

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

Appeal by Stephen Cobb

BZA Appeal No. 19818

**D.C. DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS’
RESPONSE TO INTERVENOR’S STATEMENT**

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

Intervenors, Shelby and Adam Telle, allege that the Zoning Administrator erred in issuing building permit B1804093 (Permit), which permits the Owner of 1267 Penn Street, N.E. (Property) to build a third-story pop-up with a roof deck on the top of the third story, because the construction violates the 5-foot side yard requirement of the 2016 Zoning Regulations. DCRA asserts that the Zoning Administrator correctly approved the Permit.

FACTUAL AND PROCEDURAL BACKGROUND

On May 18, 2018, 1267 Penn St NE LLC, the Owner of 1267 Penn Street, N.E., obtained building permit B1804093 to change the use from a single-family dwelling to a two family flat with full electrical, mechanical, plumbing, and structural. (Exhibit 1- Building Permit, May 18, 2018.) The permit further permitted underpinning of the existing building foot print, a third floor addition with a rear three story addition and roof decks. (Exhibit 1- Building Permit, May 18, 2018.) The building was to be fully sprinkled. (Exhibit 1- Building Permit, May 18, 2018.) The Property is located in an RF-1 zone.

On May 30, 2018, Appellant, Stephen Cobb, the property owner of 1269 Penn Street, N.E. appealed the issuance of the Permit because Appellant “takes exception to both the third story and the roof deck.”¹

On September 18, 2018, Mr. and Mrs. Telle, owners of 1265 Penn Street, N.E., requested Intervenor status.² On September 19, 2018, the Intervenors submitted a statement alleging that the proposed construction at 1267 Penn Street, N.E. ends approximately one foot from the

¹ BZA Appeal No. 19818- Exhibit 2.

² BZA Appeal No. 19818- Exhibits 24 and 32.

Intervenor’s property line in violation of the 5 foot side yard requirement.³ The Intervenor further assert that the proposed construction violates 11-C DCMR § 201.1 pertaining to nonconforming structures.⁴ During the Public Hearing on September 26, 2018, the Board granted Mr. and Mrs. Telle Intervenor Status.⁵

DCRA asserts that the proposed construction conforms with applicable Zoning Regulations.

ARGUMENT

I. The proposed construction does not violate the 5-foot side yard requirement.

The Intervenor claim that the proposed construction violates the 5-foot side yard requirement is without merit. 11-E DCMR § 307 states,

307.1 When a new dwelling or flat is erected that does not share a common division wall with an existing building or a building being constructed together with the new building, it shall have a side yard on each resulting free-standing side.

307.2 A side yard shall not be required along a side street abutting a corner lot in an RF-1 zone.

307.3 **No side yard is required for a principal building; however, any side yard provided on any portion of a principal building shall be at least five feet (5 ft.) except as provided in this section.**

307.4 In the case of a building existing on or before the effective date of this title, with a non-conforming side yard, an extension or addition may be made to the building; provided, that the width of the existing side yard shall not be decreased and provided further, that the width of the existing side yard shall be a minimum of two feet (2 ft.).

(emphasis added). Unfortunately, the Intervenor’s analysis is flawed because 1267 Penn Street, N.E. is in an RF-1 zone which means that the Property Owner has the option of providing no side yard **or** a 5-foot side yard pursuant to 11-E DCMR § 307.3. The Property Owner has elected to retain the 5-foot side yard as shown in Architectural Plan A0100; within this existing 5-foot side yard is a pre-existing, non-conforming projection, of which the footprint is unchanged (see

³ BZA Appeal No. 19818- Exhibits 25, 26 and 32.

⁴ BZA Appeal No. 19818- Exhibit 26 at page 2.

⁵ BZA Appeal No. 19818- September 26, 2018 Transcript page 45:10-13.

below). (Exhibit 2- Architectural Plan A0100) Accordingly, Appellant’s argument is not supported by the Zoning Regulations or the approved plans.

II. The Proposed Plans do not violate 11-C DCMR § 201.

Intervenor’s claim that the proposed plans expand the non-conforming structure in violation of 11-C DCMR § 201.1 is incorrect. Section 11-C DCMR § 201.1 reads, in part,

Except as otherwise permitted in this chapter, nonconforming structures or uses may not be enlarged upon, expanded, or extended, nor may they be used as a basis for adding other structures or uses prohibited elsewhere in the same zone district.

This provision pertains to enlarging or expanding upon a non-conforming structure. In the instant case, the architectural plans do not propose an expansion or enlargement of the non-conforming structure. Specifically, the footprint, gross floor area, nor mass of the non-conforming structure, encroaching into the side yard, are expanded. (Exhibit 2- Architectural Plan A0100) As a result, the proposed construction does not violate 11-C DCMR § 201.

