

BOARD OF ZONING ADJUSTMENT

441 4th Street NW, Suite 200S

Washington, DC 20011

In Re Appeal of:

ADVISORY NEIGHBORHOOD COMMISSION
5E, KATELIJN VAN DEN BERG, RICHARD A.
SEUTTER, JR., and SUSAN T. SEUTTER,

Appellants,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF
CONSUMER AND REGULATORY AFFAIRS,

Respondent.

BZA Appeal No. 19106

APPELLANTS' STATEMENT IN SUPPORT OF APPEAL

I. Introduction

Katelijan van den Berg, Richard A. Seutter, Jr., Susan T. Seutter, and Advisory Neighborhood Commission 5E ("ANC 5E") (collectively, "Appellants") hereby file this statement in support of the appeal of Building Permit No. B1505056 ("the Permit") and B1510351 ("the Ancillary Permit"). The District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") issued the Permit on June 19, 2015 and the Ancillary Permit on July 21, 2015. Appellants timely filed the instant appeal on August 5, 2015. For all of the reasons discussed *infra*, Appellants respectfully request that the Board of Zoning Adjustment ("BZA" or "the Board") grant this appeal and revoke the permits.

II. Statement of Facts

The property that is the subject of this appeal is located at 67 V Street NW, Washington, DC 20001 in an R4 zone in the Bloomingdale neighborhood of Ward 5 - Lot 0076, Square 3118 ("67 V"). The subject lot is rectangular in shape, 20 feet wide and 144 feet deep with a total lot area of 2,880 feet. The lot is improved with a two-story row dwelling constructed in 1915.

The footprint of the original row dwelling is 1,002 square feet, and it occupies approximately 35 percent of the lot. The row dwelling is in the middle of a contiguous row of like homes and is located on the north side of the unit block of V Street NW. Its use immediately preceding that of the current developer-owner was as a one-family dwelling with an English basement. The row dwelling shares a party wall with row dwellings on the adjacent lots to the east and to the west. The rear lot line abuts a 20-foot wide alley. The other side of the alley abuts the rear lot lines of other lots improved with row dwellings. These row dwellings front the southern side of the unit block of W Street NW.

On June 19, 2015, DCRA issued the Permit to convert the subject one-family row dwelling into a three-unit apartment building consisting of a basement/cellar, first floor, second floor, third floor, and roof deck. According to the plans, this will be accomplished, in part, by constructing an additional story, and more than doubling the current footprint of the house with a rear, three-story addition measuring more than 45 feet long (including rear balconies and stairs). The new rear addition will extend to the property line on the lateral sides (partially through a trellis structure on the northeast corner). **Ex. 01**, Civil and Architectural approved plans for the Permit. Unit one of 67 V will consist of two levels, two bedrooms, and 3.5 bathrooms. Unit two of 67 V will consist of one level, two bedrooms, and 2.5 bathrooms. Unit three of 67 V will consist of one level, two bedrooms, and 2 bathrooms. In total, 67 V will consist of one

basement/cellar, three stories, nine toilets, sixteen sinks, seven bathtubs/showers, two parking spaces at the rear of the lot, three balconies with stairs, and a roof deck.¹ The existing basement/cellar will be excavated to raise the ceiling height. The Permit also provides for underpinning, however in an affidavit filed in a parallel appeal concerning Building Code violations before the Office of Administrative Hearings, Case No. 2015-DCRA-00060 (“OAH Appeal”), the developer has voluntarily pledged to refrain from underpinning 67 V.

