District of Columbia Board of Zoning Adjustment
Appeal No. 19550

Proposed Findings of Fact
And Conclusions of Law
of Advisory Neighborhood Commission 6C

Introductory Findings of Fact

1. 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 ("Property Owner") is Atlas Squared, LLC, 7926 Jones Branch Drive, Ste. 600, McLean, VA 22102-3373. The Property lies entirely within the boundaries of ANC 6C.

2. The Property Owner applied for permit B1706219 ("the Original Permit") on March 23, 2017.

3. DCRA accepted the application as complete on March 29, 2017 and issued the Original Permit two days later, on March 31, 2017.

4. As shown on the application drawings, the scope of the Original Permit included

   - the total removal of the front façade and construction of a reconfigured façade with new projecting bay;
   - 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.

5. ANC 6C filed this appeal on May 30, 2017.

6. After several postponements of the hearing, the owner of the Property applied for revisions to the Original Permit on February 16, 2018. DCRA issued permit B1805207 ("the First Amended Permit") on April 18, 2018.

7. As described in greater detail below, the permit-amendment drawings made extensive changes to the original application, including

   - alterations to the proposed floor plan on every level of the front structure;
   - material changes to the roof structures, including the addition of 4'-tall penthouses enclosing stairways (in place of the "coffin-style" hinged hatches approved under the Original Permit);
   - significant modifications to the "breezeway" connecting the front and rear structures, including eliminating the below-grade portion;

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- changes to the materials of the front façade and to the height of its projecting bay; and
- elimination of features in the front and rear cellars that would have created additional illegal units.

8. On July 5, 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").

9. The primary change made by the Second Revised Permit was to allow sliding roof hatches—different from both the Original Permit's hinged hatches and the First Revised Permit's penthouses—accessible via an internal staircase.

Introductory Conclusions of Law

10. The appeal is timely, having been filed within 60 days of the Original Permit's issuance. ANC 6C has automatic standing under 11-Y DCMR § 501.1(d).

A. The Permit Fails to Require 1:1 Setback of a Rooftop Guardrail

Findings of Fact

11. Like the predecessor permits, the Second Amended Permit authorizes a 36"-high guardrail immediately adjacent to the north side building wall of the Property, with zero setback. *See* Exh. 59 at p. 2 (detail) & Exh. 59A Sheet A3.1 (roof plan drawings for Second Amended Permit).

12. The Property, proposed to be used as a flat, directly abuts two other lots (1123 and 1127 7th St. NE) that are also zoned RF-1 and thus have an equal permitted matter-of-right building height.

Conclusions of Law

13. ANC 6C alleges that the guardrail at issue violates the zoning regulations. As explained below, the text of the regulations supports this claim, and the Board therefore grants the appeal.

14. Section C 1502.1 imposes setback requirements for rooftop structures, including guardrails:

> 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**
>
> […]

(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 [....]

(Emphasis added.)

15. Relief from the setback requirements of section C 1502.1 is available only via special exception. *See* § C 1504.1. The Board has granted no such relief for the Property.

16. DCRA Zoning Administrator Matthew LeGrant testified that he invented an exception "for life safety purposes" if a proposed guardrail is perpendicular to a roof edge. (*See* Sept. 19, 2018 Hearing Transcript ("Tr.") at p. 85, lines 18-20. When asked to identify language in the text of the regulation supporting this distinction, Mr. LeGrant admitted that no such language exists. (*See* Sept. 19, 2018 Tr. at p. 85 lines 21-25 to p. 86 line 6.)

17. DCRA's position conflicts directly with the explicit language of the regulation and is therefore untenable. Section C 1502.1 on its face applies to "any guard rail on a roof." Given the lack of any ambiguity here, DCRA is not at liberty to create exceptions inconsistent with the express text of the zoning regulations.

18. Even if there were enough ambiguity in the regulation to allow greater latitude in interpreting it, the exception adopted here by DCRA cannot be upheld. To begin with, Mr. LeGrant never explained in his testimony why a perpendicular guardrail, as opposed to one parallel to the building edge, would merit different treatment other than a vague invocation of "life safety issues."

19. Moreover, public policy considerations weigh heavily against adoption of DCRA's invented rule. The "life safety issues" allegedly justifying the rule are not immutable external phenomena (such as gravity, the weather, etc.). Instead, they are hazards—in this case, a potential risk of falling into a rooftop hatch—affirmatively created by a permit applicant.

