

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

Appeal of Adams Morgan for Reasonable Development

Appeal No. 188888

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Department of Consumer and Regulatory Affairs (“**DCRA**”) hereby submits the proposed Findings of Fact and Conclusions of Law as requested by the Board of Zoning Adjustment (“**Board**”) at its January 13, 2015 public meeting.

FINDINGS OF FACT

1. The property that is the subject of this appeal is located at 1700 Columbia Road, NW (“**Property**”).
2. The Property is zoned R-2-B.
3. The Property is in the process of being improved with a six-story mixed-use building (“**Project**”).
4. The owner of the Property, Ontario Residential LLC (“**Owner**”), originally filed an application with the Board of Zoning Adjustment (“**Board**”) for relief from various requirements of the zoning regulations (Chapter 11 of the District of Columbia Municipal Regulations) (“**Zoning Regulations**”).
5. In an order dated September 7, 2013, the Board granted the requested relief. BZA Case No. 18888, Exhibits 16A, pp. 7-16, and 16B, 1-6.

BZA Appeal No. 18506

6. Adams Morgan for Reasonable Development (“**Appellant**”) filed a motion for reconsideration on October 9, 2013.
7. In an order dated January 8, 2014, the Board denied the motion for reconsideration.

8. Appellant then appealed the Board's granting of relief to the District of Columbia Court of Appeals ("**Court**").
9. The Court affirmed the Board's order and grants of relief except for the special exception relief from two provisions of the Zoning Regulations limiting rooftop structures:
 - Subsection 411.3, requiring all roof structures be contained in a single enclosure, and
 - Subsection 411.5, requiring all enclosing walls to be of equal height.The Court vacated these two grants of relief and remanded them to the Board for reconsideration. *Adams Morgan for Reasonable Development v. D.C. Bd. of Zoning Adjustment*, D.C. Court of Appeals No. 13-AA-1356, decided June 5, 2014; BZA Case No. 18888, Exhibit No. 16B, pp. 7-9.
10. Before the Board acted upon the Court's remand, Owner revised its building plans to modify the roof structure to comply with these two zoning requirements, the relief from which the Court had vacated.
11. The Zoning Administrator analyzed the Owner's revised plans for the Project and determined that the modifications these revised plans contained complied with the requirements of Subsections 411.3 and 411.5. Therefore, on July 14, 2014, the Zoning Administrator approved the Project as compliant with zoning requirements, with the notes specifically referring to the modified plans for the rooftop structures. BZA Case No. 18888, Exhibit 14B.
12. On July 24, 2014, Appellant sent an email to the Zoning Administrator inquiring about the status of the Permit and noted "We have checked the PIVS webpage at the DCRA website for information and we see that Building Permit #B1309151 has not yet been approved, as it is still under review by some DCRA disciplines." BZA Case No. 18888, Exhibit 14A.
13. On July 24, 2014, DCRA approved the Permit. BZA Case No. 18888, Exhibit 2, p. 9.
14. The plans approved by the Permit for the rear yard show the delineation of the fifteen (15) foot rear yard required for properties in the C-2-B zone.
15. On October 1, 2014, Appellant filed a motion for an immediate meeting before the Board.
16. At a public meeting on November 18, 2014, the Board unanimously denied this motion as moot since Owner's plans submitted with its Permit application included the modifications to the roof structure that removed the need for zoning relief from subsections 411.3 and 411.5. BZA Case No. 18888, Exhibit 16C, pp. 11-12.

OAH Appeal No. 2014-DCRA-00050

17. Appellant appealed the issuance of the Permit to the Office of Administrative Hearings (“OAH”).
18. In a Final Order dated December 8, 2104, OAH Judge Mangan dismissed this appeal as baseless.
19. Appellant filed a motion for reconsideration of this OAH Final Order, which is currently ongoing.

