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

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

D.C. DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Department of Consumer and Regulatory Affairs (DCRA) hereby submits the proposed Findings of Fact and Conclusions of Law as requested by the Board of Zoning Adjustment (Board) at its October 31, 2018 Public Meeting.

FINDINGS OF FACT

1. The property that is the subject of this appeal is located at 1125 7th Street, N.E. (0886, 0035) (Property), which is an RF-1 Zone in the District of Columbia.
2. The subject property currently consists of a single-family dwelling.
3. Atlas Squared, LLC, the Property Owner, obtained Building Permit B1706219 (Original Permit) to renovate and convert the single-family dwelling to a two-unit townhouse.
4. On March 24, 2017, DCRA's Projectdox filing system "accepted as complete" the application for Building Permit B1706219.[1]
5. Building Permit B1706219 was issued on March 31, 2017.
6. On April 28, 2017, Zoning Commission Order No. 14-11B's amendment to 11-E DCMR § 206.1(a), which added "cornice" to the enumerated list of protected features, became effective.
7. On April 28, 2017, Zoning Commission Order No. 14-11B adopted the 10-foot limitation on new rear additions. As a result, 11-E DCMR § 205.4 prohibits buildings in an RF-1 zone from having a rear extension further than ten feet beyond the farthest rear wall of an adjoining property.
8. On May 30, 2017, ANC 6C04 Commissioner Mark Eckenwiler, Appellant, filed this appeal with Board alleging that Building Permit B1706219 was issued in error because it permitted the following violations of the Zoning Regulations:

[1] BZA Appeal 19550- October 31, 2018 Transcript page 276:1-3.

(i) The plans did not reflect a minimum of 20% pervious surface in violation of 11-C DCMR § 501 and 11-E DCMR § 204.1.

(ii) The plans permitted construction of an addition that blocked or impeded a chimney or other external vent on an adjacent property in violation of 11-E DCMR § 206.1.

(iii) The application for the Permit proposed four units, two principal units and two accessory units, in violation of 11-E DCMR § 302.1 and 11-E DCMR §302.3; and

(iv) The application for the Permit depicts a connection between the principal building on the Property and the second building; however, the connection fails to meet the requirements of 11-B DCMR § 309.1. [2]

9. On September 7, 2017, Appellant filed its Pre-Hearing Statement reasserting the same allegations found in the Statement of Appeal.[3]

10. On September 20, 2017, Kevin Cummings, the owner of 1123 7th Street, N.E. (the Intervenor), which is an adjoining rowhome to the Property, filed an Intervenor Status Request in opposition to the building application. Mr. Cummings alleged the following violations of the Zoning Regulations:

    i. The construction of the property would impede the functioning of a chimney located on his adjoining roof in violation of 11-E DCMR § 206.1(b);

    ii. The rear townhouse would negatively impact his enjoyment and use of his home as well as property value; and

    iii. The construction does not provide the required twenty percent (20%) pervious surface minimum, which would negatively impact storm water management in his neighborhood.[4]

11. On October 20, 2017, the Board granted Intervenor status to Mr. Cummings.

12. On February 16, 2018, the Property Owner applied for a revision to Permit B1706219.[5]

[2] BZA Appeal 19550- Exhibit 3.
[3] BZA Appeal 19550- Exhibits 3 and 20.
[4] BZA Appeal 19550- Exhibit 21.
[5] BZA Appeal 19550- Exhibit 50.

