

**District of Columbia Board of Zoning Adjustment
Appeal No. 19550**

**Supplemental Statement
of Advisory Neighborhood Commission 6C**

Advisory Neighborhood Commission 6C (“ANC 6C”) submits this brief statement in response to the supplemental October 12 filings of DCRA and the Property Owner.

BACKGROUND

After the close of rebuttal presentations at the September 19 hearing, members of the Board requested supplemental written filings on three discrete issues. As reflected in the transcript,¹ those issues were as follows:

1. **Cornices:** Vice Chair Hart asked DCRA to provide “an example of when you would have seen this as being a cornice, or what you would consider that,” adding that he was “looking for no more than ten [examples] of them.” Tab A p. 182, lines 9-12 & 24-25.
2. **Timeline:** Vice Chair Hart also asked DCRA for a timeline, focusing especially on the submission of the application for the Original Permit (B1706219) and its formal acceptance as complete. *See id.* p. 183, lines 5-7 & 13-23. Commissioner Turnbull noted that this should include “information on the alternate tracking data on the case, the other system,” referring to DCRA’s separate Accela and Projectdox records systems. *Id.* p. 184, lines 5-7.
3. **Breezeway:** Commissioner Turnbull reminded the Property Owner of an earlier request “to provide some drawings showing the breezeway plan and some more clarification on how that really worked.” *Id.* p. 184, lines 9-11.

DCRA’s Submission

Timeline. Exhibit 10 of DCRA’s supplemental filing (Case Exh. 62C) includes this chart:

B2A 19550

B1706219							Completed				
Task Name	Status	Created	Updated	Group	User	Cycle	Date	Days	Hours	Min	Sec
ApplicantUpload	Complete	3/23/2017 3:45:30 PM	3/24/2017 1:51:49 AM	Applicant	Stephanie Erwin Prime Permits	0	3/24/2017 1:51:49 AM	0	10	6	19
PreScreenReview	Complete	3/24/2017 1:51:51 AM	3/29/2017 10:30:41 AM	PRC	Shaun Baskerville	0	3/29/2017 10:30:41 AM	5	128	38	0

¹ For the Board’s convenience, ANC 6C has attached the relevant portion of that transcript at Tab A.

The first line indicates that the Property Owner’s agent began the process of uploading application documents for the Original Permit on March 23, 2017 (“Created” column), submitting the last one on March 24 at 1:51:49 a.m. (“Updated” column).

Two seconds later—at 1:51:51 a.m.—a new “PreScreenReview” task was created. DCRA has highlighted this event in yellow, falsely implying that it has special significance. Given the timing, well outside DCRA’s normal business hours and only two seconds after the last document upload, it is clear that the system generated this new task field automatically. It thus reflects no human review or acceptance of the application.

Instead, the pre-screen review—the process by which a DCRA employee checks an application for facial sufficiency and then accepts it as “complete”—took place **five days later**. As shown in the “Updated” and “Completed” columns, DCRA employee Shaun Baskerville did not finish that task until the morning of March 29. Only at this point, and not before, did DCRA accept the application as complete.² A correct timeline is attached at Tab B.

Cornices. DCRA’s supplemental filing lists six prior permits involving what it considers “cornices,” but provides no photographs or descriptions illustrating these individual cases. Here is the December 2016 Google Street View image for one of the listed properties, 4000 14th St. NW:

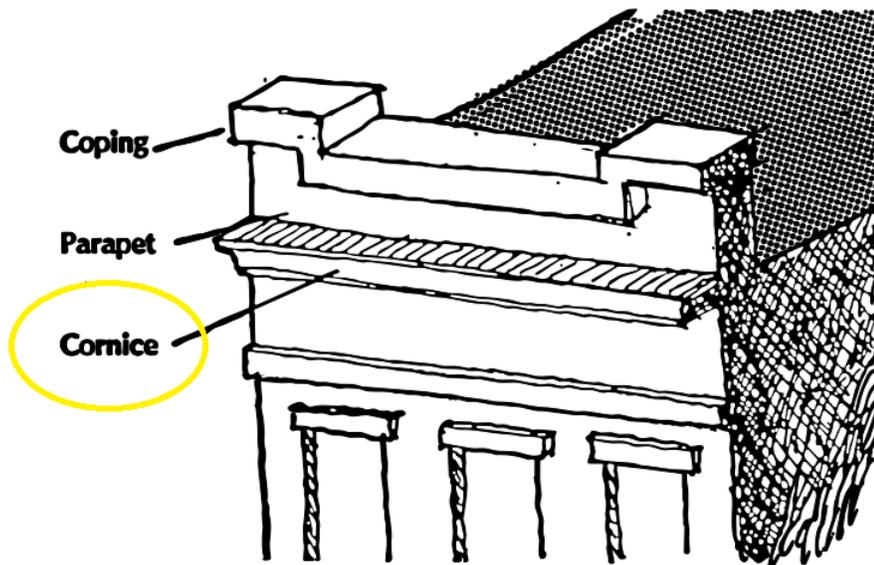


² This matches the statement made by DCRA attorney Maximilian Tondro in a later email that “B1706219 was submitted by the applicant on March 24, **but was not accepted as completed until March 29.**” Case Exh. 46H (emphasis added).

As this photograph shows, the cornice on 4000 14th St. NW sat³ well below the top of the parapet wall, just as at 1125 7th St. NE, the property at issue in this appeal.

We note that DCRA’s key concession here—that the term “cornice” includes projecting bands below the top of a parapet wall—matches the position of the District’s Historic Preservation Review Board. The HPRB-approved *Historic Preservation Guidelines: Roofs on Historic Buildings*⁴ include the following diagram:

Parapets often have plain or decorative caps, called copings, made of stone, pre-cast concrete, metal or tile.



Parapets are commonly found on flat roof commercial or residential buildings.

Id. at p. 5.

³ Contrary to the statement in DCRA’s submission that this cornice was not removed, Street View photos from September 2017 shows the cornice (and much of the parapet wall) stripped off:



⁴ The complete *Guidelines* may be found at <https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/DC%20Roof%20Guidelines.pdf>.

The Property Owner's Submission

The Property Owner submitted a “fly-through” video showing the relationship between the breezeway and other portions of the proposed structures. Going well beyond the Board’s narrow request, however, the Property Owner’s supplemental filing also includes a lengthy attempt to relitigate the arguments already raised in the Owner’s July 11 pre-hearing statement (Case Exhs. 47 & 47A-47J3).

Having previously rebutted all these claims in our September 5 response (Case Exhs. 59 & 59A-59D), ANC 6C sees no need to repeat those counterarguments here. That said, we respond briefly to three specific points.

“Precedential” cases. First, the Property Owner attempts to justify its sham “connector” by citing to allegedly similar designs approved in BZA 19524 and 19525. See Case Exh. 63 at p. 18. This argument is meritless.

As this Board has repeatedly stated, “it will determine each application on its own merits. **The grant or denial of a specific application will not set a precedent.**” BZA Order 13952 p. 4 ¶ 27 (emphasis added); *see also, e.g.*, BZA Order 18981 p. 1 (“The Board chairman [explained] that each case before the Board is decided on its own merits.... He added that there is no precedent set from one case to another in the same area and that each case has to meet all the criteria under the law....”); BZA Order 17398 p. 6 (“each case must be judged on its individual merits”); BZA Order 13334 p. 3 ¶ 19 (“the Board has consistently stated that it must decide each case on its own merits based on the specific set of facts presented therein”).

To be sure, the Board can and should look to the reasoning in prior decisions, both to fully inform its thinking and to promote consistent interpretation of the law. When a prior decision takes the form of a summary order, however, that reliance interest is minimal.

Both prior decisions cited by the Property Owner are summary orders issued with no opposition by any party. Lacking any meaningful legal challenge, those cases offer no guidance here. Instead, the Board should decide the present appeal on its own merits regardless of the disposition of those other cases, and order the permits here revoked for the reasons ANC 6C has laid out in its filings.

Timely presentation of issues on appeal. The Property Owner claims that ANC 6C failed to timely raise two of its grounds for appeal. Not only is this argument meritless, but its assertion only now is itself untimely.

