PROPERTY OWNER'S DRAFT ORDER

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 19550 of Advisory Neighborhood Commission 6C, as amended[1], pursuant to 11 DCMR Subtitle Y § 302, from a March 31, 2017 decision by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Building Permit No. B17006219, as amended, to permit the renovation of an existing single family dwelling unit to a two-unit dwelling in the RF-1 Zone at premises 1125 7th Street, N.E. (Square 886, Lot 35).

HEARING DATES: September 13, 2017, October 4, 2017, October 18, 2017, November 15, 2017, January 24, 2018, May 9, 2018, September 19, 2018, and October 31, 2018[2]

DECISION DATE: December 19, 2018

ORDER DENYING APPEAL

This appeal was submitted on May 30, 2017 by Advisory Neighborhood Commission ("**ANC**") 6C (the "**Appellant**") to challenge the decision of the Zoning Administrator ("**Zoning Administrator**" or "**ZA**") to issue a building permit that allowed the renovation of an existing single family dwelling unit to a two-unit dwelling in the RF-1 Zone. Following several public hearings, the Board of Zoning Adjustment ("**Board**" or "**BZA**") voted to deny the appeal and to affirm the determination of the Zoning Administrator.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing

By memoranda dated July 24, 2017, the Office of Zoning provided notice of the appeal to the Zoning Administrator, at the Department of Consumer and Regulatory Affairs ("**DCRA**"); the Office of Planning; the Councilmember for Ward 6; ANC 6C, the ANC in which the subject property is located, as well as the Appellant; and Single Member District/ANC 6C04. Pursuant to 11 DCMR § 3112.14, on July 24, 2017 the Office of Zoning mailed letters providing notice of the hearing to the Appellant and to the owner of the property that is the subject of the appeal,

[1] When originally filed, the subject of the appeal was Building Permit No. B1706219. The appeal was amended to include the two subsequent revisions to the Original Permit, Building Permits No. B1805207 and B1811245, which were issued during the course of the appeal proceedings.

[2] The appeal was originally scheduled for September 13, 2017 and was postponed to October 4, 2017, at the Appellant's request (Exhibits 19). DCRA requested several postponements (Exhibits 23, 29 and 31). The hearing took place on September 19, 2018 and October 31, 2018.

Board of Zoning Adjustment
District of Columbia
CASE NO.19550
EXHIBIT NO.71

Atlas Squared, LLC. Notice was published in the *D.C. Register* on July 28, 2017 (64 DCR 7240).

Procedural History

1. The appeal was originally scheduled for September 13, 2017 and was postponed to **October 4, 2017** at the Appellant's request (Exhibit 19), which was agreed to by DCRA and the Property Owner and granted by the Board. (Exhibit 24).

2. On April 23, 2018, DCRA filed a Motion to Incorporate the Revised Permit in this appeal and to continue the May 9, 2018 hearing to allow Appellant and Intervenor to review and respond to the Revised Permit in the context of this appeal. (Exhibit 36).

3. DCRA requested, and was granted, four postponements of the hearing. The first three requests (Exhibits 23, 29 & 31) were granted in order to allow a related appeal pending before the Office of Administrative Hearings ("OAH") to be heard first and resolved in favor of the Property Owner. See Paragraphs 13-14 of Permitting History, herein. The fourth request for postponement (Exhibit 36) by DCRA was requested to also incorporate the Revised Permit, issued on April 18, 2018, into the appeal. At the May 9, 2018 hearing, the Board granted the motion to incorporate the Revised Permit, denied the Motion for Mootness, and granted a Motion for the hearing to be continued to September 19, 2018.

4. The Property Owner requested that Second Revised Permit be incorporated into the appeal. (Exhibit 55). At the **September 19, 2018** hearing the Board granted the motion to incorporate the Second Revised Permit into the appeal.

5. At the close of the **September 19, 2018** hearing, the Board requested supplemental information from DCRA regarding examples of cornices, the timeline of the permits to provide information on when the permits were submitted, accepted as complete and issued. (Sept 19, 2018 Tr., p. 182 – 184). The Board asked the Property Owner for drawings showing the breezeway plan and how it works. (Id. p. 184 – 185). DCRA and the Property Owner submitted the supplemental submissions (Exhibits 62 & 63). In addition, the Property Owner submitted a video into the record showing how the two dwelling units are connected by an above-grade connection, which results in a single building (Exhibit 64). Both the Appellant and Intervenor submitted statements in response to these supplemental submissions. (Exhibits 65 & 66).

6. At the **October 31, 2018** hearing the Board reviewed the supplemental submissions and responses thereto and heard closing arguments from the parties. At the conclusion of the hearing, the Board closed the record and requested the parties submit proposed Findings of Fact and Conclusions of Law by December 5, 2018.

Parties

Appellant

The Appellant is ANC 6C, the ANC for the area within which the property is located. ANC 6C indicated by letter dated May 30, 2017 that, at a duly noticed monthly meeting and a quorum of 5 out of 6 commissioners and the public present, they voted 5-0 to appeal the issuance of Building Permit No. B17006219 to the BZA. The ANC also voted unanimously to authorize Commissioner Mark Eckenwiler to represent the ANC in the appeal. (Exhibit 2).