BZA Appeal No. 18888

20. On September 24, 2014, Appellant filed this appeal with the Board, alleging that the Permit was issued in error because the Permit violated the rear yard requirements of the Zoning Regulations, specifically citing subsections 199.1, the definition of “rear yard”, and 774.1, prescribing a fifteen (15) foot rear yard for properties in the C-2-B zone. BZA Case No. 18888, Exhibits 1 & 2.
21. On December 30, 2014, Appellant filed a Pre-Hearing Statement that added an additional alleged error to the Zoning Administrator’s approval of the Permit to the initial appeal of the rear yard – that the rooftop structure violated subsections 411.3, 411.5, 411.6 and 411.8 of the Zoning Regulations. BZA Case No. 18888, Exhibits 15, 15A & 15B.
22. On December 30, 2014, Owner filed a motion to intervene and to dismiss the Appellant’s appeal on the grounds that the appeal was untimely filed and that the appeal failed to allege a valid violation of the Zoning Regulations. BZA Case No. 18888, Exhibits 14-14E.
23. On January 8, 2015, DCRA filed a Pre-Hearing Statement denying that that Appellant had stated valid grounds for overruling the Zoning Administrator’s approval of the Permit. BZA Case No. 18888, Exhibits 16A-C.
24. At that January 13, 2015 public meeting, Appellant stated that “after the issuance of the building permit, finally we have an understanding” of the rooftop structure. BZA Case No. 18888, Transcript of January 13, 2015 public meeting, p. 70, lines 14-16.
25. At that January 13, 2015 public meeting, Appellant described the Project’s garage as “subterranean”. BZA Case No. 18888, Transcript of January 13, 2015 public meeting, p. 63, line 22.

26. At that January 13, 2015 public meeting, Appellant recognized that the plans state that the platform for the generator is forty-two (42) inches above grade according to the plans. BZA Case No. 18888, Transcript of January 13, 2015 public meeting, p. 83, line 6.
27. At the January 13, 2015 public meeting, Appellant stated that the retaining wall around the garage entrance measures forty-two (42) inches above grade according to the plans. BZA Case No. 18888, Transcript of January 13, 2015 public meeting, p. 85, lines 5-8.
28. At that January 13, 2015 public meeting, Appellant stated that he did not know the date of the plan he submitted as evidence of an exhaust vent in violation of the required rear yard, Appellant's Exhibits RYE 1 and 2 (BZA Case No. 18888, Exhibit 23, pp. 2-3). Appellant stated "you could not really readily see [the date]" on the plan. BZA Case No. 18888, Transcript of January 13, 2015 public meeting, p. 73, lines 2-7.
29. At that January 13, 2015 public meeting, Appellant stated that he was unaware that the final plans as approved by the Permit did not include this exhaust vent. BZA Case No. 18888, Transcript of January 13, 2015 public meeting, p. 74, lines 6-10.
30. At the January 13, 2015 public meeting, Appellant stated that he filed the appeal because the current state of construction of the Project appeared to violate the Zoning Regulations. BZA Case No. 18888, Transcript of January 13, 2015 public meeting, p. 68, line 6 to p. 71, line 2.
31. At the January 13, 2015 public meeting, Appellant stated that the evidence upon which he based his appeal of the rooftop structure was his personal observations and not based on the approved building plans. BZA Case No. 18888, Transcript of January 13, 2015 public meeting, p. 100, lines 5-16 and p. 101, line 19 to p. 102, line 1.
32. At the January 13, 2015 public meeting, Appellant stated that his evidence of alleged violation of the rooftop structure requirements of the Zoning Regulations was based on construction that was ongoing and that the final appearance of the rooftop structure might be different. BZA Case No. 18888, Transcript of January 13, 2015 public meeting, p. 95, line 22 to p. 97, line 2.
33. At the January 13, 2015 public meeting, Appellant stated that he recognized the inapplicability of subsection 411.8 of the Zoning Regulations to the Project and so withdrew that claim. BZA Case No. 18888, Transcript of January 13, 2015 public meeting, p. 66, lines 3-7.

