

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

Appeal by Stephen Cobb  
Intervenors Shelby and Adam Telle

BZA Appeal No. 19818

**D.C. DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS’**  
**CLOSING ARGUMENT**

The D.C. Department of Consumer and Regulatory Affairs’ (DCRA) respectfully requests that the Board of Zoning Adjustment (Board) deny this appeal because the Appellant and the Intervenors have failed to meet their burden of proof.

**BACKGROUND**

On May 18, 2018, 1267 Penn St NE LLC, the Property Owner of 1267 Penn Street, N.E., obtained Building Permit B1804093 (Permit) to change the use from a single-family dwelling to a two family flat with full electrical, mechanical, plumbing, and structural.<sup>1</sup> The permit further permitted underpinning of the existing building foot print, a third floor addition with a rear three story addition and roof decks.<sup>2</sup> 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”<sup>3</sup> for the following three (3) reasons:

1. The third story would improperly remove the existing parapets.<sup>4</sup>
2. The roof deck would be improper in both existence and design.<sup>5</sup>
3. The third story and roof deck would be inconsistent with the neighborhood’s character and would detriment the overall environment.<sup>6</sup>

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<sup>1</sup> BZA Appeal No. 19818- BZA Exhibits 33 and 33A.

<sup>2</sup> BZA Appeal No. 19818- BZA Exhibits 33 and 33A.

<sup>3</sup> BZA Appeal No. 19818- BZA Exhibit 2.

<sup>4</sup> BZA Appeal No. 19818- BZA Exhibit 2.

<sup>5</sup> BZA Appeal No. 19818- BZA Exhibit 2.

<sup>6</sup> BZA Appeal No. 19818- BZA Exhibit 2.

On September 18, 2018, approximately four months *after* the issuance of Building Permit B1804093 and the filing of Appellant’s Pre-Hearing Statement, Appellant filed a Supplemental Pre-Hearing Statement.<sup>7</sup> The Supplemental Pre-Hearing Statement then impermissibly expanded Appellant’s original claim from *three issues to six issues*. Appellant’s supplemental filing raised the following new arguments: 1) that the rear wall, as built, violates the rear yard requirements of 11-E DCMR § 306.1; and 2) the roof deck presents a safety and privacy concern.<sup>8</sup> Appellant also raised a third argument, which at best, is a tenuous argument about the side yard pertaining not to his home, but the neighbor’s home located at 1265 Penn Street. Appellant’s Supplemental Pre-Hearing Statement states, in relevant part:

“On September 15, 2018, the Appellant discovered that the developer is not building according to the plans filed with the Zoning Administrator. As a result, the property now violates [the] zoning law in several ways in addition to those listed in the Appellant’s original Pre-Hearing Statement (Exhibit 2). Further, neighbors Adam and Shelby Telle have filed for Intervenor status (Exhibits 22-26). **They present arguments related to the side yard. The Appellant raises complementary arguments below related to the rear yard.**”<sup>9</sup> (emphasis added.)

On September 18, 2018, again four months *after* the issuance of Building Permit B1804093, Mr. and Mrs. Telle, owners of 1265 Penn Street, N.E., requested Intervenor status.<sup>10</sup> Mr. and Mrs. Telle argued that this Board should grant them Intervenor Status because, as the owners of the adjacent property, the Board’s decision would directly impact them.<sup>11</sup> In support of their request, Mr. and Mrs. Telle alleged that the proposed construction at 1267 Penn Street, N.E. ends approximately one foot from their property line in violation of the 5-foot side yard

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<sup>7</sup> BZA Appeal No. 19818- BZA Exhibit 28.

<sup>8</sup> BZA Appeal No. 19818- BZA Exhibit 29.

<sup>9</sup> BZA Appeal No. 19818- BZA Exhibit 28.

<sup>10</sup> BZA Appeal No. 19818- BZA Exhibits 24 and 32.