DCRA

The Appellee, DCRA, is the agency of the government of the District of Columbia that is authorized, among other things, to issue building permits. DCRA was represented at the hearing by its Office of the General Counsel, Adrianne Lord-Sorensen, Esq. The Zoning Division of DCRA is headed by the Zoning Administrator, Matthew Le Grant, and is charged with administering the Zoning Regulations ("**Zoning Regulations**" or "**Regulations**"). Mr. Le Grant testified at the public hearing on behalf of DCRA.

Property Owner

Atlas Squared, LLC ("**Property Owner**") owns the subject property and, as such, is automatically a party to this appeal. The Board heard testimony from the following representatives of the Property Owner: Tarique Jawed, of Atlas Squared, LLC; Vincent L. Ford, of Ford & Associates LLC; Olutoye Bello, of Bello, Bello & Associates, LLC; Will Teass, AIA, of Teass\Warren Architects; and Mariah Rippe, of Moment Engineering + Design.

Intervenor

On October 18, 2017, the Board granted a request for party status by Kevin Cummins, whose property at 1123 7th Street, NE, abuts the subject property ("**Intervenor**") (Exhibits 21 & 26).

Persons in Support or Opposition

Statement in Support of Appeal. A statement in support of revoking the building permit was received into the record from Amy Stouffer, owner of 1128 8th Street, NE. (Exhibit 28).

The Positions of the Parties

Appellant's Position.

The Appellant challenged the issuance of a building permit, issued in March 2017 which authorized the renovation of an existing single family dwelling unit to a two-unit dwelling or flat. The Appellant initially alleged that the building permit violated the Zoning Regulations (11 DCMR) in four respects: pervious surface, chimney setback, excessive number of units, and construction of an illegal second principal building. (Exhibit 3). The Appellant later revised its appeal to focus exclusively on the following alleged violations of the Zoning Regulations: 1) the

roof guardrail violates the penthouse setback requirements; 2) removal of the façade element violates 11 DCMR Subtitle E § 206; 3) illegal construction of a second principal building; and 4) illegal construction of a rear addition greater than 10 Feet. (Exhibit 59), which are summarized below:

Rooftop Guard Rail: With respect the rooftop guardrail, the Appellant argued that any guard rail on the roof shall be setback from the edge of the roof at a 1:1 ratio pursuant to 11 DCMR Subtitle C § 1502.1[3] and therefore the plans approved with the permit violates this one-to-one setback. (Exhibit 59).

Façade Removal and Rear Addition: With respect to the removal of the front façade and the rear addition, the Appellant argued that the zoning regulations were revised[4] subsequent to the issuance of the original permit, in such a way that the Regulations would now require an applicant to seek zoning relief for the removal of the façade (Subtitle E, § 206.1) and for constructing a rear addition at the depth approved by the permit. (Subtitle A, § 205.4) Since the permit was revised twice since the zoning text amendment was approved, the Appellant argued that any and all revisions to a permit require compliance with the Zoning Regulations in effect at the time the building permit is revised, pursuant to Subtitle 301.4(b). (Exhibit 46).

In addition, since the Appellant argued that the amendment to the Zoning Regulations, which imposed a vesting dated of March 27, 2017 for the rear addition provision, should apply to the project since the Appellant claimed the building permit application was "complete" and vested on March 29, 2017. (Exhibit 59). Therefore, the project would need to apply for a special exception to be granted the approved depth of the rear addition.

Illegal Construction of a Second Principal Building: The Appellant argued that the rear addition was a new second structure to be constructed in the rear yard as a separate building and that the two structures do not constitute a single building since the connecting corridor does not satisfy the test provided pursuant to Subtitle B, § 309.1(d) and therefore constitutes an illegal second principal building. (Exhibit 59).

<u>DCRA's Position</u>.

DCRA asserted that the Zoning Administrator had properly reviewed and approved the relevant building permits as fully compliant with the Zoning Regulations, and that the Appellant's allegations were without merit. (Exhibit 56) First, it asserts the Building Permit No. B1706219 was filed and accepted as "complete" by DCRA on March 24, 2017 and the Zoning Regulations on that date apply to the property and therefore the project is not in violation of the Zoning Regulations with respect to the façade removal and rear addition. Second, DCRA asserts that a 1:1 set back of a guard rail is only required when the guard rail is located on the edge of a roof, not when the guard rail runs perpendicular to the parapet wall and used for required life safety purposes. Finally, DCRA asserts that the fully above-grade connection between the two units creates a single building for zoning purposes.

[3] All Subtitles referenced within the Order are within Title 11 of the DC Municipal Regulations.
[4] Zoning Text Amendment re: Cornices and Rear Yards became effective on April 28, 2017 (Z.C. Order 14-11B).