13. On April 18, 2018, DCRA issued the revised permit under B1805207 (Revised Permit or B1805207).[6]
14. On April 18, 2018, Appellant filed a Revised Pre-hearing Statement regarding the Original Permit. In the April 2018 filing, Appellant reasserted the allegations from his May 30, 2017 Statement of Appeal, but also included the following argument:
    i. The separate rear building is too large to qualify as an accessory building and therefore, is not allowed on the Property.[7]
15. On May 2, 2018, the Intervenor filed his Pre-Hearing Statement alleging the following violations of the Zoning Regulations:
    i. Building Permit B1706219 allows for the removal of the cornice in violation of 11-E DCMR § 206.1;
    ii. Building Permit B1706219 was approved on March 31, 2017 as a "revision" to two earlier permits that do not exist;
    iii. Building Permit B106219 was hastily issued in error on March 31, 2017 because the Zoning Commission 14-11B Text Amendment "pop back" rear additions would become effective in April 2018;
    iv. The Property Developer, Stoney Creek Homes, is not a registered business in the District of Columbia; and
    v. DCRA sent Mr. Cummings a neighbor notification after the permit was issued.[8]
16. On May 9, 2018, the Board incorporated the Revised Permit (B1805207) into the appeal.[9]
17. On June 25, 2018, the Appellant filed his Second Pre-Hearing Statement regarding the Revised Permit alleging the following additional violations of the Zoning Regulations:
    i. The Dayliter, or roof hatch, on the roof of each building is a penthouse which is prohibited under 11-C DCMR §1500.4. Moreover, the roof hatch is not of equal, uniform height, in violation of 11-C DCMR § 1500.9;
    ii. The roof hatch and guard rail violate the 1:1 Penthouse setback under 11-C DCMR § 1502.1;

[6] BZA Appeal 19550- Exhibit 50.
[7] BZA Appeal 19550- Exhibit 35.
[8] BZA Appeal 19550- Exhibit 40.
[9] BZA Appeal 19550- May 9, 2018 Transcript page 87:22-25, page 88:1-3.

iii. The construction allows for the removal of the cornice in violation of 11-E DCMR § 206.1(a);
iv. The connection between the two structures is a not a connector under 11-B DCMR § 309.1(d); and
v. The second structure on the property extends more than ten (10) feet beyond the farthest wall of the adjoining property in violation of 11-E DCMR § 205.4.[10]

18. On July 11, 2018, the Property Owner filed its Pre-Hearing Statement in Opposition asserting the following:
    i. Building Permit Application B1706219 was filed and accepted as completed on March 23, 2017 prior to the Zoning Commission Text Amendment 14-11B became effective on April 28, 2017;
    ii. The connection between the two structures is fully above grade, enclosed and heated, artificially lit, and has a common space shared by all users of the single building in accordance with 11-B DCMR § 309.1;
    iii. The "cornice" is a façade trim under the plain meaning of 11-E DCMR § 206.1(a) and its removal was approved before 11-E DCMR § 206.1(a) was amended on April 28, 2017 to include "cornice" as a rooftop architectural element; and
    iv. The Property Owner changed the design of the roof hatch from a skylight style to a sliding "coffin" style to vacate ANC's claim on this issue.[11]

19. On July 11, 2018, Mr. Cummings, the Intervenor, filed a revised Pre-Hearing Statement reasserting the arguments previously filed and raised the following new arguments without referencing any specific violation of the Zoning Regulations:
    i. The permit drawings for the Original and Review Permits do not reflect the conditions of the Property;
    ii. The new constructions will partially occupy a publicly maintained alley space; and

[10] BZA Appeal 19550- Exhibit 46.
[11] BZA Appeal 19550- Exhibit 47.

iii. The permit drawings reflect the party wall as 29 feet 10 inches and do not show that the rear addition and areaway foundation wall extend at least another 30 feet along the property line.[12]