<sup>11</sup> BZA Appeal No. 19818- BZA Exhibits 26.

requirement.<sup>12</sup> Mr. and Mrs. Telle also asserted that the proposed construction violates 11-C DCMR § 201.1 pertaining to nonconforming structures.<sup>13</sup> As part of the Telle’s Pre-Hearing Statement, Mr. and Mrs. Telle enclosed an April 10, 2018 letter they sent to the Property Owner’s representative, which states, in relevant part:

“Additionally, please note that your existing plans for construction include an expansion of a nonconforming structure. Our street requires houses with side yards to have 5-feet of setback on the side. The existing wooden, floor dining room that was added onto the 1267 Penn house is currently a nonconforming structure, violating the 5-foot setback requirement. Under 11-C DCMR § 201.1, nonconforming structures may not be enlarged upon, expanded or extended. The plans indicate a desire to expand the existing nonconforming first floor dining room addition, by including cellar space (that would be ground-level at the back of the 1267 Penn property and abut the 1265 Penn property) and a terrace, thus extending and increasing the nonconforming aspects of the existing structure, violating 11-C DCMR § 202.2(b).”<sup>14</sup>

In the letter, Mr. and Mrs. Telle express their concerns to the Property Owner’s representative. Approximately five months *after* writing a letter that cites applicable Zoning Regulations, Mr. Telle told this Board during the Public Hearing on September 26, 2018, “we don’t closely follow the rules and regulations” and “didn’t even know this Zoning Board existed.”<sup>15</sup> Based on Mr. Telle’s representation, the Board granted Mr. and Mrs. Telle Intervenor Status.<sup>16</sup>

DCRA asserts that the proposed construction complies with applicable Zoning Regulations, the Intervenor’s claims should be dismissed as untimely, and the instant appeal denied.

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<sup>12</sup> BZA Appeal No. 19818- BZA Exhibits 25, 26 and 32.

<sup>13</sup> BZA Appeal No. 19818- BZA Exhibit 26 at page 2.

<sup>14</sup> BZA Appeal No. 19818- BZA Exhibit 44-Intervenor’s Pre-hearing Statement at Attachment B “April 10, 2018 Letter to Adam Lobene.”

<sup>15</sup> BZA Appeal No. 19818- September 26, 2018 Transcript page 41:13-14.

<sup>16</sup> BZA Appeal No. 19818- September 26, 2018 Transcript page 45:10-13.

## ARGUMENT

On May 30, 2018, Appellant filed a timely appeal alleging three issues: 1) the third story would improperly remove the existing parapets; 2) the roof deck would be improper in both existence and design; and 3) the third story and roof deck would be inconsistent with the neighborhood’s character and would detriment the overall environment.”<sup>17</sup> However, these claims are without merit.

### **a. The 2016 Zoning Regulations Do Not Prohibit the Removal of the Parapet Wall.**

Appellant’s allegation that the proposed construction improperly removes the existing parapet walls is without merit. The zoning regulations do not prohibit the removal of parapet walls. This Board heard testimony from the Zoning Administrator that the applicable regulation in this case is 11-E DCMR § 206.1.<sup>18,19</sup> The Zoning Administrator testified that in an RF zone “a rooftop architectural element original to the building such as cornices, porch roofs, turret, tower or dormers shall not be removed or significantly altered.”<sup>20</sup> However, the provision did not prohibit the removal of parapet walls.<sup>21</sup> The Zoning Administrator also testified that, when the Zoning Commission originally drafted 11-E DCMR § 206.1, it prohibited removal of certain elements and when the Zoning Commission amended this provision in 2017, it protected additional elements such as cornices and porch roofs, but did not add parapets, despite having the

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<sup>17</sup> BZA Appeal No. 19818- BZA Exhibit 2.

<sup>18</sup> 11-E DCMR § 206.1(a)-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, including shifting its location, changing its shape or increasing its height, elevation, or size. For interior lots, not including through lots, the roof top architectural elements shall not include identified roof top architectural elements facing the structure’s rear lot line. For all other lots, the roof top architectural elements shall include identified rooftop architectural elements on all sides of the structure.

<sup>19</sup> BZA Appeal No. 19818- December 19, 2018 Transcript at page 246:15-16.

<sup>20</sup> BZA Appeal No. 19818- December 19, 2018 Transcript at page 246:17-21.

<sup>21</sup> BZA Appeal No. 19818- December 19, 2018 Transcript at page 247:7-8.

opportunity to do so.<sup>22</sup> Based on the unambiguous text of the regulation, parapet walls are not included in the enumerated list of features prohibited from removal. Thus, Appellant’s argument fails.

