Revised[1] Pre-Hearing Statement of Advisory Neighborhood Commission 6C

District of Columbia Board of Zoning Adjustment
Appeal No. 19550

Advisory Neighborhood Commission 6C (ANC 6C) submits this revised pre-hearing statement in support of its appeal from the issuance of permit B1706219 ("the Permit"). For the reasons set forth below, we respectfully urge the Board to order the revocation of the Permit.

STATEMENT OF FACTS

This appeal relates to 1125 7th St. NE, also known as square 886, lot 35 ("the Property") in the RF-1 zone. The Property's owner of record is Atlas Squared, LLC, 7926 Jones Branch Drive, Ste. 600, McLean, VA 22102-3373. The Property lies entirely within the boundaries of ANC 6C.

The owner of the Property applied for the Permit on March 23, 2017. As part of the application, the owner submitted a Zoning Data Summary sheet. (A copy is attached at Tab A.) This unsigned form

- fails to specify the zone district of the Property
- fails to specify the number of existing and proposed dwelling units
- fails to specify the number of existing and proposed parking spaces
- fails to specify the existing and proposed rear and side setbacks
- fails to specify the existing and proposed building height, and
- fails to specify the existing and proposed lot area; floor area; floor area ratio; building area; and percentage of lot occupancy.

As discussed below, the form likewise fails to specify the proposed pervious-surface percentage of the Property's lot area.

DCRA issued the Permit only eight days later, on March 31, 2017. (A copy is attached at Tab B.) It purports to be a "[r]evision to building permit B1606543 and building permit B1512853 reflecting underpinning" and for "[r]enovation of an existing single family dwelling unit to a 2-unit separate townhouse" [*sic*]. In fact, however, neither of those two earlier applications ever resulted in a final permit.[2]

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[1] This revised statement replaces ANC 6C's original September 7, 2017 pre-hearing statement in its entirety.

[2] This error and the unsigned, almost entirely blank Zoning Data Summary sheet are only two of the many irregularities associated with the conspicuously hasty and cursory review of the application for the Permit. For example, the face of the Permit indicates that the fee for this extensive work—more than doubling the

As shown on the permit application drawings (attached at Tab C), the scope of the Permit includes

- the total removal of the front façade and construction of a newly configured façade with bay projection;
- the construction of a rooftop addition increasing the height of the existing rowhouse dwelling by several feet; and
- the construction of a new structure in the rear yard, equal in size to the newly expanded original dwelling, connected to the latter by a subterranean corridor.

LEGAL ANALYSIS

As explained below, the Board should revoke the Permit because its issuance violated at least three separate provisions of the zoning regulations.

A. The Permit Violates the Minimum Pervious-Surface Requirement

Subtitle C, section 501 and subtitle E, section 204.1 require every RF zone lot larger than 2,000 square feet to have a minimum of 20% pervious surface. The Permit fails to meet this requirement.

As shown on the Permit application plat (copy at Tab D), the Property has a lot area of 2331.6 square feet. Construction on the site therefore requires a minimum pervious surface area of 20% of that area, approximately 466 square feet.

The plat claims that the "un-hatch" area—that is, the entire 40% of the lot not covered by structures—is "permeable area." This comprises the center courtyard; several "wells" (areaways), stoops, and exterior stairwells; and the parking spaces abutting the alley.

In fact, this 40% figure is patently false. Most obviously, each and every one of the "wells" shown on the plat consists not of soil allowing water percolation, but instead of impervious concrete sloped toward a drain tied into the waste line. Permit drawing S.01 (*see* Tab C) depicts this unambiguously in multiple places:

