DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

Appeal of Zoning Administrator Determination Regarding the Applicability of 11 DCMR § D-203.5 to Lighting Poles
Building Permit: #B2308807
Appellant: Burleith Citizens Association
Property: 1700 38th Street NW
Square: 1307 Lot: 0859 Zone: R-3/GT

I. Summary

This appeal seeks to reverse the March 7, 2025 determination of the Zoning Administrator Kathleen Beeton (Exhibit A) and Permit #B2308807 (Exhibit B) insofar as both exempt new-proposed-to-be-added 80-foot lighting poles at Ellington Track and Field from the definition of "structure" within the Zoning Regulations and thereby the attendant setback requirements. Structure is defined broadly in the Zoning Regulations, in pertinent part, as:

> "**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."
>
> –11 DCMR § B-100.2 (emphasis added).

The Zoning Administrator's March 7th determination interprets the words "including, among other things" as exhaustive, meaning that a lighting pole would not be a "structure" within the definition of that word "[b]ecause the definition of 'structure' does not include light poles **among the items specifically listed**." Exhibit A, 3/7/2025 11:34 AM Email from Kathleen Beeton, at 1-2 (emphasis added). The practical implication is that a lighting pole–not being explicitly listed within the definition of "structure"–would be thereby exempt from otherwise applicable limitations, including, as relevant here, the limitation that the structure be set off from the property lot lines an equal distance to its height as required in 11 DCMR § D-203.5.

The Zoning Administrator seeks to impermissibly narrow the definition of "structure" by ignoring the "anything" language intended to convey the definition's expansive breadth and by completely striking the clear non-exhaustive language "including, among other things" from the definition of "structure." The word "including" is widely understood to be non-exhaustive and the idiom that immediately follows, "among other things," confirms that non-exhaustive meaning. Indeed, the Zoning Administrator's *must-be-among-the-items-specifically-listed* interpretation is directly contradicted by none other than Merriam-Webster, which defines the idiom "among other things" as "**in addition to things that are not specifically mentioned**."[1]

[1] Merriam-Webster's Collegiate Dictionary, Merriam-Webster, https://unabridged.merriam-webster.com/collegiate/among%20other%20things. Accessed 4 Apr. 2025 (emphasis added).

As set forth below, the Zoning Administrator's determination is fundamentally at odds with: (a) the plain language of the intentionally broad definition of "structure" in the Zoning Regulations, (b) a prior determination by Office of Zoning Administration ("OZA") staff, (c) a determination by the Board of Zoning Adjustment (the "Board") in closely analogous circumstances (BZA Case #19293-A, Exhibit C), and (d) well-settled canons of interpretation. Moreover, such an interpretation would result in absurd consequences, including, among other things, the ability of homeowners within the R-3/GT zone to erect up to 90-foot lighting poles by right without meeting the otherwise applicable setback requirements. Accordingly, Appellant Burleith Citizens Association respectfully requests that the Board enter an order directing the Zoning Administrator and the Department of Building to modify[2] the permit at issue here to remove approval for the lighting poles pending an anticipated request for an area variance.

II. Procedural History

According to DC Scout, the original application for the building permit at issue on this appeal was apparently filed on July 18, 2023. The prosecution of the permit languished for months until January of 2024 when additional documents were filed and numerous reviews were conducted. Because the Department of Parks and Recreation ("DPR") and the Department of General Services ("DGS") refused to provide the building permit application to the community despite multiple requests and failed to disclose to the community that such a building permit application was made in the summer of 2023, the community obtained the building permit application belatedly via FOIA request. In reviewing the building permit application, Appellant's Representative identified and raised in a personal capacity with the OZA the specific concern at issue on this appeal: that the planned 80-foot lighting poles were structures in violation of Section D-203.5 because the 80-foot lighting poles were not sufficiently set off from the property lot lines for their proposed height.

Between March 20, 2024 and the determination letter on March 7, 2025, Appellant's Representative repeatedly raised zoning concerns in a personal capacity about the 80-foot lighting poles in correspondence with both DPR and OZA staff. For example, on June 5, 2024, Appellant's Representative specifically raised these concerns to which a Supervisory Zoning Technician at the OZA responded on June 10, 2024 that "I have reviewed the the [*sic*] proposed lighting pole and am in agreement with you for potentially violating the provisions of D-203.5. I have asked for Zoning to be added back to the pending permit and will ask for the permit applicant to demonstrate compliance with the section above." Exhibit D, 6/10/2024 9:18 AM Email from Mamadou Ndaw, at 1; *see also* Exhibit E, 3/31/2024 9:30 AM Email from Joanne Padmore, at 1-2. Ultimately, the zoning review was approved by a new-to-the-file reviewer as part of the grant of the permit on or around February 14, 2025. Appellant's Representative thereafter re-raised his concerns with the Supervisory Zoning Technician on February 18, 2025,

[2] The Board is empowered to revoke or modify decisions made by the Zoning Administrator: "In exercising its zoning appeal powers, the Board of Zoning Adjustment may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, determination, or refusal appealed from, or may make such order as may be necessary to carry out its decision or authorization, and to that end shall have all the powers of the officer or body from whom the appeal is taken." D.C. Code § 6-641.07(g)(1) and (4).

who in turn requested additional information from the permit application and stated on the next day that "we will review and get back to you as soon as possible." Exhibit F, at 3. Appellant's Representative followed up again days later in response to which a Program Analyst at OZA responded on February 27, 2025 that "[a] Zoning Enforcement case has been opened and may include soliciting information/documents for our review, investigations, and site visits, which can be lengthy" and that "[w]e will follow up to provide an update once a Zoning determination has been made." Exhibit F, 2/27/25 3:44 PM Email from JaTia Walker, at 1.

