

LAW OFFICE OF LAURIE B. HORVITZ, LLC
4520 East West Highway, Suite 700
Bethesda, MD 20814
(301) 961-6429
Email: laurie@horvitzlegal.com

From the Desk of: Laurie B. Horvitz, Esq.

Bar Memberships: DC, MD

March 10, 2016

VIA HAND DELIVERY

D.C. Board of Zoning Adjustment
Suite 210
441 4th Street, NW
Washington, D.C. 20001

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2016 MAR 10 PM 2:27

Re: **Board of Zoning Adjustment Appeal No. 19174**
Appellant's Proposed Findings of Fact and Conclusions of Law

Dear Members of the Board:

Enclosed please find one original and two copies of the Appellant's Proposed Findings of Fact and Conclusions of Law regarding the above-referenced Board of Zoning Adjustment appeal case.

If you have any questions, please do not hesitate to have staff contact me.

Regards,



Laurie B. Horvitz

Enclosures

D.C. Board of Zoning Adjustment
March 10, 2016
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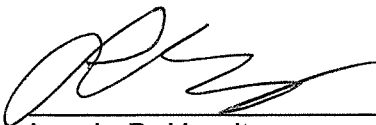
PROOF OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Proposed Findings of Fact and Conclusions of Law was filed via hand delivery with the Board of Zoning Adjustment and was sent by first class mail, this 10th day of March, 2016, to the following:

Matthew LeGrant
Zoning Administrator
Department of Consumer and Regulatory Affairs
1100 4th Street, SW
3rd Floor
Washington, DC 20024

Maximilian Tondro, Esq.
Associate General Counsel
Department of Consumer and Regulatory Affairs
1100 4th Street, SW
Room E-500
Washington, DC 20024

Christine Moseley Shiker, Esq.
Holland & Knight
800 17th Street, NW
Suite 1100
Washington, DC 20006


Laurie B. Horvitz

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

Appeal No. 19174 of Unit Owners' Association of The Erie Condominium, pursuant to 11 DCMR §§ 3100 and 3101, from a June 17, 2015 decision by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Building Permit No. B1410680, to construct a new 40-unit residential building with underground garage parking in the RC/R-5-B District at premises 2337 Champlain Street N.W. (Square 2563, Lot 887).

HEARING DATE: February 9, 2016

DECISION DATE: March 15, 2016

DECISION AND ORDER

This appeal was submitted on October 23, 2015 by the Unit Owners' Association of The Erie Condominium ("Appellant"), an association for owners in an eight-unit condominium at 2351 Champlain Street, NW ("Erie Condominium"), relating to the premises at 2337 Champlain Street, NW (Square 2563, Lot 887) ("subject property"). The appeal challenges the decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs ("DCRA"), to issue Building Permit No. B1410680.

The Board of Zoning Adjustment ("Board") held a hearing on the appeal on February 9, 2016. At the Public Meeting on March 15, 2016, the Board decided to **GRANT** the appeal by a vote of _____.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. The Office of Zoning ("OZ") sent notice of the filing of the appeal to DCRA, the D.C. Office of Planning ("OP"), Advisory Neighborhood Commission ("ANC") 1C, and the City Councilmember for Ward One. OZ provided notice of the public hearing to the owner of the subject property, 2337 Champlain Street, LLC ("Permit Holder"), the Appellant, ANC 1C, and the Zoning Administrator. Pursuant to 11 DCMR § 3113.13, the OZ published notice of the hearing on the appeal in the D.C. Register on November 20, 2015.

Requests for Party Status. ANC 1C and the Permit Holder were automatically parties to this appeal. No other persons requested party status. ANC 1C did not participate.

Motion to Dismiss. The Permit Holder filed a motion to dismiss the appeal as untimely. DCRA joined that motion. Appellant opposed the motion. The Board heard arguments relating to the Motion to Dismiss as a preliminary matter at the hearing, and then deferred ruling on that motion.

Appellant. Appellant contends that the Zoning Administrator erred by approving Building Permit No. B1410680 ("Building Permit"). Appellant claims that the permit set of plans for the subject property is inconsistent with the prior record and order in BZA Application No. 18330 (FCP Champlain, LLC). Appellant summarized the Board's earlier proceeding and decision in

BZA Application No. 18330, wherein the Board granted a special exception from the matter of right height limitations and a variance from the floor area ratio ("FAR") requirements for properties in the Reed-Cooke ("RC") Overlay District. Appellant submitted plans for the subject property that were approved by the Board in 2012, which depicted low-rise rooftop structures of only nine feet, and other features of the roof level. Appellant submitted pages from the permit set of plans from 2015 which include rooftop structures of 16.46 feet and elevated decking on the roof. According to the Appellant, the Zoning Administrator erred by approving the permit set of plans because they are inconsistent with (a) plans that the Board approved in Case No. 18330, (b) provisions in the Board's Order in Case No. 18330, (c) sworn representations made to the Board in that case, (d) plans approved by the Zoning Administrator in a determination letter on April 9, 2013, and (e) the Zoning Regulations. In part, the Regulations require construction in accordance with plans that this Board approves.

Government Reports. No government reports were filed in this proceeding.

ANC Report. ANC 1C did not submit any letter or resolution in this case and did not appear at the hearing.

Persons in Support or Opposition. Saul Levin, MD, Richard N. Wiedis, and Jason Schupbach submitted letters in support of the appeal. Dr. Levin and Mr. Wiedis reside at Erie Condominium and Mr. Schupbach resides near the subject property at 2426 Ontario Road, NW. No persons filed letters in opposition to the appeal.

