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

Appeal of Advisory Neighborhood Commission 6C BZA Appeal No. 19550

D.C. DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS' AMENDED PRE-HEARING STATEMENT

The D.C. Department of Consumer and Regulatory Affairs (DCRA) respectfully requests that the Board of Zoning Adjustment (Board) deny this appeal for the following reasons:

Appellant Advisory Neighborhood Commission 6C (ANC 6C) alleges that the Zoning Administrator erroneously issued permit B1805207 (Revised Permit), which allowed the Permit Holder, Atlas Squared, LLC, to renovate and convert 1125 7th Street, N.E. (Property) from an existing single-family dwelling to a two-unit townhouse. (Attachment A – Revised Permit.) In support of its allegation, Appellant claims that five provisions of the 2016 Zoning Regulations[1] were violated.[2] On August 2, 2018, DCRA issued revised permit B1811245 (August 2nd Revised Permit), which corrected an error in the plans and changed the manner of the construction and the design of the roof hatch. (Attachment B –August 2nd Revised Permit.) DCRA's position is that the Zoning Administrator correctly issued the August 2nd Revised Permit after determining that the drawings were compliant with the Zoning Regulations.

FACTUAL AND PROCEDURAL BACKGROUND

On March 31, 2017, DCRA issued permit B1706219 (Permit), which authorized the Permit Holder, Atlas Squared, LLC, to renovate 1125 7th Street, N.E. from "an existing single family dwelling unit to a 2-unit separate townhouse." (Attachment C- Permit.) On May 31, 2017, shortly after the issuance of the Permit, Appellant filed this appeal alleging that the Permit

[1] Title 11 of the District of Columbia Municipal Regulations.
[2] BZA Appeal 19550 - Exhibit 46.

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was issued erroneously.[3] On October 20, 2017, the Board granted Intervenor status to Mr. Cummins (Intervenor), the owner of 1123 7th Street, N.E., which is an adjoining row home to the Property. On February 16, 2018, the Permit Holder applied for a revision to the Permit, where the gross floor area of the Property was identical to the Permit.[4]

On April 18, 2018, Appellant filed the Pre-Hearing Statement based solely on the Permit.[5] On that same day, DCRA issued the Revised Permit B1805207, which changed, though not materially, the manner in which the construction on the Property would occur. Following the issuance of the Revised Permit, DCRA filed a Motion to Incorporate the Revised Permit into this appeal and a Motion to Continue the May 9 Hearing to allow the Appellant and the Intervenor an opportunity to review the Revised Permit.[6] On May 9, 2018, the Board incorporated the Revised Permit into this appeal.

On June 25, 2018, Appellant filed his second Pre-Hearing Statement[7] and raised the following issues:

(i) Whether two roof hatches are impermissible penthouses on the roof of the Property;

(ii) Whether the roof hatches trigger 1:1 penthouse setback requirement;

(iii) Whether the existing cornice is a rooftop architectural element that cannot be removed from the Property;

(iv) Whether the rear tower of the townhouse is a second principal building on the Property; and

(v) Whether the rear tower of the townhouse exceeds the maximum depth permissible by

[3] BZA Appeal 19550 - Exhibit 3.
[4] A minor exception being the bay window projections, which were located in the public space and were not subject to the Zoning Regulations.
[5] BZA Appeal 19550 - Exhibit 35.
[6] BZA Appeal 19550 - Exhibit 36.
[7] BZA Appeal 19550 - Exhibit 46.

the Zoning Regulations in effect on the date of the Revised Permit's issuance.

After noticing an error in the plans, the Permit Holder applied for a limited revision and submitted revised plans for the construction and design of the roof hatches. On July 11, 2018, DCRA filed its Pre-Hearing Statement.[8] On that same day, DCRA filed its Partial Consent Motion for Extension of Time to File Amended Pre-Hearing Statement, requesting the Board's permission to address the roof hatch issues raised by the Appellant after the review and approval of the pending application for a revision.[9] Due to an unexpected delay in accepting and reviewing the revised plans, on August 1, 2018, DCRA requested a second extension of time to file its Amended Pre-Hearing statement.[10] On August 8, 2018, the Appellant consented to DCRA's request for a second extension of time.[11]

On August 2, 2018, DCRA issued the August 2nd Revised Permit, which permanently amended the Permit and the Revised Permit so that only what is depicted on the approved plans for the August 2nd Revised Permit is authorized to be constructed. On August 9, 2018, following the issuance of the August 2nd Revised Permit, the Property Owner filed a Partial Consent Motion to Incorporate Building Permit into Appeal.[12] On August 8, 2018, the Board granted DCRA's Motion to File its Amended Pre-Hearing Statement on August 15, 2018.[13] At the time of this writing, the Property Owner's Motion is still pending before the Board.