Property Owner's Position. The owner of the subject property, Atlas Squared, LLC, argued that Appellant's appeal regarding the removal of the façade trim and roof guardrail and were untimely appealed and should be dismissed, the permitted rear addition is not subject to the ten foot limit of Subtitle E, § 205.4, the permitted project is physically and functionally a single building, removal of the front façade was approved and vested prior to the enactment of the "cornice" rule and does not constitute a rooftop architectural element, and the roof guardrails are not subject to setback requirements. (Exhibit 63).

Intervenor's Position. Kevin Cummins adopted the arguments of the Appellant and contended that the authorized construction will negatively impact his property's access to light and air. (Exhibit 48).

FINDINGS OF FACT

Property and Zoning

1. The property that is the subject of this appeal is located at 1125 7th Street, N.E. (Square 86, Lot 35) ("Property"). In June 2015, the Property Owner acquired the Property which was improved with a vacant and uninhabitable single family dwelling.

2. The Property is zoned RF-1.

3. In the RF-1 zone, a flat or two dwelling units in a single principal structure is permitted as a matter-of-right pursuant to Subtitle U, § 301.1(b).

Permitting History

4. After purchasing the Property, the Property Owner almost immediately began the design and phased, lengthy and exhaustive permitting process in accordance with the applicable RF-1 restrictions to convert the existing single-family dwelling to a two-unit flat.

5. On September 18, 2015, the Property Owner electronically filed Building Permit Application B1512853 for "excavation, underpinning and foundation only - of existing single family row house ("Foundation Permit Application"). The Foundation Permit Application was under active review, comment and revision by DCRA and the Property Owner for more than one (1) year (September 2015 to October 2016), including approval by Zoning (10/20/2015), Structural and Plumbing. (Exhibit 47E).

6. On April 4, 2016, the Property Owner electronically filed as Building Permit Application B1606543 for "Renovation and addition to existing single-family to include mechanical, electrical and plumbing upgrades. Changed from single-family to two family flat." ("2016 Permit Application"). The 2016 Permit Application was under active review, comment and revision by DCRA and the Property Owner for six (6) months (April 2016 to October 2016). Id.

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7. On October 3, 2016, DCRA unilaterally and without notice, explanation or good cause "cancelled" the Foundation Permit Application and 2016 Permit Application. Id.

8. From October 5, 2016 through March 23, 2017, the Property Owner met numerous times with senior DCRA Permitting officials attempting to refile the two cancelled permit applications. Id.

9. After lengthy consultation with DCRA regarding the "cancelled" permit applications, the Property Owner was instructed to refile the permit applications as a single new application. Id.

10. On March 23, 2017, the Property Owner filed electronically and DCRA "Projectdox Accepted" Building Permit Application B1706219. In order to correct the unilateral cancellation of the Foundation Permit and 2016 Permit Applications, the Property Owner incorporated both applications with no substantial changes into a consolidated set of permit plans for resubmission to DCRA, including the rear addition and total removal of the front façade, including the façade trim or element. Id.

11. On March 24, 2017, DCRA determined that Building Permit Application B1706219 was "complete". Testimony of Zoning Administrator on September 19, 2018.[5]

12. On March 31, 2017, DCRA issued Building Permit B1706219 to the Property Owner ("Original Permit"). As a result of the extensive prior review, comment, revisions and DCRA approvals, expedited issuance of this permit was completed by DCRA.

13. On April 4, 2017, DCRA issued a Stop Work Order to the Property Owner based on a complaint from the Intervenor at 1123 7th Street, N.E. ("1123 Property") that he had not received a Proper Neighbor Notification under 12A DCMR §3307.1 ("First Stop Work Order"). The Property Owner filed a timely appeal of the First Stop Work Order. Prior to filing Application No. 1606543, the Property Owner provided the required §3307.1 Notice to the Intervenor on March 1, 2016. By letter dated March 24, 2016, the Intervenor acknowledged receipt and responded to the March 1, 2016 §3307 Notice from the Property Owner with a lengthy and largely irrelevant and unsubstantiated list of complaints (Exhibit 47).

14. On April 13, 2017, DCRA issued a Notice to Revoke the Original Permit based on allegations by the Intervenor that the approved third floor addition was located less than ten (10) feet from the chimney/vent at the 1123 Property under 12A DCMR §3307.6 ("Notice to Revoke"). The Property Owner filed a timely appeal of the Notice to Revoke

[5] An email was sent on **September 12, 2017** from Maximilian Tondro, who at that time was the Assistant General Counsel to the Office of the General Counsel of DCRA, to the Zoning Administrator stating that, for purposes of determining the vesting date of the Original Permit, that the Original Permit was submitted on March 24, "but was not accepted as completed until March 29, 2018. BUT . . . there were no changes required by DCRA, so that the application as submitted was deemed to be complete." The Appellant provided a redacted copy of the email into the record (Exhibit 46H). Mr. Tondro's conclusion was overruled by the Zoning Administrator based on his review of the full record, including DCRA's internal records provided to the Board.

with the Office of Administrative Hearings ("OAH"). *Atlas Squared, LLC v. DCRA*, 2017-DCRA-00207. Id.