Appellant's Representative continued to follow up until he received a call from the above-referenced Program Analyst at 7:50 AM on March 4, 2025, during which call the Program Analyst apologized for getting back to Appellant's Representative belatedly due to a personal issue but noted that a zoning violation had been found and that OZA was in the process of contacting DPR and DGS. The Program Analyst elaborated that OZA originally had reached out to counsel for one of the contractors involved in seeking the permit and also candidly noted that it was difficult to get a return call from DPR and DGS despite efforts to contact representatives of each agency. The Program Analyst followed up that phone call with an email at 8:24 AM to Appellant's Representative confirming that "**OZA is collaborating with DPR and DGS to alert them of the zoning violation** and provide a compliance patch to ensure the project complies with 11 DCMR Subtitle D § 203.5" (emphasis added). Exhibit G, 3/4/2025 8:24 AM Email from JaTia Walker, at 1. This is an unambiguous statement that OZA on March 4 had determined that a zoning violation had been found and, not only that, they had communicated that fact to multiple third-parties as well as tried to reach two other DC agencies with that same information. Appellant's Representative followed up to check on the status of the case two days later on March 6. In response, Appellant's Representative received an email from the Zoning Administrator in the afternoon of March 7–three days after being informed that OZA had found a zoning violation[3]–that contrary to what multiple third-parties had been told, there was no such zoning violation. Exhibit A.

In that March 7th email, the Zoning Administrator informed Appellant's Representative that "[b]ecause the definition of "structure" does not include light poles among the items specifically listed, the Office of Zoning Administration does not consider the proposed light poles to be structures and therefore are not subject to the setback requirements of D-203.5." Exhibit A, 3/7/2025 11:34 AM Email from Kathleen Beeton, at 1-2. The Zoning Administrator went on to state that–despite the Program Analyst's email three days earlier and other zoning concerns raised by two other OZA members over the course of the prior year–"[t]he OZA confirmed this has been the long-standing interpretation of the office with regard to light poles throughout the District." Exhibit A. Thereafter, the Zoning Administrator went further to discuss BZA Case #19293 involving Gonzaga High School where this Board had required Gonzaga High School to obtain an area variance in a closely analogous situation. Instead of attempting to distinguish that case on the substance, the Zoning Administrator dismissed BZA Case 19293 because the application there was self-certified, the Board had included its standard order language that it

[3] A FOIA request has been filed to obtain documents to find out what happened between the March 4th explicit determination of a zoning violation that was conveyed to multiple third-parties and the March 7th determination by the Zoning Administrator that there was no such zoning violation. R008871-032625.

was not making a finding that relief was either necessary or sufficient to obtain a permit, and that hypothetically, if the Board had asked OZA, OZA would have advised that "OZA did not consider the light poles to be 'structures' subject to zoning regulation." Exhibit A. Finally, the Zoning Administrator circularly reasoned that if lighting poles were indeed structures, then "there would have been many more applications to the BZA seeking relief for light poles in athletic fields and recreation centers across the District." Exhibit A.

Appellant's Representative responded, asserting that the Zoning Administrator's interpretation was contrary to the plain meaning of the provision and further inquired as to whether he, as a mid-block rowhome owner, could construct 89 foot light poles by right without meeting the setback requirement but could not construct 89-foot flag poles by right because of the applicable setback requirement. Exhibit A, 3/7/2025 12:37 PM Email from Michael McDuffie, at 1. The Zoning Administrator responded unironically that "**yes, a homeowner like yourself in this zone could erect a 89-foot high light pole in your back yard without meeting the setback requirement of D-203.5**." Exhibit A, 3/7/2025 6:11 PM Email from Kathleen Beeton, at 1 (emphasis added). The Zoning Administrator did not contradict the assertion by Appellant's Representative that a flag pole would indeed require meeting the setback requirement in D-203.5 even though a lighting pole would not have to meet that requirement. Appellant's Representative thereafter informed the Zoning Administrator that the community would begin drafting appeal papers given the issues identified.