20. Adopting DCRA's claimed exception would effectively reward applicants for submitting plans not in compliance with the regulations instead of placing rooftop hazards—and the associated protective guardrails—only in legally permissible locations. (If other locations are unavailable, an applicant may always seeks special-

exception relief under section C 1504, which expressly takes account of situations in which "[t]he strict application of the requirements of this chapter would result in construction that is unduly restrictive, prohibitively costly, or unreasonable, or is inconsistent with building codes." § C 1504.1(a).)

21. DCRA and the Property Owner claim that this objection is time-barred because appellant ANC 6C raised it in response to the First and Second Revised Permits, but not the Original. This is incorrect.

22. It is true that by not raising this objection in its initial appeal, ANC 6C waived it with respect to the Original Permit. Had the Property Owner simply defended that permit, ANC 6C would have been barred from adding this issue later on.

23. However, that is not what happened. The Property Owner chose not to defend the Original Permit, but elected instead to revise it (not once, but twice, making substantial changes in the process). Because those subsequent permits are, for all practical purposes, new permits authorizing a different scope of work—and not ministerial corrections of minor errors—they restart the clock for asserting objections.

24. Although the Board incorporated those later permits into this same appeal, it did so in the interests of economy. Rather than dismissing the appeal of the Original Permit as moot after it was superseded (and requiring ANC 6C to file a new appeal of the First Revised Permit), the Board elected to streamline the proceedings. In doing so, however, it did not prejudice the rights ANC 6C would have had under that more cumbersome, by-the-book scenario—that is, the right to begin anew and appeal each permit on its own merits.

25. ANC 6C has therefore properly established by a preponderance of the evidence that the current permit (the Second Revised) illegally authorizes the construction of a roof guard rail without the setback mandated by the zoning regulations. The Board therefore grants the appeal.

B. The Permit Improperly Authorizes the Removal of a Protected Rooftop Architectural Element

Findings of Fact

26. At all times relevant to this appeal, the parapet wall atop the front façade of the Property has included two molded, projecting bands original to the structure. Numerous other rowhouses on the same block, including the adjacent property at 1123 7th St. NE owned by intervenor Kevin Cummins, feature identical bands in the same positions. (*See* Exh. 46 at pp. 6-8.)

27. All permits at issue, up to and including the Second Revised Permit, authorize removal of these architectural elements. (*See* Exh. 59A Sheet A4.1 (showing existing and proposed front elevation).)

28. ANC 6C testified that the large projecting band just below the top of the parapet wall is a "cornice" (or the functional equivalent even if it differs in slight technical respects). The Property Owner's expert architectural witness, Will Teass, expressed an opinion that the larger band is not a "cornice," but stated on seven separate occasions that the smaller band above it, at the very top of the parapet wall, is a "cornice." (Sept. 19, 2018 Tr. at p. 135, line 25 through p. 137, line 17; *id.* p. 161, line 3.)

29. In response to a request from the Board, DCRA supplied a list of properties it considered to have features qualifying as "cornices." That list included at least one property, 4000 14th St. NW, in which the only projecting band on the façade sits below the top of the parapet wall. (*See* Exh. 66 at pp. 2-3.)

Conclusions of Law

30. ANC 6C alleges that in authorizing the removal of a cornice from the Property's façade, the Second Revised Permit violates the zoning regulations. As explained below, the text of the regulations supports this claim, and the Board therefore grants the appeal on this ground as well.

31. The zoning regulations for RF zones state that "[a] roof top architectural element original to the building such as cornices, porch roofs, a turret, tower, or dormers, shall not be removed or significantly altered" absent special exception relief. 11-E DCMR § 206.1(a). The Board has not granted such relief with respect to the Property.

32. As a result, if the Property's façade contains an element protected by section E 206, the permits were issued in violation of the zoning regulations.

The Property's façade includes a "cornice"

33. This presents the initial question of law before the Board: is there a "cornice" on the Property? The Board finds that there is.

34. First, the larger projecting band on the Property façade falls squarely within the definition of a cornice: "1. *Arch.* The horizontal member (typically molded and projecting) which crowns a composition, as a façade …." *Webster's New International Dictionary of the English Language* (2d ed., unabridged).[1] As seen in the photos in the record (*see* Exh. 46 at pp. 6-8). the feature at issue in this case is

[1] The zoning regulations do not expressly define the term "cornice." Where a term is otherwise undefined, 11 DCMR B § 100.1(g) directs that it be given the meaning found in "Webster's Unabridged Dictionary."

molded; clearly projects outward; and "crowns the composition" as the most prominent feature on the parapet wall.