FINDINGS OF FACT

The Subject Property and the Adjacent Property to the North

1. The subject property is located at 2337 Champlain Street, NW (Square 2563, Lot 887), in an R-5-B Zone District. The subject property also falls within the RC Overlay District.

2. The Permit Holder is constructing a forty-unit condominium building with underground garage. The height of the new construction exceeds the matter of right height of 40 feet and includes penthouse structures and parapet that are 16.46 feet in total height above the roof.

3. The Erie Condominium sits immediately to the north of the subject property at the property line. It contains eight condominium units. The roof of The Erie Condominium includes rooftop terraces.

BZA Application No. 18330

4. The owner of the subject property in 2012, FCP Champlain, LLC ("FCP"), applied for a variance from the floor area ratio ("FAR") requirements under § 402, and a special exception to allow an increase in building height pursuant to § 1403.

5. Erie Condominium, by and through its association of unit owners, was granted party status in BZA Application No. 18330 and participated in that contested proceeding in 2012.

6. During BZA Application No. 18330, FCP submitted detailed information about the elevation of the roof and the height of the penthouse structure. FCP represented that the penthouse structure would not exceed *nine feet in height*. This information was communicated to the BZA in plans, sworn oral testimony offered by FCP, and other submissions.

7. The plans for the project were submitted to the Board in BZA Application No. 18330 as Exhibit 30 and included, without limitation, the following: (a) Site Plan & Zoning Criteria, dated March 16, 2012 (page A0.1), which identified a penthouse height of 9'0"; (b) Rendered Building Sections, dated March 16, 2012 (pages A3.2, A3.3), showing a roof elevation of 198'-10" and a penthouse roof elevation of 207'-10"; (c) West Elevation (Champlain St.), dated March 16, 2012 (page A4.1), showing a roof elevation of 198'-10" and a penthouse roof elevation of 207'-10"; and Roof Floor Plan, dated March 16, 2012 (Page A5.6), showing top of roof at 207'10." (Exhibit 18 at Tab E) ("BZA Approved Plans").

8. During hearing testimony before the Board on April 3, 2012, FCP emphasized that the penthouses were only 9 feet in height. The lawyer for FCP stated that the "size of the roof structure" had been reduced "to the maximum extent possible" after meeting with Erie Condominium. Architect Jeffrey Goins, testified under oath for FCP by stating that "the meat of the case" was the height and the penthouse. He referenced the nine-foot height of the penthouse during his testimony. Steven Sher testified under oath as an expert witness for FCP and represented: "The *penthouses are only 9 feet tall above the level of the roof.*" He further explained that the penthouse height was a promised concession to Erie Condominium, by stating: "[The penthouses] could be 18.6 as a matter-of-right, but they are only 9 feet tall." (Exhibit 18 at Tab F).

9. During BZA Application No. 18330, FCP described the relative elevations of persons who would be standing on the adjacent roofs at the subject property and Erie Condominium. Mr. Sher stated that users on the roof of the Residential Building would stand 2 feet 10 inches above people on top of Erie Condominium (referring to an elevation of 198.10 for the planned building). (Exhibit 18 at Tab F).

10. Mr. Goins further testified for the applicant in BZA Application No. 18330 that there would not be any finished interior spaces on the roof at the subject property, except for areas containing the mechanical equipment. The roof would be used solely for mechanical equipment and access to the roof. (Exhibit 18 at Tab F).

11. Erie Condominium testified against the application with evidence of likely adverse effects of the new building at the subject property. (See Exhibit 18 at Tab A).

12. At the conclusion of the hearing in 2012, staff for the Office of Planning testified that the applicant would not be able to change its plans in a manner that adversely affected Erie Condominium, because "[w]hatever plan is submitted to the Board is submitted to permitting and that's the plan that is approved." (Exhibit 18 at Tab F).

13. The Board granted FCP's request for zoning relief in Case No. 18330, including the special exception with respect to the increased height of the building. (Exhibit 3).

14. BZA Order No. 18330 included express findings that FCP had lowered the penthouse to only eight feet above the parapet (BZA Order at ¶ 31) and that the roof of the

subject building would only be two feet, 10 inches above the roof of the Erie Condominium (BZA Order at ¶¶ 8 and 20). (Exhibit 3).

15. The Board rejected Erie Condominium's concerns about adverse impacts based in part upon FCP's promises to lower the penthouse well below the height permitted as a matter of right. (Exhibit 3) (BZA Order. No. 18330 at p. 12).

16. In Order No. 18330, the Board further noted that the lowered height of the penthouse would "reduce any potential impact on the views from the Erie's roof deck." The Board specifically found that the Subject Building "will not impact views from the Erie to the Washington Monument." (Exhibit 3).

17. BZA Order No. 18330 included the following language in its ordering clause:

It is therefore ORDERED that the application is hereby GRANTED, **SUBJECT to the approved plans, as shown on Exhibit 30, and** the following conditions...

(Exhibit 3) (emphasis added). In addition, the order set forth two express conditions relating to the roof of the building. (Exhibit 3).

18. The Board's order further stated:

Pursuant to 11 DCMR § 3125, approval of an application shall include approval of the plans submitted with the application for construction of a building or structure (or addition thereto) or the renovation or alteration of an existing building or structure. **An applicant shall carry out the construction, renovation, or alteration only in accordance with the plans approved by the Board** as the same may be amended and/or modified from time to time by the Board of Zoning Adjustment.

(Exhibit 3) (emphasis added).