In response to a similar argument from DCRA—claiming that the cornice-removal issue should have been raised earlier—ANC 6C has already explained why our appeal of the Original Permit did not assert (and could not in good faith have asserted) this claim. Simply put, the relevant language in the regulation was added **after** the issuance of the Original Permit, and therefore became relevant only upon later issuance of the First

Revised Permit. (For detailed analysis, see pages 4-5 of our Reply Memorandum, Case Exhibit 59.)

On the claim that ANC 6C should have raised the guardrail defect earlier, we anticipated and rebutted this argument at the September 19 hearing. *See* Tab C. In response to our statement that this specific claim is not time-barred, Chairman Hill replied, “I’ll agree with you.” *Id.*

Tellingly, the Property Owner failed to raise either of these arguments in its pre-hearing statement or any other previous filing. Instead, the Owner raises it only now, after the Board and the other parties devoted hours at the September hearing to exploring the relevant facts and discussing the application of the regulations to those facts. Having unjustifiably sat on these claims, which could and should have been raised earlier in this appeal, the Property Owner should not be heard to raise them at this late date.

Standard of review/burden of proof. Finally, the Property Owner once again⁵ makes the frivolous claim that the standard of review in this appeal is highly deferential, alleging that ANC 6C bears the “heavy burden” of showing that the Zoning Administrator “acted unreasonably or in an arbitrary or capricious manner.” Case Exh. 63 at p. 10. The Property Owner further insists that ANC 6C must prove its case by “clear and convincing evidence.” *Id.*

The Property Owner is wrong. ANC 6C’s burden is much lighter: we need only, as the Board has recognized in the past, “show by a preponderance of the evidence that the building permit was issued in error” BZA Order 16604 pp. 2-3. In fact, DCRA itself has recognized in prior cases that this lower standard applies. *See* BZA Order 16791 p. 6 (“the Zoning Administrator made an oral motion to dismiss the case on the grounds that the Appellants had failed to demonstrate by a preponderance of the evidence that the Zoning Administrator’s decisions were in error”).

The companion claim—that the Board must defer to the Zoning Administrator except in extreme cases involving abuse of discretion—is equally nonsensical. The Board has plenary authority in an appeal to decide questions of fact and law. As made clear in the organic statute creating the Board and establishing its powers, the Board possesses “all the powers of the officer or body from whom the appeal is taken.” D.C. Official Code § 6-641.07(g)(4).

Because the Property Owner’s suggested standard of review has no legal basis, the Board should reject it. ANC 6C has shown by a preponderance of the evidence that all of the permits at issue here—up to and including the Second Revised Permit—violate

⁵ Identical arguments appear in the Property Owner’s pre-hearing statement. *See* Case Exh. 47 pp. 5-6.

multiple requirements of the zoning regulations. We therefore urge the Board to declare these permits invalid and order their revocation.

Respectfully submitted,



Mark Eckenwiler
Commissioner, ANC 6C04
Vice Chair, ANC 6C
(as authorized representative
for ANC 6C)

TABLE OF ATTACHMENTS

- A. First Excerpt of September 19, 2018 Hearing Transcript
- B. Chronology
- C. Second Excerpt of September 19, 2018 Hearing Transcript

CERTIFICATE OF SERVICE

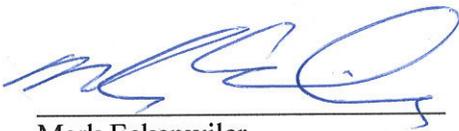
I hereby certify that on October 24, 2018, I served a copy of ANC 6C's Supplemental Statement in Appeal No. 19550, along with attachments, on the following persons by electronic mail:

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Mark Eckenwiler

Tab A

1 right, does anybody know -- because I've got to figure this
2 out, this part, before we come back again.

3 MR. ECKENWILER: Mr. Chairman, you can, of course,
4 refer to the full permit drawings, so Sheet A-5.2, for the
5 various iterations of the permit will show that in context,
6 including a grade datum, if that's what you're looking for.

7 CHAIRMAN HILL: Okay. Does anybody know what they
8 want to ask?

9 VICE CHAIR HART: I'd requested earlier some
10 information about the cornices. Really, it was just trying
11 to understand an example of when you would have seen this as
12 being a cornice, or what you would consider that. I'd asked
13 it earlier, and I think we've gone a little bit too far.
14 We've gone a little bit longer than I originally thought this
15 was going to last, but that's fine. I was just trying to
16 understand how you -- another instance where you would have
17 said oh, yes, that's a cornice, so we have an example of what
18 that is. Right now, I just --

19 MR. LEGRANT: Right, I understand. Prior to the
20 addition of the language that specified cornices, there are
21 examples of my office treating, nonetheless, cornices as
22 protected rooftop architectural features, so I will look into
23 my records, see if we find an example.

