District of Columbia Board of Zoning Adjustment
Appeal No. 19550

Reply Memorandum
of Advisory Neighborhood Commission 6C

Advisory Neighborhood Commission 6C ("ANC 6C") submits this memorandum in reply to the Property Owner's Pre-Hearing Statement ("PHS") and DCRA's Amended PHS. The arguments advanced by DCRA and the Property Owner are incorrect as a matter of law. In addition, both parties simply ignore key elements of ANC 6C's appeal, failing to offer any counterargument on those points. The Board should therefore grant this appeal and order the revocation of the relevant permits.

STATEMENT OF ADDITIONAL FACTS

Since the filing of ANC 6C's Second Revised PHS (Case Exhibit 46) on June 25, 2018, the Property Owner applied for yet another revision to the permit. DCRA approved that application on August 2, 2018 as permit B1811245 ("the Second Revised Permit"). We attach relevant portions of the approved drawings as Tab A to this Reply.

On August 9, the Property Owner moved to incorporate the Second Revised Permit into this appeal. *See* Case Exhibit 55. ANC 6C and DCRA both consented. Although the motion to incorporate remains undecided, DCRA's Amended PHS attempts to defend the Second Revised Permit. On the assumption that the Board will grant the motion, we likewise address the Second Revised Permit's defects.

ANALYSIS

In its Second Revised PHS, ANC 6C identified five separate areas in which the First Revised Permit (B1805207) violated the zoning regulations. The Property Owner's latest effort, the Second Revised Permit, cures one set of defects.

That leaves four violations. DCRA and the Property try to defend some—but not all—of these errors, but miss the mark in each case.

A. The (Former) Illegal Penthouses

We explained in Part A (pp. 3-4) of our Second Revised PHS that the Dayliter 4280 roof hatch authorized under the First Revised Permit violated multiple provisions of subtitle C, chapter 15.

DCRA and the Property Owner doggedly insist that ANC 6C was wrong. However, the Second Revised Permit eliminates these supposedly legal "flip-top" Dayliter penthouses (with enclosing walls of varying, non-uniform height), replacing

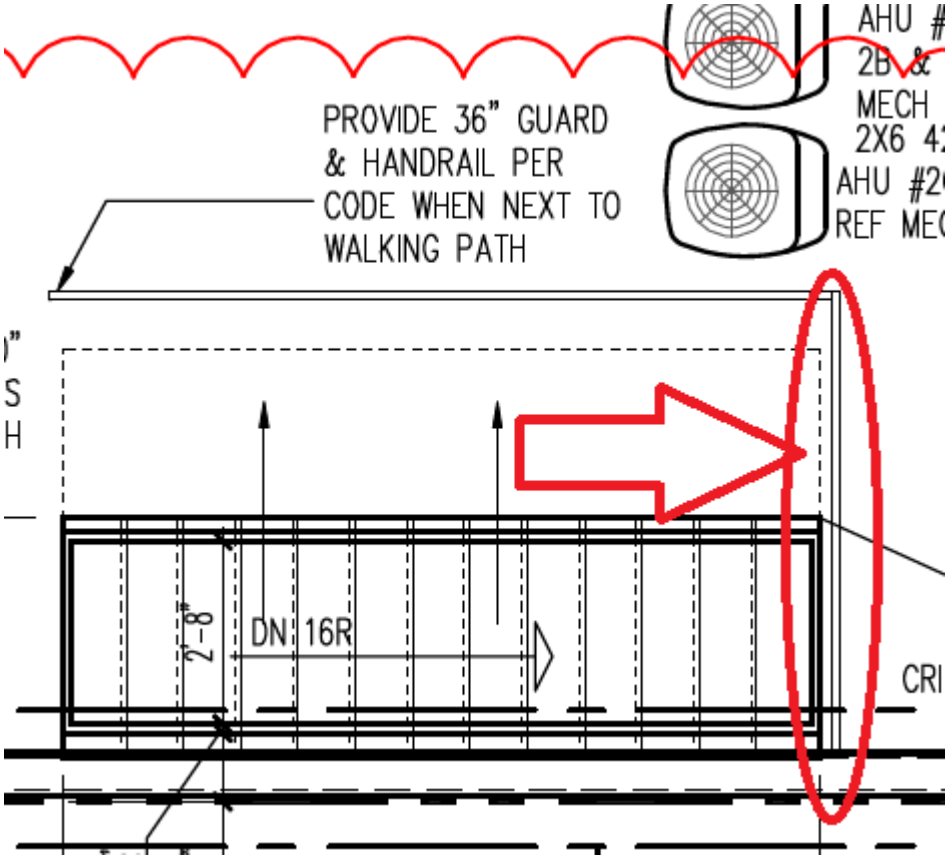
each with a lower-profile sliding hatch. This material change adequately responds to ANC 6C's objections to the Dayliter penthouses. As a result, the Board need not consider the arguments presented in Part A of our Second Revised PHS.