Additional Findings of Fact

19. After issuance of BZA Order No. 18330 (July 26, 2012), FCP requested a zoning determination letter from the Zoning Administrator in furtherance of a settlement agreement between FCP and the Appellant. FCP submitted drawings in support of the request that depicted the following: (a) a reduction in the elevation of the roof to 197.82 feet (from 198.83 feet); (b) a reduction in the elevation of the penthouse roof to 206.83 feet (from 207.83 feet); and (c) a reduction in the difference between the usable roof surfaces at the subject property and Erie Condominium to 1 foot 10 inches (from 2 feet 10 inches). (Exhibit 3). These one-foot reductions were consistent with a private agreement between FCP and the Appellant. The Appellant relied on FCP's request for a zoning determination letter in relinquishing certain rights it could have pursued against FCP.

20. The Zoning Administrator issued a determination letter, dated April 9, 2013, to Christine Shiker at Holland & Knight, in which he noted that BZA Order No. 18330 approved a "roof structure having a height of 9 feet..." The Zoning Administrator referenced the proposed modifications in the submitted Elevations and Sections, and found that the modifications *reduced* the extent of special exception relief approved by the BZA, and *reduced* the impact of the

Residential Building. (Exhibit 3). The Appellant relied on the April 9, 2013 zoning determination letter in waiving certain rights it could have exercised against FCP and the District of Columbia.

21. The Permit Holder purchased the subject property in November of 2013 and undertook efforts to re-design the Residential Building.

22. The Board finds that the Permit Holder did not share complete or accurate information with Appellant regarding plans to re-design the new building. In December of 2013, the Permit Holder withheld from Appellant selected pages from its plans and misrepresented information about the roof level of the planned building. In December of 2013, the Permit Holder did not disclose its plans to increase the height of the penthouse structures or to add elevated rooftop decking. On December 23, 2013, the Permit Holder represented to the Erie Condominium in writing that the Permit Holder was *not* increasing the height of the penthouse structure or the height of the roof. (Exhibit 18 at Tab H). The Permit Holder did not alert Erie Condominium to any material, *adverse* changes to the roof level. Instead, the Permit Holder provided an alleged “list of the benefits” of the new proposed building, while omitting any disadvantages. (Exhibit 19 at Tab C).

23. At the hearing in this appeal, the Permit Holder’s witness, Mr. Brian Papke, admitted that certain plans depicted taller penthouse structures and elevated decking, and that such plans were dated December 9, 2013. The Permit Holder further admitted that “refinements” to the building in November and December of 2013 included an increase in penthouse height. (Exhibit 16 at p. 3). Despite these admissions, this information was not shared with the Appellant in December of 2013. Instead, the Permit Holder provided information to the Appellant between December 16, 2013 and December 23, 2013 that was directly inconsistent with plans, dated December 9, 2013. Appellant submitted compelling evidence that the Permit Holder knowingly misrepresented information about the penthouse structures to Appellant in an effort to procure support or inaction from Appellant.

24. The Permit Holder claims that it obtained a determination letter from the Zoning Administrator, dated December 27, 2013. The record does not include a copy of any attachments to the December 27, 2013 letter, or any plans that were reviewed by the Zoning Administrator at that time. The letter does not reference any changes to the height of the penthouse structures.

25. In or about January of 2014, the Permit Holder sought approval from the Zoning Administrator for a re-designed building. The Zoning Administrator asked the Permit Holder to “reach out to the neighbors to ensure that they supported the modifications...”. BZA Tr. (Feb. 9, 2016) at p. 324. In response, the Permit Holder represented to the Zoning Administrator that Appellant was generally in support of the design refinements. The Board finds that this representation to the Zoning Administrator was misleading because the Permit Holder had not shared plans with the Appellant depicting the increased height of the penthouse structure and, instead, had expressly disavowed any intention to increase the height of the penthouse structures.

26. The Permit Holder did not inform the Zoning Administrator that Appellant’s alleged “general” support for the re-designed building was predicated upon false and incomplete information from the Permit Holder about the roof level of the project.

27. The Zoning Administrator issued a determination letter, dated February 10, 2014. The Permit Holder argued at the hearing that this letter approved an increase in penthouse height to 208.78 feet, but the official, online copy of the issued letter and attachments refutes this contention. The letter did not reference any change to the height of the penthouse structure. Instead, the Zoning Administrator found that the “proposed roof structure and roof decks will be reduced in overall size” and that “[t]he reduction in size minimizes the impact on the views from the adjacent Erie Condominium building to the north.” The letter further stated that “[t]he modifications will also reduce the impact on the views from the roof of the adjacent property to the north.” (Exhibit 30).

28. Appellant submitted a copy of the Zoning Administrator’s publicly posted letter, dated February 10, 2014, and the posted plans that were attached to that letter. (Exhibit 30). Those plans do *not* show any increase in penthouse height or the planned addition of elevated decking on the roof. Although the Permit Holder contends that such information was shared with DCRA at the time, the Zoning Administrator did not offer any corroborating testimony or documents. Accordingly, the Board finds that the determination letter, dated February 10, 2014, did not approve any increase in penthouse height.

29. Even if the Board credits the Permit Holder’s assertion that it requested permission from the Zoning Administrator to increase the penthouse height to 208.78 feet, there is no evidence that the Zoning Administrator issued any determination letter that approved an elevation of 213.10 feet for the top of the penthouse parapet or an elevation of 209.08 feet for the top of the penthouse roof. Those are the elevations in the permit set of plans.

30. Based upon the information that was provided directly to Appellant in December of 2013 and the public record associated with the February 10, 2014 letter determination, the Board also finds that the letter determination, dated February 10, 2014, did not put Erie Condominium on notice of any adverse changes to the roof level of the Residential Building.

