

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

Appeal of Nefretiti Makenta

BZA Appeal 19573

**DCRA’S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND
PRE-HEARING STATEMENT**

Appellant appealed the May 2, 2017 approval by the Zoning Administrator (the “**ZA**”) of building permit application B1707364, issued as a permit on May 31, 2017 (the “**Revised Permit**”). The Revised Permit revised building permit B1603868 (the “**Original Permit**”), issued on February 10, 2017 for renovations of a building located at 3616 11th Street N.W., known as Lot 803 in Square 961 (the “**Building**” and the “**Property**”, respectively), and located in the RF-1 Zone. The Revised Permit addressed a requirement of the Construction Codes that new construction retain a ten (10) foot horizontal clear space around the operating chimney on Appellant’s property by carving out a seven (7) foot semicircle out of the proposed third floor, with that void converted into a deck (the “**Side Deck**”), as illustrated by comparing Sheet A100 of the Original Permit Plans (**Attachment A**) with Sheet A100 of the Revised Permit Plans (revised area indicated with red hatching) (**Attachment B**).

Appellant had previously appealed the ZA’s approval of the Original Permit in BZA Appeal 19510, which the Board of Zoning Adjustment (the “**Board**”) dismissed.¹ This appeal is limited to the Revised Permit, and therefore solely to the changes to the Original Permit Plans authorized by the Revised Permit. In this appeal Appellant appears to allege that the ZA erred in approving the Revised Permit for two reasons: (1) determining that the Side Deck did not have to comply with the setback requirements of Section C-1502.1(c)(2) and (2) determining that the Side Deck semi-circle carve-out from the proposed 3rd floor did not constitute a “modification of consequence” requiring Board approval.²

DCRA asserts that the ZA correctly determined that the Side Deck should not be subject to the penthouse setback requirements of Section 1502.1(c)(2) because the Side Deck is on the third

¹ BZA Appeal 19510, Transcript of July 19, 2017 Public Meeting, at 11-12.

² BZA Appeal 19573, Exhibit 2, Appellant’s Statement of Appeal, at 1.

floor and so is not a penthouse, and even if a penthouse the Side Deck qualifies as a “balcony” exempt from Section C-1502.1 as articulated by the ZA’s December 22, 2016 guidance (**Attachment C**). DCRA also asserts that the ZA correctly approved the Revised Permit as the revision did not depart from the plans approved by the Board’s Order in Application 19387, and so should not be classified as a “modification of consequence.” Nonetheless, out of an abundance of caution, the Permit Holder requested ZA approval for a modification from Board approved plans allowed under Section A-304.10, which the ZA granted after review (**Attachment D**).

DCRA therefore asserts that Appellant failed to meet her burden of proof required by Section X-1101.2, and so respectfully requests that the Board find that the ZA correctly approved the Revised Permit and dismiss the appeal.

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM PER SECTION Y-302

DCRA hereby moves to dismiss this appeal of the Revised Permit for failure to state a claim in the filing of her appeal as required by Section Y-302.12.

Section Y-302 establishes the filing requirements for an appeal, specifically

- An appellant must include a statement of all issues on appeal in the initial appeal filing - Section Y-302.12(g)
- An appellant is prohibited from adding to additional allegations beyond those specified in the initial appeal filing - Section Y-302.13
- An appellant must include all evidence supporting the alleged violations of the Zoning Regulations in the initial appeal filing - Section Y-302.12(h)
- An appellant is prohibited from submitting any supplemental filings any “later than twenty-one (21) days before the date of the public hearing” - Section Y-302.16
- An appellant is prohibited from presenting at the hearing any documents or witnesses that were not included in the original appeal and 21-day filings - Section Y-302.14

Appellant filed her “Statement of Appeal” on June 30 and an “Addendum to Application Statement of Appeal” on July 17, which did not raise any additional claims. Appellant chose to not file any supplemental filing prior to September 27, the twenty-one (21) day filing deadline imposed by Section Y-302.1 prior to the scheduled October 18, 2017 hearing.