However, this permit modification only adds to the long list of changes from the Original Permit, and thus bolsters our arguments in Part E below.

B. The Second Revised Permit Still Fails to Require 1:1 Penthouse Setbacks

As we noted in Part B (pp. 4-5) of our Second Revised PHS, section 1502.1 of subtitle C mandates that "any guard rail on a roof shall be setback from the edge of the roof upon which it is located" by a 1:1 ratio.

DCRA and the Property Owner offer no response. Both focus exclusively on the setback of the 1'-tall **hatches**, but ignore the adjacent 36" guardrail with zero setback from the edge of the roof. The violation present in the First Revised Permit remains in the Second Revised Permit, as seen on Sheet A3.1:



Detail from Sheet A3.1 (Tab A)

To avoid uncertainty on this point, ANC 6C emphasizes that the setback requirement applies to **all** rooftop guardrails, including those under 4' in height. *See*

§ C 1500.2 (requiring setback under section 1502 even for sub-4' roof structures not subject to the rest of section 1500).

The Second Revised Permit therefore violates the zoning regulations; was issued in error by the Zoning Administrator; and must be revoked.

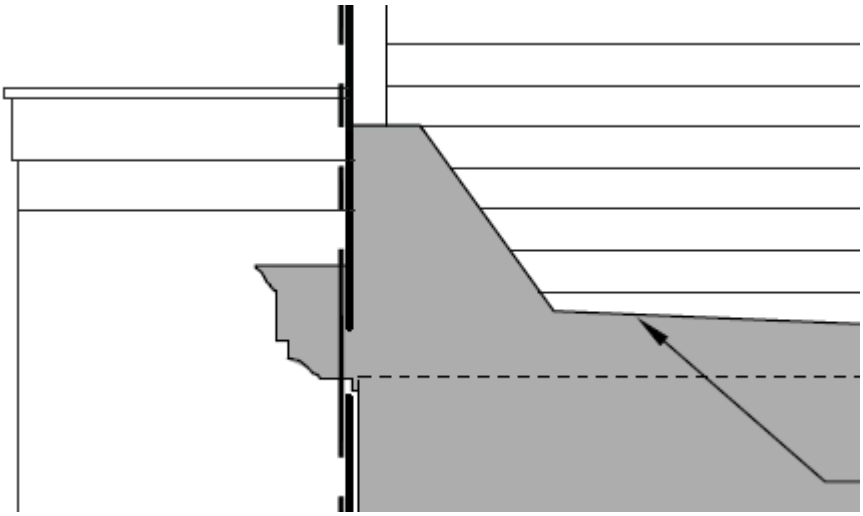
C. The Second Revised Permit Still Allows Illegal Removal of a Rooftop Architectural Element

1. The Cornice is Protected by Section E 206

In issuing the First Revised Permit, the Zoning Administrator and his staff expressly found that the molded projecting element above the top floor of the Property is a "cornice." (See the discussion at pages 8-9 of our Second Revised PHS, Case Exhibit 46.) DCRA now claims, to the contrary, that this feature is not a "cornice." This newfound view is incorrect, and the Board should reject it.