**b. The Owner’s Proposed Roof Design Does Not Trigger the Penthouse Requirements.**

Appellant’s claim that the roof deck violates the penthouse requirements under 11-C DCMR § 1503<sup>23</sup> is misguided.<sup>24</sup> Appellant’s assertion does not apply to the instant case because the proposed roof deck is simply the “roof” of 1267 Penn Street, N.E., not a penthouse, so, the penthouse requirements are not triggered. This Board heard the Zoning Administrator testify that the penthouse requirements were not triggered because the proposed roof deck extends over the entire roof.<sup>25</sup> In support of his position, the Zoning Administrator guided this Board through Architectural Plan A0502 and Architectural Plan A0301. Architectural Plan A0502 illustrated

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<sup>22</sup> BZA Appeal No. 19818- December 19, 2018 Transcript at page 247:9-17.

<sup>23</sup> 11-C DCMR § 1503.1 For the purposes of calculating floor area ratio for the building, the aggregate square footage of all penthouse levels or stories measuring six and one-half feet (6.5 ft.) or more in height shall be included in the total floor area ratio permitted for the building, with the following exceptions:

- (a) Penthouse mechanical space;
- (b) Communal recreation space;
- (c) Penthouse habitable space, other than as exempted in Subtitle C § 1503.1(b) with a floor area ratio of less than four-tenths (0.4); and
- (d) Mechanical equipment owned and operated as a penthouse by a fixed right-of-way public mass transit system.

1503.2 Penthouses shall not exceed one-third (1/3) of the total roof area upon which the penthouse sits in the following areas:

- (a) Zones or portions of zones where there is a limitation on the number of stories of three (3) or less; and
- (b) Any property fronting directly onto Independence Avenue, S.W. between 12<sup>th</sup> Street, S.W. and 2<sup>nd</sup> Street, S.W.

1503.3 Areas within curtain walls without a roof used where needed to give the appearance of one (1) structure shall not be counted in floor area ratio, but shall be computed as a roof structure to determine if they comply with Subtitle C § 1503.2.

<sup>24</sup> BZA Appeal No. 19818- BZA Exhibit 2 at page 2.

<sup>25</sup> BZA Appeal No. 19818- December 19, 2018 Transcript at page 248:8-10.

that “the roof deck was synonymous with the roof and it’s not a separate penthouse structure.”<sup>26</sup> Moreover, the Zoning Administrator explained the construction details found in Architectural Plan A0301.<sup>27</sup> This Board heard testimony that the height difference between the top of the roof deck and the top of the third floor ceiling was approximately 3 feet and 1 inch.<sup>28</sup> Based on the proposed materials, the Property Owner “is laying insulation across the entire roof followed by a flooring veneer.”<sup>29</sup> As a result, the Zoning Administrator concluded that the entire roof assembly included the roof deck.<sup>30</sup> Accordingly, this Board should find that the proposed roof design does not trigger the penthouse requirements under 11-C DCMR § 1503.

**c. The Proposed Third Story and Roof deck Comply with the Zoning Regulations.**

The Appellant’s claims that the third story exceeds the maximum height in violation of 11-E DCMR § 303.1<sup>31</sup> and that the lowest level is a “story” are not supported by the record or the regulations. The Zoning Administrator testified that the property, 1267 Penn Street, N.E., is located in an RF-1 zone.<sup>32</sup> Per 11-E DCMR § 303.1, the maximum permitted height of buildings or structures ... in an RF-1 zone is 35 ft. and 3 stories.<sup>33</sup> And, per 11-B DCMR § 308.3,<sup>34</sup> when measuring the height of a building, the parapet wall is excluded. The Zoning Administrator

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<sup>26</sup> BZA Appeal No. 19818- December 19, 2018 Transcript at page 249:5-14 and 15-17.

<sup>27</sup> BZA Appeal No. 19818- December 19, 2018 Transcript at page 249:18-25 and 250.

<sup>28</sup> BZA Appeal No. 19818- December 19, 2018 Transcript at page 250:7-9.

<sup>29</sup> BZA Appeal No. 19818- December 19, 2018 Transcript at page 250:17-19.

<sup>30</sup> BZA Appeal No. 19818- December 19, 2018 Transcript at page 250:20-22.