15. On May 18, 2017, DCRA released the First Stop Work Order after Atlas provided a new §3307 Notice to the Intervenor dated May 1, 2017. By letter dated May 30, 2017, the Intervenor acknowledged receipt and responded to the May 1, 2017 §3307 Notice again raising numerous irrelevant issues. Id.

16. On May 20, 2017, DCRA issued a Second Stop Work Order to the Property Owner alleging "construction plans to cause adverse impact on adjoining roof vent at 1123 Property under 12A DCMR §3307.6 ("Second Stop Work Order"). The Property Owner filed a timely appeal of the Second Stop Work Order to OAH. *Atlas Squared, LLC. v. DCRA*, 2017-DCRA-00207. Id.

17. On September 7, 2017, the Property Owner provided DCRA compelling evidence (including seller disclosure records, aerial photographs, and expert reports) that the chimney/vent at the 1123 Property was installed after March 22, 2016 without obtaining the required building permit. Id.

18. On November 8, 2017, at DCRA's request, the DC Superior Court issued an Administrative Search Warrant for the 1123 Property. DCRA was forced to undertake this extraordinary enforcement action based on the Intervenor's repeated refusal to cooperate with the investigation of the chimney/vent at the 1123 Property. On at least three separate occasions from May to September 2017, the Intervenor refused DCRA's request to voluntarily inspect the 1123 Property. Id.

19. On November 17, 2017, DCRA and the Metropolitan Police executed the Administrative Search Warrant at the 1123 Property. Based on the search of the 1123 Property, DCRA issued a Notice of Infraction and Correction Order to the Intervenor for performing work without the required permit for installation of roof top chimney/vent and interior installation of an illegal (and unsafe) maritime, solid fuel heater. Id.

20. Between December 6, 2017 and February 9, 2018, the Intervenor obtained "over the counter" remedial permits for the illegally constructed and unsafe interior heater and chimney/vent. DCRA promptly cancelled both permits. Id.

21. On February 13, 2018, the Intervenor obtained a demolition permit and removed the illegal chimney/vent and heater at the 1123 Property. Id.

22. On February 13, 2018, DCRA filed a Motion at OAH to withdraw the Notice to Revoke and Second Stop Work Order. Id.

23. On March 7, 2018, OAH granted DCRA's Motion and issued and Order of Dismissal for the Notice to Revoke and Second Stop Work Order. Id.

24. Between April 4, 2017 through March 7, 2018, for at least eleven (11) months, the First and Second Stop Work Orders and Notice to Revoke constituted a "hold" on any permit approvals at the Property and/or any construction activity by the Property Owner. Id.

25. On April 18, 2018, DCRA issued Building Permit B1805207 for "REVISION: REVISE Building Permit B1706219 [Original Permit] to renovate the converted single-family dwelling to a two-unit flat. No change or expansion to the building or zoning envelope. ("Revised Permit"). The Revised Permit made no change to the previously approved and vested rear addition, building and above-grade connection footprint, removal of front façade and rooftop guardrail.

26. On August 2, 2018, DCRA issued Building Permit B1811245 as a Revision to B1706219 [Original Permit] and B1805207 [Revised Permit]" to: 1) incorporate the footers and underpinning in the Original Permit; 2) update site conditions for the newly constructed rear addition at 1127 7th Street, NE; and 3) incorporate the roof hatches approved in the Original Permit ("Second Revised Permit Application"). Again, the Second Revised Permit made no change to the originally approved and vested rear addition, building and above-grade connection footprint, removal of front façade and rooftop guardrail.

Subsequent Amendments to Zoning Regulations

27. At the time the Original Permit was issued, March 31, 2017, the Zoning Regulations did not list "cornices" as a rooftop architectural element nor did the Regulations restrict the depth of rear extensions.

28. The Zoning Regulations were later amended to include both of these restrictions. Therefore, the Original Permit was subject to and complied with the Zoning Regulations in effect at the time the permit was issued on March 31, 2017. At that time, E-206.1 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" was not included in the enumerated list of features prohibited from removal.

29. Zoning Commission Order 14-11B ("**ZC Order 14-11B**") became effective on **April 28, 2017**. ZC Order 14-11B amended the Zoning Regulations with regard to rear extensions on attached and semi-detached buildings in certain zones (including the RF-1 zone of the subject property) by adding language limiting a matter-of-right rear extension to such buildings, whether as an addition to an existing building or as new construction, from extending further than ten feet (10 ft.) beyond the farthest rear wall of an adjoining principal residential building on an adjoining property (10-foot limitation). The amendments allow a rear extension to extend further than ten feet (10 ft.) if approved as a special exception. ZC Order 14-11B also revised E-206.1 to include "cornice" to the enumerated list of prohibited rooftop architectural elements that required special exception approval for removal.

