

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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SPECIAL PUBLIC MEETING

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TUESDAY
JUNE 4, 2002

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The Public Meeting convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 2001, pursuant to notice at 1:00 p.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
ANNE MOHNKERN RENSHAW	Vice Chairperson
DAVID ZAIDAIN	Board Member, NCPC
CURTIS ETHERLY, JR.	Board Member
ANTHONY HOOD	Board Member

ZONING COMMISSION MEMBER PRESENT:

CAROL J. MITTEN	Commissioner
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C-O-N-T-E-N-T-S

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APPEAL NO. 16879
NEBRASKA AVENUE NEIGHBORHOOD ASSOCIATION
(SUNRISE)

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P-R-O-C-E-E-D-I-N-G-S

1:50 p.m.

CHAIRPERSON GRIFFIS: We'll call to order the Special Public Meeting of June 4, 2002 at one o'clock. Yes, sir. Could you turn on your mike.

DR. FRYE: I'm Doctor Frye. I'm here to file a verbal protest against BZA for letting Sunrise lawyers speak on last meetings. Your actions were arbitrary and a violation of our due process because we were not informed that the parties could speak. I'm from NANA, the Nebraska Association, and I'd like to make that. Thank you.

CHAIRPERSON GRIFFIS: Okay, and we appreciate you stating that. We have clearly not anticipated having testimony, but we had questions that did come up. We will make note of that protest. In fact, we don't have preliminaries in this. We're taking up just the motion that's before us.

It's a special public meeting which means it's straight deliberation.

PARTICIPANT: (Off mike question).

CHAIRPERSON GRIFFIS: No. In fact, your case, the actual appeal is not set for today at all. It's several weeks I believe.

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COMMISSIONER MITTEN: Ms. Hubbard is here for the meeting that takes place after this discussion.

CHAIRPERSON GRIFFIS: Well she's confused. I am already indeed. No, this would - we have one decision to make on a motion and then we will call the first case.

PARTICIPANT: (Off mike question).

CHAIRPERSON GRIFFIS: No not until we call the public hearing. Okay. Then, let's do it.

SECRETARY PRUITT: Good afternoon, Mr. Chair. We have a Special Public Meeting dealing with Application 16879, Appeal of Nebraska Avenue Neighborhood Association Sunrise, pursuant to 11 DCMR § § 3100-3101 from the administrative decision of the zoning administrator, Department of Consumer Regulatory Affairs in the issuance of a building permit, (No. B442149) issued on January 22, 2002 to Sunrise Connecticut Avenue Assisted Living, LLC allowing a modification to Building Permit No. B435464 (dated March 8, 2001) allowing revisions to the roof plan/structure including the elevator in an R-2 and R-5-D District at 5111 Connecticut Avenue, N.W. (Square 1989, Lot 162).

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At the March 21st meeting, the Board voted not to accept the letters from NANA dated May 20, 2002 or from the ANC dated May 15, 2002 (stamped in the Office of Zoning on May 17, 2002). The Board decided to hold in abeyance its decision and requested that Shaw Pittman provide evidence that there is no difference between the two building permits, the one issued in March 12, 2001 and the other one in January, 2002.

Shaw Pittman was to submit and serve on the parties revised plans and illustrative evidence showing the location of the penthouse. Additionally, Shaw Pittman was to provide evidence that there is no difference in height or FAR.

The board established the following time frame: Shaw Pittman was to provide all requested information and serve all parties by close of business on Wednesday May 22nd of this year. NANA, DCRA, and the ANC would have until May 29th to respond.

And then, the Board will review this information today at a Special Public Hearing, and this is before you today to deal with a request for dismissal, Motion for Dismissal.

CHAIRPERSON GRIFFIS: Indeed, it is. Thank

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you for that quick overview and let me state to get us started here that we did it last meeting move us up to date to try to get submitted documents so that we could ascertain just enough to deliberate on the motion.

Of course, it's always difficult to deliberate on a Motion to Dismiss without reviewing everything in order to get to the basis of the substance and the facts and the bottom line, so to speak. Did you want to interrupt me?

MEMBER ZAIDAIN: Yes, I do real quick. For the record, I'd like to state that I have read all the relevant testimony, submissions and reports, et cetera and will be participating in the voting of the motion.

CHAIRPERSON GRIFFIS: Good, and we're happy to have you and I will introduce you when we actually get the public hearing in the afternoon going, but to get through most of this, Mr. Zaidain who is representing the National Planning Commission for us. Let us move quickly into that.