20. On July 11, 2018, DCRA filed its Pre-Hearing Statement contending that the Zoning's Administrator's approval of the Permit (B1706219) and the Revised Permit (B1805207) was valid and the Appellant and the Intervenor's claims were without merit. DCRA argued the following four points:
    i. The roof hatches were less than four feet above the parapet wall and thus, not subject to the penthouse regulations of 11-C DCMR § 1500;
    ii. Permit B1706219 approved the removal of the cornice because cornice was not added to 11-E DCMR § 206.1(a) as one of the enumerated list of protected features until April 28, 2017, approximately one month after the issuance of B1706219;
    iii. The front and rear towers do have a meaningful connection pursuant to 11-B DCMR § 309.1; and
    iv. The construction of the rear tower is permitted because the 10-foot limitation on new rear additions, under 11-E DCMR § 205.4, did not become effective until April 28, 2017, approximately one month after B1706219 was issued.[13]
21. On August 2, 2018, the Property Owner obtained Building Permit B1811245 (Second Revised Permit).
22. On August 9, 2018, the Property Owner filed a Partial Consent Motion to incorporate the Second Revised Permit (B1811245) into this appeal.[14]
23. On August 14, 2018, DCRA filed an Amended Pre-Hearing Statement reasserting the statements from its July 11, 2018 Pre-Hearing Statement and included the following arguments:
    i. Each roof hatch is 1-foot high on the Property and is setback 1-foot from the sidewall of the Property in accordance with 11-C DCMR § 1502.1(c).[15]

[12] BZA Appeal 19550- Exhibit 48.
[13] BZA Appeal 19550- Exhibit 50.
[14] BZA Appeal 19550- Exhibit 55.

24. On August 15, 2018, the Property Owner filed a response to the Intervenor's July 11, 2018 Revised Pre-Hearing statement denying the allegations.[16]
25. On September 5, 2018, the Appellant filed a Response to the Property Owner's Pre-Hearing Statement and DCRA's Amended Pre-Hearing Statement stating the following violations of the Zoning Regulations:
    i. The 36-inch guardrail surrounding the roof hatch is not set back 1:1 from the adjacent property in violation of 11-C DCMR § 1502.1;
    ii. The cornice is prohibited from removal under 11-E DCMR § 206.1(a);
    iii. The connection between the two structures fails to satisfy the meaningful connection criteria of 11-B DCMR § 309.1(d);
    iv. The rear addition is subject to the 10-foot rear addition limit under 11-E DCMR § 205.4. The project does not enjoy the vesting rule because the original permit was not accepted as complete until March 29, 2017 and the vesting rule 11-A DCMR § 301.14 requires a filing no later than March 27, 2017.
26. On September 19, 2018, the Board approved the Motion to Incorporate B1811245 (Second Revised Permit) into the appeal.[17]
27. At the conclusion of the September 19, 2018, Public Hearing, the Board directed DCRA to: 1) submit a timeline of the permits issued to 1125 7th Street, N.E.; 2) identify the plan/design changes between each permit revision; 3) produce DCRA documents showing when the plans were "accepted as complete" as well as the alternate tracking data on the Property; and 4) identify cases where the Office of the Zoning Administration treated a cornice as a rooftop architectural feature *prior* to the addition of cornice to 11-E DCMR § 206.1(a).[18] The Board also asked the Property Owner to provide drawings of the breezeway plan.[19]
28. On October 12, 2018, DCRA filed its supplemental submission addressing each request from the Board. This included the Projectdox Workflow Routing Slip for B1706219

[15] BZA Appeal 19550- Exhibit 56.
[16] BZA Appeal 19550- Exhibit 58.
[17] BZA Appeal 19550- September 19, 2018 Transcript pages 10- 11.
[18] BZA Appeal 19550- September 19, 2018 Transcript pages 182-184.
[19] BZA Appeal 19550- September 19, 2018 Transcript page 184.

which showed an accepted as complete status date of March 24, 2017 and the Accela Workflow History showing "ProjectDox Accepted" date of March 23, 2017.[20]

29. On October 12, 2018, the Property Owner submitted the original architectural plans and subsequent changes to the architectural plans from March 2017, when the Original Permit was issued, through the issuance of the Second Revised Permit in August 2018.[21]
30. On October 24, 2018, the Intervenor and the Appellant filed their respective responses raising the same allegations previously filed.[22]

CONCLUSIONS OF LAW

i. 36-inch guardrail

Appellant alleges that the 36-inch guard rail, which is perpendicular to the adjoining property is subject to the 1:1 setback rule. 11-B DCMR § 1502.1 reads, in part, "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." The Appellant argues that the 1:1 setback from 11-B DCMR § 1502.1 applies to all rooftop guardrails.[23]

