

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

Appellant: Burleith Citizens Association

BZA Case No. 21314

**APPELLANT BURLEITH CITIZENS ASSOCIATION'S RESPONSE TO INTERVENOR DGS'S
SECOND SUPPLEMENTAL LEGAL BRIEFING¹**

All parties agree that the central issue in this nearly 480-day-old case is whether lighting poles are "structures" as defined in the Zoning Regulations. Therefore the Board is presented with a choice:

- (1) If lighting poles are "structures," then this Board should remove approval for the lighting poles and DGS and DPR could then seek variance relief.
- (2) If lighting poles are not "structures," then it should deny the appeal knowing that it is thereby authorizing lighting poles, statues, artificial trees, and other items to be erected up to 90 feet virtually anywhere by right regardless of the otherwise applicable height limitations in various zones, including residential backyards.

That is the choice presented to the Board: either an orderly process by which parties seeking extremely tall lighting poles must get a variance and engage with the community as part of that process OR an unprincipled approach where **anyone** can erect up to 90 foot lighting poles, statues, artificial trees, and any other item not explicitly listed in the definition virtually anywhere by right. While, as shown once again below, the language of "structure" clearly includes lighting poles, it is also basic common sense that anyone should not be allowed to erect 90 foot tall lighting poles anywhere they so desire without getting some additional relief.

The necessary starting place for determining whether a lighting pole is a "structure" is the actual definition (in pertinent part):

"Anything constructed, including a building, the use of which requires permanent location on the ground, or anything attached to something having a permanent location on the ground and including, among other things, radio or television towers, reviewing stands, platforms, flag poles, tanks, bins, gas holders, chimneys, bridges, and retaining walls. The term structure shall not include mechanical equipment, but shall include the supports for mechanical equipment."

–11 DCMR § B-100.2 (emphasis added).

¹ Appellant was denied the opportunity to file any response to Intervenor DGS's motion to reopen the record, which motion did not raise any new evidence or issues based upon newly issued precedent and was granted without any explicit finding of good cause. Appellant believes that the decision to deny any opportunity to respond to Intervenor DGS's motion to submit largely duplicative briefing was an error that has violated Appellant's due process rights. While Subtitle Y § 602 bars filings that "bear on the substance" of the appeal, the decision to extend this to virtually all filings, including an inherently *procedural* motion, created an unopposable motion that was effectively *ex parte*.

The very first word of the definition is “Anything.” “Anything” *means* anything: “[a]ny thing whatever; any such thing” per Webster’s Dictionary. The definition does not use a more limited term such as “things,” “something,” “objects,” or “certain items.” So the very first word is intended to be read broadly. The provision then goes on to provide an illustrative list of examples that is explicitly non-exhaustive; in other words, the language “including” and “including, among other things” tells us that the list of examples is not intended to include every single item that would be a “structure.” This is the kind of textbook “belt-and-suspenders” approach where you have a broad general term, anything, followed by illustrative specifics—*anything from flag poles to gas holders to retaining walls*—that makes clear that the “general term is taken to include the specifics” but is not to be limited by them.² And then, at the end of the definition, the drafters tell us what is not included within the broad definition provided above: “mechanical equipment” (albeit the “supports for mechanical equipment” are structures even if the mechanical equipment itself is not).

So the question is whether a lighting pole fits within the definition of “structure.” The answer is clearly yes: a lighting pole is anything that either itself requires a permanent location on the ground or is anything attached to something requiring a permanent location on the ground. And a lighting pole is not “mechanical equipment,” so it is not one of the few items that has been excluded from the definition. And, if we look at the illustrative list of examples, we find a close analog to a lighting pole in the explicit listing of “flag poles.” As was well explained by former Vice Chair Blake in setting forth his rationale for agreeing with Appellant’s position at the first set of deliberations in this case, “light poles are similar to flag poles and radio and television communication towers. They are tall, structurally engineered, and permanently anchored.” 3/11/26 Tr. 23:18-22.

Because the language of “structure”—a definition that has worked for the District for 70-plus years—is clear and unambiguous, this Board must conclude that lighting poles are indeed structures. As the DC Court of Appeals made clear in *In re Paul*, 292 A.3d 779, 785 (D.C. 2023), “[i]n interpreting a statute or rule, we are mindful of the maxim that we must look first to its language; if the words are clear and unambiguous, we must give effect to its plain meaning.” *Id.* at 785 (citing *In re Greenspan*, 910 A.2d 324, 335 (D.C. 2006) (brackets omitted) (quoting *McPherson v. United States*, 692 A.2d 1342, 1344 (D.C. 1997)). Even if this Board does not agree with the policy outcome here, it cannot “rewrite or supply omissions to regulations to achieve a preferred policy outcome.” *Chagnon v. BZA*, 844 A.2d 345, 349 (D.C. 2004). Instead, this Board—fulfilling its role as the final administrator arbiter of the proper interpretation of the Zoning Regulations—must interpret the language as written.

In addition to the prior deliberations in this case, the Zoning Commission has considered the position urged by Intervenor DGS here. Indeed, the Office of Planning attempted to codify the interpretation urged by Intervenor DGS in Zoning Case 25-12. In response to this effort, the community and the Zoning Commission expressed “serious concerns” about the approach now advocated by Intervenor DGS here. See ZC Order 25-12, at 12 (“The Commission expressed

² Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) at 204-05 (hereinafter *Reading Law*).

serious concerns regarding this proposal based on the concerns raised by ANC's and community members in written comments and at the public hearing. The Commission indicated it did not see a way forward with the amendments as proposed.”). These concerns were so serious that the Office of Planning completely withdrew the proposed amendments after hearing the concerns raised by the community and the Zoning Commission.