We did have the additional submission from Shaw Pittman and Sunrise, which was trying to establish again enough base level that we might be able to deliberate on all of the issues that were

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coming before us just to take up the Motion to Dismiss, and I would like to open it up.

As I have gone through this and deliberated, it seems like we have honed two, several main topics and I think we can be clear enough and also correct in limiting them to the three that are actually evidenced in the Nebraska Neighborhood Association Submission of May 29, and we might want to focus our discussion briefly on that.

Also, before we get fully into the motion, it's come to our attention that the submission, required 14 days before the hearing, an appeal was done today. I would just make the statement that, in fact, our deliberations on this motion do not incorporate the review of that as it came in this morning and we were unable as a Board to look at that and review it, so.

COMMISSIONER MITTEN: Mr. Chairman, if now is the time, I would address myself at least to the first of the three issues raised in the Nebraska Avenue Neighborhood Association submission of May 29th, which is Exhibit 29. Would you like me to?

CHAIRPERSON GRIFFIS: Sure. Yes.
Absolutely.

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COMMISSIONER MITTEN: Jump into that. This submission details, not in depth, but it at least summarizes the three issues that NANA raises in this appeal and the first issue is that Sunrise's architect stated in the affidavit that the plans will include revisions to the elevator/mechanical penthouse.

No changes were made that would have any impact on the total FAR of the project, and then the appellant has raised the issue, two issues I guess, within the context of that point.

One is that the elevator that the applicant has proposed can not function within the penthouse that is being provided, and then the other issue is that there is some change to the gross floor area on the seventh floor.

As it related to the first point, which is the functionality of the elevator, that's really not a concern of the BZA, because it's not a land use issue. That's a building code issue as I see it, and whether or not the elevator will function within the penthouse as designed is an issue for DCRA to determine not for us and in fact could not be appealed to us because it's not a land use issue.

The other issue, the other point raised

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about the change in the area of the seventh floor is one that, I think, we don't have enough information in the record at this point to just cast aside, and the reason I say that is, we do have the affidavit from Mr. Ruis (phonetic) that the total FAR of the project has not changed and that, in fact may be true.

What I would like to have some discussion on and perhaps we would need to have some narrow testimony on this subject is what necessitated the change illustrated in Attachment D to the NANA submission and what, in fact, was the impact if any on FAR. I think that needs more explanation before I can be satisfied that, in fact, there has been no change to the density of the project.

So I would say that there's a narrow issue as it relates to the change in FAR or a potential change in FAR and the functionality of the elevator is none of our concern.

CHAIRPERSON GRIFFIS: Good, and let me also reiterate and add on to that several issues that are brought up. There are some life safety issues. There's some circulation, there was talk back further, although we've consolidated this, of egress issues and obviously those aren't land use and zoning issues that

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we would take up and we would not, if even at the appeal, would not be able to hear any testimony on that for frankly just the lack of jurisdiction.

Your point as I'm hearing it, however, is what we're looking for in any appeal would be new evidence that could not have been known before the original appeal.

COMMISSIONER MITTEN: Yes.

CHAIRPERSON GRIFFIS: You're stating the fact that in a comparison of elevations, there appears to be an addition that was not in the original documents, in the original appeal and there is question in your mind, and as I stated I'm hearing you say that there is not the sufficient documentation to either say it adds to FAR or it does not add to FAR. But it was, as you are looking at it, a physical change.

COMMISSIONER MITTEN: Correct.

CHAIRPERSON GRIFFIS: Okay. Do you want to take each of these issues in motion, or should we just continue down? Why don't we continue down?

COMMISSIONER MITTEN: Fine, would you like me to keep going?

CHAIRPERSON GRIFFIS: It seems to be

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rolling well so far.

COMMISSIONER MITTEN: All right, so Issue 2 is that the plans provided by Shaw Pittman in their May 22nd submission to the board are incomplete, biased and misleading. They do not reflect the building permit application materials. I guess the contention made by the appellant is that there's materials that were omitted and those materials, at least in part, are included in Exhibit E.

Again, this relates to, at least what's being offered to us in Exhibit E relates to the actual functioning of the elevator.

CHAIRPERSON GRIFFIS: Right.

COMMISSIONER MITTEN: Which again is not our concern.

CHAIRPERSON GRIFFIS: Indeed.