31. DCRA issued Building Permit No. B1410680 on June 17, 2015. (Exhibit 18 at Tab G).

32. DCRA approved a permit set of plans with the following specifications: (a) an elevation of 213.10 feet for the top of the penthouse parapet; (b) an elevation of 209.08 feet for the top of the penthouse roof; (c) an elevation of 198.75 feet to the top of the decking on the roof; and (d) an elevation of 196.64 feet for the roof. (Exhibit 18 at Tab K; Exhibit 16K) (CD Set, dated Feb. 6, 2015) (“Permit Set”). The Permit Set provides for rooftop structures with a height of 16.46 feet (including the parapet) above the elevation of the roof. (Exhibit 18 at Tab K; Exhibit 16K).

33. The penthouse structure is 16.46 feet, rather than the nine-foot height in the BZA Approved Plans from 2012.

34. The elevation of the penthouse roof with parapet on the Residential Building (213.10 feet) is 5.2667 feet higher than the roof elevation in the BZA Approved Plans.

35. Views of the Washington Monument from the Erie Condominium are now obstructed by railings on top of the elevated decking at the subject property. (Exhibit 31).

36. Neighbors have been adversely affected by the penthouse structures at the subject property. (Exhibit 26; Exhibit 17).

37. Due to the elevated roof decking (at an elevation of 198.75 feet), the roof of the Erie Condominium will be 2.75 feet below persons standing on the new building, rather than the approved difference of 1 foot 10 inches in the Zoning Administrator's determination letter, dated April 9, 2013. (Exhibit 16; Exhibit 18).

38. The Permit Holder testified that the Building Permit was posted at the site, but the Permit Holder did not specify the exact date of posting. The Board notes that no plans are referenced in the body of the issued permit form, and the block entitled "Plans" is blank. The Building Permit did *not* disclose that any plans were publicly available for inspection, mention any rights to appeal issuance of the Permit, cite any regulations governing appeals, or set forth any deadlines for appeals. (Exhibit 18 at Tab G).

39. There was no testimony on personal knowledge that the Permit Set was, in fact, available to the public for inspection or copying at DCRA between the date of approval of the Building Permit and the Board's hearing on February 9, 2016. DCRA did not offer any documentary evidence that the Permit Set was available to the public for inspection. DCRA responded to questioning from the Board by admitting that the plans were not available to the public online and that DCRA could not offer affirmative proof that these particular plans were, in fact, available to the public. DCRA's representative was simply unable to tell the Board based on personal knowledge that the plans were actually available for inspection or when they were available. Counsel for DCRA admitted as follows: "what actually happened in these specific plans is hard for us to know." BZA Tr., Feb. 9, 2016, at p. 221-221.

40. The only testimony on this subject from a witness with personal knowledge came from Mr. Wiedis who testified on behalf of the Appellant that he personally went to DCRA to review the plans in furtherance of Erie Condominium's appeal and could not do so. He was advised by DCRA staff that he was not entitled to review the plans and that the plans could not be located. At the hearing, DCRA offered no explanation for why the plans were not available when Mr. Wiedis requested them.

41. The Zoning Administrator, Matthew LeGrant, testified that he had encountered several similar situations in which other DCRA staff initially rejected efforts by members of the public to review approved plans. He also testified that approved plans are not always readily available to the public because they are, for example, sent for copying. Counsel for DCRA admitted that the same issue has arisen "multiple" times. He conceded that plans are removed from the records room for a variety of reasons, including digitization and review by District officials. Although DCRA claims that there is a check-out system for each set of plans, it did not offer any paper trail associated with the Permit Set in this case.

42. Construction of the roof level at the subject property began in October of 2015. Prior to October of 2015, the construction activities at the site did not reveal the planned heights of the penthouse roof structures and elevated decking.

43. Appellant promptly inquired in October of 2015 regarding the Permit Holder's construction at the roof level of the Property, and then appealed before the roof structures were "under roof." (Exhibit 18).

44. This appeal was filed on October 23, 2015, within a few days after Appellant learned the Permit Holder's plans for taller roof structures and elevated decking.

45. The Board finds that the Permit Holder did not clearly disclose its actual plans for the roof level of the Residential Building to the Appellant before October 19, 2015. The record includes an email, dated March 19, 2014, from the Permit Holder to the Appellant which purportedly included revised plans, but that email stated that the plans were outdated, and the attachments were dated as of December 9, 2013. The Board finds that this email communication did not adequately or accurately disclose the Permit Holder's plans to construct a penthouse structure and parapet to a combined elevation of 213.10 feet (Exhibit 16).

46. The Board credits the testimony and submissions of the Appellant that it undertook repeated efforts to understand the scope of the project. (Exhibit 16; Exhibit 18). Despite many communications between the parties, the Board finds that the Permit Holder never provided the Appellant with a final permit set of plans that it intended to submit to DCRA, and the Permit Holder never obtained Erie Condominium's agreement to those plans.

47. The Permit Holder did not submit any evidence establishing the dollar amounts incurred prior to the appeal date with respect to construction of the penthouse structures and roof level.

CONCLUSIONS OF LAW

1. Jurisdiction

The Board is authorized by the Zoning Act, D.C. Official Code § 6-641.07(g)(1) (2016), to hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal made by any administrative officer in the carrying out or enforcement of the Zoning Regulations. Section 8 of the Zoning Act authorizes appeals of any decision "granting or refusing a building permit . . . based in whole or in part upon any zoning regulation." D.C. Official Code § 6-641.07(f).

Appeals may be taken by any person aggrieved by any "...administrative decision based in whole or in part upon any zoning regulation or map...." D.C. Official Code § 6-641.07(f). Appellant has standing to appeal the Building Permit in this case. That issue was not challenged by any parties.