APPELLANT’S ALLEGATIONS

- 1) Appellant stated that “the issues on appeal relate to Title 11: Subtitle C: Section 1502.1C1A”,³ but without any substantive explanation of how Appellant alleges that the Revised Permit violated this zoning provision, or any evidence to support such an explanation, which Section Y-302.12(h) requires be submitted “at the time of filing of the appeal”.
- 2) Appellant also asserted that the Revised Permit constitutes a “modification of consequence”, but without “identifying the relevant subsections” of the Zoning Regulations that are allegedly violated, as required by Section Y-302.12(g), or providing any substantive explanation of how Appellant alleges that the Revised Permit violated this zoning provision, or supporting evidence, which Section Y-302.12(h) requires be submitted “at the time of filing of the appeal”.
- 3) Appellant also asserted that she would include
“any other subtitles and sections among the more than 1000 pages of Title 11 about which I could not yet or am not currently aware that relate to setback, guardrail, property line, privacy, light and air, which govern this deck and its adjacent placement or removal.”⁴

However, such an open-ended and broad allegation, without any specific references to the “relevant subsection” of the Zoning Regulations allegedly violated, does not comply with Sections Y-302.12(g), which requires the initial appeal state the alleged violations, and Y-302.13, which prohibits any amendment of an appeal to include additional issues beyond that filed in the initial appeal.

Since Appellant failed to provide any references to a specific subsection of the Zoning Regulations that the ZA allegedly violated, apart from “Section C-1502.1C1A”, DCRA asserts that the other two allegations should be dismissed (numbers 2 and 3 above). For Appellant’s allegation that the Revised Permit violated Section C-1502.1C1A, DCRA asserts that Appellant also failed to state a claim because the initial appeal filing did not include evidence or argument to support Appellant’s allegations and because Appellant chose to not file the twenty-one (21) day supplemental filing. Therefore, DCRA respectfully requests that the Board grant DCRA’s

³ BZA Appeal 19573, Exhibit 2, Appellant’s Statement of Appeal, at 1.

⁴ BZA Appeal 19573, Exhibit 2, Appellant’s Statement of Appeal, at 1.

Motion to Dismiss for all of Appellant’s allegations, or at least allegation numbers 2 and 3 above, and so dismiss the appeal

PRE-HEARING STATEMENT

If the Board denies DCRA’s Motion to Dismiss in full or in part, DCRA hereby submits its Pre-Hearing statement.

ARGUMENT

1. The ZA correctly determined that the Side Deck was not subject to the penthouse setback requirements Section C-1502.1(c)(2)

Appellant alleged that the Revised Permit violated the requirement of Section C-1502.1(c)(2):

1502 PENTHOUSE SETBACKS

1502.1 Penthouses, screening around unenclosed mechanical equipment, rooftop platforms for swimming pools, roof decks, trellises, and any guard rail on a roof shall be setback from the edge of the roof upon which it is located as follows:

- ... (c) A distance equal to its height from the side building wall of the roof upon which it is located if:
 - ... (1) In any zone, it is on a building used as a detached dwelling, semi-detached dwelling, rowhouse or flat, that is:
 - (A) Adjacent to a property that has a lower or equal permitted matter-of-right building height, or
 - (B) On a corner lot adjacent to a public or private street or alley right-of-way or a public park;
 - (2) In the R-1 through R-F zones, it is on any building not described in Subtitle C § 1502.1(c)(1) that is:
 - (A) Adjacent to a property that has a lower or equal permitted matter- of- right building height, or
 - (B) On a corner lot adjacent to a public or private street or alley right-of-way or a public park; ...

However, Appellant did not explain or justify her allegation, let alone provide any evidence to substantiate her allegation.

DCRA asserts that this allegation is without merit, as the Side Deck is located on the third story of the Building, which is permitted as a matter of right under Section E-303.1, as can be seen in page 7 of Exhibit 66 to Application 19387 approved by the Board (**Attachment E**). As a permitted story, the third floor of the Building does not constitute a “penthouse”, as defined by Section B-1002:

“Penthouse: A structure on or above the roof of any part of a building.”

Although “roof” is undefined by the Zoning Regulations, Webster’s Dictionary, the reference source for undefined terms per Section B-100.1(g), defines “roof” as “1a(1) the cover of a building; ...”, which would describe the covering of the top story, but not include the top story itself. Indeed, Section E-303.1 specifically excludes a penthouse from the three stories allowed as a matter of right in the RF-1 zone:

Y- 303.1 Except as specified elsewhere in this section, the maximum permitted height of buildings or structures and any additions thereto **not including the penthouse**, in an RF-1 zone shall not exceed thirty-five feet (35 ft.) and three (3) stories.”
(bold and underscore added)

Therefore, DCRA asserts that the Side Deck is not subject to Section 1502.1(c)(2), which is limited to “penthouses ... and any guard rail on a roof”.