The Zoning Administrator explained during the September 19, 2018 Public Hearing that there is a requirement for setbacks from a side wall of a building.[24] Specifically, the Zoning Administrator has interpreted the 1:1 setback to apply to a guard rail that is on the edge of the roof, parallel, or running along the edge of the roof.[25, 26] Section 11-C DCMR § 1500.4 creates an exception for certain guard rails under Title 12 of the DCMR. The regulation reads, in part, "Notwithstanding Subtitle C § 1500.3, **a penthouse, other than** screening for rooftop mechanical equipment or **a guard-rail required by Title 12 of the DCMR**, **D.C. Construction Code for a roof deck**, **shall not be permitted** on the roof of a detached dwelling, semi-detached dwelling, rowhouse or flat in any zone." (emphasis added.)

[20] BZA Appeal 19550- Exhibits 62 and 62C.
[21] BZA Appeal 19550- Exhibit 63A1.
[22] BZA Appeal 19550- Exhibits 65 and 66.
[23] BZA Appeal 19550- Exhibit 59 at page 2.
[24] BZA Appeal 19550- September 19, 2018 Transcript pages 84-85.
[25] BZA Appeal 19550- September 19, 2018 Transcript page 61:5-10.
[26] BZA Appeal 19550- September 19, 2018 Transcript pages 84-85.

In the instant case, the record reflects that the guard rail is not on the edge of the roof, parallel, or running along the edge of the roof.[27] Instead, it is perpendicular to the property line such that the guard rail is there for a life safety purpose.[28] This Board also heard testimony from Vincent Ford,[29] a former DCRA Chief Building Official, that a guard rail that is across the opening of a building edge is a life safety issue.[30] Thus, Appellant and Intervenor's arguments are flawed on two levels. First, the Zoning Regulations are not interpreted to require a 1:1 setback of a guard rail that is perpendicular to an adjoining property. Next, the building code requires a protective guard rail and both the Zoning Administrator and Mr. Ford testified that they have consistently read the Zoning Regulations to exempt protective guardrails from the 1:1 setback.[31, 32, 33, 34] The Board concludes that the Zoning Administrator reasonably interpreted the Zoning Regulations to find that the portion of the 36-inch guard rail that is perpendicular to the adjoining property is not subject to the 1:1 setback rule.

ii. Cornice

The Original Permit (B1706219), issued on March 31, 2017, proposed the removal of the cornice.[35] At that time the permit was issued, 11-E DCMR § 206.1(a) read, in part, "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." (emphasis added.) The Appellant concedes that the Permit was issued on March 31,

[27] BZA Appeal 19550- Exhibit 62A at page 7.
[28] BZA Appeal 19550- September 19, 2018 Transcript page 61:11-15.
[29] BZA Appeal 19550- Exhibit 47J3.
[30] BZA Appeal 19550- September 19, 2018 Transcript page 128:19-25, page 129:1-12.
[31] BZA Appeal 19550- September 19, 2018 Transcript page 61:5-15.
[32] See generally, BZA Appeal 19550- September 19, 2018 Transcript page 128:19-25, page 129:1-12.
[33] BZA Appeal 19550- September 19, 2018 Transcript page 63:8-13.
[34] 12G DCMR § 307.1 General. **Every exterior** and interior **flight of stairs having more than three risers shall have a handrail on one side of the stair and every open portion of a stair, landing, balcony, porch, deck, ramp or other walking surface which is more than 30 inches (762 mm) above the floor or grade below shall have *guards*.** Handrails shall not be less than 30 inches (762 mm) in height or more than 42 inches (1067 mm) in height measured vertically above the nosing of the tread or above the finished floor of the landing or walking surfaces. ***Guards* shall not be less than 30 inches** (762 mm) in height above the floor of the landing, balcony, porch, deck, or ramp or other walking surface. (emphasis added).
[35] BZA Appeal 19550- Exhibit 62A- Architectural Plan A4.1 at page 10.