III. Property History and Ownership by District of Columbia Public Schools

The property now known as Duke Ellington Track and Field at 1700 38th Street NW was originally acquired by the real estate developer Shannon & Luchs in the 1920s with the intention that it would form part of the Burleith neighborhood development.[4] Contrary to the developer's original plan, the Commissioners of the District of Columbia sought to obtain the land from Shannon & Luchs. Unable to acquire the land via negotiation with the developers and landowners in Burleith, the District of Columbia sought to condemn the current site via eminent domain petitions, which petitions resulted in litigation between the District of Columbia and landowners including the construction/development firm Shannon & Luchs. *See Com'rs of Dist. of Columbia* v. *Shannon & Luchs Const. Co.*, 17 F.2d 219, 219 (D.C. Cir. 1927) (Exhibit H). The property owners sought dismissal of the petitions on the ground that using the subject property as an athletic field was an impermissible use of the property and would constitute a nuisance. *See id*. The trial justice agreed and dismissed the petitions. *Id*. On appeal, the District contended that "the proposed athletic field is being acquired for use accessory to and a part of the Western High School" and thus was, in fact, a permissible use; "in other words, that the land sought to be condemned is to be used as part of an educational institution and for educational purposes." *Id*. at 220 (emphasis added). The DC Court of Appeals, in reversing the decision of

[4] *See* Shannon & Luchs, *The Story of Burleith* (1926), at 11 (showing the area that now is Ellington Track and Field as having a road–presumably what would have been extension of R Street NW–through the middle of the property), *available at https://static1.squarespace.com/static/543940e3e4b03c56171e6ce6/t/54e24e0be4b05ae62269636c/1424117259422/1926_The_Story_of_Burleith_v3.pdf*.

the trial justice, held that the District's contention was "well founded" and, based upon the District's accessory-to-and-a-part-of-an-educational-institution position, held that the use was permissible. *Id*. The DC Court of Appeals opinion then went on at length about the value of such open air spaces as "an essential part of a modern educational institution," highlighting the importance to the Court of the educational use of the field and its tie to the local school. *Id*. This DC Court of Appeals ruling appears to govern the field as a matter of law, and, in any event, but for the District's representation that Western High School Athletic Field (now Ellington Field) would be used in such an educational capacity, the DC Court of Appeals would not have reversed the trial justice's dismissal of the petitions.

In conformity with the opinion, the property now known as Duke Ellington Track and Field was deeded over to the District in 1928 for use by Western High School. While the field has undergone various renovations over the intervening 90-plus years, Appellant is not aware of the facility ever having any kind of permanent lighting system. And, until recently as described below, the facility was managed by District of Columbia Public Schools ("DCPS"). For example, on April 7, 2005, DCPS entered into a covenant and stormwater easement declaration as the "Owner" of the facility, which was consistent with how the field had been treated at that point as a property belonging to DCPS. Likewise, until around 2020, the facility was largely managed by DCPS and Duke Ellington School of the Arts, whose uses include marching band practice and community events.

In 2020, in the wake of concerns about the use of the nearby Jelleff Recreation facility by private schools to the detriment of public schools,[5] then-Deputy Mayor John Falcicchio, Deputy Mayor Paul Kihn, and others within District government participated in an effort to transfer control of Duke Ellington Track and Field from DCPS to DPR. This effort was largely opposed by the community as well as the parent-teacher associations of nearby District of Columbia Public Schools in part due to the unusual nature of having DPR manage a facility that was owned by DCPS and judicially mandated to be used for public educational purposes. This effort culminated in an unusual "Inventory Transfer Agreement"[6] whereby DPR purportedly assumed control of Duke Ellington Track and Field even though it was widely acknowledged that the facility was still owned by DCPS.[7] One purported basis for this transfer was the upkeep of the facility, with Deputy Mayor Kihn telling Burleith residents in a February 20, 2020 letter[8] that:

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[5] *See generally* Kelyn Soong, *Local Residents Express Outrage at DPR's Imminent Takeover of Ellington Field*, Washington City Paper, available at https://washingtoncitypaper.com/article/177412/local-residents-express-outrage-at-dprs-imminent-takeover-of-ellington-field/

[6] *Available at* https://dpr.dc.gov/sites/default/files/dc/sites/dpr/page_content/attachments/Inter-Agency%20Transfer%20Memo%20from%20DCPS%20to%20DPR%20-%20Ellington%20Field.pdf

[7] District of Columbia Public Schools Headquarters is located at 1200 First Street, NE, Washington, D.C., 20002.

[8] February 20, 2020 Letter from Deputy Mayor Paul Kihn to Community Members, available at https://dpr.dc.gov/sites/default/files/dc/sites/dpr/page_content/attachments/Ellington%20Field%20Community%20Letter_2.20.2020_0.pdf

> Moving forward, Ellington Field will be operated and maintained by the Department of Parks and Recreation (DPR). I am confident DPR improving and operating this community asset will ensure all residents have improved access to another world-class DPR field.

Contrary to Deputy Mayor Kihn's promise and numerous requests from residents, the facility sat in disrepair for years despite numerous community complaints.

Thereafter, beginning in 2021, DPR and/or DGS held various meetings purporting to inform the community about the planned renovation of the facility, including the addition of athletic field lighting. Throughout this period, DPR refused to answer direct questions during community meetings and in writing as to how exactly DPR intended to change the permitting of the field, including days and hours of operation of the lighting, a proposed schedule of use, intended permittees, what noise restrictions would be in place, what crowd restrictions would be implemented, how traffic and parking concerns would be managed, when ANC or local community organization approval would be required for use of the lights, and the like. Various members of the community, including representatives of the Burleith Citizens Association, have repeatedly sought this information from DPR to no avail. To date, these questions have not been definitively answered.