34. At the January 13, 2015 public meeting, Appellant stated that he recognized the mechanical equipment located on the roof is less than four (4) feet tall. BZA Case No. 18888, Transcript of January 13, 2015 public meeting, p. 94, lines 16-21.
35. At the January 13, 2015 public meeting, Appellant stated that the trellis on top of the curtain wall connected the stairwell penthouses. BZA Case No. 18888, Transcript of January 13, 2015 public meeting, p. 93, lines 3-6.
36. At the January 13, 2015 public meeting, Appellant stated that “the elevator overrun is the same height as the trellis” on top of the curtain wall. BZA Case No. 18888, Transcript of January 13, 2015 public meeting, p. 94, lines 2-3.
37. At the January 13, 2015 public meeting, Appellant declared that “a trellis is not a roof, which is what the zoning regs require.” BZA Case No. 18888, Transcript of January 13, 2015 public meeting, p. 91, lines 13-15.

CONCLUSIONS OF LAW

OPTION 1: If the Board decides to dismiss based on the untimeliness of the appeal]

The Board finds that Appellant failed to file the appeal within the required time period. Under subsection 3112.2(a) of the Zoning Regulations, an appeal of a decision of the Zoning Administrator “shall be filed within sixty (60) days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, *whichever is shorter*” (emphasis added).

Appellant appealed the July 14, 2014 decision of the Zoning Administrator to approve the Permit for zoning compliance. Appellant appealed the final issuance of the Permit ten (10) days later to OAH. (Fact No. 17). Appellant indicated that he had checked the status of the Permit on DCRA’s website in his email of July 24, 2014. (Fact No. 12). In that email he noted that several disciplines were still reviewing the Permit, and therefore that other disciplines, including Zoning, had already signed off. This email is evidence that Appellant reasonably had knowledge by that day. Yet Appellant failed to file the appeal until September 24, 2014, sixty-two (62) days after Appellant reasonably had knowledge of the Zoning Administrator’s approval of the Permit and two (2) days after the maximum appeal time permitted by the Zoning Regulations.

Accordingly, it is **ORDERED** that the appeal is **DISMISSED** for failure to file the appeal within the required time period.

OPTION 2: If the Board decides to dismiss the appeal of the rear yard on the merits as it is deemed timely filed, but to dismiss the rooftop structure appeal for failure to file in time.]

CONCLUSIONS OF LAW

The Board finds that Appellant's initial appeal of the rear yard was filed within the required time period, but that Appellant's subsequent expansion of the appeal to include the rooftop structure failed to comply with the time limits for filing an appeal. Under subsection 3112.2(a) of the Zoning Regulations, an appeal of a decision of the Zoning Administrator "shall be filed within sixty (60) days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge". Appellant asserts that he had actual notice of the Zoning Administrator's decision on July 26, 2014 when DCRA's letter announcing the issuance of the Permit was delivered. Appellant's filing of this appeal on September 24, 2014 therefore was made on the last day possible for timely filing.

However, that September 24, 2014 appeal only alleged violations of the rear yard requirements of the Zoning Regulations. Appellant admitted that he expanded this appeal to include alleged violations of the rooftop structure requirements of the Zoning Regulations in his December 30, 2014 Pre-Hearing Statement occurred more than three months after the sixty day deadline for appeals had closed. BZA Case No. 18888, Exhibit 15, pp. 2-3. This expanded appeal did not grow out of, or depend upon, the subject matter or requirements addressed in the initial appeal. The expanded appeal instead addressed a completely different aspect of the plans approved for zoning compliance by the Zoning Administrator. By his own statement, Appellant was aware of the plans approved by the Permit, including the rooftop structure, no later than July 26, 2014. BZA Case No. 18888, Exhibit 2, pp. 5-8. Indeed Appellant admitted that "after the issuance of the building permit, finally we have an understanding" of the rooftop structure. (Fact No. 24) Yet Appellant declined to include in his initial appeal any challenge to the Zoning Administrator's approval of the rooftop structure, instead choosing to wait for more than one hundred and fifty (150) days after acknowledging notice of the Permit issuance. Therefore, the appeal of the rooftop structure made in Appellant's December 30, 2014 filing is denied as untimely filed.