2017 and that the approved plans for B1706219, called for the removal of the cornice.[36, 37] The Board heard testimony from Mariah Rippe, the plan designer, that the plans for the Original Permit (B1706219) included the removal of the façade/cornice.[38]

On April 28, 2017, 11-E DCMR § 206.1(a) was amended to include cornice as an architectural element. Appellant wants this Board to apply the amended version of 11-E DCMR § 206.1(a), which added cornice as a rooftop architectural element on April 28, 2017, and ignore the fact that the Original Permit was issued *before* cornice was added as a rooftop architectural element. This Board finds that at the time the Original Permit (B1706219) was issued 11-E DCMR § 206.1(a) did not include cornice as a rooftop architectural element and the Board will not retroactively apply the revised 11-E DCMR § 206.1 to the Original Permit.

iii. Connection Between the Two Towers

It is undisputed that the connection between the two towers satisfies the first three criteria of 11-B DCMR § 309.1- the connection is above grade, enclosed, heated and artificially lit. The issue for this Board is whether the connection satisfies 11-B DCMR § 309.1 (d): 1) a common space shared by users of all portions of the building or 2) the space is designed and used to provide free and unrestricted passage between separate portions of the building.

Appellant argues that the structure between the front and rear towers does not qualify as a single building because the connection fails to satisfy either 11-B DCMR § 309.1(d)(1) or (d)(2). Appellant claims that the "narrow connecting corridor" neither serves as a common space nor provides "free and unrestricted passage between separate portions of the building.[39] This Board heard testimony from the DCRA Zoning Administrator that the structure will be a single building because the connection satisfies 11-B DCMR § 309.1.[40] Specifically, the connection met the final criteria of 11-B DCMR § 309.1(d)(1); the connector was a common space shared by users of all portions of the building.[41] The Zoning Administrator testified that the connection functions "as a common space, used by all users of the building."[42] The connection functions as

[36] BZA Appeal 19550- September 19, 2018 Transcript page 14:10-11, page 16:6-13.
[37] BZA Appeal 19550- October 31, 2018 Transcript page 206: 2-13.
[38] BZA Appeal 19550- September 19, 2018 Transcript page 125:24-25, page 126:1-3.
[39] BZA Appeal 19550- Exhibit 59.
[40] BZA Appeal 19550- September 19, 2018 Transcript pages 67-68.
[41] BZA Appeal 19550- September 19, 2018 Transcript pages 67-68.
[42] BZA Appeal 19550- September 19, 2018 Transcript page 67:25 and page 68:1-2.

a corridor as well as a doorway that leads to the interior courtyard.[43] "Residents of both of the units can access the courtyard by going through the doors from their respective units to this common space."[44] Based on this analysis, the Zoning Administrator concluded that the connector did "qualify as common space that allows people"[45] to "share this space, to be able to access, in this case, the closed courtyard between the two towers."[46] The Board notes that throughout the appeal, Appellant described the connection as a "Rube Goldberg arrangement,"[47] and a "fig leaf."[48] Appellant also argued that the connection is not a connector because the residents "still got to go outside,"[49] are "going to get rained on or snowed on"[50] and that "[y]ou don't need to have that corridor there."[51] It is clear that Appellant is more concerned about the functionality of the connection rather than whether the connection satisfies the Zoning Regulations. The Board's function is to determine whether the connection conforms with the applicable Zoning Regulations, not the functionality of the project. The Board finds that the connection is a common space, which will be shared by the occupants of both towers and therefore, satisfies 11-B DCMR § 309.1.

iv. *Rear Addition and the Pop-Back Rule*

The Applicant in this case argues that the rear addition is subject to the 10-foot rear addition limit under 11-E DCMR § 205.4 because the project does not enjoy the vesting rule. Specifically, the Appellant argued: 1) the Original Permit was not accepted as complete until March 29, 2017 and the vesting rule 11-A DCMR § 301.14 requires a filing no later than March 27, 2017; and 2) the subsequent changes to the architectural plans were so substantial that the Property Owner lost its vesting rights.