Vesting Provisions

30. Zoning Commission Order 14-11D ("**ZC Order 14-11D**") became effective on **November 24, 2017**. ZC Order 14-11D amended the Zoning Regulations to include an exception to Subtitle A, § 301.4. That provision vests development rights based upon the Zoning Regulations in place on the date a building permit is issued. The exemption applies to building permit applications that proposed construction of a rear wall of an attached or semi-detached building that would extend farther than ten feet (10 ft.) beyond the farthest rear wall of any adjoining principal residential building on an adjoining property, if the application 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. Such construction became unlawful on April 28, 2017 as a result of the Commission's March 28, 2017 vote to adopt amendments proposed in Z.C. Case No. 14-11B.

31. Subtitle A, § 301.4 of the Zoning Regulations provides: "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 issued", subject to limited conditions.

No Impact of Revised Permits on Original Permit

32. The Original Permit, Revised Permit and Second Revised Permit (collectively referred to as, "**Amended Building Permit**"), were not subject to ZC Order 14-11B since the revisions to the permit did not include any substantial changes or deviations from what was originally approved. The Zoning Administrator testified that when an amendment to the Zoning Regulations goes into effect, the overall issue of vesting is, "were there substantial deviations from the plans that would then be subject to the revised text amendment itself?" The Zoning Administrator went on to note that the revisions to the Original Permit did not increase the gross floor area, building height or number of units. "The basic mass of the building stayed the same." (Sept 19, 2018 Transcript ("Tr."), p. 65-66) In addition, it was pointed out that the Original Permit, which pre-dated the effective date of ZC Order 14-11B, showed the approved plans included the removal of the front façade, including the existing façade trim or element.[6] (Comparison of the Original Permit Plans vs the Revised Permit Plans, Exhibit 63A1)

33. The Original Permit, Revised Permit and Second Revised Permit each approved the 36 inch high guard rail running perpendicular to the 42 inch high parapet wall (Exhibit 46D p. A3.1). The Zoning Administrator testified a setback is not needed for a guard rail, which is perpendicular to the roof line and is installed for required life and safety reasons. Mr. Ford, the retired Chief Building Inspector for DCRA, testified that he was responsible for amending the Building Code in the late 1990s to include the guardrail requirement for life safety purposes.

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[6] The Original Permit allowed for the total removal of front façade (which includes the removal of architectural features) as shown on p. A4.1 of the Plans at Exhibit 3D, a rear addition greater than 10 feet (p. A4.2) and a rooftop guardrail perpendicular to the side parapet wall (p. A5.2).

34. Appellant alleges that the rear addition of the structure is a separate building and thus constitutes an illegal second principal building. However, the front and rear portions of the dwelling have a meaningful connection between them, which makes it a single building pursuant to the Zoning Regulations 11-B DCMR § 309.1.

35. 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.

36. The connection between the front and rear units satisfies all four zoning requirements, and therefore the two structures (the existing structure connected to the rear addition) comprise a single building. The connection is enclosed, fully above grade, and heated. The connection is an above grade, artificially lit, conditioned and enclosed breezeway that both provides access to a common space (courtyard) shared by the users of the building and free and unrestricted passage between separate portions of the building including separate dwelling units as specifically allowed by B-309.2.

37. The Board accepted Will Teass (Architecture) Toye Bello (Zoning) and Vince Ford (Building Code and DCRA Permitting) as expert witnesses in their respective fields at the September 19, 2018 hearing.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized by § 8 of the Zoning Act to "hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal" made by any administrative officer in the administration or enforcement of the Zoning Regulations. D.C. Official Code § 6-641.07(g)(1) (2008 Repl.).) (*See also* 11 DCMR § 3100.2.) Appeals to the Board of Zoning Adjustment "may be taken by any person aggrieved, or organization authorized to represent that person, … affected by any decision of an administrative officer…granting or withholding a certificate of occupancy…based in whole or part upon any zoning regulations or map" adopted pursuant to the Zoning Act. (D.C. Official Code § 6-641.07(f) (2008 Repl.).) (*See also* 11 DCMR § 3200.2.)

1. The Roof Guardrail and Façade Trim Removal Appeals are Untimely and Must Be Dismissed.

The D.C. Court of Appeals has established that the Board is required to consider the threshold jurisdictional issue of timeliness prior to the merits of an appeal. *See Basken v. D.C. Bd. of Zoning Adjustment*, 946 A.2d 356, 364 (D.C. 2008) (upholding the Board's decision to dismiss an appeal as untimely at a preliminary hearing where the Board did not hear the merits of the case).

Further, D.C. Court of Appeals case precedent is clear that "if the appeal was not timely filed, the Board was without power to consider" the merits of the case. *See Waste Mgmt. of Md. v. State Bd. of Zoning Adjustment*, 775 A.2d 1117, 1121-1122, (2001); *see also Mendelson v. D.C. Bd. of Zoning* Adjustment, 645 A.2d 1090, 1093 (D.C. 1994) ("The timely filing of an appeal with the BZA is mandatory and jurisdictional."); *see also Woodley Park Community Assoc. v. D.C. Bd. of Zoning Adjustment*, 490 A.2d 628, 635 (D.C. 1985) (When an appeal is untimely filed the Board is "without power to consider it.") *See Woodley Park Community Assoc. v. D.C. Bd. of Zoning Adjustment*, 490 A.2d 628, 635 (D.C. 1985).