COMMISSIONER MITTEN: So, I don't think that the requirement, and I wasn't here for the May 21st discussion, but we certainly are not required to receive everything that Sunrise submitted to DCRA, only those things that are relevant to land use issues for the Board, and more narrowly, this appeal.

So, I don't think the fact that we didn't receive certain submissions that had been given to

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DCRA is a de facto lack of compliance with the request of the Board. So, I don't find any merit to Appellant's Issue 2.

CHAIRPERSON GRIFFIS: And I think for absolute clarity, and I don't think we stated it outright but actually, let me just go back a little bit to the bigger picture in terms of when we heard this appeal and the schedule and the process that actually went to and responded to the Zoning Commission and went from there, which as I'm doing and I believe I'm correct, actually led to a lot of the changes with the elevator that is of issue and surrounding issue.

Again we need to underscore the fact that there is numerous things within the building process and the permitting process of shop drawing documentation and specific how to build documentation that would not go directly to any sort of zoning issue for us, if we had seen those documentations or not. I don't anticipate we'd ever see those.

But the important issue and what I had just touched on when you brought this up is, that although there's a permit number that's associated and we did talk about this last, what happened through the

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whole course of this was there was a modification to the existing base building permit.

So, I just wanted to be clear for the Board that we are actually looking at a process. On a normal schedule, if there's such a thing for permitting, you have numerous submission of documents in terms of the constructibility and means and methods of getting out of the ground. So a slight aside, but I'll have you continue.

COMMISSIONER MITTEN: Okay, then I will press on with Issue 3. That issue is that new information from DCRA that was provided on April 10, 2002 shows a non-compliant rear yard structure and increase in FAR.

There's nothing in the - at least to my reading of it, there's nothing in the May 29th submission that speaks to the non-compliant rear yard structure, so I don't know precisely what is being - what the point is there, although it makes reference to new information and that, at least as it related to this motion, has not been provided.

And also, the increase in FAR in references made to Exhibit F and Exhibit F seems to relate, I've never seen one of these before, it says

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that it's the computer calculations for the first - the Zoning Administrator's computer calculations for the first floor perimeter and gross floor area, but it seems to relate to the functioning of the elevator, and this does not seem to me to be - the purpose of this document does not seem to be, to calculate zoning density.

So, even though there's an area that is a total area at the bottom of the third page, we have - there's no way that we would know whether or not the square foot measurement has been performed the way that zoning density is calculated. So, I don't really know what conclusion we're supposed to draw from this document.

If we were to decide to go ahead, you know, with a narrow hearing, this might be an area that we would want to at least give the applicant or the appellant some latitude to at least make a showing that there is some relevance to the document, but I don't see anything here that gives me pause on its face, and I certainly wouldn't say that we should have a hearing exclusively on this subject.

CHAIRPERSON GRIFFIS: Right. I think there is some ambiguity of what this information is and what

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point it's trying to make. The analysis isn't in front of us at this point.

COMMISSIONER MITTEN: And maybe just to flush out completely something that you had raised earlier, which is there was a submission made today and we have not read the submission. We know generally what's contained in the submission, which is that it's the pre-hearing submission by NANA for the appeal, and presumably these issues are flushed out in greater detail.

But I don't think there's any lack of fairness on the part of the BZA proceeding, without having read those documents, because the appellant knew that we were going to be taking up this issue of the Motion for Dismissal today and certainly should have put in front of us anything that was relevant in a timely manner for deciding that motion.

So, I just wanted to maybe weigh in on the point you had raised earlier, specifically as it relates to the fact that they did not really elucidate for us, you know what's the significance of Exhibit F, what's the non-compliant rear yard structure. Did I make myself clear there?

CHAIRPERSON GRIFFIS: Yes, very clear. It

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goes to the heart of my problem with this and that's twofold. I basically said it but trying to decide without the complete information and addressing each of these issues, which actually goes to a full blown appeal, it's very difficult to get to the bottom.

And, I think the most important thing for this Board in all we try to do at all points is get to the facts, get to the substance of the issue in order that we might make a decision on it.

My concern in this specific case, in particular, is that in some respects it looks like there's a lot of searching going on and grabbing for some new information and I mean, the amount that we can discharge of not within our own jurisdiction supports some of my feelings in that.