As regards the alleged violations of the rear yard made in Appellant's initial appeal on September 24, 2014, the Board finds that Appellant failed to identify any structure in the required rear yard that violated the Zoning Regulations.

All structures shown in the plans approved by the Permit in the Project's required fifteen (15) foot rear yard are permitted under Section 2503 of the Zoning Regulations, which establishes the

exemptions from the limit on structures in a required rear yard. Under subsection 2503.1, underground structures are not covered by rear yard requirements, which only cover structures “from the ground up”. Appellant described the Project’s garage as “subterranean”, which removes it from regulation under the required rear yard provisions of the Zoning Regulations. (Fact No. 25). Appellant stated that the portions of the platform for the generator and of the retaining wall around the ramp to the underground garage that are within the required rear yard are shown on the plans approved by the Permit as measuring forty-two (42) inches, or three and a half (3 ½) feet, above the grade. (Fact Nos. 26 and 27). Both of these structures are therefore permitted in a required rear yard under subsection 2503.2, which exempts structures less than four (4) feet above grade from the required rear yard restrictions. Appellant admitted that his allegation that an exhaust vent would exceed the four (4) foot limit permitted by subsection 2503.2 was based on a building plan provided by Appellant, the date of which he did not know since, as Appellant admitted, “you can’t really readily see” the stamped date on the plan. (Fact No. 28) Appellant also stated that he was unaware that this exhaust vent was not part of the final submitted plans approved by the Permit (Fact No. 29). Appellant therefore failed to substantiate allegations that any structure in the rear yard violated the Zoning Regulations.

Accordingly, it is **ORDERED** that the appeal is **DISMISSED**; as regards the rear yard, for failure to substantiate allegations of any violation of the Zoning Regulations, and as regards the rooftop structure, for failure to file in time.

[OPTION 3: If the Board decides that the appeal of both the rear yard and the rooftop structure were timely filed, but dismisses both appeals on the merits.]

CONCLUSIONS OF LAW

The Board finds that Appellant failed to identify any structure in the required rear yard or on the roof that violated the Zoning Regulations.

Rear yard

All structures shown in the required rear yard on the plans approved by the Permit in the Project’s required fifteen (15) foot rear yard are permitted under Section 2503 of the Zoning Regulations, which establishes the exemptions from the limit on structures in a required rear yard. Under subsection 2503.1, underground structures are not covered by rear yard requirements, which only cover structures “from the ground up”. Appellant described the Project’s garage as “subterranean”, which removes it from regulation under the required rear yard provisions of the Zoning Regulations. (Fact No. 25). Appellant stated that the portions of the platform for the generator and of the retaining wall around the ramp to the underground

garage that are within the required rear yard are shown on the plans approved by the Permit as measuring forty-two (42) inches, or three and a half (3 ½) feet, above the grade. (Fact Nos. 26 and 27). Both of these structures are therefore permitted in a required rear yard under subsection 2503.2, which exempts structures less than four (4) feet above grade from the required rear yard restrictions. Appellant admitted that his allegation that an exhaust vent would exceed the four (4) foot limit permitted by subsection 2503.2 was based on a building plan provided by Appellant, the date of which he did not know and which Appellant admitted “you can’t really readily see.” (Fact No. 28) Appellant also stated that he was unaware that this exhaust vent was not part of the final submitted plans approved by the Permit (Fact No. 29). Appellant therefore failed to substantiate allegations that any structure in the rear yard violated the Zoning Regulations and that the Zoning Administrator erred in approving the Permit.