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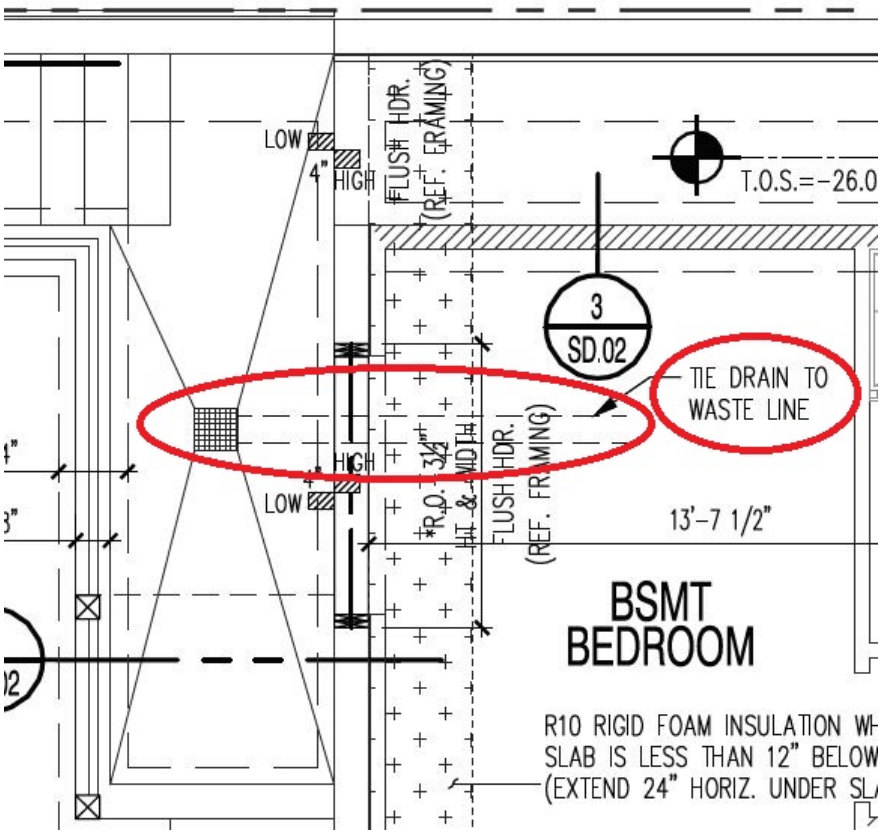
floor area and volume of the existing rowhouse dwelling—is $36.30. In addition, the field on the Permit for specifying the Property's zone is blank.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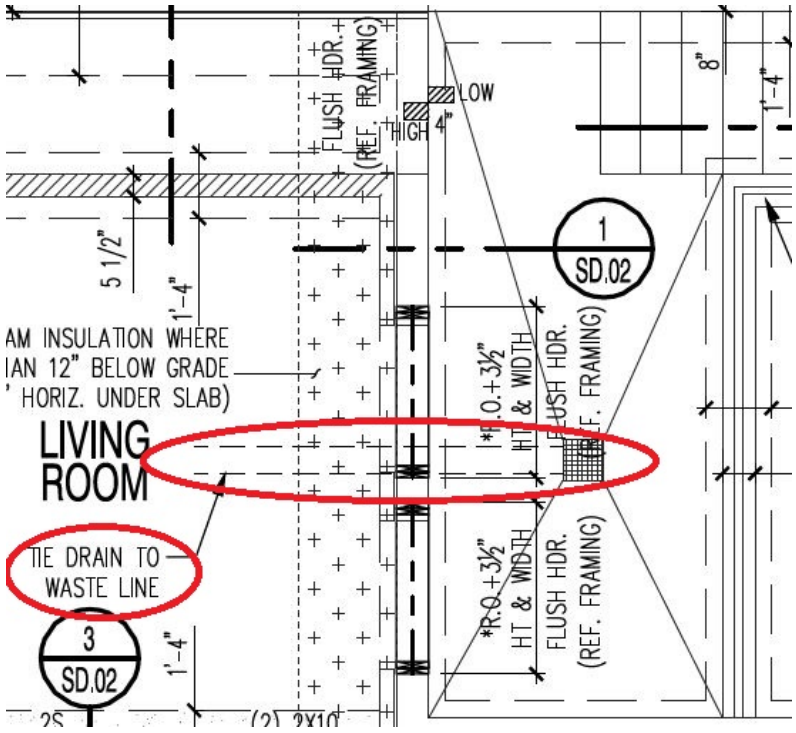
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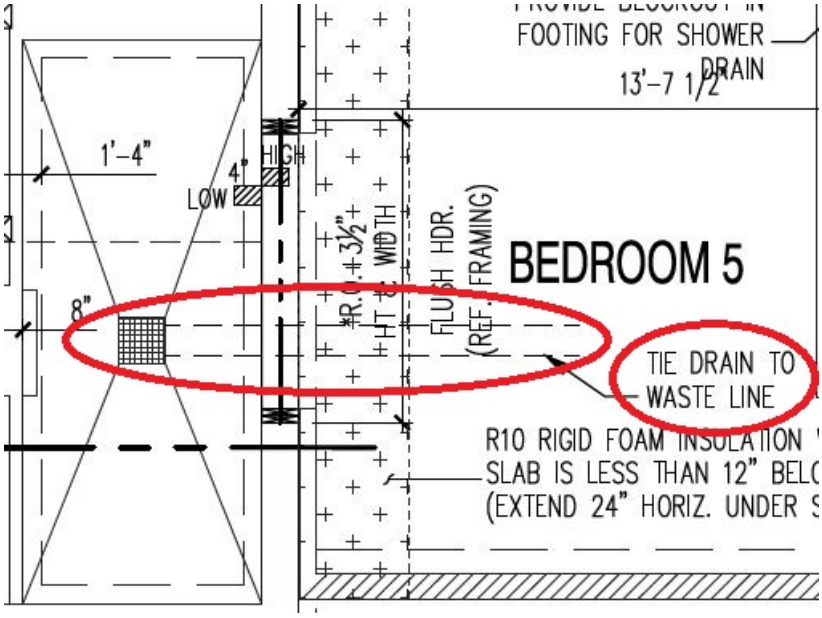
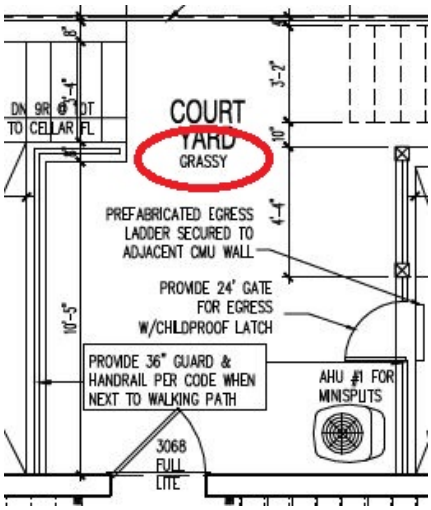