I think what we need to do at this point is just gauge how strongly we feel that the information that we've evidenced today, and I'm recalling two issues, is that sufficient enough for us to deny the motion to dismiss, which would set this for the appeal, and I think it might be, in fact, advantageous for this Board in its pursuit of the facts and the substance to limit the scope of the appeal if, in fact, that's the direction we went.

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MEMBER ZAIDAIN: Just to clarify, make sure I'm in an understanding with what Ms. Mitten is saying, there's been several issues that have been brought to our attention in terms of the discussion about this appeal. But it seems to me, you have weeded out the relevant issue with the BOCA code and relevant safety concerns there.

The DCRA submissions are materials that may or may not have been seen, et cetera, things like that. But the real issue before us in terms of whether or not we go on to hear this case is the change in FAR resulting from the change on the seventh floor. Am I understanding that correctly?

COMMISSIONER MITTEN: As I see it, that's the only thing that I can unequivocally say gives me pause. Now whether or not I believe that the appellant has the capacity to meet their burden of proof to prove that there has been a change that now causes the density to exceed what is permitted, I don't have enough information in the record.

But I do have - there are unanswered questions for me to the point that I think we need at least some narrow fact-finding on the issue of the change in the configuration of the seventh floor, and

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if that's all we want to hear, then that's fine. I guess I would argue for a slightly broader scope to a hearing, but I don't want to interrupt you any more.

MEMBER ZAIDAIN: No, I just wanted to make sure I was in understanding with your position, because I think you've got some good points, especially when it relates to the elevator and its working capacity and things such as that. I think that's beyond what we're looking at. We need to focus on what the issue is and determine whether or not that warrants hearing on the development or not, so.

COMMISSIONER MITTEN: Right.

CHAIRPERSON GRIFFIS: Let me also speak to the FAR because I think clearly the record shows in the past appeal that we did not solely rely on one source to calculate the FAR and the FAR square footage and I think that will have some relevancy.

We, in fact, did our own calculations on it but I am in limited agreement, Ms. Mitten, with you in terms of not having at least enough addressed to show that that didn't go toward FAR, and it doesn't appear from what we have that there may have been physical change. It could be an enclosure of an area that already went to FAR. It may not be.

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(Off mike question.)

CHAIRPERSON GRIFFIS: No, indeed not.

MS. HOLMES: Mr. Chairman -

CHAIRPERSON GRIFFIS: Let's just make sure

-

(Off mike question.)

CHAIRPERSON GRIFFIS: Are all the parties
in this case here today?

DR. FRYE: No. Our president's not here.
He's in court. He has to -

MS. HOLMES: Mr. Chairman, rules do permit
you to allow testimony from the audience for
clarification. There is a representative of NANA as
well as a representative of the ANC, and as a
representative of the applicant or actually Sunrise,
we would like to understand what the issue is with the
FAR, because we filed in our filing, attached as
Exhibit A, the plans showing the before and after.

CHAIRPERSON GRIFFIS: Right.

MS. HOLMES: And the permit we received
from the city was simply to eliminate the elevator
penthouse, no other changes to the plans. There has
been no change to the seventh floor and, if you look
at that drawing, it shows on the bottom the plans that

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were in the record on October 24, 2001, and at the top it shows the change. There has been absolutely no change to the seventh floor.

CHAIRPERSON GRIFFIS: Okay, this is a good point. Why don't we have all the parties up to the table and, we need to introduce for the record because I think this is going to be important in terms of however this goes that everyone understands what we're looking at because we can be archaic in what we're talking about, and I understand what Ms. Mitten's talking about but you all may not. Do you have all the submissions in front of you?

PARTICIPANTS: No.

CHAIRPERSON GRIFFIS: Okay, well then I'm going to ask for cooperation and shared documents then, and I'm going to call your attention, first of all, to the -

DR. FRYE: Let me say right now that this is unfair because the president of this organization is the major one doing it. He is very much aware of all of the details, and if there has been a change and she can speak to it. Maybe she can not speak to it.

CHAIRPERSON GRIFFIS: Okay, we'll take that under advisement. Let me just be clear and have you

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introduced.

MS. HOLMES: I'm Marilyn Holmes from Advisory Neighborhood Commission 3G.

CHAIRPERSON GRIFFIS: Good.

MS. HOLMES: I attended the hearing today merely to observe the proceedings. I was not notified that there would be an opportunity to make a presentation and I'm not prepared to do so and I have to enter an objection, although I appreciate very much your willingness to try to understand this.

I think it's extremely unfair on the applicant to do so under circumstances where we're not prepared to give you information you need.

