**BEFORE THE ZONING COMMISSION**
**OF THE DISTRICT OF COLUMBIA**

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

**Statement by ANC 3G**
**In Support of Sua Sponte Review**

Advisory Neighborhood Commission 3G respectfully submits this statement in connection with the Zoning Commission's sua sponte review of the Decision and Order by the Board of Zoning Adjustment dated October 12, 2001, in BZA Appeal No. 16716. This matter is 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. ANC 3G recommends that the Zoning Commission order revocation of the building permit on the following grounds: (1) its issuance was not in compliance with zoning requirements relating to penthouses; (2) the interpretation of zoning provisions relied on by the Zoning Administrator and the BZA violate fundamental principles of statutory and regulatory construction; and (3) its issuance violated a code procedural requirement in that the building plans were not referred to the Office of Planning before final approval of the roof structures plan.

(1) Noncompliance with Zoning Requirements

ANC 3G contends that this building permit was issued in error because the proposed building does not comply with zoning requirements applicable to penthouses.[1] The BZA decision to the contrary 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 set forth in more detail in the attached motion for reconsideration submitted to the BZA. See Attachment A. A summary follows:

(a) 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. Some findings indicate that the rooftop structure is a penthouse and that it complies with the code provision requiring placement in a single enclosure. These findings lead to the conclusion that the structure qualifies for the excess FAR for penthouses and is not subject to the building height limitation. In direct contradiction, other findings conclude that the rooftop structures are not penthouses at all but that the elevator equipment is instead an elevator tower housed within an "architectural embellishment"and that it is not subject to the penthouse setback requirement of 11 DCMR § 400.7.

[1] ANC 3G also contends that the building fails to comply with other important zoning requirements, including the FAR limitations and the rear yard setback requirement, and that the Zoning Administrator and the BZA failed to accord to ANC 3G's findings as to the rear property line the statutorily mandated "great weight" to which it is entitled. We respectfully suggest that the Zoning Commission expand its sua sponte review to include consideration of these legal violations as well, which are summarized in the attached motion for reconsideration submitted to the BZA. See Attachment A.

BZA
Case No. 16716
Exhibit No. 65

ZONING COMMISSION
District of Columbia
Case No. 01-26/16716
Exhibit No. 5

ZONING COMMISSION
District of Columbia
CASE NO.01-26
EXHIBIT NO.5

(b) 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 and not to constitute habitable space, but in other findings it is conceded to have a functional use of housing mechanical equipment. 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.

In addition to being inconsistent, the findings entered by the BZA (and implicitly made by the Zoning Administrator) are factually erroneous. It is clear from the building plans that the proposed rooftop structures are not housed in a single enclosure and that a roundabout perimeter "roof" that touches but does not cover or enclose these separate structures cannot operate to render them a single, integrated unit. Moreover, if such a non-functional perimeter roof were indeed part of the rooftop penthouse, then the penthouse would be even more seriously non-conforming with the zoning requirements in that it would have no setback from the ENTIRE perimeter of the building (rather than just one edge of the building) and it would appear to exceed the rooftop area permitted for such structures under the code.

Disregarding the perimeter roof and the single enclosure noncompliances, the structure housing the elevator machinery clearly violates the code's setback requirement because it is placed at the edge of the rear building wall. Placement of an "architectural embellishment" next to or around the elevator machinery does not alter the basic fact that the elevator machinery is not set back from the building edge as is clearly required.

(2) Flawed Interpretation of Zoning Code

The decisions by the Zoning Administrator and the BZA to issue and uphold this building permit both rest on an exceedingly flawed and legally improper interpretation of the zoning code provisions applicable to rooftop penthouses. Essentially, the Zoning Administrator and the BZA concluded that the rooftop penthouses did not need to comply with code provisions requiring that a penthouse be contained in a single structure and that it be set back from the building edge a distance equivalent to its height. See DCMR § 400.7.[1] Their reasoning was that the penthouse structures were contained in an "architectural embellishment," an undefined term that clearly refers to nonutilitarian, nonfunctional building enhancements. But this rationale is not simply a wrong-headed interpretation of the code provisions pertaining to architectural embellishments; it also has the effect of impliedly repealing the specific and explicit code provisions regulating rooftop penthouses.

This interpretation of the code violates three fundamental and longstanding principles of statutory and regulatory construction. First, principles of regulatory construction insist that an interpretation of code provisions attempt to give meaning to ALL provisions of the code to the extent possible. Under this precept, arguably conflicting provisions should be reconciled rather than ignored. This was certainly possible in this instance, as there is no reason the code could not have been interpreted BOTH to permit elevator and mechanical equipment to be housed in an architectural embellishment AND to comply with the specific provisions relating to penthouses (i.e., be housed in a single enclosure and set back from the building edge).