IV. Timely Filing

This Appeal meets the jurisdictional requirement of timeliness, as specified in Subtitle Y § 302.2. As set forth above, the procedural history of this appeal is somewhat complicated by contradictory statements of OZA staff, but the Appellant arguably first had notice and knowledge of the final decision being appealed on March 7, 2025 when the Zoning Administrator contradicted an apparent finding of a OZA staff member three days earlier and informed Appellant's Representative that the lighting poles actually did not constitute a zoning violation and that the no-zoning-violation determination was the Zoning Administrator's final position. That said, building permit #B2308807 was apparently granted by DOB on or around February 14, 2025 (Exhibit B), but Appellant nor its Representative was aware of the grant of the permit until on or around February 17, 2025 via DC Scout search. The building permit itself was not posted at the facility until March 6, 2025. In any event, this appeal is timely because it is being filed within 60 days from the date Appellant had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of.

V. Appellant and Standing

The Burleith Citizens Association was founded in 1925 and for over a century has sought to promote the interests and rights of all residents of the Burleith community,[9] including

[9] The Burleith Citizens Association Bylaws define the "Burleith Community" as "the area within the following boundaries: beginning at the center of the intersection of Reservoir Road and 35th Street, N.W.; north to the middle of the center of Whitehaven Parkway, N.W., west to its end; and in a straight line to the end of 39th Street, N.W., south to the middle of Reservoir Road, N.W.; and east in the middle of Reservoir

with respect to Ellington Track and Field. Since its inception, the Burleith Citizens Association sought to advocate for the interests of Burleith residents and has been instrumental in getting superior streets, street lights, sidewalks, and improved bus service, among many other improvements in the area. Indeed, the Burleith Citizens Association Bylaws are explicit as its advocacy role:

> The Association is organized to promote the social welfare of, and to promote and advocate the interests and rights of, all residents of the Burleith Community; to sponsor or participate in activities that maintain and improve the quality of life within the Burleith Community, including safeguarding the neighborhood's heritage; and for related purposes. The Association shall not undertake activities or make expenditures that are inconsistent with its status as a social welfare organization exempt from federal taxation under section 501(c)(4) of the Internal Revenue Code of 1986 as amended.
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> –Burleith Citizens Association Bylaws Art. I § 3.

As a 501(c)(4) non-profit civics association, the Burleith Citizens Association is composed of over 150 member families or individuals, the majority of which are full-time residents in the neighborhood. These resident member families or individuals own property throughout the Burleith neighborhood, including in close proximity to the Ellington Track and Field.[10] The Burleith Citizens Association has long taken an active role in helping to maintain Ellington Track and Field, including regularly scheduled and unscheduled clean-ups of the facility, advocating for facility repairs, and even collaborating in a relatively recent substantial landscape beautification project.

Appellant has standing to bring this Appeal pursuant to D.C. Code § 6-641.07(f) and 11-Y DCMR § 302.1 because Appellant and its member families and individuals are "person[s] aggrieved" by the Zoning Administrator's determination that lighting poles are not structures within the definition provided in the Zoning Regulations. Appellant has associational standing to bring this Appeal on its own behalf and on the behalf of its members. Appellant is a not-for-profit civic association that is comprised of, controlled by, and represents the interests of residents of properties, including those in close proximity to Ellington Track and Field. The Zoning Administrator's decision to permit the construction of 80-foot lighting poles will directly and uniquely impact the use and enjoyment of resident members' properties in close proximity to the field by, among other things, obstructing views, creating light pollution, contributing to nighttime

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Road to the point of beginning, all within the District of Columbia." Burleith Citizens Association Bylaws Art. I § 2, *available at* https://static1.squarespace.com/static/543940e3e4b03c56171e6ce6/t/5de5655b83bec649d347eeb6/1575314779991/BCA_Bylaws_2019.pdf

[10] There are at least six family or individual members of the Burleith Citizens Association that live directly across the street from Ellington Track and Field and significantly more that live within 200 feet of the facility. As set forth in this section, there should be no question as to the Burleith Citizens Association standing in this matter, but the Burleith Citizens Association can provide specific names and addresses if the Board deems it necessary.

noise, and generating traffic hazards for which no mitigation efforts have been undertaken. In addition, the unusual precedent set by the Zoning Administrator's decision would permit any residential property owner in the R-3/GT zone to erect up to 90 foot lighting poles, among other things, which would likewise affect the use and enjoyment of resident members' properties. The filing of this appeal represents an effort to ensure that lighting poles and other items in Burleith are erected consistent with applicable regulations, which furthers the general purpose of the Burleith Citizens Association. Because Ellington Track and Field is part of the Burleith neighborhood and members of the Burleith Citizens Association would therefore be more affected than the general public, the Burleith Citizens Association has standing to pursue this appeal.

