

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

Appeals of Nefretiti Makenta

BZA Appeal 19573

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**DCRA’S MOTION TO REOPEN RECORD TO INCLUDE PERMIT REVISION  
B1802077 FOR SIDE DECK GUARD AND TO INCORPORATE INTO APPEAL**

DCRA respectfully requests that the Board of Zoning Adjustment (the “**Board**”) grant DCRA’s request under Section Y-602.6 of the Zoning Regulations to reopen the record in this appeal to allow the inclusion in the record, and the incorporation into the appeal, of a revision to the building permit challenged in this appeal as the revision clarifies one of the key issues in the appeal – namely if a guard is required by the Building Code (Title 12A of the DCMR) on the Side Deck. DCRA asserts that reopening the record for this purpose is in the interests of judicial economy as it clarifies the scope of the appeal and avoids the possibility that the revision may be separately appealed to the Board. DCRA also asserts that there is no prejudice to the parties as the Appellant raised the issue of the requirement for a guard at the hearing as well as in her related appeal before the Office of Administrative Hearings, and as Section Y-602.7 provides that Appellant may submit a response within seven (7) days from the email notice from the Office of Zoning should the Board grant DCRA’s motion.

At the November 15, 2017 hearing, DCRA noted that the plans approved with the Revised Permit (B1707364) did not appear to show any guardrail at the edge of the Side Deck. After this hearing, Counsel for DCRA followed up with DCRA Building Code reviewers, who confirmed (i) that the portion of the Side Deck adjacent to the window well must be protected by a guard under Section 1013 of the Building Code (Title 12A of the DCMR) and (ii) that the DCRA Building Code review of the Revised Permit had failed to identify this requirement. DCRA therefore required the Permit Holder to submit a revision to comply with this provision of the Building Code, which the Permit Holder did immediately. Permit B1802077 was issued on November 20, 2017 with the following scope of work (the “**Guard Permit**”):

“Revision to existing building permit number B1707364. To add 42” high guardrail to balcony” (**Attachment A**)

The elevations and plans approved with the Guard Permit show that the guard will be 42” high above the roof deck (**Attachments B and C**).

DCRA asserts that the Guard Permit does not materially change the correctness of the ZA’s decision to grant the Revised Permit and only clarifies the issue in the appeal. DCRA maintains its position taken in its Pre-Hearing Statement and at the hearing that the ZA correctly determined that Section C-1502.1(c)(2) did not apply to the Revised Permit because

- (i) Section C-1502.1(c)(2) only applies to penthouses, which are above the maximum by-right building envelope – in this case above the by-right permitted third floor where the Side Deck is located; or
- (ii) alternatively, if the Board determines that the third floor is subject to the penthouse setback provisions of Section C-1502.1(c)(2), that the guard proposed in the Guard Permit is exempt from Section C-1502.1(c)(2) under the ZA Guidance issued to DCRA zoning staff and the Office of Planning in December 2016 (Attachment C to DCRA’s Pre-Hearing Statement, BZA Appeal 19573 Exhibit 36C), since the Side Deck was less than ten (10) feet deep and so qualified as a “balcony”.

Therefore DCRA asserts that reopening the record to include the Guard Permit, and to incorporate the Guard Permit in this appeal, clarifies the issues before the Board and avoids the potential for an additional appeal of the Guard Permit. DCRA does not believe that a new hearing is required as the Guard Permit only establishes that a guard is required and specifies where the guard will be installed. Since the guard would be the structure subject to Section C-1502.1(c)(2) under Appellant’s interpretation, DCRA asserts that incorporating the Guard Permit, which specifies the height and location of the guard may help the Board in determining whether the guard is subject to Section C-1502.1(c)(2) – one of the key issues in this appeal.

### **CONCLUSION**

DCRA therefore respectfully requests the Board to grant DCRA’s Motion to Reopen the Record to Include the Guard Permit and to Incorporate the Guard Permit into this appeal.

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

Date: 11/28/17

/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 4<sup>th</sup> Street, S.W., 5<sup>th</sup> Floor  
Washington, D.C. 20024  
(202) 442-8403 (office) / (202) 442-9477 (fax)  
[maximilian.tondro@dc.gov](mailto:maximilian.tondro@dc.gov)  
*Attorney for Department of Consumer and Regulatory Affairs*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 28<sup>th</sup> day of November 2017, a copy of the foregoing DCRA’s Motion to Reopen Record to Include Guard Permit was served via electronic mail to:

Nefretiti Makenta  
3618 11<sup>th</sup> Street, N.W.  
Washington, D.C. 20010  
[dcnef@earthlink.net](mailto: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](mailto:1A08@anc.dc.gov)

Meridith Moldenhauer  
Cozen O’Connor  
1200 19<sup>th</sup> Street, N.W., 3<sup>rd</sup> Floor  
Washington, D.C. 20036  
[mmoldenhauer@cozen.com](mailto:mmoldenhauer@cozen.com)  
*Counsel for Permit Holder*

Sharon Farmer, Single Member Advisory  
Neighborhood Commissioner, ANC-1A07  
3601 11<sup>th</sup> Street, N.W.  
Washington, D.C. 20010  
[1A07@anc.dc.gov](mailto:1A07@anc.dc.gov)

/s/ Maximilian L.S. Tondro  
Maximilian L.S. Tondro

**ATTACHMENT A**

Building Permit B1802077, issued by DCRA on November 20, 2017, to revise Building Permit B1707364 to include a guardrail for the Side Deck (the “**Guard Permit**”) (submitted as a separate document)

**ATTACHMENT B**

Elevations approved with the Guard Permit (submitted as a separate document)

**ATTACHMENT C**

Plans approved with the Guard Permit (submitted as a separate document)