DCRA pins its argument on the claim that the cornice "is located on the façade approximately 1 foot below the rooftop." DCRA Amended PHS (Case Exhibit 56) at 6-7. To begin with, this is simply wrong; although the cornice does fall below the top of the parapet wall, it sits above the highest point on the roof.

This can be seen most clearly on Sheet A4.2, the right-side elevation showing the profile of 1123 7th St. That abutting property has an identical, aligned cornice[1] whose top projects above the surface of the roof:



Detail from Sheet A4.2 (Tab A)

[1] For a view of the matching cornices, see the photograph on page 6 of our Second Revised PHS (Case Exhibit 46). For conclusive proof that the roof and parapet wall at the Property sit at the same levels as those on 1123 7th St., see the photographs at Tab E of our initial appeal filing (Case Exhibit 3E).

More importantly, the cornice's positioning slightly below the parapet wall has essentially no effect on its function as the crowning visual element on the Property's façade. We refer the Board to the photographs provided on pages 6-8 of our Second Revised PHS (Case Exhibit 46), all of which were taken from the public sidewalk in front of several properties on this block with identical cornices. Viewed from the angle of any passing observer, these cornices emphatically cap the façade and visually define its top edge.

DCRA is also wrong that section E 206 requires a "rooftop architectural element" to be at the very top of the structure. Dormers, for example, often sit well below the top of a façade's composition—yet section E 206 expressly protects them as well.

The Property Owner's essentially identical arguments fare no better. The esthetic interests embodied in section E 206 are not aimed at viewers perched on a ladder (or in a tree) 30' above the ground, as shown in the submitted photo.

As we discussed previously, even if the Board adopts a narrow reading of the term "cornice," the protections of section E 206.1(a) would still apply. The regulation protects not only cornices *per se*, but also other similar elements. The phrase "such as" makes clear that the enumerated list of features is not exhaustive, but rather illustrative of the section's overall intent.

However, the Board need not decide this appeal on the basis of this fallback argument, which DCRA and the Property Owner fail to address. During its extensive internal deliberations on the application for the First Revised Permit, DCRA explicitly determined that the cornice is, in fact, a "cornice." In doing so, it expressly rejected the argument—put forward then, as now, by the Property Owner—that the cornice is mere "trim" outside the protection of the regulation. Having made that written determination, DCRA now argues to the contrary in its Amended PHS with no explanation whatsoever for its sudden reversal.

2. ANC 6C Raised This Objection Timely and Appropriately

DCRA claims that ANC 6C should have raised its objection to the cornice removal in its original 2017 appeal, and that the claim cannot now be entertained. This argument is frivolous.

To recap: DCRA issued the Original Permit on March 31, 2017. On that date, the text of section E 206 made no reference to "cornices." Because the regulations require a permit to comply only with the regulations at the time of issuance, and not future regulations not yet in effect, there was no reason for ANC 6C to challenge the Original Permit in the manner DCRA suggests.

As we explained previously, however, section A 301.4 of the regulations requires that "[a]ny amendment of [a] permit shall comply with the provisions of this title **in**

effect on the date the permit is amended" (emphasis added). When DCRA issued the Revised Permit on April 18, 2018—nearly a full year after the cornice-protection language came into effect—that permit revision triggered the obligation to comply with the new language in section E 206. The same is equally true for the Second Revised Permit issued on August 2, 2018, fifteen months after ZC Order 14-11B became final.[2]

ANC raised its cornice-related objection at the first available opportunity after the issuance of the First Revised Permit: that is, in our Second Revised PHS (Case Exhibit 46) filed on June 25, 2018.[3]

Frankly, we are at a loss to understand DCRA's remaining arguments. Contrary to DCRA's assertion on page 7 of its Amended PHS, the 1958 regulations are not at issue in this appeal and never have been. And instead of rebutting ANC 6C's arguments, DCRA supports our arguments when it claims (also at p. 7) that the regulations did not protect cornices before April 28, 2017.