This Board has repeatedly recognized the ability of neighborhood citizens associations to bring zoning appeals on behalf of their members. *See, e.g.*, BZA Appeal #19374.[11] Indeed, that fact is specifically acknowledged by the regulation and form permitting "[a] citizens' association or association created for civic purposes that is not for profit" to file an "[a]ppeal of any decision of the Zoning Administrator" without paying a fee. *See* 11 DCMR § 1600.1(a). A relatively recent case, BZA Case #19374, concerning the Dupont Circle Citizen's Association is instructive: in that case, the Dupont Circle Citizen's Association sought to appeal a decision by the DCRA to issue a building permit for the conversion of a one-family dwelling into a four-unit apartment building in the Dupont Circle area. The Department of Building's predecessor, the Department of Consumer and Regulatory Affairs, filed a motion to dismiss the appeal for lack of standing. This Board rejected the claim that the citizens association lacked standing because (a) the citizens association's membership included individual members residing in the surrounding area, including an adjacent neighbor, (b) the appeal was "an effort to ensure that the use of the Subject Property is consistent with applicable regulations, which furthers the general purpose of the Association," and (c) the citizens association was affected more than the general public by the determination made by the Zoning Administrator." BZA Case No. 19374 Dismissal Order, at 6. So too here.

VI. Proposed Addition of 80-foot Lighting Poles to Ellington Track and Field

The renovation plans reflected in building permit #B2308807 represent a significant renovation of Ellington Track and Field, including a new track, substantially renovated field houses, various other structures, and the lighting poles at issue on this appeal. To be clear, this appeal only concerns the lighting poles. As reflected in the building plans, the 80-foot lighting poles (Exhibit I) are proposed to be located at the far west and east sides of the field (Exhibits J & K), in close proximity to the property lot lines. While the plans do not show official measurements from the property lot lines to the lighting poles, it is clear from the plans that both the lighting poles on the east side and the west side are closer to the lot lines than their height

[11] *See also* BZA Cases 16935 (Southeast Citizens for Smart Development); 18568 (Shaw Dupont Citizens Alliance); 17513 (Citizens Association of Georgetown, finding that "the organization had a significant relationship to the property because the property is located in Georgetown where its members live. In addition, the organization was in a position to address the broader context or ramifications of the appeal issues on Georgetown properties in general."); 16702 (Citizens Association of Georgetown); 17109A (Kalorama Citizens Association).

of 80 feet. Looking at the scale on the plat and related lighting exhibit, the lighting poles on the east side and west side appear to be roughly 30 feet from the property lot line, but, in any event, no reading of the applicable documents could allow for the lighting poles to be 80 feet or more from the lot line as would be required if the lighting poles are determined to be "structures" for the purposes of D-203.5.

VII. Statement of the Issues on Appeal

A. The Zoning Administrator's interpretation is contrary to the plain meaning of "structure" in 11 DCMR § B-100.2

The Zoning Administrator here has adopted an impermissibly narrow interpretation of the word "structure" that is at odds with the plain meaning of definition and the evident intent of the drafters to ensure that "structure" was interpreted broadly. Many of the restrictions on non-building items in the Zoning Regulations are imported through the use of the term "structure." The drafters of the Zoning Regulations clearly took pains in the language used to make sure that the term "structure" was to be construed broadly and that the listing in the definition was to be interpreted in a non-exhaustive fashion. Indeed, for the reasons set forth below, it is difficult to conceive of much more that the drafters could have done to make it any more clear that the definition was meant to be read broadly and non-exhaustively.

1. The definition of "structure" in the Zoning Regulations is intended to be read broadly

The language used in the definition of structure makes clear that the regulation was meant to be read broadly. In pertinent part, "structure" is defined as:

> "**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."
>
> –11 DCMR § B-100.2 (emphasis added).

In other words, a "structure" has the following condition sets:

<u>First Condition Set</u>

(1) It has to be "[a]nything"
(2) It has to be "constructed"
(3) Its use requires a permanent location on the ground

Guidance: The possible things that qualify as (1) and (2) "includ[e] a building."

Second Condition Set

(1) It has to be "anything"
(2) It has to be "attached to something having a permanent location on the ground"

Guidance: The possible things that qualify as meeting (1) and (2) "includ[e], among other things, radio or or television towers, reviewing stands, platforms, flag poles, tanks, bins, gas holders, chimneys, bridges, and retaining walls."

The breadth of each set of conditions is set by the very first condition of each: "anything." Webster's Unabridged Dictionary–the mandated dictionary provided for in 11 DCMR § B-100.1(g) for words that are not otherwise defined in the Zoning Regulations[12]–defines "anything" as "[a]ny thing whatever; any such thing," which in context conveys at the outset the broad construction intended for the definition. The choice of the drafters to begin the definition with this expansive term–and not "things," "something," "objects," or "items"–makes clear that this provision is to be construed broadly.

Next, we have the conditions of "constructed" and "use requiring a permanent location on the ground" for the first condition set or "attached to something having a permanent location on the ground" for the second condition set. The Zoning Administrator makes no attempt to suggest–and no reasonable person could agree—that lighting poles somehow are not "constructed," that their use does not require a permanent location on the ground, or that they are not "attached to something having a permanent location on the ground."