Notwithstanding the absence of the Board's decision on the pending motion – specifically, the requested incorporation of the August 2nd Revised Permit, DCRA asserts that the August 2nd Revised Permit was issued in accordance with the Zoning Regulations.

[8] BZA Appeal 19550 - Exhibit 50.
[9] BZA Appeal 19550 - Exhibit 49.
[10] BZA Appeal 19550 - Exhibit 51.
[11] BZA Appeal 19550 - Exhibit 54.
[12] BZA Appeal 19550 - Exhibit 55.
[13] BZA Appeal 19550- Exhibit 53.

ARGUMENT

The Zoning Administrator correctly issued the August 2nd Revised Permit after reviewing the drawings and deeming them compliant with the Zoning Regulations.

I. Construction of Roof Structures Lower than Four Feet Is Permissible.

Appellant sets forth the argument that the roof structures on the Property constitute two impermissible penthouses in violation of 11-C DCMR § 1500.4. Appellant is incorrect.

The roof structures, consisting of two roof hatches, are exempt from the requirements of Section C[14] and, therefore, are permissible under the Zoning Regulations. Specifically, 11-C DCMR § 1500.2 establishes that "a penthouse that is less than four feet (4 ft.) in height above a roof or parapet wall shall not be subject to the requirements of this section."

In the instant case, both roof hatches[15] are less than four (4) feet in height – one (1) foot and one-fourth (1/4) inch exactly – above the roof of the Property. (Attachment D - Sheet A5.2 of the approved drawings associated with the August 2nd Permit.) Since both roof hatches are less than four (4) feet above the rooftop, both roof hatches are not subject to the penthouse requirements of Section C.[16]

The design of the roof hatches depicted on the drawings associated with the Revised Permit B1805207 was not entirely clear. However, the plans, associated with Permit B1706219 and August 2nd Revised Permit, which reverted to the sliding roof hatches,[17] clearly show that both roof hatches are one (1) foot and one-fourth (1/4) inch in height above the rooftop and, thus, do not trigger the requirements of Section C. (Attachment D- Sheet A5.2; Attachment E - Sheet

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[14] All references to a "Section" refer to the Zoning Regulations (Title 11 of the District of Columbia Municipal Regulations) unless otherwise specifically indicated.
[15] Depicted as "sliding access hatch" on Sheet A3.1 of the drawings, included in this filing- Permit (Attachment E and the August 2nd Revised Permit Attachment F.)
[16] All references to a "Section" refer to the Zoning Regulations (Title 11 of the District of Columbia Municipal Regulations) unless otherwise specifically indicated.
[17] Sliding roof hatches are depicted on Sheet A3.1 of the drawings, associated with the Permit (Attachment E and the August 2nd Revised Permit Attachment F.)

A3.1 drawing showing the sliding roof hatch associated with the Permit; Attachment F- Sheet A3.1 drawing showing the sliding roof hatch associated with the August 2nd Revised Permit.)

For this reason, the Zoning Administrator correctly determined that construction of both roof structures complies with the Zoning Regulations and approved revised plans associated with the August 2nd Revised Permit.

II. The Approved Plans Provide for 1:1 penthouse setbacks.

The Appellant asserts that the roof structures are impermissible because they lack the setbacks required by 11-C DCMR § 1502.1. However, after discovering an error in the plans, Permit Holder applied for a limited revision, which (i) sought reversion to the sliding roof hatches instead of the roof hatches opening upward and (ii) provided the required 1:1 setbacks for both roof hatches. The Zoning Administrator reviewed and approved the revised plans as compliant with the Zoning Regulations.