Second, under these well-established principles of construction, repeals by implication are greatly disfavored. Yet that is precisely what the Zoning Administrator and the BZA have done: they have repealed the explicit requirements relating to rooftop penthouses, even though neither is authorized to repeal provisions of the Zoning Code. More troubling is the fact that both entities cite to a pattern of similar decisions repealing these same provisions by allowing elevator penthouses to be housed in nonconforming architectural embellishments without meeting the explicit penthouse code standards (notably, it appears that none of these decisions was previously reviewed by the Zoning Commission). The Zoning Commission should act quickly and decisively to correct this pattern of erroneous interpretations and unauthorized actions.

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[1] Even so, they also concluded that the penthouse structures could benefit from the relaxed code provisions on FAR and building height that apply only to conforming penthouses – a material inconsistency that should not be allowed to stand.

Third, in the case of a conflict between a specific and a more general provision, fundamental principles of statutory construction require that the specific provision prevails. In this instance, the specific provision pertaining to rooftop penthouses was ignored in favor of reliance on a general and largely undefined reference in the code to architectural embellishments. Instead, officials should have done the reverse by giving effect to the specific rooftop penthouse requirements and setting aside the provisions pertaining to architectural embellishments to the extent they could not be reconciled.

(3) Violation of Procedural Requirement

Little discussion is required on this point, as both the Zoning Administrator and the BZA conceded that the building permit was issued without referring the rooftop plans to the Office of Planning for review. This review requirement is explicitly set out in the zoning code. The only explanation for failing to honor it was that it had been ignored on many other occasions as well – hardly a standard of public service to be endorsed by the Zoning Commission!

No doubt referral to the Office of Planning would have led to heightened scrutiny of the structures' nonconformance with code requirements. This would have spared the Zoning Administrator (and the BZA) of the awkward situation now before us, where the permit was issued with inadequate attention to regulatory requirements, obliging city officials to adopt belatedly the strained and disingenuous justification put forth by the applicant. Yet the applicant undoubtedly realized the nonconformance of its proposed structures from the first instance. The admitted failure of the Zoning Administrator to fulfill the review requirement should not be countenanced, particularly in view of its materiality in this instance, in that a referral would have resulted in either a denial of the permit or a revision of the building plans to render them conforming.

Conclusion

For the foregoing reasons, ANC 3G respectfully urges the Zoning Commission to reverse the decision of the Zoning Administrator and the BZA and to order revocation of the building permit erroneously issued by the Zoning Administrator. It would also be useful for the Zoning Commission to clarify its endorsement of the general rules of regulatory construction and the interpretation of the specific code requirements set forth above

Respectfully submitted,

Joseph L. Bishop /ars

Joseph L. Bishop
Vice Chair, ANC 3G

Attachment

cc: Maureen Dwyer, Esq.
Ellen McCarthy, Office of Planning
Michael Johnson, Zoning Administrator
Charlotte W. Parker, Esq, 441 4th St. N.W., Room 450

Attachment A

**BEFORE THE BOARD OF ZONING ADJUSTMENT**
**OF THE DISTRICT OF COLUMBIA**

| | | |
|---|---|---|
| In Re: 5111 Connecticut Ave., N.W.<br>Square 1989, New Lot 162<br>Previous Lots 49-57 & 161 | ) | BZA Appeal No. 16716 |
| Appeal of: | ) | |
| Nebraska Avenue Neighborhood Association | ) | |
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**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.

(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
Vice Chair, ANC 3G

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Certificate of Service

I herby certify that a copy of the ANC 3G statement by ANC 3G in support of Sua Sponte Review, BZA appeal No 16716 was sent by first class mail on Friday November 9, 2001 as follows to:

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Allen E. Beach
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ANC 3G

November 9, 2001
Cc: Office of Zoning FAX 727-6072

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(1) Noncompliance with Zoning Requirements

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[1] ANC 3G also contends that the building fails to comply with other important zoning requirements, including the FAR limitations and the rear yard setback requirement, and that the Zoning Administrator and the BZA failed to accord to ANC 3G's findings as to the rear property line the statutorily mandated "great weight" to which it is entitled. We respectfully suggest that the Zoning Commission expand its sua sponte review to include consideration of these legal violations as well, which are summarized in the attached motion for reconsideration submitted to the BZA. See Attachment A.

BZA
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FAX