CHAIRPERSON GRIFFIS: So noted. This is what I intend to do is just make clear what we're saying. I'm not taking any testimony today, nor do I expect or want any sort of presentations. So if we can bring a little clarity to where we are, I think the Board has enough. We can sit you all down and deliberate. I have no question of that.

I think in order to hopefully save time, if and when we see each other, or this afternoon, it is helpful for you to understand what we are trying to say. So, please continue.

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DR. FRYE: I'm Doctor Frye, the Nebraska Association. While I am a little bit familiar with this, there has been a change on the seventh floor due to the elevator which will increase the FAR.

CHAIRPERSON GRIFFIS: Okay, just introductions at this point.

MS. DWYER: Maureen Dwyer with Shaw Pittman for Sunrise.

MR. PRINCE: Allison Prince with Shaw Pittman for Sunrise.

CHAIRPERSON GRIFFIS: Thank you. Hold on for just a moment. I want to draw your attention to A-202. There is a clouded area on the roof and then, are you in possession of the May 29 submission of the neighborhood association?

MS. DWYER: Yes.

CHAIRPERSON GRIFFIS: We have a copy down there also. What I believe Ms. Mitten is talking about, let's go to if you open them both up simultaneously, the neighborhood association submission in Section D original elevation and compare it to the clouded area on A-202.

It appears that there is an enclosed area with actually two kind of straight windows that have

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appeared and that is, I believe, the impact that Ms. Mitten is talking about. There's not a clear indication of whether that was covered always and went to FAR was not. There just wasn't sufficient information and that's the area in which we're talking about.

MS. DWYER: In our filing, our Exhibit A, we filed a copy of the plans that were filed in the record. I do not know what these plans are that NANA has filed. They're not dated. They're not identified. I'm not sure where they came from.

DR. FRYE: You're familiar with them, I'm sure.

MS. DWYER: But I do know -

CHAIRPERSON GRIFFIS: Let's just keep it cordial.

MS. DWYER: Right, that the plans that we filed show the plans that are in the record and there's been no change on that window area. What NANA has filed may have been a much earlier plan that didn't show the windows in any event. That area has been covered and included within FAR, so there's no change within FAR.

DR. FRYE: Actually, this came from one of

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the large prints, the blueprints, that was gotten from downtown and the large blueprints show there's a definite change in that particular spot increasing the FAR.

MS. DWYER: And I would just respond that the area has been covered and included in FAR and the windows if, in fact, they were changed from this plan, in no way changes the FAR, and the plans that we filed were the plans that were filed with the city in connection with the revised elevator drawing.

They've been in the record of the BZA and the Zoning Commission and they are the plans that were part of the permit that was issued, and the city permit said revised elevator penthouse only. No other change.

CHAIRPERSON GRIFFIS: A-202 was the same elevation that was part of the original appeal, that area?

MS. DWYER: Yes.

CHAIRPERSON GRIFFIS: And that also went to the commission?

COMMISSIONER MITTEN: Yes. Mr. Chairman on the issue of the front elevation, and that's the first page of Exhibit D.

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CHAIRPERSON GRIFFIS: Yes.

COMMISSIONER MITTEN: Staff is going to pull out the file on Appeal 167 - I mean if we want to dispatch with it today, we have to establish what was -

DR. FRYE: Please don't dispatch with it today. This has been hours and hours and hours and hours of work. Don't treat it like it's nothing. This is our time. These people get paid for their work. We have spent hours and hours for two years doing this stuff.

COMMISSIONER MITTEN: Dr. Frye, I fully appreciate this.

DR. FRYE: I don't think you do, Ms. Mitten.

CHAIRPERSON GRIFFIS: Well, let's be cautious because I can speak for her and I think she does, and I think you underestimate the fact of how much time we actually spent also taking a look and how seriously we take this issue.

DR. FRYE: If you do, you could not possibly say what you're saying.

CHAIRPERSON GRIFFIS: Indeed, well.

DR. FRYE: To go forward to a hearing is

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what it should do.

MS. HOLMES: Your Honor, may I be heard?

CHAIRPERSON GRIFFIS: Briefly, yes.

MS. HOLMES: As I indicated, I'm not prepared to make a substantive presentation, but it seems to me if there's this much dispute, factual dispute, as to whether there is an issue to be heard at a hearing, then the moving party has failed in its burden of convincing you that there isn't an issue that needs to be heard. As a result, I would argue that we ought to have the opportunity to make our presentation.