24 VICE CHAIR HART: I appreciate that. I'm kind of
25 looking for no more than ten of them, if you can find ten.

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1 I'm trying not to make this be exhaustive, so that we have
2 hundreds of these things. I just need to have a few examples
3 of that.

4 MR. LEGRANT: I'll be lucky to find ten.

5 VICE CHAIR HART: I just have to -- I wanted to
6 make sure that we were limiting it to something. I think
7 we've also asked for a timeline, as well. It's just there's
8 a lot of different moving parts here. Commissioner
9 Eckenwiler, I do appreciate your stepping us through this.

10 Mr. Brown, you've also provided a -- I think we
11 have pieces of all this, and it would be helpful for us to
12 hear that I guess I'm asking for DCRA to do that, since you
13 all have that. As part of that, could you state where you
14 have made the determination that it is a -- the permit has
15 been -- it's a completed permit? Because I think that's part
16 of the --

17 MR. LEGRANT: Yes, I understand.

18 VICE CHAIR HART: Because there's a completed
19 permit, and there's also a permit issuance, which are not
20 necessarily the same two dates. Because there were some
21 things that Mr. Brown described as the permits being issued,
22 and those were a couple of days after you all said that the
23 permit was complete.

24 MR. LEGRANT: Right, we'll provide a full timeline
25 for the sited permits, the permit review history, including

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1 when they were submitted, when they were accepted as
2 complete, and when they were issued.

3 VICE CHAIR HART: I know this is -- that's a lot,
4 but it's helpful to see that sequence.

5 MEMBER TURNBULL: I think Mr. LeGrant was going
6 to provide some information on the alternate tracking data
7 on the case, the other system.

8 MR. LEGRANT: Yes.

9 MEMBER TURNBULL: I think the owner was going to
10 provide some drawings showing the breezeway plan and some
11 more clarification on how that really worked, some better
12 drawings on that.

13 MR. JAWED: Yes, we understand what the Board is
14 looking for and will provide that.

15 CHAIRMAN HILL: Okay, is that it? All right.
16 Again, just to reiterate what Commissioner Turnbull just
17 mentioned again, for me, again, I'm kind of just wrapping my
18 head around the 309.1. I saw there was -- again, I'm just
19 trying to understand what's fully above grade, what's
20 enclosed, what's heated and artificially lit, and then how
21 that common space is shared by -- you can do them all, if you
22 want to.

23 Apparently, I thought the zoning administrator
24 seems to be only concerned with D(1), but both of you seem
25 to be saying that D(1) and (2) are there, so if you could

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1 just provide something that's easier to understand, that
2 would be helpful. That being the case, when do you think you
3 might be able to provide all of this to us -- actually, Mr.
4 Moy, I'm just going to turn it to you, then, because then
5 everyone has to have a chance to respond. Then we come back
6 for a continued hearing.

7 MR. MOY: Let me work backwards a little bit, Mr.
8 Chair. Looking at the docket, staff would suggest that in
9 terms of open dates, I'm basing it primarily on the fact that
10 the next several hearings approaching, we have appeal cases,
11 so avoiding those dates, then the available dates we could
12 use would be -- for a continued hearing could be October 3rd
13 or October 24th, but I don't know if you want to go that far
14 out.

15 PARTICIPANT: That's a pretty tight time frame to
16 submit and --

17 (Simultaneous Speaking)

18 MR. MOY: Working from those dates, then, would
19 be from -- asking of DCRA, the property owner, I guess, in
20 this case, it would be Will Teass -- I don't recall if the
21 Board asked for any information from the appellant -- when
22 those filings can be submitted into the record.

23 CHAIRMAN HILL: We didn't ask anything from the
24 appellant. The appellant, I'm sure, will have commentary on
25 what is submitted by DCRA and as what's going to be submitted

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1 by the property owner, so they'll be the ones that will be
2 submitting that. Then I guess I forget how this circle ends.
3 Then there's another seven days that they'll have to respond
4 back to that?