These areaways, which have a combined area of over 300 square feet, in no way satisfy the definition of "pervious surface" in the regulations. As a result, the applicant's claim that 40% of the lot is "permeable area" is incontrovertibly false. The pervious-surface figures on the plat must therefore be disregarded in their entirety, and the individual plan drawings examined for explicit indications that pervious surface is planned.

With one exception, no such notations exist. The 304sf parking pad at the rear of the property (shown on sheet A1.1 at Tab C) bears no such markings. The two outdoor stairwells leading to the rear basement unit—which are disqualified in any event by 11 DCMR C § 502.2(a)—likewise bear no such notations.

Indeed, the lone pervious-surface marking we have located in the plan drawings is for the central courtyard (sheet A1.1), which labels it "grassy":



Although the plans do not provide specific dimensions for this portion of the Property, our measurements indicate that this area covers only 156 square feet, or less than 6.7% of the overall lot area. (This calculation generously ignores the air-conditioning unit seen above.) Even if our calculations were off by 100%—and we respectfully submit that they are not—the labeled "grassy" area would still fall far below the minimum 466 square feet of pervious surface required by the zoning regulations.[3]

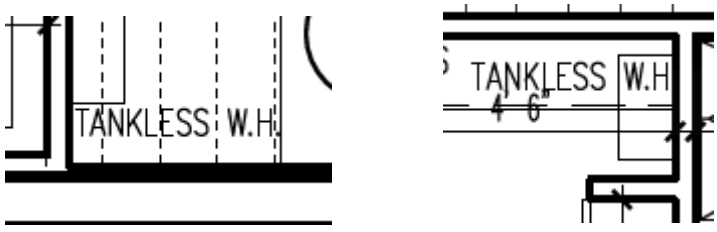
The Zoning Administrator failed to note any of these contradictions and deficiencies in the application drawings for the Permit. Likewise, the Administrator ignored the applicant's failure to provide a pervious-surface figure (or any other relevant information other than number of stories) on the Zoning Data Summary sheet. Instead, the Administrator accepted at face value the applicant's untruthful statement on the plat that fully 40% of the lot would consist of pervious surface.