<sup>31</sup> 11-E DCMR § 303.1 Except as specified elsewhere in this section, the maximum permitted height of buildings or structures and any additions thereto not including the penthouse, in an RF-1 zone shall not exceed thirty-five feet (35 ft.) and three (3) stories.

<sup>32</sup> BZA Appeal No. 19818- December 19, 2018 Transcript at page 251:2-4.

<sup>33</sup> BZA Appeal No. 19818- December 19, 2018 Transcript at page 251:10-13.

<sup>34</sup> 11-B DCMR § 308.3- The height of a building with a flat roof shall be measured from the BHMP to the highest point of the roof excluding parapets and balustrades not exceeding four feet (4 ft.) in height. (2016 Zoning Regulations)

testified that the height of 1267 Penn St, N.E., excluding the parapet wall,<sup>35</sup> is 31 feet and 7 inches.<sup>36</sup>

The Zoning Administrator also testified that the lowest area was not included because it is considered a cellar.<sup>37</sup> A cellar is “that portion of a story, the ceiling of which is less than four feet (4 ft.) above the adjacent finished grade.”<sup>38</sup> The height of the ceiling in this case is less than four feet, so by definition, cellars are not included in the calculation of stories.<sup>39</sup> Based on the foregoing, this Board should find that: 1) the proposed height of the building is allowed as a matter of right and 2) the number of stories complies with the Zoning Regulations.

**d. Intervenors’ Claims are Untimely and Without Merit.**

1. Intervenors’ appeal should be dismissed because their claims are untimely and unduly expand the issues before this Board in violation of 11-Y DCMR § 501.3.

The Intervenors’ claims should be dismissed as untimely. The regulations are clear that an appeal must be filed within sixty (60) days from the date of the administrative decision.<sup>40</sup> The appeal must include a statement of the issues on appeal, “identifying the relevant subsection(s) for each issue of the Zoning Regulations” and “an appeal **may not be amended to add issues not identified in the statement of issues on appeal.**”<sup>41</sup> (emphasis added.) In the instant case, the Building Permit was issued on May 18, 2018. On May 30, 2018, Appellant filed a timely appeal and raised issues about the parapet wall, the roof deck, and the height of the building. Then, *four*

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<sup>35</sup> 11-B DCMR § 308.3- The height of a building with a flat roof shall be measured from the BHMP to the highest point of the roof excluding parapets and balustrades not exceeding four feet (4 ft.) in height. (2016 Zoning Regulations)

<sup>36</sup> BZA Appeal No. 19818- December 19, 2018 Transcript at page 252: 3-6.

<sup>37</sup> BZA Appeal No. 19818- December 19, 2018 Transcript at page 252:11-25.

<sup>38</sup> 11-B DCMR § 100.

<sup>39</sup> BZA Appeal No. 19818- December 19, 2018 Transcript at page 252:11-25 and 253 at page 1.

<sup>40</sup> 11-Y DCMR § 302.4.

<sup>41</sup> 11-Y DCMR § 302.12(g); 11-Y DCMR § 302.13.

*months later*, the Intervenors were granted Intervenor Status and, *for the very first time*, raised the issues of the 5-foot side yard, the non-conforming structures, and whether the property was razed.

The Board should dismiss Intervenors three claims because their claims unduly broaden the issues on appeal in violation of 11-Y DCMR § 501.3. This regulation states:

“Any person may move to intervene in a zoning appeal and may become an intervenor thereto if the Board finds that the party has an interest that may not be adequately represented by the automatic parties; provided, **that the intervention would not unduly broaden the issues** or delay the proceedings.”

(emphasis added.) The record is clear that Intervenor’s issues were raised for the first time in September 2018, more than sixty (60) days after the issuance of the Building Permit. The regulations are also clear that the issues on appeal may not be amended to add issues not original identified in the initial appeal. According to the regulations, this Board should only entertain Appellant’s three claims from his May 30, 2018 filing, and dismiss Intervenors’ claims as untimely and unduly broadening the issues on appeal.

2. Intervenors’ claims are without merit and should be dismissed.

Assuming, *per arguendo*, that the Board decides to broaden the issues of this appeal, the testimony and evidence support DCRA’s position that the Building Permit was properly issued.