The facts and the law are clear that Appellant, Advisory Neighborhood Commission 6C failed to comply with Subtitle Y §§ 302.2 and 302.5 and file this appeal with respect to the roof guardrail and removal of the façade trim within the required sixty days of **March 31, 2017** – the date DCRA issued the Original Permit. The Original Permit included approval for both the rooftop guardrail running perpendicular to the parapet wall and removal of the façade trim and put ANC 6C on actual notice.

Based on the Original Permit, ANC 6C filed this Appeal on May 30, 2017. In its appeal Statement, ANC 6C raised four alleged violations (pervious surface, chimney setback, excessive number of units, and construction of a second illegal principal building). BZA Exhibit 3. On September 7, 2017, ANC 6C filed its first Prehearing Statement which recognized that the Original Permit approved "total removal of the front façade", but did not allege that this violated the Zoning Regulations. Also, ANC 6C did not discuss or allege any violation related to the perpendicular roof guardrail approved by the Original Permit. BZA Exhibit 20. Again, in its April 18, 2018 Revised Prehearing Statement, ANC 6C failed to raise the removal of the facade trim and the rooftop guardrail as violations of the Zoning Regulations. BZA Exhibit 35. Not until its Second Prehearing Statement on June 25, 2018 did ANC 6C first challenge the removal of the façade trim and roof guardrail first approved by the Original Permit on March 31, 2017.

Raising these issues for the first time almost fifteen (15) months after the Original Permit was issued and thirteen (13) months after filing its Appeal is unquestionably untimely. Based on clear D.C. Court of Appeals case law, the Board does not have the power to consider the merits of these issues on appeal, and they should be dismissed.

The timeliness of the Appeals must comply with both the sixty (60) day rule of Y §302.2 and the "first writing" rule of Y §302.5.

Y §302.2 provides:

> 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, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier.

Y §302.5 modifies Y §302.5 and provides:

> 302.5 A zoning appeal may only be taken from the first writing that reflects the administrative decision complained of to which the appellant had notice. No subsequent document, including a building permit or certificate of occupancy, may be appealed unless the document modifies or reverses the original decision or reflects a new decision

Y §§302.2, 302.5 (ZR2016) (Emphasis added)

In this case, the "first writing" that reflects the administrative decision complained of occurred on March 31, 2017, when the Original Permit was issued. Nothing in the Revised Permit and Second Revised Permit altered or in any way disturbed the approval granted in the Original Permit for removal of the façade trim and perpendicular roof guard rail that would allow ANC 6C a second and untimely bite of the apple.

Under the clear facts of the Original Permit as the "first writing", the 60-day time for appeal began on March 31, 2017 and expired on May 31, 2017. Both Appeal issues were raised after the March 30, 2017 60-day deadline and are untimely. As a result, the Board lacks jurisdiction to hear the Appeals and they must be dismissed with prejudice.

In this case, the Board's finding of untimeliness is entirely consistent with its recent dismissal of BZA Appeal No. 19839 of ANC 8A (October 3, 2018) under very similar relevant circumstances. Although a written order has not been issued, the transcript and video of the Public Meeting, shows that Board found the appeal untimely under Y-302.2 and 302.5. Specifically, the 60-day appeal clock began to run with the issuance of the first building permit and was not tolled or extended by subsequent permit modifications that made no material or substantial modifications.

2. The Original Building Permit Application Was Vested on March 24, 2017 and the Original Building Permit on March 31, 2017

An overarching issue in this appeal has to do with the vesting of the building permit and whether subsequent revisions to the permit required certain aspects of the project (removal of front facade and the depth of a rear addition) to seek zoning relief pursuant to later text amendments made to the Zoning Regulations.

DCRA determined the application vesting date to be March 24, 2017, the date the Original Permit application was considered to be "complete" for processing according to DCRA's Projectdox internal software. (Exhibit 62C). Further, the Original Permit was vested when issued on March 31, 2017 prior to the April 28, 2017 effective date of ZC Order 14-11B.

As the Zoning Administrator testified, he relied on the "totality of the zoning rules together. I look at Subtitle A, § 304, Subtitle A, § 301.4, and Subtitle A, § 301.14 together to come to a conclusion that this, in my view, the application is deemed vested in the rules prior to ZC Order 14-11B." (Sept 19, 2018, Tr., p. 96). The Board confirmed with the Zoning Administrator that

the revisions did not change the vesting date, "[j]ust so I can follow through with what I think the question - - so I just understand, Mr. Le Grant, you don't think of any of those changes changed the project significantly enough that these other things - - it would change the vesting issue." To which the Zoning Administrator responded, "That's correct." (Sept 19, 2018, Tr., p. 104).