Because the Permit drawings fail to provide for 20% pervious surface area on the lot, DCRA issued the Permit in error and the Board should order its revocation.

B. <u>The Permit Allows for Construction of Too Many Units</u>

Subtitle E, section 302.1 allows a maximum of two dwelling units to be constructed on this Property in the RF-1 zone. Although the drawings explicitly label only two units—one in the existing rowhouse structure and a second in the new structure in the rear yard—the drawings actually depict four units.

Sheet A1.1 of the Permit drawings (*see* Tab C) shows a functioning separate unit on the cellar level of each of the two (front and rear) structures. Each cellar unit has a bedroom. Each cellar unit has full bathroom. Each cellar unit has a "living room" featuring a refrigerator, dishwasher, and large kitchen-style sink. And each cellar unit has its own tankless water heater separate from the water heaters in the two units (front and rear) on the first floor:

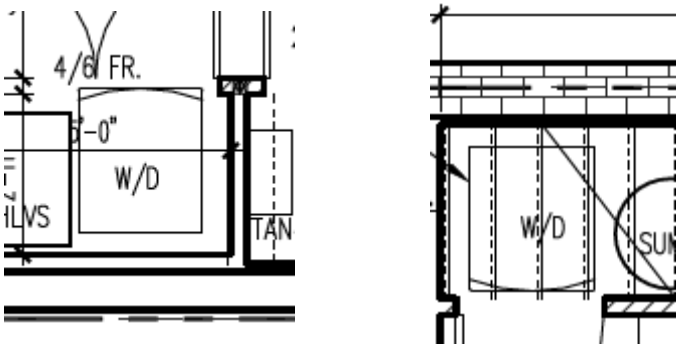


Sheet A1.1: Cellar-unit water heaters in rear structure (left) and front structure (right)

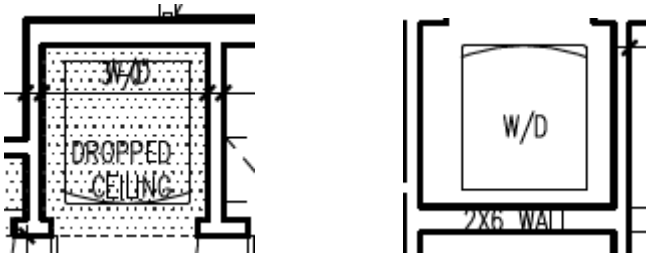
[3] Even if appellant were obliged to identify **<u>non</u>**-pervious surface area—as opposed to simply pointing out that the Property owner failed to affirmatively identify on the permit drawings those specific areas qualifying as pervious surfaces—the Permit would be still be invalid. As noted above, the applicant's plat asserts that 40% of the lot (932.6sf) is pervious surface. Subtracting the parking pad (304sf) and the paved areaways (over 300sf collectively, even without including all of the stairwell areas) leaves at most ~328sf, still far below the required minimum 466sf of pervious surface.

Sheet A1.1: First-floor water heaters in upper units in rear structure (left) and front structure (right)

Moreover, each cellar unit has its own laundry facilities (marked "W/D") distinct from the laundry facilities in the front and rear upper units. These four separate washer/dryer units appear clearly on Sheet A1.1 (cellar level) and Sheet A2.1[4] (second floor):



Sheet A1.1: Cellar-unit laundry facilities in rear structure (left) and front structure (right)



Sheet A2.1: Second-floor laundry facilities in upper units in rear structure (left) and front structure (right)

[4] ANC 6C notes that although Sheet A2.1 was not included as an attachment to its initial Appeal Statement, this drawing later became part of the official case record as an attachment to the statement of neighbor Amy Stouffer. *See* Case Exhibit 28. ANC 6C, which is therefore entitled to cite to this document, has included a copy in the drawings at Tab C for the Board's convenience.