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

The Intervenors’ claim that the proposed construction violates the 5-foot side yard requirement is unfounded. The Board heard testimony from the Zoning Administrator that a 5-foot side yard is not required in an RF-1 zone, but if one is provided, it should be at least five feet.<sup>42</sup> Since 1267 Penn Street, N.E. is in an RF-1 zone, the Property Owner has the option of providing no side yard **or** a 5-foot side yard pursuant to 11-E DCMR § 307.3.<sup>43</sup> Nonetheless, the

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<sup>42</sup> BZA Appeal No. 19818- December 19, 2018 Transcript at page 261:20-24.

<sup>43</sup> 11-E DCMR § 307.3- No side yard is required for a principal building; however, any side yard provided



proposed construction provides for a 5-foot side yard.<sup>44</sup> As an aside, the Intervenors also claim that the Property Owner is required to provide a side yard of a minimum of 2 feet under 11-E DCMR § 307.3. As stated earlier, the proposed plans do not call for a change in the width of the existing side yard. This Board should find that the Intervenors’ argument is neither supported by the Zoning Regulations nor the approved plans.

*b. Non-conforming structure.*

Intervenor’s claim that the proposed plans expand the non-conforming structure in violation of 11-C DCMR § 201<sup>45</sup> is without merit. In the instant case, 11-C DCMR § 202<sup>46</sup> is the applicable regulations given that it pertains specifically to the non-conforming portion of the building projecting into the side yard. The Zoning Administrator testified that he tested whether the footprint of this non-conforming aspect is expanded, whether the gross area is expanded, and whether the height is expanded.<sup>47</sup> In this case, neither the height, footprint, nor gross floor area of

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on any portion of a principal building shall be at least five feet (5 ft.) except as provided in this section.

<sup>44</sup> BZA Appeal No. 19818- December 19, 2018 Transcript at page 262:1-3.

<sup>45</sup> 11-C DCMR § 201.1-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.

11-C DCMR § 201.2- Any nonconforming use of a structure or of land, or any nonconforming structure lawfully existing on the effective date of this title that remains nonconforming, and any use or structure lawfully existing that became nonconforming on the effective date of this title, may be continued, operated, occupied, or maintained, subject to the provisions of this chapter.

11-C DCMR § 201.3- It is necessary and consistent with the establishment of the separate zone districts under this title that all uses and structures incompatible with permitted uses or structures shall be regulated strictly and permitted only under rigid controls, to the extent permitted by the Zoning Act of 1938.

<sup>46</sup> 11-C DCMR § 202.2- Except as provided in Subtitle C § 203.8, ordinary repairs, alterations, and modernizations to the structure, including structural alterations, shall be permitted.

11-C DCMR § 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.

<sup>47</sup> BZA Appeal No. 19818- December 19, 2018 Transcript at page 264:9-14.

the non-conforming portion of the building projecting into the side yard was expanded. Accordingly, this Board should deny this claim.

*c. Raze*

Lastly, the Intervenor’s claim that a raze, rather than a demolition, occurred at the property is not supported by the record. At the December 19, 2018 Public Hearing, the Zoning Administrator explained that he determines whether the construction is a demolition or raze by reviewing the proposed plans for changes in the gross floor area, lot occupancy, or height.<sup>48</sup> With respect to the footprint, in order to be considered a demolition, the Zoning Administrator reviews the plans to determine whether the proposed construction retains at least forty (40%) percent of the pre-existing walls of the building.<sup>49</sup> The Zoning Administrator testified that a demolition, not a raze, occurred because the plans reflect that forty-four (44) percent of the enclosing exterior walls were retained.<sup>50</sup>

**CONCLUSION**

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

Respectfully submitted,

/s/ Esther Yong McGraw

ESTHER YONG MCGRAW

General Counsel

Department of Consumer and Regulatory Affairs

/s/ Patricia B. Donkor

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<sup>48</sup> BZA Appeal No. 19818- December 19, 2018 Transcript at page 265:11-14.

<sup>49</sup> BZA Appeal No. 19818- December 19, 2018 Transcript at page 265:14-17.

<sup>50</sup> BZA Appeal No. 19818- December 19, 2018 Transcript at page 266:8-19.

Date: 1/23/2019

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**CERTIFICATE OF SERVICE**

I certify that on this 23<sup>rd</sup> day of January 2019 a copy of “D.C. Department of Consumer and Regulatory Affairs’ Closing Argument” was served via electronic mail to:

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