CHAIRPERSON GRIFFIS: And I appreciate that. What I don't want to do is get into total arguments on that. I mean I think we evidence that ourselves in statements when we began the fact that it's always difficult without having everything in front of you and you don't know what to ask for necessarily.

I was hoping that perhaps that this motion may expedite things or at least fine tune things, but what I don't want to do is get involved. This is an unraveling situation. I mean we could go into a full blown appeal this afternoon, although most of you are

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not ready to do that.

COMMISSIONER MITTEN: I would recommend that we just take two minutes to allow staff to pull up that file, see what's in that file, and then we can proceed.

CHAIRPERSON GRIFFIS: Okay. Are there other things we can do on this?

MEMBER ETHERLY: Mr. Chairman, on a lighter note, I would just simply extend my apologies to my colleagues. As many of you know, we were scheduled to hear this matter last week, but due to an unavoidable conflict with my professional commitments, I was unable to be present to maintain our quorum.

So, I'd like to extend that apology to my colleagues and to all members of the community who are involved in this case. Thank you very much, Mr. Chairman.

MS. HOLMES: If there's time, I'll raise another issue.

BOARD MEMBERS: No.

MS. HOLMES: Well, you're allowing Sunrise to give you arguments on one issue. I'd like to address an issue that you previously disposed of that you did not allow us to address.

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CHAIRPERSON GRIFFIS: Which is the issue?

MS. HOLMES: Which is the question you were discussing earlier relating to the non-compliant rear yard structure. Again, I apologize for not being fully prepared to address this, but it is my understanding that the earlier plans for this building indicated and the Zoning Administrator looked at that structure and said it was simply a retaining wall.

The more recently filed plans on which this most recent building permit is based, make it clear that that is a balcony. It is incorporated into the building. It includes electrical wiring and other features that make it clear that it is a structure in the rear yard. It's non-compliant because the rear yard setback is required at that part of the property and this part of the building extends.

CHAIRPERSON GRIFFIS: Do you know how far off the ground it is?

MS. HOLMES: I'm sorry, I was not prepared to address this. I simply -

CHAIRPERSON GRIFFIS: Do you know if you have that information?

MS. HOLMES: It's at the top of a set of stairs.

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CHAIRPERSON GRIFFIS: Who has it?

MS. HOLMES: I assume it's at least eight feet to ten feet tall.

CHAIRPERSON GRIFFIS: I see. I see.

DR. FRYE: You have it in the new stuff that came in today.

CHAIRPERSON GRIFFIS: Okay.

MS. DWYER: And, Mr. Chairman, I would just again state for the record that there were no changes made to the plans with regard to any other feature.

CHAIRPERSON GRIFFIS: Right.

MS. DWYER: That all the plans are in the record. The Board fully addressed all of these issues. The Zoning Commission addressed them. It came back to the board. There was reconsideration, a second request for reconsideration and hopefully when staff returns, they will confirm that the plans that we attached as Exhibit A were indeed the most recent plans filed in the record, which have been before the commission and the BZA. There has been no change.

DR. FRYE: We met with DCRA on May, I think it was, in May and got the recent updated plans, and that was just a few days ago. I don't know what she's talking about. We were not able to have those. They

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are recent to us, and we're making our - what we've been doing on the basis of what we got, the new material.

CHAIRPERSON GRIFFIS: Okay.

MEMBER ETHERLY: Mr. Chairman, at this point, it might be appropriate perhaps to take a short recess to allow staff time to secure the appropriate materials for the record.

CHAIRPERSON GRIFFIS: I would agree. We'll take five minutes. We'll go help staff find the documents.

(Whereupon, the above-entitled matter went off the record.)

CHAIRPERSON GRIFFIS: Where we were and left off, I think I can have you folks sit down because I think I know and have a good handle on where we're going to go with this at this point.

We did go in and look at the documentation and I don't think it's frankly what we were looking for, so it's not answering our question at this point. The issue still is there and so, what I want to do -

MS. DWYER: Mr. Chairman, can I just say one thing.

CHAIRPERSON GRIFFIS: Very briefly, please.

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MS. DWYER: We included as an exhibit to our filing, Exhibit E, a copy of what NANA filed on December 3, 2001, and this was in the record of the Zoning Commission case which then went to the BZA, and in that filing, they have attached the identical plans that we filed and included as Exhibit A.