For all these reasons, DCRA issued the Second Revised Permit (as well as the First Revised Permit) in violation of the protections for rooftop architectural elements at section E 206.1. The Board should therefore order the revocation of all permits at issue.

D. The Second Revised Permit Still Allows Construction of an Illegal Second Principal Building

Like its two predecessors, the Second Revised 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 building (as defined in the zoning regulations) and because it does not qualify as an accessory building, it constitutes an illegal second principal building.

Section B 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 between separate portions of the building."

The narrow connecting corridor (depicted in plan on Sheet A1.1) is obviously not a lobby, recreation room, or other qualifying area. It serves not as a "common space" intended for shared functional use, but instead strictly as a means of passage between different portions of the Property, and thus it fails to satisfy the first alternative prong of subsection (d).

---

[2] As discussed in our Second Revised PHS, there is no vesting (*i.e.*, grandfathering) provision in the zoning regulations exempting the First and Second Revised Permits from this requirement. DCRA and the Property Owner do not dispute this point.

[3] As the Board may recall, our First Revised PHS (addressing the Original Permit) was due April 18, 2018. **DCRA waited until after ANC 6C made its filing that day to inform us that it had issued the First Revised Permit**. For DCRA to claim now that we should have objected sooner to the Revised Permit reeks of bad faith.

The Property Owner argues to the contrary, alleging that the breezeway constitutes "common space." In doing so, the Property Owner points to the supposed criss-cross traffic pattern in which the occupants of each unit would pass underneath the other unit (via the below-grade corridor), traverse the rear yard, enter the breezeway, and then enter their respective units.

Even if this were to happen in practice, it remains clear that the breezeway is not "shared": the front unit occupants would use only the west half (from the central doorway to the rear of the front tower), and the rear occupants only the other half. Neither set of residents would ever have any reason to use, or even enter, the half of the breezeway adjacent to the other unit. This arrangement is functionally two separate, abutting corridors into the backyard, not "[c]ommon space shared by users **of all portions** of the building." § B 309.1(d)(1).

For the same reasons, 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 A) shows, the corridor starts at the rear door—obviously locked—of Unit #1's kitchen and ends at the entrance—also obviously locked—of Unit #2's living room.

Because this Rube Goldberg arrangement fails to comply with the text or the spirit of the ZR16 standard for a meaningful connection, the Board should find that the two towers are separate buildings. It follows—as discussed in our Second Revised PHS—that the latest permit once again authorizes an impermissible second principal building in violation of the zoning regulations. The Board should therefore grant this appeal and order the revocation of the permits at issue.

E. The Second Revised Permit Still Allows Construction of an Illegally Deep Rear Addition

The Property Owner and DCRA agree with ANC 6C that the Second Revised Permit is by default subject to the 10' rear-addition limit in section E 205.4. We disagree only on whether the vesting exception in section A 301.14 applies here. DCRA and the Property Owner claim it does; they are mistaken.

As discussed in our Second Revised PHS, section A 301.14 allows construction of a rear addition more than 10' past the rear wall of an adjacent dwelling, notwithstanding the restriction in section E 205.4, only if two conditions are met: "the building permit application for such construction was filed and accepted as complete by the Department of Consumer and Regulatory Affairs on or before March 27, 2017 and not substantially changed after filing." The permits at issue, including the newly issued Second Revised Permit, fail both conditions.

1. The Property Owner's Reliance on Application B1606543 is Misguided

The Property Owner not only insists that the Original Permit was "accepted as complete" on or before March 27, 2017, but goes much further and argues that the Original Permit is not, in fact, the proper point of comparison. Instead, the Property Owner claims that application B1606543 ("the '543 Application"), submitted and allegedly accepted as complete by DCRA in April 2016, marks the starting point.

