APPELLANT'S STATEMENT
BOARD OF ZONING ADJUSTMENT

Appeal of Zoning Administrator Determination
Involving Work Undertaken Pursuant to
Raze Permit # R2000030, and Building Permit #B1914344,
Appellant/Property Owner: 1501 Erie Street Construction LLC
Property: 113 18th Street, SE (Square 1097, Lot 118)

I. Introduction

This appeal (the "**Appeal**") is submitted by 1501 Erie Street Construction LLC, (the "**Appellant**" or "Owner"), the owner of the property located at 113 18th Street, SE (Square 1097, Lot 118)(the "**Property**"), represented by Sullivan & Barros, LLP. The Appeal is of a decision by the Office of Zoning Administration ("OZA") in the D.C. Department of Buildings ("DOB"), communicated in a formal email on February 2, 2023, from Mr. Tarek Bolden, Program Analyst, Zoning Compliance Division, OZA (the "**Determination**")(Exhibit A). The Determination was made in regard to work authorized pursuant to: (i) Building Permit No. B1914344, issued on April 21, 2021, for "Construction of new 3-story over cellar 2-Family Flat with roof deck" (the "**Building Permit**")(Exhibit B); and (ii) Raze Permit No. R2000030, issued on February 10, 2021, for "Complete raze of existing two story over cellar single-family rowhouse and 1 story garage." (the "**Raze Permit**")(Exhibit C).

II. Timely Filing

This Appeal meets the jurisdictional requirement of timeliness, as specified in Subtitle Y Section 302.2. The Appellant first had notice and knowledge of the decision being appealed on February 2, 2023, upon receiving the Determination. The main issue presented in this Appeal is whether or not OZA erred in determining that "demoing a building in phases is NOT A RAZE." This determination, that a raze in phases is not a raze at all, was first communicated to the Owner in the February 2, 2023, Determination. Flowing from that Determination - that a raze may not be executed in phases – is a demand that the Owner must (i) replace the previously existing mansard roof on top of the Building's second story and (ii) set the third-story addition back three feet from that mansard roof. The second issue presented in this Appeal, therefore, is whether or not OZA erred in citing a "3-foot setback" requirement in the absence of any language in the Zoning

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Regulations providing such a requirement. While this unwritten "3-foot setback" rule had been discussed previously in this case, it was not until OZA issued its "no raze in phases" determination that it was determined by the Owner to be a certain requirement, since the Building could no longer be razed in phases.

Previous to the Determination email on February 2, 2023, Mr. Bolden had sent an email on January 20, 2023, in which he included language which he said was sent to the Owner's architects on October 27, 2022. (Exhibit D) In the October 27 email text, it was stated that the Owner must "Provide proof that the building was actually fully raised [sic] in accordance with issued permit R2000030."[1] The position of OZA in October was that the Building had not been razed because the Owner retained a portion of the front façade, and because the entire front façade had not been removed. The Owner subsequently removed the entire front façade and on February 2, 2023, Owner's counsel emailed photos to Mr. Bolden evidencing that both facades had been completely demolished, albeit not at the same time (Exhibit E). The rear façade had been rebuilt by the time the front façade was demolished. The later demolition of the front façade was the Owner's attempt to comply fully with the October directive that the entire Building must be razed. In response to Owner's counsel's February 2 email providing photo evidence of each façade fully razed, Mr. Bolden first issued OZA's Determination that the raze was only legitimate if both the rear façade and the front façade were down at the same time, prior to any reconstruction on either façade. In other words, according to the Determination, no reconstruction of a demolished façade may commence unless and until all other facades (not counting party walls) are demolished.

III. Standing

Pursuant to Y-302.1 of the D.C. Zoning Regulations provides that "any person aggrieved or any officer or department of the government of the District of Columbia or the federal government affected by an order, requirement, decision, determination, or refusal made by an administrative officer or body, including the Mayor of the District of Columbia, in the administration or enforcement of the Zoning Regulations may file a timely zoning appeal with the Board". The Owner, as owner and developer of the Property, is suffering financial harm from the Determination, as it has been delayed in completing the development, with the only matter-of-right

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[1] The Building being considered "razed" is critical because once razed, the Owner is no longer required to keep, or rebuild, the mansard roof or set the third story back three (3) feet.

alternative to this appeal being to either demolish the already-constructed third story, or to re-remove the already-constructed front and rear façades, both at catastrophic financial harm. As owner and developer, Owner is clearly aggrieved by the decision being appealed and therefore has standing to file this Appeal.