So it's the same drawings that we're talking about. It shows in those drawings the window. Those are the plans that they have in the record and that they responded to.

DR. FRYE: Correction. We got ours in May from DCRA.

MS. DWYER: I do not know what May plans they are responding to but the plans that are in the record, the plans that everyone reviewed are the same plans that we filed in Exhibit A.

CHAIRPERSON GRIFFIS: Okay.

MS. DWYER: And it shows no change in the seventh floor at all.

DR. FRYE: We're talking a new plan, new information that was given to us later.

CHAIRPERSON GRIFFIS: And now, I think we have put our finger on the crux of the issue that's before us. And so, without arguing it exactly today, I

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think we can find a direction that will be more efficient than frankly kind of skipping around as we're doing right now.

So let us proceed with that, and as it occurs to me and as we have been going to, obviously this is the one issue just the clarification. I think that's what we'd be looking for, and the second is the issue, again I'm seeing more of a lack of information at this point that we need on this rear structure or addition, I think also perhaps may have to be flushed out. But let me hear from other Board members and see how they feel on that.

COMMISSIONER MITTEN: Mr. Chairman, I think we don't have a sufficient amount of information in the record of this appeal to determine whether or not there has been a change to the seventh floor that affects FAR. We would like to get that information. This is clearly not the time and I think that would be a very narrow issue for a hearing, and the issue about the rear yard structure, I don't know that there's anything that has changed.

I would suggest that if the appellant can show that there has been a change, so they could show that this is somehow relevant to the new appeal that

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that would appropriately be within the scope of the appeal and that perhaps since they're not prepared to do that today, that as a preliminary matter to if we decide to go forward with the hearing that it would be a narrow scope of the issue of the seventh floor and everybody can submit dated drawings and everything and we can just satisfy ourselves as to what is correct.

And then, if the appellant can show that there has been a change that relates to this rear yard structure, that that would then be included in the scope of the appeal.

Otherwise, it would be excluded but there would be this preliminary matter and we could vote on that whether it was relevant or not relevant and then proceed with a very narrow scope to a hearing on the appeal, because these other issues raised by the appellant are not relevant. They are building code issues.

CHAIRPERSON GRIFFIS: I would absolutely agree. I think that is well said and very clear that we would look to a very brief and succinct, direct preliminary showing at the scheduled date, and we may well be able to dispense quickly with each of these two issues.

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COMMISSIONER MITTEN: I would make a motion then, Mr. Chairman, and I would move that we deny the Motion to Dismiss as it relates to the issue of the seventh floor, and the non-compliant rear yard structure, and grant the Motion to Dismiss based on the other issues related to the functioning of the elevator.

And then, I would just elaborate on that by saying I would want as a preliminary matter to the hearing on the appeal, that the appellant has to show how the rear yard structure has changed from what the applicant originally had shown on the plans so that that would be relevant on the appeal in this case. Otherwise, we would only hear the issue on the seventh floor.

CHAIRPERSON GRIFFIS: I would second that.

Any other questions, discussions, clarifications? Board members?

MEMBER ETHERLY: Mr. Chairman, just for the sake of discussion, I will be voting against the motion. I believe that these issues were very well flushed out at our prior session on this matter, the session in advance of last week.

We had some questions raised at that

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meeting that directed the appellee to provide some very specific responses on the form of an affidavit from the architect, one stating that there was no change, which went to FAR.

We received that affidavit, yet we still at this point for some reason are not at a comfort level. I do not believe that the case has been made for this appeal to move forward, and for that reason, Mr. Chairman, I will be voting against the motion.

CHAIRPERSON GRIFFIS: Very well, Mr. Etherly, thank you very much. So, we're in the middle of a motion and deliberation. I'm not going to take any comments. Anybody else?

MEMBER ZAIDAIN: No, I agree with Ms. Mitten. I think you know despite the frustration on both sides, there is one vague issue that just needs to be handled out for the sake of security for everyone, and as long as we can limit it to those two matters, one being preliminary, one being the substance of the hearing, I'll vote in favor of the motion, but it has to be rendered to that issue stated.

CHAIRPERSON GRIFFIS: Very well, and I think that clearly the burden is on the appellants in

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the entire appeal, but also in the terms of the showing initially, and I think that is what you were searching for is just the exact documentation that either shows it up or down so to speak. Others? Anything further we need to do on this? Then I would ask for all those in favor of the motion signify by saying aye.