35. The Property Owner attempts to characterize the cornice as mere "applied trim." The Board rejects that claim, which ignores the visual and esthetic significance of this element in defining the top of the façade on the Property and several other houses in the same row. (Significantly, DCRA itself considered the Owner's argument and rejected it during its consideration of the application for the First Revised Permit. The zoning reviewer called it a "cornice" in his official case notes on the permit's approval. *See* Exh. 46 pp. 2-3 & Exhs. 46E, 46F, & 46G.)

36. Both DCRA and the Property Owner claim incorrectly that a feature cannot be a "cornice" if it does not occupy the topmost position on a façade. The Board disagrees for multiple reasons.

37. First, DCRA itself has conceded that the projecting band at 4000 14th St. NW, visibly located below the top of the parapet wall, is a "cornice." (*See* Exh. 66 at p. 2-3.)

38. Second, as pointed out by ANC 6C and intervenor Kevin Cummins, the Historic Preservation Review Board has addressed this issue. The HPRB-approved *Historic Preservation Guidelines: Roofs on Historic Buildings*[2] include a diagram showing a "cornice," explicitly labeled as such, that sits below the top of a parapet wall. (*See* Exh. 66 at p. 3.)

39. DCRA argued in addition that the disputed feature cannot be protected under section E 206 because it "is located on the façade approximately 1 foot below the rooftop." (Exh. 56 at 6-7.) This objection lacks merit because it is factually incorrect: the permit drawings show unambiguously that the cornice rises above the roof's highest point. (*See* Exh. 59 p.3 & Exh. 59A Sheet A4.2.)

40. Even if the larger projecting band were not a "cornice" in a technical sense, the Board would sustain the appeal on two independent alternative grounds.

41. First, the Property Owner's own architectural expert acknowledged repeatedly that the façade includes a "cornice." It is true that the feature he identified—the smaller projecting band atop the parapet wall—differs from the one on which the ANC focused its argument. That fact, however, is irrelevant for the simple reason that the permits at issue here authorize the removal of both bands; if either is a cornice, then removing both is improper.

42. Second, the list of elements protected by section E 206 is not exhaustive. That section extends not only to "cornices," "turrets," and the like, but also to elements "such as"—that is, in the nature of or similar to—those expressly listed. As explained above, the projecting bands on the front façade of the Property (and

[2] The complete *Guidelines* may be found at https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/DC%20Roof%20Guidelines.pdf.

neighboring rowhouses) serve the same function as a cornice. They define the top of the façade, as well as creating compositional unity across multiple houses along the block.

Appeal of the illegal cornice removal is timely

43. There remains one last set of claims advanced by DCRA and the Owner. First, they note that the Original Permit authorized the removal of the entire front façade and argue that ANC 6C should have objected to this on section E 206 grounds in its original appeal.

44. This argument is frivolous. DCRA issued the Original Permit on March 31, 2017. On that date, the text of section E 206 made no reference to "cornices." It was not until April 28, 2017, when ZC Order 14-11B took effect, that section E 206 protected elements "such as cornices." [3]

45. 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.

46. ANC 6C raised its cornice-related objection at the first available opportunity after the issuance of the First Revised Permit: that is, in its Second Revised Prehearing Statement (Exh. 46) filed on June 25, 2018. The appeal of the Original Permit did not assert (and could not in good faith have asserted) this claim. Simply put, the relevant language in the regulation was added **after** the issuance of the Original Permit. As explained below, that new language became relevant only upon later issuance of the First Revised Permit. ANC 6C's claim is thus not time-barred.

47. Section A 301.4 lays out the rules[4] that apply when the zoning regulations change between the issuance of a permit and the later filing of an application to revise that permit:

> Except as provided in Subtitle A §§ 301.9 through 301.13, any construction authorized by a permit may be carried to completion pursuant to the provisions of this title in effect on the date that the permit is issued, subject to the following conditions:

[3] Prior to that order, the regulation stated only that rooftop elements "such as a turret, tower, or dormers shall not be removed or significantly altered." *See* Office of Planning Setdown Report, Apr. 29 2016 at p. 4 (ZC 14-11B Case Exhibit 1).