IV. Appeal Argument

A. No Raze in Phases. OZA erred in determining that a raze did not occur, and consequently that Owner was subject to Section E-206.1, which only applies to repairs, and replacements, or addition, but not to completely new buildings. OZA approved issuance of the Building Permit as compliant with the Zoning Regulations. The Building Permit application proposed the raze of the rear and front facades, in which case E-206.1 would not apply. Owner was therefore approved to construct a new front facade as proposed in the approved Building Permit plans, with no retention of the mansard roof, and no 3-foot setback of the top story (Front Elevation attached as Exhibit F). So OZA is not claiming that a full raze of the Building was not possible, and OZA is not claiming that E-206.1 would apply in the event of a raze. To the contrary, OZA's communications, and permit issuance, make it clear that a raze of the front and rear facades would allow construction pursuant to Owner's approved plans. It was never noted that the raze would be required to be fully completed on both facades before any reconstruction could commence, and there is nothing in the Regulations providing so either.

The claim by OZA, first made on February 2, 2023, is that a raze is not a raze unless both the front and rear facades are razed, and remain down before reconstruction on either façade may take place. OZA did not cite any Regulation or other authority supporting this determination, nor did OZA provide any reason or reasoning behind the arbitrary decision. In fact, after OZA relied entirely on the definition of "raze" in the D.C. Building Code, it then departed entirely from that definition.

In a separate January 20, 2023 email (Exhibit G), Mr. Bolden emailed to Owner's architect the following:

"Good Morning Mr. Meekins,
Here is some materials on the definitions regarding a Raze and a Raze Permit that we discussed:

According to the D.C. Building Code 12 DCMR A202 the definition of a Raze is as follows:

RAZE*. The complete removal of any existing structure, with or without the removal of party walls and below grade portions of a structure.*

I hope this information is helpful."

On February 3, 2023, Owner's counsel sent a follow-up request for clarification to OZA, and included the Chief Building Official, Clarence Whitescarver, in the distribution. This email thread is attached as Exhibit H. To summarize the thread, Owner's counsel asked Mr. Bolden for clarification on the question, by asking: *If a permit applicant did what the Owner did here – removed a façade and rebuilt it, and then removed the other façade and rebuilt it – would they not need to obtain a raze permit, since a raze in phases is purportedly not a raze?*

Mr. Whitescarver, Chief Building Official, responded to this request, ultimately writing: "Yes, the "project" would in your example constitute a raze and be subject to needing a raze permit in addition to any Building permits issue for demolition. We have followed this logic on scores of SWO cases over the years."

So, OZA relied on the definition of "RAZE" in the D.C. Building Code in approving the Building Permit application, but later rejected that definition as interpreted by the Chief Building Official (the "**CBO**") responsible for ultimately making such an interpretation. The CBO even stated that "We have followed this logic on scores of SWO cases over the years." OZA provided no reason, or statement of policy, or authority in the Zoning Regulations, for why OZA would have a separate "no-raze-in-phases" rule. When Owner was notified that it had not sufficiently razed the front façade, it then did so, at which point OZA moved the target and then effectively required that the Owner re-raze the already-constructed rear and front facades once again, but this time both at the same time. For what purpose? On what authority? For whose benefit or to advance what policy? The Appellant had complied with the Building Code requirement to raze the Building and OZA had already stated that OZA uses the Building Code definition of "raze."

For these reasons, the Appellant asserts that OZA has erred in interpreting the Zoning Regulations, and Appellant asks that the Board reverse the "raze-in-phases" Determination and allow the Appellant to proceed with its Project as approved in the Building Permit.

B. The Three-Foot Rule. If the Board grants the Appeal on the first issue above, this issue is mooted. But if the Board does not grant the Appeal on the first issue, Appellant respectfully

requests that the Board grant the Appeal on the second issue. The second issue is that OZA erred in writing and attempting to enforce a rule which has no basis in the plan language of the Zoning Regulations. In creating the unwritten "3-foot rule", OZA presumably relies on the language in E-206.1, which provides that:

> "*a roof top architectural element original to a principal 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,"*

This is the entire directive adopted by the Zoning Commission in adopting E-206.1. The mansard roof shall not be removed or significantly altered, including shifting its location, changing its shape or increasing its height, elevation, or size. Nothing in that language suggests that OZA shall require a 3-foot setback from certain architectural elements. If the Zoning Commission also wanted to include an "adjacency" or "setback" requirement, it had the ability to do so. More importantly, the Zoning Commission has the "exclusive authority to enact zoning regulations"[2] OZA does not have the authority to write additional requirements into zoning regulations that the Zoning Commission did not include in its duly-noticed, considered, and adopted language. To do so is a violation of the due process inherent in the Zoning Commission rule-making process, not to mention it is not in accordance with the language that was duly adopted in that process.

For these reasons, the Appellant asserts that OZA has erred in interpreting the Zoning Regulations, Section E-206.1, to include language never adopted by the Zoning Commission, and Appellant respectfully requests that the Board, if it does not grant the Appeal on the first issue above, grant the Appeal on this second issue and direct OZA to not require any setback from the mansard roof for the third story.

Respectfully submitted,

Martin P Sullivan

Martin Sullivan
Sullivan & Barros, LLP
Date: March 28, 2023

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[2] *Durant v. District of Columbia Zoning Commission*; 65 A.3d 1161,1166