The rules governing the timely filing of an appeal before the Board are set forth in 11 DCMR § 3112.2. This rule is not jurisdictional. *Appeal No. 19049 of Caesar Junker* (2015); *Appeal No. 18031-C of West End Citizens Association* (2014), affirmed on other grounds, *W. End Citizens Ass'n v. D.C. Bd. of Zoning Adjustment*, 112 A.3d 900, 903 (D.C. 2015). In *Appeal No. 18031-C of West End Citizens Association*, the Board explained this finding as follows: "[T]he body that adopted [the Rule] – the Zoning Commission – has no authority to define the Board's subject

matter jurisdiction. Rather, that jurisdiction was created by Congress when it adopted § 8 of the Zoning Act of 1938 (D.C. Official Code § 641.07). Since the Zoning Commission cannot add to or reduce the Board's jurisdiction, § 3112.2 cannot be jurisdictional in nature." Thus, the Board has jurisdiction over this case.

2. The Timeliness of the Appeal

The Permit Holder moved to dismiss the appeal as untimely, and DCRA joined in that motion. The moving parties argue that Appellant was required to initiate this appeal within sixty (60) days after issuance of the Building Permit. Subject to certain exceptions, the Board's Rules of Practice and Procedure (11 DCMR, Chapter 31) require that appeals be filed within 60 days of the date the person filing the appeal had notice or knew of the decision complained of, whichever is earlier. 11 DCMR § 3112.2(a).

Appellant asserts that it filed a timely appeal because it did not know (and should not have known) about the challenged DCRA decision until October 2015 and did not know of any good faith grounds to appeal until October of 2015. Appellant contends that it was unaware of DCRA's approval of plans for taller penthouse structures, elevated decking and other revised features on the roof level of the building because Appellant reasonably relied upon specific information that had been provided by FCP, in BZA Order 18830, and in the Zoning Administrator's letter determination, dated April 9, 2013, about the height of the penthouse structures. Further, the Permit Holder explicitly represented in writing to the Appellant that the penthouse structures would not be increased in height — even though the Permit Holder was seeking approval to construct penthouse structures that would rise more than 16 feet above the roof. This appeal was filed before the penthouse structures were under roof.

A. Appellant Has Satisfied the "Under Roof" Standard

Section 3112.2 also includes an "under roof" provision which states that an appellant shall appeal with ten (10) days after the date on which the challenged structure is "under roof." 11 DCMR § 3112.2(b). Appellant contends that this appeal is timely because it did not have actual or constructive knowledge of the challenged decision until it saw construction at the roof level of the subject property.

Appellant cites the regulatory history of § 3112.2(b), wherein the Zoning Commission explained: "Because an appellant may not have notice or knowledge of a decision until construction is underway, the amendment provides that no appeal may be filed later than ten (10) days after construction is 'under roof.'" 50 D.C. Reg. 1202 (2003). "The stated purpose of that regulation is to allow an appellant *more time than he or she would otherwise be allotted under the sixty-day rule.*" *Economides v. D.C. Bd. of Zoning Adjustment*, 954 A.2d 427, 440 (D.C. 2008) (*emphasis added*). DCRA and Holland & Knight, acting as counsel for the Permit Holder, incorrectly contend that the "under roof" provision *shortens* the sixty-day timeframe. This precise argument was advanced by Holland & Knight before the Zoning Commission in 2002 and was *rejected* when the "under roof" provision was adopted. In Z.C. Order No. 02-01, the Zoning Commission explained the following:

Further, Holland & Knight interprets paragraph (b) in § 3112.2 as potentially shortening the sixty- (60) day time period established in paragraph (a), and suggests revising

paragraph (b) to state that an appeal must be filed no later than ten days after the date the structure is under roof or within the sixty- (60) day period established in paragraph (a), whichever comes first. *The Commission, however, does not intend in paragraph (b) to shorten the sixty- (60) day appeal period.* ... When an appellant seeks to file an appeal more than sixty (60) days after the date of the decision on the grounds that the appellant did not have notice or knowledge of the decision until sometime after the date of the decision, the latest date an appeal can be filed is ten (10) days after the structure is under roof.

Z.C. Order No. 02-01 (Sept. 9, 2002) (emphasis added).¹

The Board finds that this appeal was filed in a timely manner based upon evidence that Appellant did not know of the decision complained of before witnessing construction on the roof level of the subject property in October of 2015. The “under roof” exception applies here. The penthouse structures were not under roof at the time of the appeal.

B. Appellant Has Established Exceptional Circumstances

The normal 60-day time limit may also be extended if an appellant shows that: (1) there are exceptional circumstances that are outside the appellant’s control and could not have been reasonably anticipated that substantially impaired the appellant’s ability to file an appeal to the Board; and (2) the extension of time will not prejudice the parties to the appeal. 11 DCMR § 3112.2(d).

The Board finds such exceptional circumstances. The Appellant reasonably relied upon plans and sworn testimony in BZA Case No. 18330, this Board’s order in BZA Case No. 18330, representations by the owners of the subject property, and a determination letter from the Zoning Administrator, dated April 9, 2013. The Board credits the testimony of the Appellant that it only learned about DCRA’s approval of a materially different roof and taller penthouse structures when construction reached the roof level in October of 2015. Then, it acted swiftly by appealing immediately.

The Board rejects the contentions of the Permit Holder and DCRA that the Appellant had a duty to investigate further after the posting of the Building Permit. As noted in this Order, the Appellant had investigated the scope and character of the planned work and reasonably relied upon the information provided to it. The Permit Holder engaged in deception that delayed Appellant’s discovery of revised plans for the roof level and, under these exceptional circumstances, the Permit Holder cannot benefit from delays that are directly attributable to the Permit Holder’s own misconduct.