The language in the Zoning Regulations 11-A DCMR § 301.14, adopted on November 24, 2017, states in part, "a rear wall of an attached or semi-detached building may be constructed

[43] BZA Appeal 19550- September 19, 2018 Transcript page 68:2-4.
[44] BZA Appeal 19550- September 19, 2018 Transcript page 68:1-8.
[45] BZA Appeal 19550- September 19, 2018 Transcript page 68:10-11.
[46] BZA Appeal 19550- September 19, 2018 Transcript page 68:12-13.
[47] BZA Appeal 19550- September 19, 2018 Transcript page 171:24-25.
[48] BZA Appeal 19550- September 19, 2018 Transcript page 172:11.
[49] BZA Appeal 19550- September 19, 2018 Transcript page 172:18-19.
[50] BZA Appeal 19550- September 19, 2018 Transcript page 172:18-19.
[51] BZA Appeal 19550- September 19, 2018 Transcript page 173:1-5.

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." (emphasis added). This Board heard testimony from the Zoning Administrator that the project was accepted as complete on March 24, 2017.[52,53] In support, the Zoning Administrator provided the Projectdox Workflow, which showed an accepted as complete date of March 24, 2017 as well as the Accela Workflow, which identified the accepted as complete date of March 23, 2017.[54] Despite the evidence, Appellant wants this Board to ignore the clear language of the Zoning Regulations and DCRA's official documents. The Board concludes that the application was accepted as complete, in accordance with 11-A DCMR § 301.14, on March 24, 2018.

With regards to the second issue, this Board finds that the changes to the plans were not substantial to warrant the Property Owner to lose its vesting rights. The Zoning Administrator testified that a substantial change would consist of a major alteration, such as increase or decrease of the height of the building, the gross floor area, or number of dwelling units.[55] These are triggers the Zoning Administrator would have taken into account.[56] Following each approved revision there were changes to the exterior façade and materials, and changes to the roof hatch element,[57] but the basic mass of the building stayed the same.[58] The Board also heard testimony from Mariah Rippe, the plan designer, that the revised plans reflect changes made to the interior.[59] Specifically, the interior aspects changed, but there were no changes in the overall footprint, height and use of the building.[60, 61]

After reviewing the testimony and the documents, the Board has concluded that the architectural changes were not substantial changes. Accordingly, the Property Owner did not

[52] BZA Appeal 19550- September 19, 2018 Transcript page 70:25, page 71:1-2.
[53] BZA Appeal 19550- September 19, 2018 Transcript page 71:24-25, page 72, page 73:1-14.
[54] BZA Appeal 19550- Exhibit 62C filed on October 12, 2018.
[55] BZA Appeal 19550- September 19, 2018 Transcript page 65:16-25, page 66:1-9.
[56] See generally, BZA Appeal 19550 September 19, 2018 Transcript pages 65-66.
[57] BZA Appeal 19550- September 19, 2018 Transcript at page 66:7-9.
[58] BZA Appeal 19550- September 19, 2018 Transcript at page 66:6-7.
[59] BZA Appeal 19550- September 19, 2018 Transcript at page 165:8-25; page 166:1-2.
[60] BZA Appeal 19550- September 19, 2018 Transcript at page 165:8-10.
[61] BZA Appeal 19550- September 19, 2018 Transcript at page 126:20-24.

lose its vesting rights and may build more than 10 feet beyond the farthest rear wall of any adjoining principal residential building on an adjoining property.

For the above-mentioned reasons, the Board determines that the Zoning Administrator correctly approved the Original Permit and Revised Permit as compliant with the Zoning Regulations. Accordingly, it is hereby **ORDERED** that the appeal is **DENIED.**

Respectfully submitted,

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Date: 12/5/2018

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December 2018 a copy of the foregoing Findings of Fact and Conclusions of Law was served via electronic mail to:

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