN

SUNRISE
CLARENDON AT WASHINGTON, DC

1/8"=1'-0"



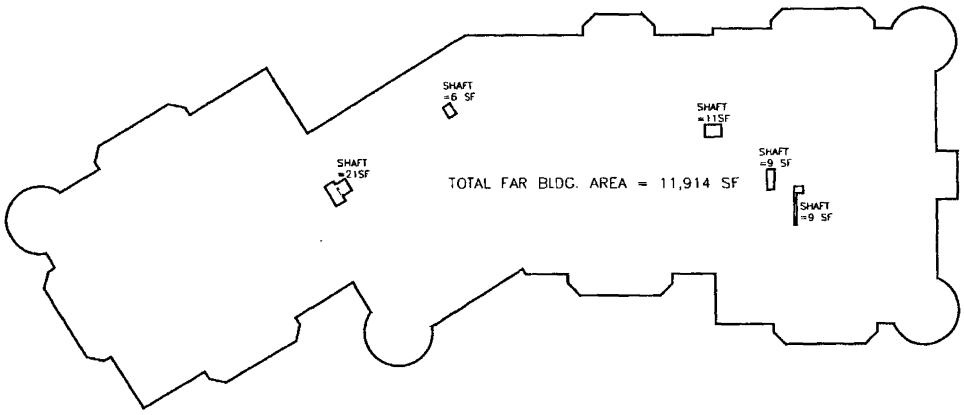
12,917 SF		TOTAL BLDG.
–	29 SF	SHAFTS
–	526 SF	ATRIUM
12,362 SF		ACTUAL FAR BLDG. AREA

5111 CONNECTICUT AVENUE

2ND FLOOR PLAN

SUNRISE

1/8"=1'-0"



11,914 SF	TOTAL BLDG.	
– 56 SF	SHAFTS	
11,858 SF	ACTUAL FAR BLDG. AREA	

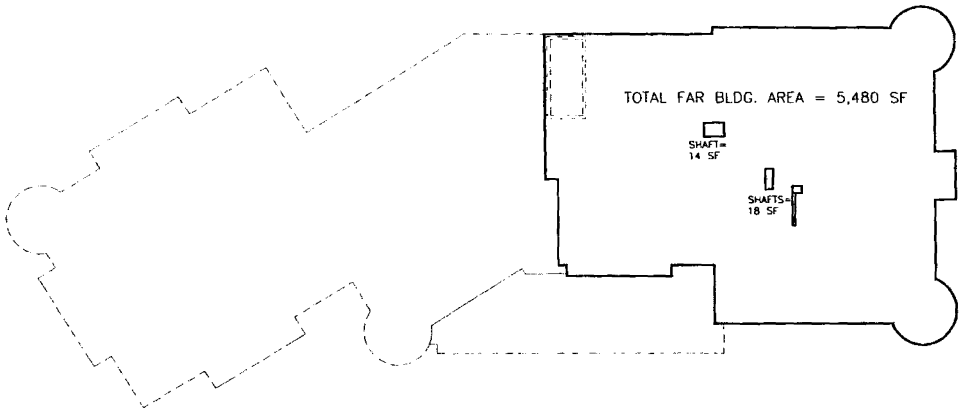
5111 CONNECTICUT AVENUE

3RD THRU 6TH FLOOR PLAN

SUNRISE
CONNECTICUT AVENUE, WASHINGTON D.C.

1/8"=1'-0"

BEERY RIO AND ASSOCIATES ARCHITECTS



5,480 SF	TOTAL BLDG.	
– 32 SF	SHAFTS	
5,432 SF	ACTUAL BLDG. AREA	

5111 CONNECTICUT AVENUE

7TH FLOOR PLAN

SUNRISE
Connecticut Avenue Washington, DC

1/8"=1'-0"

BEERY, RIO and ASSOCIATES ARCHITECTS