This argument suffers from at least two major defects. First, as the Property Owner admits, this application never resulted in the issuance of a permit because DCRA canceled it, along with B1512853 ("the '853 Application"). *See* Tab B. For this reason alone, neither of these unapproved applications bears on the vesting issue presented in this case.

Second, supposing that the '543 Application were the proper starting point, this argument would in fact support ANC 6C's argument. The changes since then—from the '543 Application to the Original Permit to the First Revised Permit to the Second Revised Permit—are even more extensive than the already substantial changes from the Original Permit to today.[4]

2. The Original Permit Missed the Deadline in the Vesting Rule at Section A 301.14

According to former DCRA counsel Max Tondro's September 12, 2017 email (Case Exhibit 46H), "B1706219 [the Original Permit] was submitted by applicant on March 24, but was not accepted as completed until March 29." That makes the Original Permit ineligible for the section A 301.14 vesting rule, which requires a filing no later than March 27.

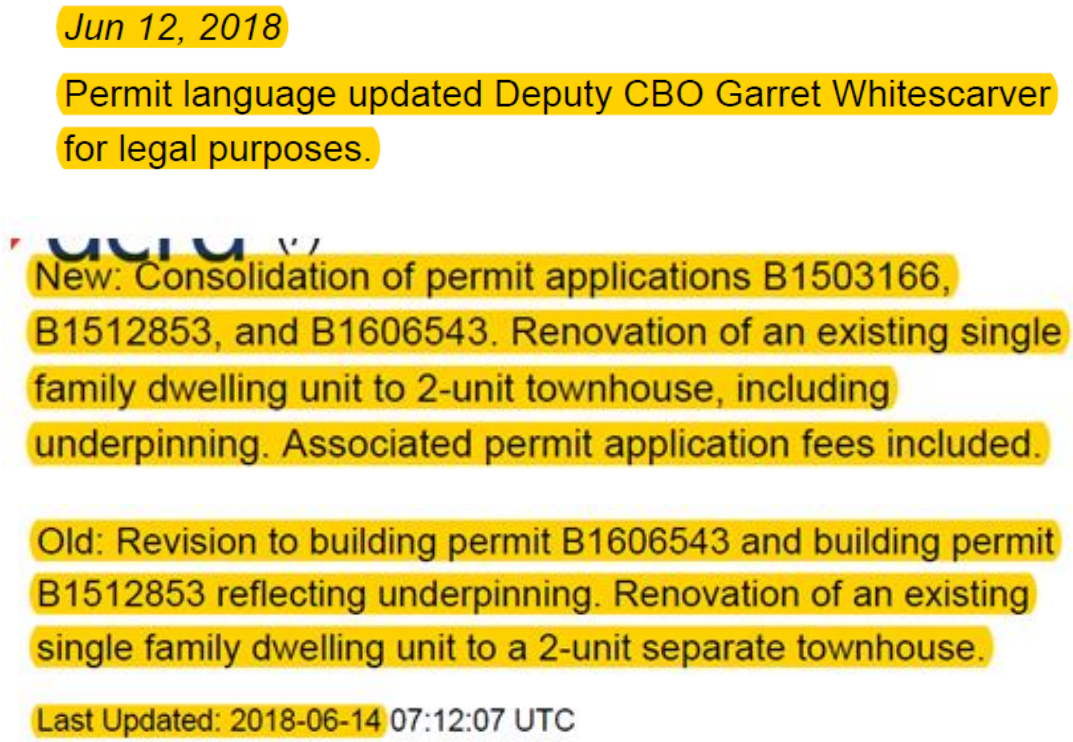
The Property Owner offers a printout of DCRA's permit history (Case Exhibit 47E) purporting to show the contrary. Unfortunately, DCRA has chosen to retroactively alter the permit records for this property, rendering them unreliable.