The Appellant challenged DCRA on the vesting date, arguing that the vesting date was March 29, 2018, which would have meant that ZC Order 14-11D, which amended the Zoning Regulations to include an exception to Subtitle A, § 301.4, would apply. That provision vests development rights based upon the Zoning Regulations in place on the date a building permit is issued. The exemption applies to building permit applications that proposed construction of a rear wall of an attached or semi-detached building that would extend farther than ten feet (10 ft.) beyond the farthest rear wall of any adjoining principal residential building on an adjoining property, if the application 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 Zoning Administrator explained the discrepancy between the March 24, 2017 date that he used as the vesting date and the March 29, 2017 date that was referenced in the redacted email from Maximillian Tondro, Esq., (Exhibit 46H) which stated the permit application was not completed until March 29th. The ZA testified, "[a]s with other internal deliberation, I treat this, Mr. Tondro's, as information that he asserted at that point in time. Following that communication, looking at all the information available, I concluded it was a different date than Mr. Tondro initially indicated in that email." (Sept 19, 2018, Tr., p. 102).

The Board requested DCRA to provide additional information in the form of a timeline for the permits issued for the property to which DCRA submitted into the record an internal "Workflow Routing Slip" for the Original Permit and highlighted that the task, "PreScreenReview" was completed on March 24, 2017. (Exhibit 62C).

The Board concurs with DCRA that the Zoning Administrator correctly approved the project based on the vesting date of March 24, 2017 and the issuance date of March 31, 2017 and that the revisions to the permit were not substantial in nature as to reset the date of when the project vested or require compliance with the subsequently effective ten foot limit on rear additions or "cornice" removal.

3. <u>The Subsequent Revisions to the Plans Were Not Substantial and Therefore Did Not Change the Vesting Date</u>

The Board rejects the Appellant's contention that the revisions to the approved plans were substantial. The Zoning Administrator testified that the revisions were not major alterations, such as an increase or decrease of the height of the building, the gross floor area or number of units. In addition, the mass of the building stayed the same. The Property Owner testified to the changes that were made and submitted into the record a powerpoint illustrating the comparison of the permits to show the approved revisions. (Exhibit 68). The Board is satisfied that the revisions were not substantial.

4. The Rooftop Guard Rail is not Required to be Setback Under Subtitle C § 1502.1

The Appellant argued that any guard rail on the roof shall be setback from the edge of the roof at a 1:1 ratio pursuant to 11 DCMR Subtitle C § 1502.1 and therefore DCRA erroneously approved the permit which violates this one-to-one setback.

The Board reviewed the plans and the testimony of the Zoning Administrator. The ZA stated that he interprets the setback provision to apply, "when the guard rail is at the roof edge, on the roof edge or parallel with the roof edge . . ." (Sept 19, 2018, Tr., p. 85). The Board concurs with the Zoning Administrator's conclusion in exercise of his sound discretion.

5. Removal of the Façade Trim or Element is not Prohibited under Subtitle E, § 206.1(a)

The Board heard extensive discussion as to whether or not the architectural element approved to be removed is a "cornice". At the time of approval, the Zoning Regulations did not include the example of "cornice" as an architectural element.

The Original Permit, approved the total removal of the existing front façade, including the façade trim or feature on the front of the existing building based on the "roof top architectural element" restriction that existed on March 31, 2017. This approval to remove the façade trim was vested under A-301.4 at that time. The Revised Permit and Second Revised Permit did not change the approval previously granted and did not trigger compliance with the subsequently amended "cornice" restriction.

There was no disagreement as to the date the Original Permit was issued (March 31, 2017).

6. The Depth of the Rear Addition is not Prohibited under Subtitle E, § 205.4

It is undisputed that the Original Permit approved a rear addition greater than ten feet. The Original Permit was issued on March 31, 2017, before the ten foot rear addition restriction became effective on April 28, 2017 under ZC Order 14-11B. Issuance of the Original Permit fully vested the Property Owner's right to construct the rear addition as approved pursuant to Subtitle A, § 301.4 which provides:

> Except as provided in Subtitle A §§ 301.9 through 301.15, 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: (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.

As a result, Subtitle A, § 301.4 authorized the Property Owner to complete all the work authorized by the Original Permit, to final completion.

As the Zoning Administrator, and the former Zoning Administrator (Mr. Bello), clearly testified, the Subtitle A, § 301.4(b) provision of the general vesting rule was never intended to and has not

been interpreted or applied to any and/or all amendments to a vested building permit. The § 301.4(b) limitation must be understood and is limited by the context of the controlling vesting rule – "any construction authorized by a permit may be carried to completion pursuant to the provisions of this title in effect on the date the permit is issued."

Specifically, the rule itself, common sense and practice dictate that not all permit amendments rise to the level requiring compliance with any subsequent change to the Zoning Regulations. As a result, the restriction of § 301.4(b) has been routinely and dating back to similar to provisions in the 1958 Regulations limited to only "substantial" or "material" changes to the previously approved permit. Applied to this specific situation, the Zoning Administrator correctly determined that the rear addition approved by the Original Permit was vested and that the Revised Permit and Second Revised Permit did not include material or substantial changes that would trigger the retroactive application of the ten foot rear addition restriction to work that was allowed to be carried to completion. Significantly, the two permit revisions did not change the approved building or zoning envelope and more to point made no change in the rear addition previously authorized. The changes sought and approved were minor and related to the interior design and configuration of the building, exterior materials, work in public space, mechanical equipment and design of the roof hatch (not the perpendicular guardrail) – all determined to not be material or substantial. A more detailed side-by-side comparison of the permit revisions is provided by the Property Owner in Exhibit 63A1.