The approved plans provide the required 1:1 setbacks for both roof hatches. Pursuant to 11-C DCMR § 1502.1(c), if a penthouse is on a flat adjacent to a property with equal permitted matter-of-right building height, such penthouse shall be setback from the edge of the roof upon which it is located a distance equal to its height from the side building wall of the roof upon which it is located. In the instant case, the Property is a flat directly abutting two other buildings with equal permitted matter-of-right height. Thus, the 1-foot high roof structures on the Property must have a 1-foot setback from the sidewall of the Property.[18] In accordance with this requirement, approved revised plans show a 1-foot setback from the edge of the parapet wall, which is aligned with the property line between the Property and 1127 7th St., N.E.[19] Following

[18] Height of both roof hatches is one (1) foot, as depicted on Sheet A5.2 of the drawings.
[19] The parapet wall and the setbacks for the roof hatches are depicted on Sheet A3.1 of the drawings, associated with the Permit and the August 2nd Revised Permit.

careful review, the Zoning Administrator approved the revised plans as compliant with the Zoning Regulations.

III. The Permit and Both Revised Permits Correctly Allowed the Removal of the Alleged "Cornice."

Appellant alleges that the plans contemplate removal of an alleged "cornice" and alleges that the "cornice" is a rooftop architectural element prohibited from removal by 11-E DCMR § 206.1(a). Appellant is incorrect for several reasons.

As an initial matter, Appellant failed to timely raise this issue, and thus the Board should reject this argument.[20] Pursuant to 11-Y DCMR § 302.2, "a zoning appeal shall be filed within sixty (60) days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of." Here, the Permit authorizing the removal of the cornice on the Property was issued on March 31, 2017. (Attachment G – Sheet A4.1 of the Permit drawings.) Appellant did not raise this issue until its second pre-hearing statement filed on June 25, 2018 - well over one year after the Permit was issued.[21] Pursuant to 11-Y DCMR §§ 302.16 through 302.19, Appellant is precluded from introducing new information and documents in an untimely manner, absent permission from the Board. Because Appellant failed to timely raise the issue of the alleged "cornice" removal, Appellant is time-barred from presenting this new argument now.

Second, the alleged "cornice" on the Property is not a rooftop architectural element. The photos included in Appellant's second Pre-Hearing statement demonstrate that the "cornice" on the Property is actually a façade element because it is located on the façade approximately 1 foot

[20] BZA Appeal 19550 - Exhibit 20.
[21] Nor did Appellant raise this issue in its first pre-hearing statement filed on September 7, 2017.

below the rooftop.[22] Therefore, Appellant's assertion is without basis because the element at issue is not a rooftop element but a façade element.

Third, the Permit complied with the Zoning Regulations in effect at the time of issuance. The Permit was issued on March 31, 2017. At that time, 11 DCMR § 400.24 (1958 Zoning Regulations), as amended by the Zoning Commission (ZC),[23] was in effect and provided that "a roof top architectural element original to the building such as a turret, tower or dormers, shall not be removed or significantly altered, including changing its shape or increasing its height, elevation, or size." "Cornice" is not defined in the 1958 Zoning Regulations and is not included in the enumerated list of features prohibited from removal. Thus, there was no prohibition on removal of cornices under the 1958 Zoning Regulations.

This interpretation is supported by subsequent amendments made by the Zoning Commission. Zoning Commission Order No. 14-11B, which was issued on March 27, 2017 and became effective on April 28, 2017, amended 11-E DCMR § 206.1(a)—the 2016 Zoning Regulations successor to 11 DCMR § 400.24 (1958 Zoning Regulations)—by adding "cornice" to the enumerated list of protected features. If the 1958 Zoning Regulations clearly prohibited the removal of cornices, then the Zoning Commission would have no need to add "cornice" to the list of enumerated protected features.

Here, the Permit was issued on March 31, 2017, almost a month before Zoning Commission Order No. 14-11B went into effect on April 28, 2017. Therefore, pursuant to 11-A DCMR § 301.4, the Permit was in compliance with the provision of the Zoning Regulations in effect on the date that the Permit was issued. Nor is there any defect with the Revised Permit or the August 2nd Revised Permit. The requirements of Zoning Commission Order No. 14-11B and

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[22] BZA Appeal 19550 - Exhibit 46, p.6.

[23] Zoning Commission Order No. 14-11, issued on June 8, 2015, amending Section § 400.24 of the 1958 Zoning Regulations.