In pre-hearing submissions and hearing testimony, Appellant submits a very troubling picture of repeated promises and representations by the past owner and current Permit Holder regarding the planned roof level at the subject property. This Board approved an application for special exception and variance in 2012 based in part upon plans to build a low-rise penthouse structure

¹ The Board no longer treats § 3112.2(a) as a jurisdictional requirement. Accordingly, the “under roof” provision extends the sixty-day deadline when applicable, and 11 DCMR § 3112.2(b)(2) does not limit the applicability of the “under roof” exception.

of only nine feet. The zoning applicant submitted plans to this Board in 2012 that clearly showed a nine-foot penthouse and the applicant emphasized that feature in a successful effort to procure a special exception from this Board to increase the height of the building. The Appellant was a party to that BZA proceeding and reasonably relied upon the testimony and plans presented by the applicant. The Board issued BZA Order No. 18330, which required construction in accordance with the plans that were approved by this Board. The BZA's findings included references to the low-rise penthouse structure. As a party to that case, Appellant received a copy of that order and reasonably expected compliance with the terms of the Board's decision.

After BZA Case No. 18330, the zoning applicant made additional promises to the Appellant that, in part, reduced the elevation of the penthouse structure by another foot, and reduced the elevation of the roof by one foot. The Zoning Administrator issued a determination letter, dated April 9, 2013, that approved these changes, and Appellant was provided with a copy. The Appellant reasonably believed that construction would proceed in accordance with the promised changes to the roof level.

There is uncontested evidence that the current Permit Holder represented on December 23, 2013 that it would not increase the height of the penthouse structure or change certain other features of the roof level when it redesigned the building. The Board finds that the Permit Holder never provided the Appellant with a clear and entirely accurate explanation of its plans for the building. The totality of the evidence supports the Board's conclusion that Appellant reasonably relied upon the misinformation that the Permit Holder provided about the project. The Permit Holder did not offer any convincing evidence that it corrected its misleading statements in a manner that was sufficient to inform Appellant of significant changes to the roof level.

Appellant has submitted numerous emails showing that it contacted the Permit Holder repeatedly in an effort to learn about material developments relating to the project. It made many requests for information and plans, and the Permit Holder responded with assurances and promises regarding the "benefits" of the revised design, without disclosing the known disadvantages. Despite the numerous correspondence between the parties, the Permit Holder never provided the Appellant with a final permit set of plans that it intended to submit to DCRA or obtained Erie Condominium's agreement to those plans. The Permit Holder never informed the Zoning Administrator that the Erie Condominium did not agree to a change in the height of the penthouse structures, even though the Zoning Administrator's specifically requested that the Permit Holder obtain input from the Erie Condominium.

DCRA and the Permit Holder argue that Appellant should have investigated further and they point to the alleged posting of the Building Permit at the construction site. Both DCRA and the Permit Holder contend that, upon seeing the posted permit or construction activities, Appellant should have realized that plans were publicly available for inspection and undertaken efforts to review them immediately. However, the Permit Holder did not testify as to the exact date on which it posted the permit and there was no testimony establishing that the Appellant saw a posted permit or the date of any such observations. In any event, the Permit did not reference to any specific "plans" and the box for "plans" on the Permit form was blank. Instead, the Permit specifically referenced BZA Order No. 18330, thereby indicating that the approved construction was still subject to the terms in that order. (Exhibit 18, at Tab G). Moreover, the Permit did not state that the plans were available for public inspection or disclose any timeframe for appeal.

(Exhibit 18 at tab G). The Permit did not make any reference to finished rooftop cabanas, penthouse structures that were inconsistent with prior representations to the Appellant or rooftop decking. (Exhibit 18 at Tab G).

DCRA asks this Board to impose a very strict time limit upon this appeal, but DCRA used a permit form that did not provide any information about the rights of the public to inspect the plans or appeal. There is no evidence that Appellant actually knew where to go for a review of the plans, knew about the timeframe for appeals, or was familiar with Section 3112.2 of the Zoning Regulations during the sixty-day period following issuance of the Building Permit. The Appellant did not have a zoning attorney on retainer at that time, and the occupants of Erie Condominium did not possess any expertise in the building permit process. (Exhibit 24).

The Board also heard testimony regarding the general availability of plans at DCRA for public inspection. However, Mr. Wiedis testified for Appellant that he personally went to DCRA's offices to review the plans and was unable to do so. He recounted conversations with DCRA staff in which he was told that the plans were unavailable to him because he was not affiliated with the developer and that, in any event, they could not be located. DCRA attempted to rebut this testimony, but the Zoning Administrator admitted that he had encountered very similar situations when members of the public complained to him about the unavailability of plans. No party submitted direct evidence that the plans for the subject property were actually available for inspection during the sixty-day period or thereafter. Accordingly, the Board cannot find that the plans were actually available for inspection at DCRA, and the Board will not dismiss this particular appeal based upon Appellant's failure to review them.

The Board finds that the Appellant has met the exceptional circumstances standard in the Zoning Regulations based upon the totality of the circumstances and the information that was provided to the Appellant by the owners of the subject property, the BZA, DCRA and the Zoning Administrator.

C. The Parties Will Not Be Prejudiced

The Board finds that the extension of time for this appeal will not prejudice the parties. There is no evidence of any prejudice to DCRA in this particular case. The Permit Holder vaguely alleged prejudice, but it relied upon costs and construction activities that do not support an assertion of prejudice here. Appellant filed this appeal promptly after construction reached the roof level at the subject property. Construction had just commenced on the roof level at the time of appeal. The Permit Holder cannot claim prejudice for work performed after the date of the appeal. It performed such work at its own risk. *See Draude v. District of Columbia Bd. Of Zoning Adjustment*, 582 A.2d 949, 951 n.1 (D.C. 1990); *see also* BZA Order 17532-B (*AppleTree Institute for Education Innovation, Inc.*) ("a landowner who proceeds to erect a building while the issuance of a building permit is on appeal does so at his own risk." (citation omitted)). Notably, this appeal relates to areas of the project that had not been completed when the appeal was filed. The Board does not find prejudice based upon construction activities on the lower levels of the building that are not the subject of this appeal.