The enlarged footprint of the proposed apartment building will increase lot occupancy to 56 percent. This increase in size will almost double the footprint and lot occupancy of the original dwelling. The surrounding properties in the neighborhood consist primarily of modestly sized one-family row dwellings. The homes on the unit block of V Street and W Street NW generally occupy between 35-40 percent of the lot. **Ex. 4.** Meanwhile, the conversion of 67 V into three units is nearing completion.²

III. Legal Arguments

A. The Zoning Administrator erred in allowing a non-compliant closed court on the third story in the Permit.

¹ Although not listed on Appellants’ Form 125-Appeal, another ancillary permit issued on October 30, 2015, B1512076. B1512076 adds a penthouse to the original permit, moves the roof deck from the rear to the front of the property, and replaces the extended deck over the non-compliant open court at the northeast corner of the property with a 12” on center trellis structure. **Exs. 2 and 3.**

² As an aside, Appellants note that during the course of the ongoing construction at 67 V, police reports were filed for four acts of vandalism to the adjoining homes at 65 and 69 V Street NW. The two acts in August and the two acts in September occurred in tandem to the adjoining homeowners and did not affect any other homes or residents on the block. One of the reported incidents resulted in police calling the crime scene unit to 65 V Street NW to take photographs. The other incidents left Appellant Ms. van den Berg without transportation for over a week and without gas for a couple of days, and left Appellants Mr. and Mrs. Seutter without telephone, cable, and internet service for several days.

Pursuant to zoning regulation, “a building permit shall not be issued for the proposed erection, construction, conversion, or alteration of any structure unless the plans of and for the erection, construction, conversion, or alteration fully conform to the provisions of [the Zoning Regulations].” 11 DCMR § 3202.1.

The Zoning Administrator erred in issuing the Permit, because the plans for the third story contain a non-compliant closed court based on Section 11-406 of the Zoning Regulations. In the peer review report of Patrick X. Williams, AIA, NCARB, LEED AP BD+C, the Appellants’ architect confirms that the new third-floor wall configuration, created to maintain the requisite 10-foot distance from the chimney of the adjoining property at 65 V Street NW, results in a non-compliant closed court. **Exs. 5 and 6.** The width of this court is 10 feet 9 inches, which is less than the 15-foot minimum width requirement. 11 DCMR § 11-406. Also, the area of the Closed Court is 198.06 square feet, which is less than the minimum area requirement of 350 square feet. *Id.* Appellants had informed DCRA about the non-conforming closed court prior to the Permit issuance. DCRA’s permit tracking system demonstrates that DCRA requested additional information from the permit holder to address the non-compliant closed court as per the structural comments dated June 16, 2015. **Ex. 7, at 3.** Hence, the Zoning Administrator was required to review such information before the Permit was issued. The Zoning Administrator’s decision was arbitrary and capricious and pursuant to Section 3202.1 of the Zoning Regulations, the Permit should not have been issued.

B. The Zoning Administrator erred in allowing encroachment onto neighboring property in the Permit.

The foundation plans in the Permit showed that the column and stair footings of the proposed development encroached upon the property of 65 V Street NW in violation of Zoning

Regulations. See 11 DCMR § 3202. It is evident that the Zoning Administrator issued the Permit in error, as the adjacent homeowners had communicated this violation to DCRA's Deputy Chief Building Official and the Director on April 24, 2015, almost two months before the Permit issuance on June 19, 2015. **Exs. 8-10.** If the building plans were deficient, then DCRA should not have issued the Permit. The Zoning Administrator's decision was arbitrary, capricious, and contrary to the Zoning Regulations, specifically Section 3202.1, the Permit should not have been issued without resolving this error.

C. The Ancillary Permit contains substantive and material changes that further support Appellants' contention that the Permit was issued prematurely and in error.

DCRA asserted that the Ancillary Permit was issued on July 21, 2015 in order "to correct plan anomalies on the previously issued permit[.]" **Ex. 11.** However, the revised plans contain material and substantive changes that further evidence that the Permit was issued in error, as both DCRA and the developer knew about the issues necessitating these changes prior to the Permit issuance.