So the crux of the issue is that the Zoning Administrator would read the guidance provided for each set of conditions that both feature the word "including" as somehow limiting the entire definition. Indeed, the Zoning Administrator was explicit on this point: "Because the definition of "structure" does not include light poles among the items specifically listed, the Office of Zoning Administration does not consider the proposed light poles to be structures and therefore are not subject to the setback requirements of D-203.5." Exhibit A, 3/7/2025 11:34 AM Email from Kathleen Beeton, at 1. But such a limitation would fundamentally negate the very first condition of each set, "anything," and would instead distort "anything" into merely "somethings" in violation of the meaning required to be given to the word. And such an interpretation would likewise require reading "including" and "including, among other things" as exhaustive, which flies in the face of the plain meaning of those words and how they are generally understood to be defined.

2. The word "including" sets forth a non-exhaustive list

The term "including" is generally understood as a non-exhaustive term. Indeed, Scalia and Garner's persuasive "Reading Law" is clear on this point: "The verb *to include* introduces examples, not an exhaustive list." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012) at 132-33 (hereinafter Reading Law) (citing supporting

[12] 11 DCMR § B-100.1(g): "Words not defined in this section shall have the meanings given in Webster's Unabridged Dictionary."

definitions from numerous authorities, including *The Random House Dictionary of the English Language*, *A Dictionary of Modern English Usage*, *The Careful Writer: A Modern Guide to English Usage*, and *A Dictionary of Contemporary American Usage*). The Zoning Regulations mandated definitional resource, Webster's Unabridged Dictionary is likewise in accord, defining "including" as "to place, list, or rate **as a part or component of a whole or of a larger group, class, or aggregate**."[13] These mandatory and persuasive authorities agree that a list following the word "including" is merely intended to give examples of an unstated larger group of things.

Ignoring the plain meaning of those words, the Zoning Administrator's interpretation explicitly reads "including" as exhaustive, meaning that the entire definition has to be limited by the relatively short listing of things in each set of conditions. Not only does that contradict the first word of the definition, "anything," but it likewise runs counter to the definitions required to be given to the words by the Zoning Regulations as set forth in Webster's Unabridged Dictionary as well as the widely understood meaning of the word "including." The Zoning Administrator would have the reader change the word "including" to mean "but only," which is the exact opposite of the meaning required to be given to the word. And, as set forth below, the non-exhaustive nature of the word "including" is confirmed by the use of the idiom "among other things."

3. That non-exhaustive meaning is emphasized by the wording "among other things"

The non-exhaustive meaning of "including" in the definition of "structure" is confirmed by the immediately following phrase "among other things." Merriam-Webster Collegiate Dictionary defines the idiom "among other things" as "in addition to things that are not specifically mentioned."[14] Even if the use of the "including" was insufficient to convey the non-exhaustive nature of the listing, the use of "among other things" cannot be possibly interpreted in any other way other than making clear that the listing merely provides examples of a greater set of "structures." The Zoning Administrator's interpretation runs contrary to the plain meaning of the word and indeed requires its complete deletion from the definition of "structure."

4. Lighting poles were clearly intended to be within the ambit of the definition of "structure"

In addition to the broad reading that should be accorded the term "anything," "including," and "among other things," the examples that are provided of the greater set of "structures" likewise confirm that lighting poles should be considered "structures." The listing of "structures" after "including, among other things" includes a wide variety of things that have many different heights, areas, and usages, which likewise conveys the intended breadth of the definition. In particular, the definition of "structure" includes flag poles among the specifically listed items, which are close analogs to lighting poles; both represent tall, singular structures that have large

[13] Merriam-Webster's Unabridged Dictionary, Merriam-Webster, https://unabridged.merriam-webster.com/unabridged/include. Accessed 4 Apr. 2025 (emphasis added).
[14] "Among other things." Merriam-Webster's Collegiate Dictionary, Merriam-Webster, https://unabridged.merriam-webster.com/collegiate/among%20other%20things. Accessed 26 Mar. 2025.

features at the top. Indeed, from a common sense perspective, a reasonable person would be more concerned about making sure that certain zoning restrictions apply to lights because lights have additional externalities including light pollution and nighttime usage that are above and beyond those of a mere flag pole. Yet the Zoning Administrator would paradoxically require an area variance for an 89-foot flag pole for a mid-block rowhome owner but would permit any residential homeowner in the R-3/GT zone to build an 89-foot lighting pole by right without the need for any setback. This simply makes no sense.

B. Even if there were some ambiguity in the definition of "structure", long-settled canons of interpretation do not support Zoning Administrator's interpretation.

As set forth immediately above, the plain meaning of the intentionally broad definition for structure clearly encompasses lighting poles. Nevertheless, even if one were to attempt to confect some vagueness or ambiguity in the definition (which is not present), well-settled canons of interpretation both embodied in the Zoning Regulations themselves as well as generally applicable interpretative guidelines require that lighting poles be included within the definition of "structure."

