

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**
441 4th Street, N.W.
Washington D.C. 20001

2011 NOV 22 AM 11:20

OFFICE OF ZONING

Appeal of Walter Parrs, Dorina Kanopka, and
Zdenek Nikodem

Appeal No. 18257

DISTRICT OF COLUMBIA'S POST HEARING BRIEF

The Appellee, the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"), by and through undersigned counsel, respectfully submits its Post Hearing Brief. During the Board's deliberations at the November 8, 2011 Public Meeting, the Board requested that the parties submit a brief on the question of whether the permit for the construction of the elevator penthouse was issued in violation of the Zoning Regulations governing non-conforming structures.

At the November 8th Public Meeting, the Board decided the issues raised by the Appellants in favor of the Zoning Administrator and Intervenor. The Board found that the Zoning Administrator correctly concluded the elevator penthouse was a roof structure and that it was not subject to a 1:1 setback under 11 DCMR § 770.6. During deliberations, the Chairperson of the Board articulated her view that the property may be non-conforming because it does not have a 15 ft. rear yard as would be required for new construction under 11 DCMR § 774.1. Since the elevator penthouse is not set back 15 ft. from the property line, the Chair questioned whether the elevator penthouse violates 11 DCMR § 2001.3, which is applicable to non-conforming structures.

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO.

18257

EXHIBIT NO.

32

Board of Zoning Adjustment
District of Columbia
CASE NO. 18257
EXHIBIT NO. 32

While the issue of whether the building at 3307 M St., NW is non-conforming was not raised at the hearing, for the purposes of addressing the Board's question in this brief we will assume that it is.¹ Section § 2001.3 allows additions to non-conforming structures provided a few conditions are met. It states:

Enlargements or additions may be made to the structure; provided:

- (a) The structure shall conform to percentage of lot occupancy requirements, except as provided in § 2001.13; and
- (b) The addition or enlargement itself shall:
 - (1) Conform to use and structure requirements; and
 - (2) Neither increase or extend any existing, nonconforming aspect of the structure; nor create any new nonconformity of structure and addition combined.

See 11 DCMR § 2001.3.

If we apply the three conditions of § 2001.3 to this case, it is clear that the addition of the elevator penthouse is permitted.

First, the elevator penthouse does not change the lot occupancy of the building because it was built on the roof the building and thus it does not increase the percentage of the lot occupied by the building. Further, in a C-2-A zone commercial uses may occupy 100% of a lot.

Next, as explained in more detail in the District's Pre-Hearing Statement, the elevator penthouse complies with the applicable use and structure requirements for roof structures found in § 411 and § 770.6.²

Lastly, the elevator penthouse does not increase or extend any existing non-conformity or create a new non-conformity. As identified by the Chair, the non-conforming aspect of the

¹ DCRA does not believe this question is material to the Board's analysis in this case as the Building Permit complies with the regulations whether or not the building is non-conforming.

² During deliberations, the Board did not indicate that the elevator penthouse violated any provision of § 411 or § 770.6.

building is the lack of a 15 ft. rear yard setback as required by § 774.1. If we accept that the building is non-conforming in this respect, the addition of the elevator penthouse does not extend that nonconformity.

Roof structures, such as vent shafts, mechanical equipment, stair and elevator penthouses, are integral to the use and operation of the parts of the building immediately below it. Accordingly, the Zoning Regulations regulate roof structures differently than other types of structures. If the property owner in this case were to construct another story on top of the existing rooftop courtyard, that story would have to be set back 15 ft. from the property line, because that type of addition is subject to § 774.1. If the new story was not set back 15 ft., we could say that addition extended the non-conformity; however, the same is not true for the addition of a roof structure.

Since roof structures are governed by § 411 and § 770.6, the 15 ft. rear yard set back in § 774.1 is not applicable. If the roof extends all the way to the property line and there is no required setback for a roof structure, it does not make sense to require the roof structure to be set back 15 ft. to account for a rear yard. To put it simply: since roof structures are not governed by § 774.1, the addition of a roof structure does not extend the existing non-conformity. Here, the Zoning Administrator correctly looked to § 770.6 (and not § 774.1), which allows a roof structure to be built to the edge of the non-exterior walls of the building. Thus, the Zoning Administrator determined that the roof structure was permitted in this case.

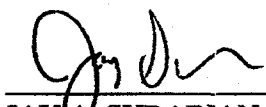
For these reasons, the Board must conclude the Zoning Administrator did not err and should proceed to deny the appeal.

Respectfully Submitted,

IRVIN B. NATHAN
Attorney General for the District of Columbia

MELINDA M. BOLLING
General Counsel

November 22, 2011



JAY A. SURABIAN (DC Bar # 977657)
Assistant Attorney General
Department Of Consumer And
Regulatory Affairs
Office of the General Counsel
1100 4th Street, SW, 5th Floor
Washington, DC 20024
(202) 442-8403 (office)
(202) 442-9447 (fax)
jay.surabian@dc.gov

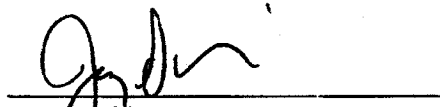
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing filing was served by email or first class mail, this 22 day of November 2011, to the following:

Ruthanne Miller, Esq.
Sullivan, Styles and Barros, LLP
1990 M St., NW, Suite 200
Washington, DC 20036
Via email rmiller@ssblawfirm.com

Advisory Neighborhood Commission 2E
c/o Commissioner Ron Lewis, Chair
400 Reservoir Road, NW
Washington, DC 20007

Leila Batties, Esq.
Holland & Knight
2099 Pennsylvania Ave., NW
Washington, DC 20006
Via email Leila.batties@hklaw.com


Jay Surabian