[4] On August 17, 2018, the Zoning Commission amended section A 301.4 to replace "301.13" with "301.15". *See* ZC Order 17-18. Because this change post-dates all the events at issue in this appeal, up to and including the Second Revised Permit's issuance on August 2, 2018, it is not relevant here. Accordingly, we provide the text as it existed at the time of the events at issue.

(a) The permit holder shall begin construction work within two (2) years of the date on which the permit is issued; and

(b) Any amendment of the permit shall comply with the provisions of this title in effect on the date the permit is amended.

48. This provision creates two distinct rules for grandfathering a/k/a "vesting". First, the introductory language declares that once a permit is issued, the permitholder may carry out the permitted work under that original permit even if the relevant zoning rules later change. This limited right ("Initial Vesting") exists so long as the permitholder begins work within two years, as required by subsection (a). In this narrow respect, *every* construction permit issued by DCRA is "vested."

49. Initial Vesting is temporary, however. When an owner seeks "[a]ny amendment" of the permit, that act voids the Initial Vesting absent an explicit exception set out elsewhere in section A 301 (per the "[e]xcept as provided" clause that begins the section). If there is no relevant exception in section A 301.9 or those that follow, "the permit shall comply with the provisions of this title in effect on the date the permit is amended." § A 301.4(b).

50. DCRA and the Property Owner conflate these two types of vesting, asserting wrongly that the contemplated removal of the cornice is permanently "vested" against *any* challenge. As discussed above, this claim would read section A 301.4(b) out of existence. Once the Property Owner sought the First Revised Permit, Initial Vesting ended. To avoid the rule in section A 301.4(b), there would have to be an explicit vesting rule exempting the **revised** permit application from the current regulations (including any changes post-dating the initial permit).

51. There is no such vesting provision in section A 301 or anywhere else in the regulations. Subsections 301.9 through 301.14 contain vesting exceptions for various situations, but none address section E 206. And because section A 301.4 requires an **explicit** vesting exception "in Subtitle A §§ 301.9 through 301.13," DCRA may not rely on "the totality of the zoning rules" (Sept. 19, 2018 Tr. at p. 96, lines 19-20) to invent new, unenumerated exceptions.

52. To summarize,

- the Property has a cornice;
- the Original Permit allowed for removal of the cornice;
- a subsequent text amendment added protections for cornices in section E 206.1;
- the Owner applied for revisions to the Original Permit, thereby voiding the Initial Vesting and subjecting those permit revisions to the cornice-protection rule; and
- the Owner has not obtained a special exception under section E 206.2 granting permission to remove the cornice.

53. ANC 6C has therefore established by a preponderance of the evidence that the current permit (the Second Revised) illegally authorizes the removal of a cornice. The Zoning Commission amended section E 206 to provide increased protection for the character of historic buildings—and the permit at issue here detracts from that interest by illegally authorizing the removal of a protected architectural element. The Board therefore grants the appeal and orders the revocation of the Second Revised Permit.

C. The Permit Improperly Authorizes the Construction of Two Principal Buildings on a Single Lot

Findings of Fact

54. All permits at issue in this appeal authorize construction that would result in two structures: the existing rowhouse (with third-story addition) and, to the rear, a second structure of essentially equal height, width, and depth.

55. All the permits contemplate a "breezeway" running between these two structures. The drawings for the Original Permit depicted a sizable below-grade portion of this breezeway at its west end (running under the existing row dwelling. (*See* Exh. 46 at p. 19; Exh. 46D, Sheet A5.2.) The First and Second Revised Permits substantially altered this configuration, bringing the entire breezeway above grade. (*See* Exh. 46 at p. 19; Exh. 46B, Sheet A5.2.)

Conclusions of Law

56. ANC 6C argues that the breezeway fails to unify the two structures into a single building under the standards in the regulations. Because this is true—and the permits thus authorize the illegal creation of two principal buildings on a single lot—the Board grants the appeal on this issue.

The two structures are not a single building

57. Subtitle B, section 309.1 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 B 309.1(a)-(d).

58. Because the current connector scheme differs substantially from what was approved in the Original Permit, the first three criteria are no longer at issue in this appeal. The fourth criterion, section B 309.1(d), mandates that a single-building connector must be either (1) space for common use, such as a 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, such as an unrestricted doorway or walkway."

59. The breezeway authorized under the Second Revised Permit (and its predecessors) fails this test. Self-evidently, this narrow (3'8") connecting corridor is 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[5] between different portions of the Property, and thus it fails to satisfy the first alternative prong of subsection (d)(1).