1. Most Restrictive Interpretation Applies

The Zoning Regulation's built-in interpretive guidelines set forth that the most restrictive interpretation of the Zoning Regulation applies. Indeed, 11 DCMR § A-101.3 states that "[t]he provisions of this title shall govern whenever they" "[r]equire larger setbacks, courts, or other open spaces," "[r]equire a lower height or bulk of buildings or a smaller number of stories," or "[i]mpose other higher standards than are required in or under any statute or by any other municipal regulations." The evident intent of this provision and other provisions in this section are to ensure that in cases of ambiguity, vagueness, or conflict that the Zoning Regulations are interpreted to provide for a more restrictive interpretation that requires a lower height or larger setbacks. Here, the interpretation offered by the Zoning Administrator would do the precise opposite; instead of requiring a lower height with a larger setback, the Zoning Administrator's interpretation would permit the highest height available by law with no setback requirement. Putting aside the plain meaning of the definition of "structure," the Zoning Administrator's interpretation is clearly at odds with the conservative approach embodied in the Zoning Regulations built-in interpretative guidelines.

2. Rule Against Surplusage

In interpreting provisions and statutes, the surplusage canon states that, if possible, every word and every provision should be given effect. *See* Reading Law, at 174 ("If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or have no consequence"); *see generally Czajka* v. *Holt Graphic Arts, Inc.*, 310 A.3d 1051, 1061 (D.C. 2024) ("There is a significant preference for giving all of the words in

a provision independent effect, but that is not a flat requirement."). Here, the interpretation proffered by the Zoning Administrator requires not giving any effect to key words in the definition of structure and distorting others. Whereas the definition of structure is intended to be expansive, the Zoning Administrator's interpretation would require striking certain words entirely from the definition and modifying others:

Definition of Structure	Zoning Administrator's Effective Interpretation
"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."	Some~~Any~~thing constructed, ~~including~~ a building, the use of which requires permanent location on the ground, or some~~any~~ things attached to something having a permanent location on the ground but only ~~and including, among other things,~~ radio or television towers, reviewing stands, platforms, flag poles, tanks, bins, gas holders, chimneys, bridges, and retaining walls.

This clearly violates the surplusage canon because it requires pretending as if the words "including" and "including, among other things" are absent from the provision; these words are given no meaning by the interpretation offered by the Zoning Administrator here. As set forth above, the proper interpretation requires giving these words their plain meaning and not a meaning that is to the precise contrary of their ordinary and customary usage.

3. Absurdity Doctrine

At a basic level, the Zoning Administrator's interpretation here leads to absurd results, which can easily be avoided by applying the plain meaning of the words at issue. It is axiomatic that courts and quasi-judicial bodies interpreting texts should not adopt interpretations that would lead to absurd results. *See* Reading Law, 234-239; *see also Citizens Ass'n of Georgetown* v. *Zoning Comm'n of the District of Columbia*, 392 A. 2d 1027, 1033 (D.C. 1978). By the Zoning Administrator's own admission, lighting poles and other items that are not specifically listed in the definition of structure would not be subject to numerous otherwise applicable requirements. So, for example, what is to stop a mid-block rowhouse owner from erecting up to 89 foot lighting poles on their property? Appellant's representative asked that precise question of the Zoning Administrator and the Zoning Administrator unironically responded that one could do so without meeting any setback requirement. Exhibit A, 3/7/2025 6:11 PM Email from Kathleen Beeton, at 1. Well, what about an 89-foot Transformers statue? Or an 89-foot tall *Titanosaurus* dinosaur model on its rear legs? Or an outdoor tightrope set running between two 89-foot poles? Possibilities abound.

While these examples are admittedly extreme, the examples highlight the absurdity and unsound nature of the interpretative position taken by the Zoning Administrator here. The fact

that Appellant is not aware of a residential property featuring these examples does not strengthen the Zoning Administrator's position but rather shows that it does not comport with sound interpretative guidelines. Relying on the public–particularly a public as creative as that in the District–to only erect non-extreme non-structures in residential zones is a recipe for zoning disaster. And, in any event, one can easily conceive of more conventional examples of tall residential lighting for basketball courts, pickleball courts, and pools that would be the kind of structures for which any reasonable person would think that additional relief ought to be required. Because the Zoning Administrator's interpretation would lead to absurd results, this Board should not depart from the position it has already taken in BZA Case 19293 as described below.

C. The Board has already held that lighting poles are structures for the purposes of height limitations in a closely analogous case involving athletic field lighting

The issue of whether lighting poles are structures and thus subject to setback requirements has already been addressed in a closely analogous case. In BZA Case 19293, Gonzaga College High School sought, among other things, to add four 90-foot lighting poles to an athletic field that was previously unlit. The Office of Planning in that case reviewed the application and recommended that even though structures exceeded the maximum height for "structures" in the applicable zone that nevertheless the variance relief should be granted. BZA Case 19293, Exhibit 26.[15] The Board–albeit in a summary order–ultimately held that it was "requir[ing] the Applicant to satisfy the burden of proving the elements that are necessary establish the case pursuant to § 3103.2 for area variances from the limitation on number of stories requirements under § 400.1, and the height requirements under § 770.1, to permit the installation of four monopole light arrays to serve existing athletic fields on the campus of a private school." BZA Case 19293 Exhibit C, at 2. There is simply no reason to disturb the Office of Planning's finding nor this Board's conclusion that lighting poles are "structures." While the definition at issue there appears to have been that incorporated as part of the 1958 Zoning Regulations, as amended, that definition of structure[16] was virtually identical to that applicable here. Putting aside that it would be inconsistent to have required Gonzaga High School to