The revised plans of the Ancillary Permit now contain the addition of a trellis to cover the non-compliant closed court on the third story. **Ex. 12.** The Ancillary Permit plans also change the location of the stair and column footings. Contrary to what DCRA alleged, the addition of a trellis to the closed court on the third story, as well as the change of the location of the stair and column footings, do not merely "correct plan anomalies," rather they are material and substantive changes to the proposed building which should have been subject to both zoning and structural review *before* issuance of the Permit.

D. The proposed trellis cannot be added to resolve the non-compliant closed court, the trellis is a structure within 10 feet of the neighboring chimney at 65 V Street NW in violation of the Building Code.

The proposed trellis is a structure that violates the Building Code. **Ex. 13.** See also, DC Zoning Map Glossary defining Structure as “something constructed, especially a building or part of a building, but also including fences, trellises, gazebos, and similar standing features.” **Ex. 14.**

The Building Code requires a chimney to extend “at least 2 feet higher than *any* portion of a building within a horizontal distance of 10 feet (emphasis added).” The addition of the trellis in an attempt to resolve the non-compliant closed court on the third story is less than a horizontal distance of 10 feet from the neighbors’ property at 65 V Street NW, and it extends above the neighboring property’s roof and chimney. The trellis and other building code violations regarding the Permit are the subject of the pending OAH Appeal.

E. Even with the trellis added to the closed court on the third story as part of the Ancillary Permit, there is still a non-compliant closed-court.

In the Ancillary Permit plans, a trellis was added to the non-compliant closed court in order to attempt to comply with Section 11-406 of the Zoning Regulations. **Ex 12, at 2.** Section 199.1 of the Zoning Regulations defines a “building” as a structure having a roof supported by columns or walls for the shelter, support or enclosure of persons, animals or chattel. The BZA has previously concluded that a trellis meets the definition of “building” when it has a roof that provides at least 51% coverage, is supported by columns or walls and is used for the shelter, enclosure or support of persons. See “BZA Case No. 17331, *JPI Apartment*

Development LP, on behalf of Larry D. and Carol K. Quillian, **Ex 15, at 2**. See also, “BZA Case No. 18263-B, *Stephanie and John Lester*”, **Ex. 16, at 10-11**. See also, “*Letter of the Zoning Administrator to Holland and Night, dated April 27, 2010*, BZA Case No. 18263-B”, **Ex. 17, at 3**.

The third story trellis addressing the non-compliant closed court in the Ancillary Permit does not have the sufficient coverage of 51% to constitute a “roof” and therefore does not meet the definition of a “building” under the Zoning Regulations. According to Appellants’ architect calculations, the trellis covers 8.53%. **Ex. 18**. The roof plan drawings indicate that the metal trellis joists are spaced at 24 inches on center, with each joist being 2 inches wide. The total length of the metal trellis joists is calculated as follows:

- $(5 \text{ at } 10 \text{ FT}) + 2 \text{ at } (9.25 \text{ FT} + 7.5 \text{ FT} + 5.75 \text{ FT}) = 50 \text{ FT} + 2 \text{ at } (22.5 \text{ FT}) = 95 \text{ FT}$

The coverage area of the trellis is calculated as follows:

- $(2 \text{ inches at } 95 \text{ FT}) = (0.166 \text{ FT at } 95 \text{ FT}) = 15.83 \text{ square feet.}$

The trellis therefore only provides 8.53% coverage and does not meet the 51% coverage requirement as per longstanding Zoning practice.

As stated by the Office of Planning in its Memorandum in BZA Case Number 18263-B, “[Zoning] past precedent dictates that a trellised structure, though not enclosed, can be considered a meaningful connection if the lattice provides at least 51% coverage and if the covered [area] provides communication between different parts of the building.” **Ex. 19, at 2**. The final order confirmed that the trellis (Ex. 20) met the definition of “building” under the zoning regulations based on a design to contain sufficient coverage to constitute a “roof”, supported by columns and provide shelter and support. **Ex. 16, at 11**.