60. The Property Owner argues to the contrary, alleging that the breezeway constitutes "common space." In doing so, the Owner points to the 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. The Owner emphasizes the convenience of this arrangement for access to the parking at rear and to 7th St. at the front.

61. This may be convenient, but it does not make the narrow breezeway "[c]ommon space shared by users of all portions of the building." Indeed, instead of showing that the two structures are functionally a single building, it provides a means for the residents of each structure to **get past** the other structure.

62. 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." (Emphasis added.) But as the first-floor plan (Exh. 46B, Sheet A1.1) shows, the corridor starts at the rear door of Unit #1's kitchen and ends at the entrance of Unit #2's living room. The Owner's expert witness, architect Will Teass, confirmed at the hearing that both of these doors would be locked. (*See* Sept. 19, 2018 Tr. at p. 155, lines 23-24.)

63. The Office of Planning and the Zoning Commission were concerned from the outset of the ZR16 zoning rewrite about the past practice of allowing such restricted passageways to masquerade as legitimate unifying connectors. *See* Memorandum from Deputy Director Jennifer Steingasser to the Zoning Commission, Sept. 15, 2008 (ZC 08-06-1, Case Exhibit 12) ("Often two buildings are combined into one building by a single locked doorway"). The Zoning Commission shared this concern, as reflected by its eventual insertion of the term "unrestricted" not once, but twice in the regulation.

64. In this case, the locked dwelling-unit entrances at either end of the breezeway prevent it from providing "free and unrestricted passage between separate portions of the building." 11-B DCMR § 309.1(d)(2).

65. The initial DCRA zoning reviewer, Mamadou Ndaw, noted this deficiency in his April 5, 2018 comments on the First Revised Permit. *See* Exh. 46E at p.2 ("The proposed structure does not have the characteristics of a single building as per

[5] The drawings for the Original Permit labeled this corridor a "breezeway." (*See* Exh. 46D, Sheets A1.1 & A5.2.) After the filing of this appeal, the Owner recharacterized this space in the drawings for the Revised Permits as a "lobby". (*See* Exh. 46B, Sheets A1.1 & A5.2.)

DCMR 11 B - Section 309"). After the case was reassigned on April 18, 2018 to a second reviewer, Shawn Gibbs, DCRA abruptly reversed course and issued the permit without any explanation in the reviewer comments. *Id.* at p. 4.

66. DCRA's hearing testimony on this issue was inconsistent. Zoning Administrator Matthew LeGrant initially asserted that both alternative prongs of section B 309.1(d) were met. (*See* Sept. 19, 2018 Tr. at p. 68, lines 1-4.) Later, however, Mr. LeGrant backtracked, admitting that the breezeway fails to provide "unrestricted access" (*id.* at p. 77, lines 18-19) and stating instead that in approving the permits he regarded the breezeway only as shared common space under section B 309.1(d)(1). (See Sept. 19, 2018 Tr. at p. 97, line 10.)

67. Stepping back from the text of the regulations, the simplest way to understand the breezeway's failure to unify the two structures is to imagine an alternative plan without the breezeway. Access to the rear yard, streetfront, and parking would be the same as with the breezeway. Only one scenario that would be different: the one where an occupant of Unit #1 in the front structure wishes to visit Unit #2 without going outside. In that case, however, the function of the breezeway is only to shield the visitor from the elements; the visitor encounters locks at both doors and therefore enjoys only restricted, not "unrestricted" access as mandated by section B 309.1(d)(2).

68. Viewed in this light, the breezeway serves as a fig-leaf connection that in no way unifies the two structures into a single functional building. Instead, they are two separate buildings, each a self-contained dwelling unit.

The rear structure is an impermissible second principal building on the lot

69. Because the regulations do not allow a second principal building on the Property, the new separate rear building would be legal only if it qualified as an accessory building. It does not.

70. Most obviously, an accessory building in an RF zone may be no taller than 20' and two stories. As the Second Revised Permit drawings show (*see* Exh. 59B, Sheet A5.2), the proposed rear building exceeds both of these limits.

71. More generally, an accessory building in an RF zone must be "subordinate to" the principal building and "secondary in size" to it. *See* 11-E DCMR §§ 5000.1(a) & 5000.2. Numerous drawings submitted in support of the application for the Second Revised Permit—including the plat and sheets A4.2 and A5.2 (*see* Exh. 59B)—demonstrate that the new rear building would equal the size of the existing front building even after the expansion of the latter.