III. The Proposed Plans do not violate 11-C DCMR § 202.

The Intervenor’s argument that the pre-existing property at 1267 Penn Street, N.E. was torn down and, as a result, the proposed construction must provide a 5-foot side yard is without merit.⁶ In essence, the Intervenor’s allege that the Property Owner razed 1267 Penn Street, N.E. It is worth noting that neither the 1958 Zoning Regulations nor the 2016 Zoning Regulations define “demolition” and “raze.” As a result, the Office of the Zoning Administrator created a standard, which he has consistently applied over the years, for determining whether a structure was razed or demolished. The Office of the Zoning Administrator determines whether the proposed construction: 1) changes the gross floor area of the property; 2) changes the lot occupancy, 3) changes the height of the non-conforming structure; and 4) retains a minimum of 40% of the pre-existing wall surface area. The Intervenor’s assert that 1267 Penn Street, N.E. was razed because, “the entire home has been demolished, including the basement, foundation,

⁶ BZA Appeal 19818- Exhibit No. 26 Intervenor’s Statement at page 2.

footers, etc. As such, new construction must comply with the existing code requirements.”⁷ Under the Office of the Zoning Administrator’s standard, the Intervenor would be correct that if 1267 Penn Street, N.E. was razed, then any subsequent construction would be considered new construction. Unfortunately, the Intervenor’s argument fails because the proposed plans show a demolition under the Office of the Zoning Administrator’s standard.

The Office of the Zoning Administrator’s position is that although portions of the building were partially demolished, the building was not razed. Section 11-C DCMR § 202 reads:

- 202.1 Except as provided in Subtitle C § 203.8, ordinary repairs, alterations, and modernizations to the structure, including structural alterations, shall be permitted.
- 202.2 Enlargements or additions may be made to the structure; provided that the addition or enlargement itself shall:
 - (a) Conform to use and development standard requirements; and
 - (b) Neither increase or extend any existing, nonconforming aspect of the structure; nor create any new nonconformity of structure and addition combined.

Although the proposed construction does not enlarge or expand the existing non-conforming structure, it requires some demolition. In the instant case, the Office of the Zoning Administrator reviewed the plans and found that the proposed construction: 1) did not change the gross floor area of the Property; 2) did not change the lot occupancy; 3) did not change the height of the non-conforming structure; and 4) did retain a minimum of 40% of the pre-existing wall surface area.

a. Gross floor area

The Property consists of the maximum three stories permitted in this zone because the lowest level of the Property is a cellar, and a “story,” as defined by the zoning regulations, does not include cellars. A cellar is “that portion of a story, the ceiling of which is less than four feet (4 ft.) above the adjacent finished grade.”⁸ Since the vertical height, from grade to the floor

⁷ BZA Appeal No. 19818- Exhibit 25.

⁸ 11-B DCMR § 100.

above, is less than six feet, the lowest level is deemed a cellar. (Exhibit 3- Architectural Plan A0301.) A cellar is not included in the gross floor area calculation.⁹

With respect to Intervenor’s claim that the proposed construction expands the property, Section 11-C DCMR § 202 applies to the non-conforming structure. The proposed construction does not expand or enlarge the gross floor area of the non-conforming structure therefore, the construction does not violate 11-C DCMR § 202.

b. Lot occupancy and height of non-conforming structure

The proposed construction is confined to the pre-existing lot occupancy and does not alter the height of the non-conforming structure in the side yard. Accordingly, the Office of the Zoning Administrator correctly approved these plans.

c. A Minimum of 40% of Pre-existing Exterior Wall Surface Area Retained

The construction activity at 1267 Penn Street, N.E. is a demolition, or partial removal of the building. The Property Owner submitted to the Office of Zoning Administrator the demolition plans. The demolition plans show that 50% of the exterior surface wall on the 2nd floor of the Property is retained and 42% of the exterior surface wall on the 1st floor is retained. (Exhibit 4- Architectural Plan AD0101 and Exhibit 5- Architectural Plan A0101, respectively) Moreover, the entire pre-existing wall on the east side of the property is retained. (Exhibit 6- Architectural Plan A0204) After reviewing the approved demolition plans, the Office of the Zoning Administrator correctly determined that the plans showed the retention of a sufficient amount of the pre-existing structure so that it did not constitute a raze.

The proposed construction met the Office of the Zoning Administrator’s demolition standard.

CONCLUSION

For the foregoing reasons, DCRA respectfully requests that the Board (1) affirm the Zoning Administrator’s decision; and (2) deny this appeal.

⁹ 11-B DCMR § 304.8

Respectfully submitted,
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Date: 12/12/2018

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CERTIFICATE OF SERVICE

I certify that on this 12th day of December 2018 a copy of “DCRA’s Response to Intervenor’s Statement” was served via electronic mail to:

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