

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

**APPEAL OF
WALTER PARRS, ET AL**

**BOARD APPEAL NO. 18257
HEARING: NOVEMBER 1, 2011
PRELIMINARY DECISION: NOVEMBER 8, 2011
ANC 2E**

INTERVENOR'S BRIEF REGARDING "NONCONFORMING BUILDING" ISSUE

Intervenor Euromarket Designs, Inc., d/b/a CB2 ("CB2") submits that the Board correctly determined in its preliminary vote that the subject construction is a roof structure. But the concern of some Members regarding whether the building is "nonconforming" is misplaced. CB2 analyzes the issue as follows:

- The building does not meet the definition of a nonconforming structure.
- The nonconforming-structure issue is not properly raised in this appeal.
- Even if the building were nonconforming and the issue were timely raised, the elevator construction does not expand the "nonconformity" and is otherwise allowed under the regulations.

Because the structure meets the requirements for the type and placement of a roof structure, CB2 requests that the Board affirm the decision of the Zoning Administrator in issuing the permit.

A. The Building is not "nonconforming."

A "nonconforming structure" is one that was lawful when built but which has become noncompliant with current standards:

Nonconforming structure—a structure, lawfully existing at the time this title or any amendment to this title became effective, that does not conform to all provisions of this title or the amendment, other than use, parking, loading, and roof structure requirements. Regulatory standards that create nonconformity of structures include, but are not limited to, height of building, lot area, width of lot, floor area ratio, lot occupancy, yard, court, and residential recreation space requirements. (11 DCMR 199).

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By definition, this building cannot be a nonconforming structure because the standards applicable to the building have not changed. The subject building was constructed in 1989. The District issued permits and the building was lawfully built. Since then, there have been no changes in the regulatory standards for the C-2-A District relevant to any claimed nonconformity (for example, standards on lot area, FAR, or yard requirements). Because it is not a "nonconforming structure," the regulatory provisions addressing changes to nonconforming structures do not apply.

B. The Issue is Not Properly Before the Board.

With due and genuine respect for the Board, there is no issue pending before it regarding whether the building is "nonconforming." This is an appeal from the decision to issue a building permit for the elevator roof structure. None of the parties before the Board has challenged that the building is "nonconforming"; certainly that was not an issue raised by the Appellant. The Zoning Administrator did not opine on the subject because no one raised this issue, including the neighbors actively monitoring the permit and who filed this appeal.

This is not an issue of semantics or "mere procedure." It goes to the question of the Board's role in an appeal and the rights of all parties. For example, when the appeal was filed and the case heard, no one was on notice of this claimed issue—not the District, not the ANC, not even the building owner itself, which as the Board knows is CB2's landlord. This belated inquiry into "nonconforming structure" status flips the Board's role from appellate review of a Zoning Administrator's decision into a trial-type inquiry of the sort that the Board would handle initially if this were properly before it as a variance or special-exception request. The procedures, evidence, and burdens would be substantially different.

In sum, the "nonconforming structure" status of the building is an issue that has not been placed before the Board. It is not an issue which can be considered a "clean-up" item on this

building permit but, rather, is inconsistent both with the status of this appeal and with the Board's initial vote on the appeal confirming that the subject construction is a roof structure, as discussed in the next section.

C. "Nonconforming status" is irrelevant to issues in this appeal.

CB2 submits that there is no reasonable dispute that the building does not qualify as a "nonconforming structure" under the regulations and that the issue is not timely or properly raised now. But even if the building were deemed "nonconforming" and the issue were properly before the Board, this roof structure should still be approved.

Assuming for discussion that this roof elevator were considered an "enlargement" or "addition" to a nonconforming structure, the issue properly would be analyzed as an addition to a nonconforming structure devoted to a conforming use under Section 2001.3 of the regulations. That Section states that additions can be made to structures providing certain requirements are met, all of which are met with this roof structure:

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 [not applicable];
- (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.

Here, the addition of the elevator structure on this roof does not cause the structure to exceed the permissible lot occupancy. The elevator is used as part of the commercial portion of the building and is part of that building (not an accessory building). Since, in the C-2-A District, commercial uses may occupy 100% of the lot, the addition of the elevator structure does not create a lot-occupancy problem. An elevator penthouse is an allowed structure, *see* 11 DCMR

411 and 770, and the structure of the elevator penthouse meets the size and location requirements under the regulations. (The size and siting of the elevator penthouse was discussed in more detail in CB2's initial filings and in its presentation to the Board and therefore will not be repeated here.)

The installation of this roof structure does not "increase or extend any existing, nonconforming aspect of the structure; nor create any new nonconformity." There was no suggestion at the Board's November 1 hearing or at the November 8 decisional meeting that there was any "nonconformity" associated with the roof or the building height or any other regulatory standard arguably impacted by the installation of this elevator penthouse. By contrast, if a building were nonconforming because of its height, adding more height might increase or extend the nonconformity.

Because the building cannot be properly classified as a nonconforming structure, there should be no issue before the Board. Instead, having already determined by preliminary vote that the elevator structure is a roof structure under the Regulations, the Board should deny the appeal and affirm the issuance of the permit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of November, 2011, a copy of the Intervenor's Brief Regarding "Nonconforming Building" Issue for **BZA Appeal No 18257**, was sent to the following persons:

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