Rooftop structure

Appellant is unclear as to whether he is appealing the rooftop structure that the Zoning Administrator deemed compliant in approving the Permit or instead alleged discrepancies between the plans approved by the Permit and the actual appearance of the rooftop structure in the midst of construction. Appellant admitted that he expanded his appeal to include a challenge to the rooftop structure not because the plans approved by the Zoning Administrator violated the Zoning Regulations, but because he believed that the current state of the construction of the Project appeared to violate the Zoning Regulations. (Fact No. 30). Appellant also admitted that he based his allegations on personal observations and not on the building plans approved by the Zoning Administrator. (Fact No. 31). Appellant admitted that his evidence was based on incomplete construction and the final appearance of the rooftop structure might be different. (Fact No. 32). If Appellant is appealing the actual plans approved by the Permit, the appeal should have been filed contemporaneously with the initial appeal of the rear yard. If on the other hand Appellant is alleging that the building as it is being constructed fails to comply with the plans approved by the Permit, then the proper venue for appeal is to OAH (as Appellant has already done) and the Board would lack jurisdiction. However, for the purposes of this decision, the Board presumes that Appellant is appealing the Zoning Administrator’s approval of the rooftop structure as part of the plans included in the Permit.

Appellant did not substantiate his allegations that the rooftop structure depicted on the plans approved by the Zoning Administrator as part of the Permit violated the Zoning Regulations. Appellant admitted that subsection 411.8, a violation of which he had claimed in his appeal, does not apply to the Property, which is in a zone exempted from this subsection. (Fact No. 33). Appellant recognized that the mechanical equipment on the roof is less than four (4) feet tall, and therefore exempt from the rooftop requirements by subsection 411.17. (Fact No. 34). Appellant described the curtain wall as linking the stairwell structures. (Fact 35). Although Appellant asserted that the elevator penthouse is separate from the curtain wall, the plans approved by the Permit clearly illustrate that the elevator penthouse shares a wall with one stairwell structure and

is clearly linked to by the curtain wall to a stairwell structure on both the 17th Street and lot interior sides. BZA Appeal No. 18888, Exhibit 16C, pp. 20-23. Thus the curtain wall connects and includes all structures governed by the rooftop requirements of Section 411, as is required by subsection 411.3. Appellant stated that the trellis on top of this curtain wall is the same height as the elevator enclosure, so that all structures are of the same height as required by subsection 411.5. (Fact 36). Although Appellant repeatedly asserted “a trellis is not a roof, which is what the zoning regs require”, subsection 411.14 explicitly permits “curtain walls without a roof [to be] used where needed to give the appearance of one (1) structure” as required by subsection 411.3. (Fact No. 37). Thus Appellant failed to provide evidence supporting his assertions that the Zoning Administrator erred in approving the rooftop structure as depicted in the Permit as compliant with the Zoning Regulations.

Accordingly, it is **ORDERED** that the appeal is **DISMISSED** for failure to substantiate the allegations of any violations of the Zoning Regulations.

Respectfully submitted,

CHARLES THOMAS
Interim General Counsel
Department of Consumer and Regulatory Affairs

Date:

2/3/15



Maximilian L.S. Tondro*
Assistant General Counsel
Office of General Counsel
Department of Consumer and Regulatory Affairs
1100 4th Street, S.W., Suite 5266
Washington, D.C. 20024
(202) 442-8403 (office)
(202) 442-9477 (fax)
maximilian.tondro@dc.gov

*Attorney for Department of
Consumer and Regulatory Affairs*

* Admitted to practice in Maryland. Practicing in the District of Columbia pursuant to D.C. Court of Appeals Rule 49(c)(4).

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February 2015, a copy of the foregoing Findings of Fact and Conclusions of Law was served via electronic mail to:

Chris Otten
Adams Morgan for Reasonable Development
1830 Belmont Road, N.W.
Washington, D.C. 20009
admo4rd@gmail.com
chrisotten2@yahoo.com

Ontario Residential, LLC
c/o Christine Roddy, Esq.
Goulston & Storrs
1999 K Street, N.W., Suite 500
Washington, D.C. 20006
croddy@goulstonstorrs.com

Billy Simpson, Chair
Advisory Neighborhood Commission, ANC-1C
1C06@anc.dc.gov

Date: 2/3/15


Maximilian Tondro