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[15] *Available at* https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/19293%2019%20I%20Street%2C%20NW%20OP%20Report.pdf

[16] "Structure" appears to have been defined as: "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. Any combination of commercial occupancies separated in their entirety, erected, or maintained in a single ownership shall be considered as one (1) structure." 11 DCMR § 199.1 from 1958 Zoning Regulations, as amended. Likewise, the setback provision in Section 400.7 appears to have been substantially identical: "A building or other structure may be erected to a height not exceeding ninety feet (90 ft.); provided, that the building or structure shall be removed from all lot lines of its lot for a distance equal to the height of the building or structure above the natural grade."

obtain a variance but not require one here, the Zoning Administrator has not offered–and Appellant is unaware–of any cogent reason to depart from the determination in that case.

In the Zoning Administrator's March 7th determination, the Zoning Administrator opted to not address the substance of the BZA's finding in Case 19293, but rather attempted to distinguish it on the basis of procedural grounds: (1) the application there was self-certified, (2) that the Board included its standard order language that it was not making a finding that relief was either necessary or sufficient to obtain a building permit, and (3) that, if the Board had hypothetically asked OZA, OZA would have advised that "OZA did not consider the light poles to be 'structures' subject to zoning regulation." Exhibit A, 3/7/2025 11:34 AM Email from Kathleen Beeton, at 1-2. None of these procedural issues bears directly on the substance of what this Board held and none of them provide any substantive reason to depart here from the determination in that case. That an application is self-certified has nothing to do with the substance of this Board's determination that it was requiring Gonzaga High School to establish its entitlement to variance for the height of the lighting poles. Nor does the Board's standard language in such orders that it was not making an explicit finding that relief was necessary or sufficient for obtaining a building permit. Finally, the idea that had the Zoning Administrator been consulted there that the Zoning Administrator would have advised differently is hypothetical, inherently circular, and likewise does not reach the substance of the determination.

D. The Zoning Administrator's other *post hoc* arguments are meritless

While the Zoning Administrator's plainly erroneous textual arguments have already been addressed above, one remaining argument stands out: that if lighting poles were considered "structures" for the purposes of 11 DCMR § D-203.5, then "there would have been many more applications to the BZA seeking relief for light poles in athletic fields and recreation centers across the District." Exhibit B, 3/7/2025 11:34 AM Email from Kathleen Beeton, at 2. Simply because the Office of Zoning Administration has failed to properly interpret the Zoning Regulations in the past does not mean that it should continue to do so in the future. The Zoning Administrator is not bound by any authority to continue such an obvious error and has cited no prior case, ruling, or compliance letter where it has considered this issue and ruled affirmatively that lighting poles were not structures. Indeed, to the contrary and as set forth above, the Board has previously ruled in a summary order in BZA Case #19293 that lighting poles did require such relief in closely analogous circumstances, so it is all the more curious why the Zoning Administrator has persisted in the now-appealed determination.

VIII. Written Summary of the Testimony of Witnesses

A representative of the Burleith Citizens Association will testify regarding the role of the Burleith Citizens Association in advocating on behalf of Burleith residents, concerns of its members about the impact of the proposed-to-be-added lighting, and the unusual precedent that would be set by the Zoning Administrator's conclusion that lighting poles and other non-listed items are exempt from the limitations that apply to structures. Regarding the lighting poles, the Burleith Citizens Association representative will convey the concerns that members

have regarding the lighting as it relates to noise, traffic and parking, light pollution, obstruction of views, as well as use and enjoyment of nearby properties. The Burleith Citizens Association representative will also testify about the lack of engagement from DPR and DGS regarding community concerns relating to the lights and lack of clarity regarding how DPR and DGS intend to permit out the property during evening hours, any restrictions that would apply, or even what times the lights for the facility would be used. Finally, the Burleith Citizens Association representative will also convey members' concerns regarding the ability of any homeowner in the zone to add lighting or other items not specifically listed in the definition of structure up to 90 feet tall without meeting the setback requirements that otherwise apply to items that fall within the definition of "structure."

Additionally, Appellant may offer the testimony of members with residences in close proximity to the facility regarding their concerns relating to the noise, traffic and parking, light pollution, obstruction of view, as well as use and enjoyment of their properties.

IX. Conclusion

Given the plainly erroneous interpretation by the Zoning Administrator at issue here and the unusual procedural history present in this case, Appellant Burleith Citizens Association requests the prompt reversal of the Zoning Administrator's determination in this case as it relates to the lighting poles. The net effect of the Zoning Administrator's interpretation is to deny the public the opportunity to participate in an anticipated area variance proceeding that would otherwise be required for the lighting poles and has been required by the Board in a past, closely analogous case. Appellant Burleith Citizens Association does not wish to impede the progress of the other aspects of the planned renovation, so it requests that this Board exercise its powers pursuant to D.C. Code § 6-641.07(g)(1) and (4) to modify building permit #B2308807 to remove approval for the lighting poles.

Respectfully Submitted

/s/ Michael J. McDuffie
DC Bar # 241789
Date: April 15, 2025