In October 2017, DCRA issued written guidance—the "DCRA Guidance," attached at Tab E—on the issue of identifying dwelling units in plan submissions. In general, the Guidance seeks to a) define differences between spaces with similar functions (*e.g.*, "wet bar" vs. "kitchen") and b) provide standards for when a given combination of connected spaces and features (*e.g.*, a space with a full bath, sleeping quarters, laundry, and "wet bar") rises to the level of a full dwelling unit.

Under the terms of the DCRA Guidance, each of the two cellar spaces (front and rear) authorized under the Permit is presumptively a separate dwelling unit:

a) **Kitchen, not "wet bar"**: The two cellar spaces (front and rear) labeled "living room" on Sheet A1.1 each contain a sink, refrigerator, and dishwasher. Because section III.A.4 of the Guidance prohibits a "wet bar" from including a dishwasher or a sink larger than 2sf, DCRA treats this "living room" as a kitchen. *See* DCRA Guidance III.A.1 ("Exceeding any element of the below limitations will cause a 'wet bar' to be classified as a 'kitchen' for zoning compliance review.") (emphasis in original).

b) Under section IV.B.3, "a design that includes a kitchen … would presumptively be reviewed as a dwelling unit design for zoning purposes."

c) Even if the sink/refrigerator/dishwasher area in each of the Property's planned cellars could somehow be construed as a mere "wet bar," the Permission Chart in section IV.B.7 presumes that a space is a separate unit if, in addition to a wet bar, it has **either** a full bath **or** laundry facilities. *See* DCRA Guidance IV.B.7(i)(b).[5]

In sum, not only does common sense compel the conclusion that the front and rear cellar spaces are separate, additional units, but DCRA's own internal written standards for zoning analysis reinforce that conclusion.

Regardless of whether the Board considers these cellar units to be principal units or accessory units,[6] they bring the total number of units to double the legal maximum. Because the Permit violates the cap on the allowable number of units, the Board should therefore order its revocation.

C. The Permit Allows Construction of an Illegal Second Principal Building

The Permit allows the construction in the rear yard of a new second structure equal in size to the expanded existing rowhouse dwelling. Because this structure is a separate

[5] This provision applies to spaces in a principal building that feature both direct access to the outdoors and interior access to the rest of the structure, such as through a stairway. Both the front and rear cellars of the Property would meet these criteria.

[6] Section 302.3 of Subtitle E expressly prohibits *any* accessory units in this zone district.

building (as defined in the zoning regulations) and because it does not qualify as an accessory building, it constitutes an illegal second principal building.

1. The Two Structures are Separate Buildings

Prior to the adoption of the 2016 zoning regulations, much uncertainty and controversy surrounded the question of when a new addition qualified as a separate building. As the Office of Planning noted in 2008 at the start of the comprehensive zoning rewrite,

> [o]ver the past few years the determination of what constitutes a single building for zoning purposes has hinged on the concept of a "meaningful connection." This has generally been interpreted to mean that some above ground interrelatedness is required, but often only in token fashion. In some instances, a covered walkway has served to combine two structures into one building for zoning purposes. Often two buildings are combined into one building by a single locked doorway.

Memorandum from Deputy Director Jennifer Steingasser to the Zoning Commission, Sept. 15, 2008 (ZC 08-06-1, Case Exhibit 12).

Addressing the problem of such "fig leaf" connections remained a continuing concern for the Zoning Commission through the many years of the zoning rewrite, and the draft language evolved repeatedly from the initial proposal laid out in Deputy Director Steingasser's original memo. *See* Memorandum from Travis Parker, Office of Planning, Dec. 1, 2008 (ZC 08-06-1, Case Exhibit 46) (summarizing public comment and offering revised definitional language); Setdown Report for Portions of ZC 08-06, Aug. 12, 2010 (ZC 09-06, Case Exhibit 4) (proposing further modifications to definition).