The Board finds that the appeal was timely pursuant to 11 DCMR § 3112.2(d). The Board finds that the standards of that section have been met, namely exceptional circumstances and an absence of prejudice to the parties. Permit holders will not be allowed to mislead neighbors and

then capitalize upon such questionable conduct by invoking the procedural protections of the Zoning Regulations.

Pursuant to Section 3100.5, the Board further waives the non-jurisdictional requirements of Section 3112.2 based upon the unique circumstances presented herein. 11 DCMR § 3100.5.

Based upon the totality of the circumstances, and the entire record of this case, the Board denies the Motion to Dismiss the appeal as untimely.

3. The Merits

DCRA erred by issuing the Building Permit because the Permit Set is inconsistent with BZA Order 18330 and the BZA Approved Plans. The inconsistencies include, but are not limited to, the height of the penthouse structures and their overall elevation. The Permit Holder and DCRA admit the inconsistencies relating to the penthouse structures. They admit that the plans changed so that the promised nine-foot penthouse structures are now 16.46 feet in height. They admit that the elevation of those structures is more than five feet higher than promised in 2012. They do not deny the authenticity of transcripts from the 2012 hearing containing express and repeated representations under oath to this Board regarding the low-rise penthouse structures.

Instead, DCRA and the Permit Holder argue that DCRA can approve plans that are materially different from the plans previously approved by this Board. According to DCRA, it can disregard every aspect of BZA-approved plans except for the particular specifications that relate directly to the zoning relief granted by the BZA or to separately enumerated conditions in BZA orders. The Board has never approved this interpretation of the Zoning Regulations and DCRA does not cite any court cases or legal authority in support of this position. Instead, DCRA and the Permit Holder rely solely upon an alleged “historical” practice by DCRA that has never been considered by the Board until this case.

The Board finds that DCRA lacks the authority to disregard the plans that the BZA approved in BZA Case No. 18330 with respect to material aspects of the roof level of that project. The Board, not the Zoning Administrator, has final administrative responsibility to interpret the Zoning Regulations. D.C. Code § 6-641.07 (g)(4) (2016); *Bannum, Inc. v. D.C. Bd. of Zoning Adjustment*, 894 A.2d 423, 431 (D.C. 2006). The Board, the parties to BZA Case No. 18330, and the public relied upon the specific representations and promises of the zoning applicant regarding features that supported the relief sought and were offered to mitigate adverse effects upon adjacent properties and the neighborhood. The applicant in BZA Case No. 18330 repeatedly highlighted specific concessions for the benefit of Erie Condominium in order to obtain the Board’s approval of its zoning application. The Board expressly noted and relied upon those promised features in its written opinion. In BZA Order No. 18330, this Board approved the zoning relief “subject to” the approved plans. DCRA erred by ignoring the Board’s prior mandate.

Moreover, BZA Order No. 18330 included the following language:

Pursuant to 11 DCMR § 3125, approval of an application shall include approval of the plans submitted with the application for construction of a building or structure (or addition thereto) or the renovation or alteration of an existing building or structure. An

applicant shall carry out the construction, renovation, or alteration only in accordance with the plans approved by the Board as the same may be amended and/or modified from time to time by the Board of Zoning Adjustment.

DCRA erred when it issued the Building Permit in violation of the express provisions in the Board's order and in 11 DCMR § 3125. Section 3125.7 of the Zoning Regulations provides that the approval of an application includes "approval of the plans submitted with the application for the construction of a building, unless the Board orders otherwise." 11 DCMR § 3125.7. Section 3125.8 provides:

An applicant shall be required to carry out the construction, renovation, or alteration only in accordance with the plans approved by the Board, unless the Board orders otherwise.

11 DCMR § 3125.8. Section 3205.3 further states that each condition to the approval of a special exception or variance "shall be treated as a condition to the issuance of [a] building permit." 11 DCMR § 3205.3. Section 3205.5 obligates any owner of the subject property to comply "at all times" "with any condition to the issuance of the building permit." 11 DCMR § 3205.5. The alleged "historical" practice of DCRA is inconsistent with these sections of the Zoning Regulations.

If a property owner is unclear as to compliance with a prior BZA order, then the Zoning Regulations provide for modification requests to the BZA. Sections 3129.2 through 3129.9 set forth procedures for modification of plans by the Board, including a streamlined request for "minor modifications." Section 3129.6 defines "minor modifications" to be "modifications that do not change the material facts upon which the Board based its original approval of the application." 11 DCMR § 3129.6. DCRA's "historical" practice is inconsistent with these Regulations, which expressly require this Board's involvement in modifications of BZA-approved plans. The Permit Holder in this case did not avail itself of these established procedures.

DCRA correctly argues that the Board's decision in this case may have implications that warrant further clarification in order to avoid confusion and a flood of potentially meritless appeals. This decision is based solely upon the facts presented in this case. These facts include without limitation a prior BZA order in which approval was *expressly* subject to the approved plans. The Board's order in BZA Case No. 18330 did not provide DCRA with flexibility to change those plans. Moreover, the inconsistencies between the BZA Approved Plans and the Permit Set of plans in this case involved important elements of the project that were expressly discussed in the Board's written Order No. 18330. In the instant case, the changes between the two sets of plans were closely related to the actual zoning relief that the Board granted in BZA Order No. 18330. In BZA Case No. 18330, the Board granted a special exception regarding the overall height of the building and that relief directly affected the height of the penthouse structures on top of the taller building. For that reason, the zoning applicant promised to reduce the height of the penthouse structures in an effort to counteract and minimize the adverse effects of a taller building.