The coverage of the trellis cannot be increased to make the court compliant, the mere existence of the trellis in this location violates the Building Code. The reason the court was originally created was to avoid violating the Building Code by having a structure within 10 feet of the neighboring chimney. Covering this court with a trellis in order for it to constitute a “roof” would further impede the functioning of the neighboring chimney, that is, to exhaust flue gases away from combustible materials and allow for proper airflow through the chimney. It is for these safety requirements that the 10-foot distance requirement is included in the Building Code. **Ex. 13.** There is no legally acceptable manner in which the third story could be permitted with a closed court of only 198.06 square feet complying with both Zoning Regulations and the Building Code. Only a closed court of 350 square feet would suffice to conform to the Zoning Regulations and the Building Code.

The decision of the Zoning Administrator to allow this non-compliant closed court was arbitrary and capricious and benefits only the developer of the subject property. The Permit was issued in error, it does not comply with the Zoning regulations. Accordingly, the Permit and Ancillary Permit should be revoked.

F. DCRA approved the Permit without an Official Building Plat issued by the DC Office of the Surveyor and upon which the new development footprint should have been drawn by the architect of record.

When erecting a new building or structure or constructing an addition to an existing structure, the District of Columbia’s Building Code requires an Official Building Plat, issued by the DC Office of the Surveyor³, showing in detail the improvements to the property and other

³ The DC Office of the Surveyor maintains the legal records of all land plots and subdivisions of private and District government property within the District of Columbia.

data. 12 DCMR § 106.1.13. Section 106.12.1 of the Building Code requires the following data, amongst others, to be provided on the Official Building Plat for the purpose of the *zoning compliance review*: (i) the shape, dimensions and topography of the lot to be built upon, in sufficient detail to allow determination of heights above existing and proposed finished grade of all proposed structures; (ii) the shape and location in plan of all existing and proposed structures, fully dimensioned, including orientation and distances to lot lines so as to define without ambiguity the dimensions and location of said structures; (iii) the elevations of all existing and proposed *structures* fully dimensioned so as to define without ambiguity the dimensions of said *structures*; (iv) a Zoning Data Summary of the project including, as applicable, at least the following data: lot width, area of the lot, percentage of lot occupancy, height of the structure and the location and elevation of the height measurement reference points, gross floor area for each floor level, area of basement, area of cellar, areas dedicated to each use, width of any proposed side yard, rear yard or court, number of standard and compact parking spaces and dimensions of loading berths and delivery loading spaces; and (v) other information necessary to determine compliance with the *Zoning Regulations*.

No such plat was provided in the Permit Application for B1505056. Notwithstanding the fact that DCRA has been informed on several occasions that this Plat was missing and should be included, the Zoning Administrator issued the Permit without it. **Exs. 8 and 21.** A plat was only added by the developer as part of the OAH Exhibits. **Ex. 22.** This plat is not signed, stamped or dated by the Office of the Surveyor, the Zoning reviewer, or the owner. In addition, the plat does not show a trellis over the non-compliant closed court and does not show a trellis over the non-compliant open court in the northeast corner of the property. Again, there is no record of this plat being part of the Permit application on file at DCRA.

G. The lack of an Official Building Plat impairs the purpose of the applicable Zoning Regulations in relation to the Basement versus Cellar determination of the lowest level.

Both the conditions of the existing property as well as the original drawings for determination of zoning requirements for the provided construction at 67 V confirmed that the ceiling height of the lower level was and remained at least 4' above the existing finished grade. Supporting evidence with photo measurements of distances between the ceiling height of the lower level for both the adjacent existing and finished grade are presented in Exhibit 23. Following Zoning Review comments from DCRA, the grade was changed in the construction drawings without any meaningful purpose other than to re-qualify the lower level of the property from a basement to a cellar. However, the formal approved Zoning Data as per approved drawing A1.02 by the Zoning Administrator still classifies the lower level of 67 V - both existing finished grade and proposed finished grade - as a basement and not as a cellar. **Ex. 23.** As a result, the lower level of 67 V is classified as a basement, not a cellar, and thus this basement must be considered as one of the three stories allowed under R4. Consequently, the additional fourth story in the Permit plans is not permissible and the permit should be revoked.