72. As a result, ANC 6C has established by a preponderance of the evidence that the current permit (the Second Revised) illegally authorizes the construction of a second

principal building on a single lot. The Board therefore grants the appeal on this basis as well and orders the revocation of the Second Revised Permit.

D. The Permit Allows Construction of an Illegally Deep Rear Addition

Findings of Fact

73. The Revised Permit authorizes the construction of a rear addition at the Property extending 57'9" past the rear wall of the adjoining principal residential building at 1123 7th St. NE. (*See* Exh. 59A, Sheets A1.1, A4.2, and SP.01.)

74. The Property Owner's agent began the process of uploading application documents for the Original Permit on March 23, 2017. (*See* Exh. 62C, Tab C, sub-exhibit 10, "Created" column.) The agent submitted the last document on March 24 at 1:51:49 a.m. (*See id.*, "Updated" column.)

75. Two seconds later—at 1:51:51 a.m.—a new "PreScreenReview" task was created in DCRA's recordkeeping system. (*See id.*) As shown in the "Updated" and "Completed" columns, DCRA employee Shaun Baskerville did not finish that task until the morning of March 29, 2017.

Conclusions of Law

76. ANC 6C contends that the Second Revised Permit (and the First Revised Permit as well) illegally authorizes an addition more than 10' past an adjacent dwelling. Although the regulations vest some applications that preceded this rule, the permits at issue in this case fail to satisfy the conditions of that vesting provision. For these reasons, the Board grants the appeal on this issue.

77. Section 205.4 of Subtitle E states that in an RF zone,

> a rear wall of an attached or semi-detached building shall not be constructed to extend farther than ten feet (10 ft.) beyond the farthest rear wall of any adjoining principal residential building on any adjacent property.

78. The current text of section E 205.4 came into effect on August 25, 2017. (*See* ZC Order 14-11E.)

79. 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." DCRA issued the Second Revised Permit on August 2, 2018, nearly a full year after the current text of section E 205.4 came into effect. The Second Revised Permit should therefore have complied with that requirement absent a relevant exception.

80. No exception applies here. The vesting provision in section A 301.14 allows for 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 here fail not just one condition—that alone would be fatal—but instead fail both.

The application for the Original Permit was not "accepted as complete" until after March 27, 2017

81. DCRA and the Property Owner argue that the authority to build more than 10' past the adjacent was properly vested because a permit application was "accepted as complete" before March 27, 2017. This argument takes two forms, neither of which holds up under scrutiny.

82. The first claim is that DCRA accepted the Original Permit on March 24, 2017. While it is true that the Owner's agent completed uploading on March 24, the regulation does not speak merely in terms of "filing." It requires not only that an application be "filed," but also that it be "accepted as complete" by DCRA.

83. In his hearing testimony, DCRA Zoning Administrator Matthew LeGrant described this "acceptance" process as follows: "When an application is submitted to DCRA, it goes through an initial vetting to see if sufficient information exists in order to begin a review …" (Sept. 19, 2018 Tr. at p. 72, lines 12-14.)

84. DCRA's own internal records demonstrate that immediately after the Owner's agent "filed" the last Original Permit application document, the DCRA system created a new, uncompleted "PreScreenReview" task. Given the timing—1:51 a.m., well outside DCRA's normal business hours and exactly two seconds after the last document upload—it is clear that the system generated this new task field automatically. It thus reflects no human review or acceptance of the application.

85. Instead, the pre-screen review—the process by which a DCRA employee checks an application for facial sufficiency and then accepts it as "complete"—took place five days later. As shown in the "Updated" and "Completed" columns, DCRA employee Shaun Baskerville did not finish that task until the morning of March 29. Only at this point, and not before, did DCRA accept the application as complete.

86. This matches the statement made by DCRA attorney Maximilian Tondro in a later email that "B1706219 was submitted by the applicant on March 24, but was not accepted as completed until March 29." (Exh. 46H.)

87. The Property Owner offers an alternative argument for timely acceptance: that the relevant application was not the one of the Original Permit, but instead one (or both) of two earlier permit applications. This argument fails for the simple reason that both

applications were canceled in October 2016. (*See* Exh. 59B.) Having been extinguished, those earlier applications lend no support to the Owner's claims.[6]

The application for the Original Permit "substantially changed after filing"

88. 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." Compared to the Original Permit application, the Second Revised application changed substantially by any reasonable measure.