In addition to the general vesting rule of Subtitle A, § 301.4, the Original Permit application was also fully vested under the additional vesting rule specific to the ten foot restriction on rear additions. Critically, the text amendment enacted as a result of ZC Order 14-11D in enacting Subtitle E, § 205.4, the Zoning Commission included a very additional specific vesting provision in Subtitle A, § 301.14:

> 301.14 Notwithstanding Subtitle A § 301.4, Subtitle D §§ 306.3, 306.4, 706.3, 706.4, 1006.2, 1006.3 1206.3, and 1206.4, and Subtitle E §§ 205.4 and 205.5, a rear wall of an attached or semi-detached building may be constructed to extend farther than ten feet (10 ft.) beyond the farthest rear wall of any adjoining principal residential building on an adjoining property provided that 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 Original Building Permit Application was filed electronically by the Property Owner on March 23, 2017 and accepted as complete by DCRA on March 24, 2017. On its face, this permit application was also vested prior to March 27, 2017. The Board is not convinced by the Appellant's claim that this application was not accepted as complete by DCRA until March 29, 2017. Significantly, DCRA's official records and sworn testimony establish that this application was accepted as complete on March 24, 2017.

7. <u>The Existing Structure and Rear Addition Are Considered a Single Building Pursuant to Subtitle B, § 309.1</u>

Appellant claimed that the approved rear addition to be constructed in the rear yard is a separate building and that the two structures do not constitute a single building since the connecting corridor does not satisfy the criteria provided pursuant to Subtitle B, § 309.1(a)-(d), specifically the fourth required criterion (d). (Exhibit 46). However, the Board was satisfied with the Zoning Administrator's review of how the project qualified as a single building.

The Zoning Administrator testified that the first three required criteria of 11-B DCMR § 309.1(a)-(c) (fully above-grade, enclosed, heated and artificially lit) are not at issue and the Board agrees. It is the fourth criterion, § 309.1(d) which requires the determination whether the connection is EITHER 1) a common space shared by users OR 2) provides a free and unrestricted passage between the portions of the building (*only one of these two needs to apply*). The Zoning Administrator testified that the connection functions as a common space, used by all users of the building to access the shared courtyard, thus meeting the first prong of criterion 4. (Sept 19, 2018 Tr., p. 67-69, 77-78). He later clarified in his testimony that he believed, "an argument can be made for both prongs, but I rely on the first prong, the common space shared by users of the building, as the definitive prong." (<u>Id</u>. at p. 97).

The Board was also persuaded by the Property Owner's submissions into the record showing that the above grade connection is common space that: a) Allows use by all the owners, occupants and visitors of the front or rear units to access both the common courtyard and the front and rear of the building by way of the connected corridors; AND b) Allows free, unrestricted and reciprocal access for the owners, occupants and visitors of each dwelling unit to other portions of the building. (Exhibit 63). The video simulation demonstrated that the owners of both dwelling units can freely enter the front of the building from 7th Street, travel through the cellar level corridor, take the stairs up to the above grade connection to access each dwelling unit or the common courtyard or, cross this common space, descend the stairs to the cellar level corridor and travel to rear of the building and exit to the parking area. Similarly, both unit owners can enter the building from the rear parking area and alley and travel the same unrestricted and common path to the common courtyard, the front unit or travel to the front of the building and 7th Street. The unit circulation diagram submitted also demonstrated that the project operates physically and functionally as a single building. (Exhibit 63A2). Under these circumstances, this conclusion is supported by and must be read in conjunction with B-309.2 which specifically allows that "a single building may contain multiple uses or dwelling units that do not share access."

The Board is required to give "great weight" to the issues and concerns raised by the affected ANC. (§ 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2001)).) In this case, ANC 6C is the Appellant. For the reasons discussed above, the Board concludes that the ANC has not offered a persuasive argument to repeal the Amended Building Permit.

The Board was not persuaded by the Appellant that any error occurred in the Zoning Administrator's decision to approve the building permit at issue in this appeal.

Based on the findings of fact and conclusion of law, the Board concludes that the Appellant has not satisfied the burden of proof in its claims of error in the decisions of the Zoning Administrator to approve Building Permit No. B1706219, as amended, to permit the renovation of an existing single family dwelling unit to a two-unit flat in the RF-1 Zone at premises 1125 7th Street, N.E. (Square 886, Lot 35). Accordingly, it is therefore **ORDERED** that Zoning Administrator's determination is **SUSTAINED** and this appeal is **DENIED**.

VOTE: _____

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

A majority of the Board members approved the issuance of this order.

FINAL DATE OF ORDER: ________________

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

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