This is not a case in which the changes between the Permit Set and the BZA Approved Plans are completely unrelated to the zoning relief granted by the Board. Instead, the Permit Set was materially inconsistent with the BZA Approved Plans and with the findings of the Board in its

prior written opinion. This is not a case where new details were simply added to a construction set of plans after BZA's approval of earlier plans that lacked such specificity. Similarly, this is not a case where an appellant is challenging a decision by DCRA to *reduce* the relief previously granted by the BZA or to *reduce* adverse impacts in a manner that is incontrovertible. In those circumstances, the Board may find that such changes are permissible because they conform with the letter and spirit of the Board's prior determination.

4. This Appeal is Not Barred by the Doctrines of Estoppel or Laches

This appeal is not barred by the doctrines of equitable estoppel or laches. Equitable estoppel is "judicially disfavored in the zoning context because of the public interest in enforcement of zoning laws." *Economides v. District of Columbia Bd. of Zoning Adjustment*, 954 A.2d 427 (D.C. 2008) (quoting *Beins v. District of Columbia Bd. of Zoning Adjustment*, 572 A.2d 122, 126 (D.C. 1990)). "Because of the public interest in enforcement of the zoning laws, stringent conditions are placed on the assertion of an equitable estoppel defense against the government" and the equities must "strongly" favor the party invoking the doctrine. *West End Citizens Assn. v. District of Columbia Bd. of Zoning Adjustment*, 112 A.3d 900, 903 (D.C. 2015). "For the equities to favor the party claiming the estoppel, any injury to the public that would flow from non-enforcement of the zoning laws must be minimal and outweighed by the injury estoppel would avoid." *Id.* at 904.

Similarly, "[l]aches is rarely applied in the zoning context except in the clearest and most convincing circumstances." BZA Order 17109 (*Kalorama Citizens Association*) (2005). (citation omitted). It is an equitable defense that can only be invoked by a person with clean hands. *Id.* Laches must be predicated upon *inexcusable* delay which has resulted in *substantial* prejudice. *Wieck v. District of Columbia Bd. of Zoning Adjustment*, 383 A.2d 7 (D.C. 1978) (finding 6 and ½ year delay in government enforcement was inexcusable).

Even if these equitable doctrines could be applied in this case, they cannot be invoked to protect a party who has unclean hands. The equities strongly favor Appellant for the reasons previously stated in this order.

The Permit Holder has not established that it made expensive and permanent improvements based upon its justifiable reliance upon actions of the District. Any such reliance was not justified. The Permit Holder was familiar with BZA Order 18330 and the determination letter from April 9, 2013 before it purchased the subject property. The Permit Holder had actual notice of the restrictions associated with development of the property and somehow procured a building permit in violation of those limitations.

The Permit Holder did not justifiably rely upon the Zoning Administrator's determination letters, dated December 27, 2013 and February 10, 2014. Neither letter expressly approved the height increase of the penthouse structures. The Permit Holder did not submit any plans that were approved or reviewed by the Zoning Administrator in connection with the December 27, 2013. The Zoning Administrator did not post online any plans with the February 10, 2014 letter showing a change in the height of the penthouse. (Exhibit 30).

Moreover, the Permit Holder's reliance upon DCRA was not "justifiable and reasonable" regarding material departures from BZA-approved plans because the Board, not the Zoning

Administrator, has final administrative responsibility to interpret the Zoning Regulations. D.C. Code § 6-641.07 (g)(4) (2016); *Bannum, Inc. v. D.C. Bd. of Zoning Adjustment*, 894 A.2d 423, 431 (D.C. 2006).

This appeal focuses upon the roof level of the Residential Building and the structures and decking on top of the roof. The Permit Holder cannot establish prejudice by relying upon the total expenses and improvements associated with unrelated parts of the building. The Board concludes that the Permit Holder knew about Appellant's concerns before the roof was built, before the rooftop structures were under roof, and before any rooftop decking was installed. At the time of the appeal, the rooftop cabanas had been very roughly framed with a few pieces of wood. (Exhibit 19). The Permit Holder continued to build at its own risk after Appellant challenged the largely unbuilt penthouse structures and roof decking.

The Board rejects the Permit Holder's contentions that *future* delays support a laches or estoppel defense. The Permit Holder could have applied to the BZA for a modification of its plans before securing any permit, and failed to do so.

Based upon all of the reasons stated above and the record herein, the Board concludes that the appeal should be **GRANTED**.

Accordingly, it is hereby **ORDERED** that the appeal is **GRANTED**.

And it is further **ORDERED** that no construction may proceed on the subject property pursuant to Building Permit No. B1410680 until the Permit Holder submits revised plans depicting a redesigned roof level, and DCRA issues an amended permit, approving the following changes:

- (a) penthouse structures that do not exceed 9 feet in height (including any parapet) or an elevation of 206.83 feet (including any parapet), whichever is lower; and
- (b) rooftop decking that is not more than one foot ten inches above the roof surface of Erie Condominium; and
- (c) such other changes as are required by this Order.

And it is further **ORDERED** that no occupancy permit shall issue for the premises until the aforementioned amended permit is issued and construction is completed in accordance therewith.

VOTE: _____

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

A majority of the Board members approved the issuance of this order.

ATTESTED BY:

SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: _____

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES.

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.