89. Changes from the Original Permit include the following:

- The Second Revised Permit flips the proposed internal configuration of every level in the front building. (*See* Exh. 46 at p. 15. *Compare* Exh. 46D, Sheet A2.1 (Original) *with* Exh. 59A Sheet A2.1 (Second Revised).)

- The Second Revised Permit radically alters the proposed front façade, indicating entirely different materials, increasing the projecting bay height from two stories to three, and flipping the front entrances to opposite sides. (*See* Exh. 46 at p. 16-17. *Compare* Exh. 46D, Sheet A4.1 (Original) *with* Exh. 59A Sheet A4.1 (Second Revised).)

- The roof hatches—one on each tower—have evolved not once, but twice. The Original Permit began with a hinged, low-profile "coffin-lid" hatch, which the First Revised Permit replaced with a 4' tall Dayliter 4280 penthouse structure. (*See* Exh. 46 at p. 18.) Finally, the Second Revised Permit authorizes a third type of hatch with no hinges, which slides across the rooftop. (*See* Exh. 59A, Sheet A3.1.)

- The First and Second Revised Permits significantly alter the proposed breezeway to bring it above grade, apparently in response to the objection noted in ANC 6C's initial appeal filing. (*See* Exh. 46 at p. 19. *Compare* Exh. 46D, Sheet A5.2 (Original) to Exh. 59A, Sheet A5.2 (Second Revised).)

- The First and Second Revised Permits remove the Original Permit's separate kitchen and laundry facilities in the front and rear cellars, again apparently responding to the objection in ANC 6C's initial appeal filing that the Original Permit illegally created four units, two more than the maximum. (*See* Exh. 46 at p. 20. *Compare* Exh. 46D, Sheet A1.1 (Original) to Exh. 59A, Sheet A1.1 (Second Revised).)

[6] As ANC 6C points out, *see* Exh. 59 at pp. 7-9, DCRA altered its permit records in June 2018 to show these applications as "reinstated per [Office of General Counsel]." The Board does not countenance this alteration of the records, coming as it did more than a year after this appeal was filed (and several months after ANC 6C first raised the Original Permit's acceptance date as an issue).

90. This is by no means an exhaustive list of the extensive changes. The simplest and most comprehensive illustration of the changes is found in the "bubbles" on the drawings submitted for the Second Revised Permit. (*See* Exh. 59A, Sheets A1.1, A2.1, A4.3, A5.2, & A5.3.) Mr. LeGrant testified that these dozens of bubbles all represent changes. (*See* Sept. 19, 2018 Tr. at p, 103 line 7 through p. 104, line 12.)

91. Taken together, these numerous differences from the Original Permit application are "substantial." For that reason, they disqualify the Second Revised Permit application from taking advantage of section A 301.14's vesting rule.

92. The Property Owner argues that the Board must overlook these numerous changes because the building envelope has not changed. But the language of the regulation is not so narrow. Section A 301.14 establishes a broad standard—"substantially changed"—with no limitations. Nothing in that section suggests that building envelope changes are the only ones that disqualify an application from vesting. Given the extent of the changes in this case, some of which go directly to zoning compliance (*e.g.*, number of units; height of penthouse structure), the Board concludes that they are "substantial."

93. In analyzing this issue, it is helpful to recall the justification for the standards in the vesting provision. "Not substantially changed" is there to prevent the filing of a materially deficient application as a placeholder.

94. In this case, DCRA began its review of the Original Permit application on March 29, 2017. Two days later, it issued the permit. Since then, the Owner has revised the Original Permit not once, but twice, and in legally meaningful respects. This is precisely the scenario in which the "not substantially changed" prong of section A 301.14 is meant to deny vesting.

95. Thus, the Second Revised Permit enjoys no vesting benefit from section A 301.14, and was required to comply with the 10' "pop-back" rule (at section E 205.4) in effect on the permit's issuance date. It does not comply.

96. It follows that ANC 6C has established by a preponderance of the evidence that the current permit (the Second Revised) improperly authorizes the construction of a rear addition far more than 10' past the adjacent dwelling. The Board grants the appeal on this issue and orders the revocation of the Second Revised Permit.

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2018, I served a copy of ANC 6C's Proposed Findings of Fact and Conclusions of Law in Appeal No. 19550 on the following persons by electronic mail:

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