11-A DCMR § 301.4(b) were not triggered since neither the Revised Permit nor the August 2nd Revised Permit include any amendments to the removal of the "cornice." Both permits—the Revised Permit and the August 2nd Revised Permit—complied with the Zoning Regulations.

For these reasons, the Zoning Administrator correctly determined that removal of the "cornice" was permissible and issued the August 2nd Revised Permit accordingly.

IV. The Rear Tower of the Townhouse Is a Portion of the Single Joint Building.

Appellant alleges that the rear tower of the townhouse is a separate building and thus constitutes an illegal second principal building. Appellant is incorrect. The front and rear towers of the townhouse have a meaningful connection between them, which makes it a single building under 11-B DCMR § 309.1.

11-B DCMR § 309.1 provides:

> Structures or sections shall be considered parts of a single building if they are joined by a connection that is:
> (a) Fully above grade;
> (b) Enclosed;
> (c) Heated and artificially lit; and
> (d) Either:
> (1) Common space shared by users of all portions of the building, such as a lobby or recreation room, loading dock or service bay; or
> (2) Space that is designed and used to provide free and unrestricted passage between separate portions of the building, such as an unrestricted doorway or walkway.

In the instant case, the connection between the front and rear towers satisfies all four zoning requirements, and therefore the two towers comprise a single building. The lobby connecting the towers is designed and intended to provide free and unrestricted passage between the front and rear towers. The connection is enclosed, fully above grade, and heated. The connection is an artificially lit breezeway with a handrail, providing unrestricted passage

between the front and rear towers.[24] (Attachment H- A1.1 drawings for August 2nd Revised Permit.)

For these reasons, the Zoning Administrator correctly determined that the connection between the front and rear towers satisfies 11-B DCMR § 309.1 and thus the two towers "shall be considered" parts of a single building.

V. The Rear Tower Is a Permissible Rear Addition.

Appellant alleges that the rear tower of the townhouse exceeds the maximum allowable depth in an RF-1 zone. Appellant is incorrect. The Permit authorized construction of the rear tower extending further than ten (10) feet beyond the farthest rear wall of the adjacent building because such construction was permitted under the Zoning Regulations in effect at the time that the Permit was issued.

11-E DCMR § 205.4 prohibits buildings in an RF-1 zone from having a rear extension further than ten feet beyond the farthest rear wall of an adjoining property. The Permit authorizing construction of the rear tower was issued on March 31, 2017. At the time the Permit was issued, the Zoning Regulations did not limit rear extensions. Zoning Commission Order No. 14-11B adopted the 10-foot limitation on new rear additions found in 11-E DCMR § 205.4, but it did not become final and effective until April 28, 2017, almost one month after the Permit was issued on March 31, 2017.[25]

Nor is there any defect with the Revised Permit or the August 2nd Revised Permit. The requirements of Zoning Commission Order No. 14-11B and 11-A DCMR § 301.4(b) were not triggered because neither the Revised Permit nor the August 2nd Revised Permit include any

[24] As shown on Sheet A1.1 of the August 2nd Revised Permit drawings.
[25] Zoning Commission Order No. 14-11B, p. 9, issued on March 27, 2017.

amendments to the authorized construction of the rear tower. Both permits—the Revised Permit and the August 2nd Revised Permit—complied with the Zoning Regulations.

Appellant argues that the construction of the rear tower is impermissible because the vesting provision in 11-A DCMR § 301.14 is inapplicable. This argument is without merit. The Permit authorizing construction of the rear tower was issued on March 31, 2017, well before the ten-foot limitation became final and effective on April 28, 2017. Given that the Permit Holder did not make any substantial changes to the building permit application's plans for the construction of the rear tower, the Revised Permit and the August 2nd Revised Permit correctly allowed for the construction of the rear tower.

The Zoning Administrator correctly issued the 2nd Revised Permit after reviewing the drawings and deeming them compliant with the Zoning Regulations.

CONCLUSION

For the foregoing reasons, DCRA respectfully requests that the Board (1) affirm that the Zoning Administrator correctly issued the August 2nd Revised Permit B1811245; and (2) deny this appeal.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August 2018 a copy of the foregoing DCRA's Amended Pre-hearing Statement was served via electronic mail to:

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