However, even if the Board determined that the third story of the Building constituted a “penthouse”, and so the Side Deck would potentially be subject to the penthouse setback requirements of Section C-1502.1(c)(2), the Side Deck would still be exempt from these penthouse setback requirements because it would qualify as a “balcony” under the ZA’s guidance, as stated in the December 2016 determination (the “**ZA Guidance**”, **Attachment C**). The ZA Guidance distinguished between a “rooftop deck” – an uncovered deck projecting ten or more feet from the building wall – that must comply with these penthouse setback requirements, and a “balcony” – an uncovered deck that projects no more than ten feet (10’) from the building wall – that is exempt from these penthouse setback requirements. As authorized by Sheet A100 of the Revised Permit Plans (**Attachment B**), the Side Deck projects out no more than six feet, ten inches (6’ 10”) from the building wall. Therefore DCRA asserts that the Side Deck qualifies as a “balcony” under the ZA Guidance and so is exempt from the penthouse setback requirements of Section 1502.1(c)(2).

DCRA therefore asserts that the appeal is without merit and should be dismissed.

2. The ZA correctly determined that the Side Deck semi-circle carve-out from the 3rd story did not constitute a “modification of consequence” requiring Board approval

The Board’s Summary Order in Application 19387 for the Property approved the special exception relief requested “subject to the approved plans at Exhibit 66”.⁵ This Exhibit 66

⁵ BZA Application 19387, Summary Order dated December 28, 2016, at 2.

(**Attachment E**) only showed renderings of the front (east) and rear (west) elevations (at pages 7 and 11). The Revised Permit, however, only authorized changes to a portion of the third floor on the north side of the Building, as can be seen by comparing Sheet A100 of the Original Permit Plans (**Attachment A**) with the Revised Permit Plans (**Attachment B**). Moreover, the Revised Permit actually slightly reduced the Permit Holder’s use of the relief granted by the Board in Application 19387 to the extent that the Side Deck did not utilize the special exception relief from building height granted for the third floor.

Nonetheless, out of an abundance of caution the Permit Holder requested ZA approval for modifications from plans approved by a Board Order pursuant to Section A-304.10 (**Attachment D**). Upon review of the request, the ZA determined that the requested modification met all of the standards of Section A-304.10.

DCRA therefore asserts that the appeal is without merit and should be dismissed.

CONCLUSION

DCRA therefore respectfully requests the Board find that (i) the ZA correctly approved the Revised Permit as compliant with the Zoning Regulations and (ii) that Appellant failed to meet her burden of proof under Section X-1101.2 to establish that the ZA erred in approving the Revised Permit; and therefore dismiss this appeal.

Respectfully submitted,
CHARLES THOMAS
General Counsel
Department of Consumer and Regulatory Affairs

Date: 10/11/17

/s/ Maximilian L.S. Tondro
Maximilian L. S. Tondro (D.C. Bar # 1031033)
Assistant General Counsel, Office of General Counsel
Department of Consumer and Regulatory Affairs
1100 4th Street, S.W., 5th Floor
Washington, D.C. 20024
(202) 442-8403 (office) / (202) 442-9477 (fax)
maximilian.tondro@dc.gov
Attorney for Department of Consumer and Regulatory Affairs

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October 2017, a copy of the foregoing DCRA’s Pre-Hearing Statement was served via electronic mail to:

Nefretiti Makenta
3618 11th Street, N.W.
Washington, D.C. 20010
dcnef@earthlink.net
Appellant

Kent C. Boese, Chairperson
Advisory Neighborhood Commission 1A
608 Rock Creek Church Road, N.W.
Washington, D.C. 20010
1A08@anc.dc.gov

Meridith Moldenhauer
Cozen O’Connor
1200 19th Street, N.W., 3rd Floor
Washington, D.C. 20036
mmoldenhauer@cozen.com
Counsel for Permit Holder

Sharon Farmer, Single Member Advisory
Neighborhood Commissioner, ANC-1A07
3601 11th Street, N.W.
Washington, D.C. 20010
1A07@anc.dc.gov

/s/ Maximilian L.S. Tondro

Maximilian L.S. Tondro (D.C. Bar #1031033)

ATTACHMENT A

Sheet A100 of the Original Permit Approved Plans

ATTACHMENT B

Sheet A100 of the Revised Permit Approved Plans
(red hatching indicating area of change to create 10 foot clear space around adjacent chimney)

ATTACHMENT C

ZA’s December 22, 2016 guidance on “balcony” not subject to penthouse setback requirements of Section C-1502.1

ATTACHMENT D

ZA's approved modification from BZA approved plans per Section A-304.10

ATTACHMENT E

BZA Approved Plans - Exhibit 66 to Application 19387 approved by the Board