For example, compare the text of the Original Permit[5] as issued—"Revision to building permit B1606543 and building permit 1512853 reflecting underpinning"—with the altered language shown on Case Exhibit 47E ("Consolidation of permit applications B1503166, B1512853, and B1606543"). This deliberate alteration of the record took

[4] Because the record in this appeal, with its numerous permit revisions, is already extensive, ANC 6C has chosen not to attach the B1606543 drawings to this reply memorandum. As we demonstrate in Part E below, the changes from the Original Permit to the present are more than sufficient to prove our case. If the Board desires, however, we would be happy to supplement the record.

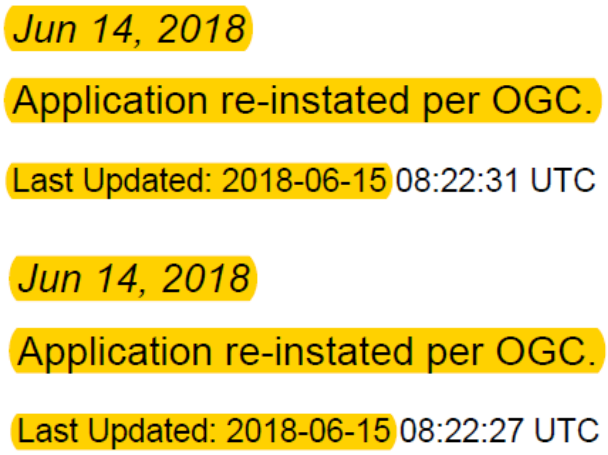
[5] The Original Permit (B1706219) in its unaltered form may be found at Case Exhibit 3A (as an attachment to ANC 6C's initial appeal), Case Exhibit 35B (as an attachment to ANC 6C's First Revised PHS), Case Exhibit 46C (as an attachment to ANC 6C's Second Revised PHS), and Case Exhibit 47A (as an attachment to the Property Owner's PHS).

place on June 12, 2018 at the direction of DCRA's Deputy Chief Building Official "for legal purposes":



Detail from Reviewer Notes on Original Permit (Tab C)

Two days later, DCRA also tampered with the records for the canceled, unapproved '543 and '853 Applications, both of which are now mysteriously listed as "re-instated per OGC":



Detail from Reviewer Notes on '543 and '843 Applications (Tab D)

The printout submitted by the Property Owner contains companion irregularities, showing the '543 Application newly canceled on 6/14/18, yet still "in-process,"

Plumbing Review Pending	Comments Submitted to the Applicant for Correction	09/29/2016
Plan Review Coordinator	Application Canceled	10/03/2016
Plan Review Coordinator	Application Canceled	06/14/2018
ProjectDox QA	In-Process	

Detail from Case Exhibit 47E (page 3) for '543 Application

and the '853 Application "in-process" and apparently even approved:

Structural Review Pending	Comments Submitted to the Applicant for Correction	09/28/2016
Plan Review Coordinator	Application Canceled	10/03/2016
Plan Review Coordinator	Application Canceled	06/14/2018
ProjectDox QA	In-Process	
Issue Permit	In-Process	

Detail from Case Exhibit 47E (page 3) for '853 Application

These canceled, long-dead applications were apparently resurrected on June 12 when DCRA retroactively "consolidated" them with the Original Permit. *See* Case Exhibit 47F (extension to Original Permit purporting to consolidate it with "permit applications B1503166, B1512853, and B1606543").

The result: the permit history relied upon by the Property Owner simply cannot be trusted. Under normal circumstances, DCRA's published records would enjoy a presumption of regularity; here, however, DCRA's decision to tamper with those records **while this appeal is pending** not only undermines that presumption, but raises serious questions about the records' accuracy (and, indeed, about DCRA's candor before the Board).