BOARD MEMBERS: Aye.

CHAIRPERSON GRIFFIS: And opposed?

MEMBER ETHERLY: No.

CHAIRPERSON GRIFFIS: Thank you very much. We can record that vote and then we'll just give quick clarification of the schedules and what we're doing and then we will move on.

SECRETARY PRUITT: Staff will record the vote 3-1 to deny the Motion to Dismiss concerning issues related to the seventh floor and rear yard structure. Motion made by Ms. Mitten, seconded by Mr. Griffis, Mr. Etherly in opposition.

COMMISSIONER MITTEN: And Mr. Zaidain in favor.

CHAIRPERSON GRIFFIS: So what day is this going to be called, the 16th? Okay. Okay.

MS. BAILEY: The 18th, June 18th. The

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hearing is scheduled for June 18th, Mr. Chairman.

MEMBER ETHERLY: Mr. Chairman, I will note for the record that I am at this point presently scheduled to not be here on June 18th, just as a point of information. I understand that based on a preliminary look, it does not appear to be a quorum issue for that day, but it will merit some checking to be certain.

CHAIRPERSON GRIFFIS: Okay, well we're going to have to do that.

COMMISSIONER MITTEN: I would also, I see that the appellant, the representative for the appellant is gone, but I'll just state for the record that they do have the obligation at the commencement of the hearing to make a showing of relevance on the issue of the non-conforming rear yard setback.

CHAIRPERSON GRIFFIS: Right. I think we may look to making a note of that and sending it out and we can send that to everybody involved.

COMMISSIONER MITTEN: Thank you.

CHAIRPERSON GRIFFIS: Okay, anything else? Everybody clear? Oh, you're going to get me in so much trouble now.

MS. DWYER: Just a tiny clarification.

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CHAIRPERSON GRIFFIS: Yes.

MS. DWYER: They've made their filing today for the hearing on the 18th, so is there any additional filing that they will be making in the record?

CHAIRPERSON GRIFFIS: Yes, my understanding is there is no additional filing, that we have set - we've always been on track with the schedule for the scheduled appeal. We do not anticipate anything else. Correct me if I'm wrong.

COMMISSIONER MITTEN: Well, it's possible that they would make a written submission on the relevance issue.

CHAIRPERSON GRIFFIS: We're going to need a written response, are we not?

COMMISSIONER MITTEN: Well, the responses, they can make the showing right then.

CHAIRPERSON GRIFFIS: In two weeks, though, let's think realistically whether we can deal with that.

COMMISSIONER MITTEN: It's their burden to show.

CHAIRPERSON GRIFFIS: I'm just saying timing, that's all. Do we want to require what they're submitting in a week and then we have response

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in a week?

COMMISSIONER MITTEN: I don't know.

MS. DWYER: We're fine with them presenting at the hearing. I just don't want something coming in the day before the hearing.

CHAIRPERSON GRIFFIS: No, and forgive me I didn't make it clear. In my mind, I was thinking we were going to get that and they can submit it but it's going to be on whatever date it was at the hearing date, because I didn't see - we don't have time to have the responses in and back.

COMMISSIONER MITTEN: Well, that's fair. I mean it's fair because actually if they can't show it's relevant. Normally, because we don't have the sort of preliminary review of the merits of the appeal, we would just sort of take it all up and let everything in.

CHAIRPERSON GRIFFIS: Right.

COMMISSIONER MITTEN: So presumably, the relevance is already shown by their submission. This would be another opportunity for them to emphasize why it's relevant. So, if we did give them some period of time to submit additional documentation which the appellee could respond, maybe corporation counsel can

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help us with timing on that, what's fair. But clearly, we want it all in before the hearing.

CHAIRPERSON GRIFFIS: And I think the limited nature of the scope and how we've limited the entire piece doesn't warrant such a structured submission.

COMMISSIONER MITTEN: Okay.

CHAIRPERSON GRIFFIS: I'd say we're safer now, in fact they've even left, that we're losing time, that we're better off getting it the day of.

COMMISSIONER MITTEN: Okay.

CHAIRPERSON GRIFFIS: Good, unless others disagree. In which case, we can adjourn the public meeting of June 4, 2002 and we'll simultaneously call the afternoon public hearing to order and wish everybody a good afternoon and also thank you for your patience as we get through some of our other course of work.

(Whereupon, the above-entitled matter was concluded at 2:45 p.m.)

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