

BOARD OF ZONING ADJUSTMENT
APPEAL No. 21142
638 I Street, NE
Property Owner's Responsive Brief

I. Introduction

We are hereby submitting this responsive brief on behalf of Kevin R. Chen (the “Owner”), owner of the property located at 638 I Street, NE, the property which is the subject of this Appeal. Pursuant to Y-501.1, Mr. Chen is automatically a party to the Appeal. ANC 6C (the “Appellant”) claims that the Zoning Administrator has violated E-204.1 of the Zoning Regulations, by *not* requiring that the subject building’s (the “Building”) third-story addition be set back at least three (3) feet from the cornice located at the top of the Building’s second story façade.

The Owner refers to and substantially agrees with DOB Counsel’s arguments in its prehearing statement filed earlier today and wishes to add a few points.

II. Cornice Remains Intact

As noted by DOB, the subject permit plans and the finished product show the subject cornice to be 100% intact. The cornice has not been altered, removed, nor changed in location, shape, height, elevation, or size. Appellant has not claimed otherwise. This alone provides enough for the Board to deny the Appeal.

While the Appellant has the burden to prove clear error by the Zoning Administrator, Appellant has not provided a single example of the Zoning Administrator requiring a setback from a cornice element.¹ Appellant has substantial zoning expertise from its numerous appeals on technical issues like this, including other cases involving cornice elements, and surely knows that the Zoning Administrator has never required setbacks from cornices. Yet, Appellant has pounced on ambiguous language in the ZA’s response email in filing this Appeal.²

Finally, if Appellant’s main argument is that the ZA must adhere to the exact letter of this written interpretation (and that *is* Appellant’s argument), then it is far and away more accurate to say that the ZA must adhere to the exact letter of the actual Regulation, and that Regulation makes no mention of any required setbacks.

¹ One might ask why ANC 6C hasn’t appealed this situation before. The 638 I Street addition is modeled directly after another addition above a cornice, two doors down (see photo attached of 642 I St, NE – Exhibit A).

² It is as if Appellant is appealing the ZA’s inartful language in her response email; not the permit approval; *i.e.*, if she had said clearly in that email that the 3-foot setback has never applied to cornices, instead of saying that a cornice is not an architectural element, would the Appellant have filed this appeal?

III. No Setback Required in E-204.1

That last point in the previous section is where the Owner's position may differ somewhat from that of the ZA (albeit immaterially insofar as denial of this appeal is concerned). Since the original adoption of the architectural element regulations, the ZA has consistently and correctly ruled that under E-204.1, there is no 3-foot setback from cornices. We would go further to say that the entirety of ZA-007, and the setback rule, constitutes not merely an interpretation but a completely distinct regulation beyond the authority of the ZA to adopt.

The Zoning Commission has exclusive responsibility for adopting the Zoning Regulations. If the Zoning Commission intended any setback from any architectural element, then it could have adopted such specific language. Surely the Zoning Commission has the competence to determine, and communicate, whether a 3-foot setback is required to protect the integrity of an architectural element.

Likewise, if the (also competent) Office of Planning believed that protecting the integrity of an architectural element required a space between that element and an addition, it would have suggested this to the Zoning Commission. We have found no such evidence in the legislative history behind E-204.1.

We have always believed that the 3-foot setback was an illegitimate incursion by the Zoning Administrator into the authority of the Zoning Commission, as it added a particular new requirement that is nowhere to be found, or even suggested, in the E-204.1 language duly adopted by the Zoning Commission. The BZA could also deny the Appeal for this reason.

IV. Closing

Section E-204.1 provides that a roof top architectural element like a cornice shall not be removed or significantly altered, including shifting its location, changing its shape, or increasing its height, elevation, or size. We believe it to be stipulated by all parties here that none of the above consequences can be attributed to the subject cornice.

Even if the 3-foot rule is legitimate, it has never been applied to cornices. The appellant has not provided any evidence to the contrary and, therefore, has not met its burden. Therefore, the Board should deny the Appeal either on the finding that the 3-foot rule does not apply to cornices, or on the finding that E-204.1 contains no setback requirement at all.

Respectfully Submitted,

Martin P Sullivan

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Exhibit A

Certificate of Service

I certify that on November 13, 2024, I served a copy of this submission to the following:

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