In view of these serious questions about the accuracy and reliability of DCRA's records, the best evidence of the acceptance date for the Original Permit is instead DCRA's own internal statement in the form of Mr. Tondro's email. That statement puts the acceptance later than March 27, 2017, rendering the resulting permit ineligible for vesting under section A 301.14.

3. The Application Has in Any Event Changed Substantially

The Second Revised Permit fails to meet the standards of the vesting provision for a second, entirely independent, reason. Section A 301.14 applies only where the application is "not substantially changed after filing." That is not the case here.

ANC 6C's Second Revised PHS (at Part E, pp. 14-21) highlighted only a few of the most obvious changes between the Original Permit and the First Revised Permit. Since then, the application has evolved yet again with the issuance of the Second Revised Permit.

The Property Owner mistakenly claims that this latest permit revision "replace[s] the skylight style roof hatch with the previously approved 'coffin' style roof hatch approved by the Original Permit." Case Exhibit 47 at p. 16. This is not a reversion to the original, but rather a third hatch style (sliding, with no "coffin lid" hinge) different from those shown on the Original and First Revised Permits. *Compare* Case Exhibit 46D, Sheet A3.1 (for the Original Permit) with Tab A, Sheet A3.1 (Second Revised Permit); *see also* DCRA's Amended PHS (Case Exhibit 56) at pp. 4-5 (noting the sliding hatch style but wrongly asserting that this "reverted" to the earlier plans).

The Property Owner also argues that the self-serving language on the First Revised Permit ("No change or expansion to the building or zoning envelope") disposes of this issue. Here, too, the facts prove the opposite. Not only did the First Revised Permit make extensive changes to the building—as discussed in ANC 6C's Second Revised PHS—but those changes included an impermissible expansion of the zoning envelope in the form of the illegal Dayliter 4280 roof hatch. After ANC 6C identified the error and explained in detail how it violated the zoning regulations, the Property Owner sought the Second Revised Permit.

Putting aside this latest change to the roof plan, the drawings for the Second Revised Permit differ substantially from those for the Original Permit. Even a cursory comparison of the most recent Sheets A1.1, A2.1, and A5.2 (all attached at Tab A) with the corresponding sheets from the Original Permit (*see* Case Exhibit 46D) reveals the extent of the changes.

As a result, the rear addition approved under the Revised Permit—far exceeding the 10' maximum imposed by section E 205.4—is not vested under section A 301.14 and thus violates the zoning regulations.

CONCLUSION

For all the reasons stated above, DCRA and the Zoning Administrator violated the zoning regulations in issuing the Second Revised Permit. Accordingly, ANC 6C urges the Board to reverse the decision of the Zoning Administrator and to order the immediate revocation of the Second Revised Permit (as well as the underlying Original and First Revised Permits and any extensions thereof).

Respectfully submitted,

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

TABLE OF ATTACHMENTS

CERTIFICATE OF SERVICE

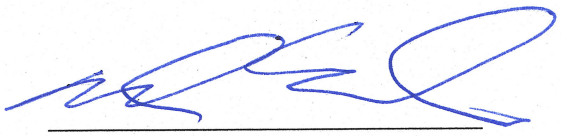
I hereby certify that on September 5, 2018, I served a copy of ANC 6C's Reply Memorandum in Appeal No. 19550, along with attachments, on the following persons by electronic mail:

Matt LeGrant
Zoning Administrator
DCRA
matthew.legrant@dc.gov

Patricia Donkor
Interim Deputy General Counsel
patricia.donkor2@dc.gov
Adrianne Lord-Sorensen, Esq.
Assistant General Counsel
adrianne.lord-sorensen@dc.gov
DCRA

John Patrick Brown, Jr., Esq.
jpb@gdllaw.com
Lyle M. Blanchard, Esq.
lmb@gdllaw.com
Greenstein DeLorme & Luchs, P.C.
(counsel for Atlas Squared, LLC)

Kevin Cummins
Intervenor
1123 7th St. NE
kevin.cummins11@gmail.com



Mark Eckenwiler