These efforts resulted in current Subtitle B, section 309.1. In relevant part, that regulation states that two structures qualify as a single building only if the connection between them satisfies each of the four criteria set out in subsection 309.1(a)-(d). The structures authorized under the Permit fail this test in two separate and equally fatal respects.

a) The subterranean connecting corridor is not "fully above grade"

First, the below-grade connecting corridor in this case is not "fully above grade" as required by subsection 309.1(a). Sheet A5.2 shows a section view of the two structures and the connector. *See* Tab C. As this drawing makes clear, the "breezeway" serves exclusively to connect a cellar corridor under the existing rowhouse to the new rear structure. Although the "breezeway" is over 23' long, the overwhelming majority of its length is dedicated to corridor, stairs, and a landing below the grade (marked "BHMP") at the front of the Property.[7]

[7] Even when measured against the grade in the interior courtyard, the western half of the "breezeway"—the nine steps down and the landing/corridor at their base—is still below grade.

In an attempt to obscure this defect, the Permit drawings provide for a roof over the "breezeway" roughly level with the ceiling of the front and rear structures' first floors. In one section at the west end, the result is an underground passageway with a roof more than 18' overhead. The Board should reject this transparent effort to circumvent the requirements of the new zoning regulations. Instead, the Board should construe "fully above grade" in section 309.1(a) to exclude any such connector whose floor is at any point, for the full width of the connector, below grade.

b) The connector fails to meet the standards of section 309.1(d)

Even if the Board finds, contrary to ANC 6C's contentions, that the connector is "fully above grade," the front and rear structures fail to qualify as a single building for a second, independent reason. Specifically, the connector does not satisfy the function/ purpose requirements of the regulations.

Section 309.1(d) mandates that in order for two structures to qualify as a "single building," the connector must be either (1) space for common use, such as lobby, recreation room, loading dock, or service bay or (2) "space that is designed and used to provide free and unrestricted passage."

Self-evidently, the narrow underground corridor is not a lobby, recreation room, or other qualifying common-use area. It serves not as a room, but strictly as a means of passage between different portions of the Property, and thus fails to satisfy the first alternative prong of subsection (d).

Subsection (d)(2) is equally unavailing. That test requires a qualifying connector to provide "free and unrestricted passage between separate portions of the building, such as an unrestricted doorway or walkway." But as the first-floor plan (sheet A1.1 at Tab C) shows, the east end of the "breezeway" stops at the entrance—obviously locked—of what is labeled Unit #2.

The Office of Planning and the Zoning Commission were concerned from the outset of the zoning rewrite about the past practice of allowing such restricted passageways to masquerade as legitimate unifying connectors. *See* Steingasser Memo of Sept. 15, 2008 ("Often two buildings are combined into one building by a single locked doorway"). In this case, the locked front entrance of Unit #2 disqualifies the "breezeway" from providing "free and unrestricted passage."

Instead, the "breezeway" should be seen for what it is: a sham connection between two functionally separate buildings that house entirely separate dwelling units. Like the lack of a "fully above grade" connection, this defect is fatal to the Permit.

2. The Separate Rear Building is Not an Accessory Building

Because a second principal building is not allowed on the Property, the new separate rear building would be legal only if it qualified as an accessory building. It does not, and the Permit must therefore be revoked.

Most obviously, an accessory building in an RF zone may be no taller than 20' and two stories. As sheet A5.2 (*see* Tab C) shows, the proposed rear building exceeds both of these limits.

More generally, an accessory building in an RF zone must be "subordinate to" the principal building and "secondary in size" to it. *See* 11 DCMR Subtitle E §§ 5000.1(a) & 5000.2. Numerous drawings submitted in support of the application for the Permit—including the plat (Tab D) and sheets A4.2 and A5.2 (both at Tab C)—demonstrate that the new rear building would equal the size of the existing front building even after the expansion of the latter.

CONCLUSION

For all the reasons stated above, ANC 6C respectfully urges the Board to find that DCRA and the Zoning Administrator violated the Zoning Regulations in issuing permit B1706219. Accordingly, we ask the Board to reverse the decision of the Zoning Administrator and to order the immediate revocation of permit B1706219.

Respectfully submitted,

Mark Eckenwiler
Commissioner, ANC 6C04
(as authorized representative
for ANC 6C)

TABLE OF ATTACHMENTS

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2018, I served a copy of ANC 6C's Revised Pre-Hearing Statement in Appeal No. 19550, along with attachments, on the following persons by electronic mail:

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