Lastly, the Zoning Administrator's decision to grant the Permit represents a disregard of DC Zoning Regulations and long-established DCRA policy on using grade plane analysis to determine the height of the lower level. A *fair* and *accurate* assessment of existing and proposed circumstances is missing. This is apparent in DCRA's drive to allow a redefinition of the lower level from a basement to a cellar in order to allow for an additional story.

H. Neighboring homes and the neighborhood are severely adversely impacted.

The Bloomingdale neighborhood is a quiet, established residential rowhouse neighborhood with mature trees, well-maintained front and back yards and quiet neighbors, some of whom have lived in their homes for decades. Properties in the immediate vicinity of the subject property primarily are one-family rowhouses with an English basement, first floor, and second floor. There is a consistent design and size to each rowhouse that fits with the character of the neighborhood. Each rowhouse generally occupies between 35-40 percent of the lot. The conversion of the subject property would be dramatically out of scale and character with existing rowhomes in the neighborhood. **Ex. 4.** The personal and property interests of the surrounding homes and property owners in ANC 5E would be adversely affected by the conversion of the subject property as approved by DCRA. The conversion of the subject property as described would negatively impact the air, light, privacy, and property values of the surrounding homes. In approving this permit, it does not appear that DCRA fully considered the additional stress the conversion would add to the aging infrastructure in the neighborhood.

Appellants' architect calculated a Floor Area Ratio (FAR) of 1.5 for 67 V. The FAR for 67 V would not even be allowed in an apartment district, such as an R5A District where Zoning Regulations set the maximum FAR at 0.9. R4 is not an apartment district, and Section 330.2 of the Zoning Regulations provides that "its primary purpose shall be the stabilization of remaining one-family dwellings." Furthermore, Section 330.3 states that "the R-4 District shall not be an apartment house district as contemplated under the General Residence (R-5) Districts, since the conversion of existing structures shall be controlled by a minimum lot area per family requirement."

IV. Conclusion

Building Permit No. B1505056 is inconsistent with the purpose of the Zoning Regulations, the Zoning Administrator issued the Permit even though it did not comply with all sections of the Zoning Regulations, the Permit and its Ancillary Permit should be revoked. The reasons for this incompliance with the Zoning Regulations are clarified in detail *supra*.

The District is plagued with monstrous ‘Pop-ups’ and ‘Pop-backs’ that are out of scale and out of character with the neighborhoods. Many of these are located in ANC 5E and Bloomingdale. Adjoining homeowners are adversely affected and are losing the use, value, and enjoyment of their properties. Backyards are blighted by 40-foot high walls along the property line which darken and obscure the space where fresh air and sunshine were once present. Families wishing to buy single-family homes in the neighborhood find it difficult or impossible to compete with developers who place inflated cash offers and waive inspections and contingencies.

DCRA’s failure to implement proper Zoning Regulations has a substantial impact on compliance expectations for similar properties owned by developers in Bloomingdale which would fundamentally change the character of the neighborhood as a single family home district. Appellants respectfully requests that the Board grant the appeal and revoke the Permit and Ancillary Permit.

In addition, Appellants respectfully ask for an expedited determination by BZA that no Certificate of Occupancy may be provided by DCRA or a third party inspector until the BZA ruling has been finalized. As the building is rapidly progressing and the developer is actively attempting to sell the units and without displaying information about the pending BZA case.

Potential future homeowners should be protected against a possibly illegally constructed apartment building.

Respectfully submitted,



Dated: November 3, 2015

By: _____

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Exhibit List

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 3, 2015, Appellants in the above-captioned case electronically filed the foregoing **STATEMENT IN SUPPORT OF APPEAL** via IZIS, the CM/ECF system, and a true and correct copy was served via email, on the following.

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