After the failed attempt at codifying Intervenor DGS's interpretation before the Zoning Commission, Intervenor DGS now asks this Board in its second supplemental statement to ignore the language (which is shockingly not addressed at all in its second supplemental legal brief) and instead rewrite the provision to fit its preferred policy outcome: removing any requirement of community engagement or what Intervenor DGS has previously termed “regulatory friction”. See Ex. 33 Br. 7. A prime example of this effort to rewrite the provision is Intervenor DGS's suggestion that the drafters 70 plus years ago should have used the term “poles” if they wanted to include lighting poles. Of course, that ignores the plain language of the provision, which makes clear that the illustrative list of examples is not meant to be every possible example of a “structure.” And it would also give rise to a host of new interpretive issues in a definition that has stood the test of time: if we ignore the non-exhaustive language and illustrative nature of the examples, then statues, tight-rope poles, artificial trees, and literally anything not listed in the definition suddenly is removed from virtually any zoning regulation.³ That is the fundamental problem with the suggestion that the exclusion of lighting poles from the definition 70-plus years ago was intentional: not only does it violate the structure of the definition and plain meaning of the non-exhaustive language, but that logic would remove any item not specifically listed in the definition from virtually any zoning regulation. Statues, artificial trees, lighting poles, and any other item not specifically listed could be erected virtually anywhere up to 90 feet.

Finally, Intervenor DGS urges this Board to look to amendments made in 2008 as part of Zoning Case 01-02 to regulate antennas, which changes are unrelated to the present situation. These non-contemporaneous amendments—made some 50 years after the adoption of the definition of “structure” relevant here and in an entirely different section—cannot serve as a basis for finding that the original adoption intentionally omitted reference to light poles. Indeed, to the precise contrary, why would the Zoning Commission feel the need to reference “light poles” at all in listing potential stealth structures if they were not indeed considered “structure[s]”? During the lengthy discussions and comment process prior to the 2008 adoption as part of Zoning Case 01-02, lighting poles were repeatedly referred to as “structures.”⁴ In addition, stealth structures

³ See 2/25/26 Tr. 69:22-72:6 (Zoning Administrator Beeton admitting upon cross-examination that lighting poles, statues, artificial trees, and potential other items would not be “structures” and could be erected in a residential backyard without meeting any setback requirement).

⁴ See, e.g., Case ZC 01-02, Ex. 130, at 4-5 (Office of Planning Memorandum) (emphasis in original) (“*Stealth Structure: More information on the types of stealth structures and what could be deemed pre-approved by means of number, set back, height, physical appearance, etc.*”).

Stealth Structures can be almost anything that fits the design of an antenna. Stealth structures that have been approved during the past three years in the District include two modified church steeples, three flag poles between 80 and 130 in height, and a stealth penthouse structure that mimicked the roof form and

must comply with several other requirements since they must contain antennas that do not apply to run-of-the-mill structures.

In addition to not addressing the language of the definition of “structure,” Intervenor DGS raises a host of other issues, including concerns about Appellant Burleith Citizens Association’s standing. While these collateral issues are not relevant to the core issue before this Board, it is important for the current Board to understand that Intervenor DGS is the only participant in this proceeding that has ever contested or even expressed any doubt as to Appellant’s standing. No Board member or Commissioner in the course of several hearings and deliberations in this 480-day-plus-old case has ever expressed any doubt as to the Burleith Citizens Association’s standing to pursue this appeal. Indeed, the Appellee in this case, the Department of Buildings, is *not* contesting the Burleith Citizens Association’s standing despite joining with many of Intervenor DGS’s other non-standing arguments. The Department of Buildings only joined the “Argument” section of Intervenor DGS’s initial brief whereas Intervenor DGS’s arguments concerning Appellant’s standing were intentionally tucked into the “Factual History” section in an apparent effort to avoid the appearance of divergence between the two agencies. This difference in views is also reflected in DOB’s response to Intervenor DGS’s second supplemental legal brief. The issue of standing has been addressed in several briefs and this Board moved forward with deliberations without raising any concerns about Appellant’s standing.

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This case needs to end. The central and discrete issue in this case—the proper interpretation of the definition of “structure”—has not changed during the nearly 480 days this case has been pending. And yet it has been the subject of numerous and unusual delays almost all of which have been without Appellant’s consent. Intervenor DGS has had every opportunity (and then some) to think, tinker, re-think, and ultimately make its various legal arguments at oral argument and in multiple briefs. Another potential future zoning amendment—which will not have any retroactive effect—is not going to change the interpretative issues in this case. And there have been no settlement discussions in this matter since the case was fully argued and submitted back in February of this year. It is respectfully submitted that there has been more than enough legal argument in this matter and the only needed next step is a decision. This Board is charged with being the final arbiter for interpretations of the Zoning Regulations before any court challenges: the District needs a definitive ruling on this issue.

Finally, it is worth emphasizing the limited relief being sought by Appellant here. Appellant’s relatively modest request for relief is that the permit at issue be modified to remove approval for the 80-foot tall lighting poles. DGS, its aggressive private law-firm counsel, DPR, and whatever other agencies or counsel are involved could then seek a variance for the very tall lighting poles. That process would require engagement with the community regarding the

shielded 18 antennas. Other potential stealth structures could include church crosses, fake trees, building cupolas and other architectural features, as well as ball field lights, and fence supports.).

amazingly still unresolved issues regarding when exactly the Ellington Field lights would be turned on and off, what noise restrictions would be in place, what groups would be permitted to use the field, what traffic, parking, and trash mitigation would be present for large events, and the like—all of which issues are ones for which the community has repeatedly requested clear guidance that has never been received and which issues should have been addressed years ago.

Respectfully Submitted

/s/ Michael J. McDuffie

Date: August 7, 2026