5 MR. MOY: -- response time, which I think the
6 Board should allow at least a week, minimum, but that's up
7 to the Board -- to respond to the filings.

8 CHAIRMAN HILL: Okay.

9 MR. MOY: So again, when DCRA can provide
10 requested information, and then when the property owner can
11 provide their filing.

12 MR. ECKENWILER: Mr. Chairman, I'm going to insert
13 myself into this, just to offer a suggestion, see if that's
14 agreeable to everyone. I think October 3rd is probably too
15 soon. I don't presume to speak for DCRA, but I think some
16 of this may take a little time to pull together, and I know
17 they have other responsibilities.

18 I would propose we continue this to October 24th,
19 have the filings from appellee, the property, and DCRA due
20 on October 10th, have the response from ANC 6C due October
21 17th, one week later, and then that gives the Board a full
22 week to have --

23 CHAIRMAN HILL: October what? We'd be back here
24 on the 17th.

25 MR. ECKENWILER: No, Mr. Moy, I thought, had

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1 proposed October 24th as the next hearing date.

2 CHAIRMAN HILL: Right.

3 MR. BROWN: Let me jump in. I have a personal
4 conflict.

5 CHAIRMAN HILL: That's okay; I'm not here the
6 24th, and neither is Ms. White. Are we going to have a
7 quorum just with the --

8 MR. ECKENWILER: Are you saying you want to miss
9 a moment of this?

10 CHAIRMAN HILL: That'd be perfect for Halloween.

11 MR. MOY: Does that work?

12 CHAIRMAN HILL: Okay, so we'll come back here on
13 the 31st, so let's work back from the 31st. We'll come back
14 here on Halloween, unless you've all got young kids. You
15 should trick or treat the day before, then.

16 MR. ECKENWILER: Mr. Chairman, you could put this
17 on earlier.

18 (Simultaneous Speaking.)

19 CHAIRMAN HILL: It's okay. We'll figure it out.
20 The 31st. If we work backwards from the 31st, Mr. Moy.

21 MR. MOY: Okay, for point of discussion, continued
22 hearing on October 31st, responses, let's say, a week before,
23 so that would be October 17th -- let's say October 24th. We
24 can make that October 24th for responses. Let's say for
25 filings from DCRA and the property owner, we can make that

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1 October 10th. Would that be enough time for responses, two
2 weeks?

3 MS. LORD-SORENSEN: Is it possible to move it to
4 October 12th?

5 PARTICIPANT: It's up to the Board.

6 MS. LORD-SORENSEN: It's just a Friday.

7 MR. ECKENWILER: No objection from appellant.

8 PARTICIPANT: That's fine.

9 MR. MOY: Mr. Chair, filings on October 12th,
10 which is a Friday.

11 CHAIRMAN HILL: Sure.

12 MR. MOY: Then responses October 24th, okay?

13 CHAIRMAN HILL: Sure.

14 MR. MOY: Then we see everyone back Wednesday,
15 October 31st.

16 MR. BROWN: On the 31st, is that for testimony on
17 the material that's submitted? What do you envision?

18 CHAIRMAN HILL: I'm going to look to OAG or
19 whatever. I'm done with testimony. We just have some
20 clarification as to what we wanted to hear. Then I suppose
21 there would be a conclusion. We wouldn't take new testimony.
22 We would just be taking a conclusion from, I guess, the order
23 that I remember it going. Appellant goes first, then the
24 property owner, then DCRA, in terms of your conclusions. Is
25 that correct?

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1 PARTICIPANT: Do you anticipate the Board having
2 any questions of the witnesses on the new material?

3 CHAIRMAN HILL: I do.

4 PARTICIPANT: Then it would be a continued
5 hearing.

6 CHAIRMAN HILL: No, it's going to be a continued
7 hearing. The question from over there was whether or not
8 there would be testimony. The Board's not asking for
9 testimony.

10 PARTICIPANT: Well, there would be responses to
11 the Board's questions.

12 CHAIRMAN HILL: There would be responses to the
13 Board's questions. Is that clear?

14 MR. BROWN: Yes, it is, but not testimony --
15 (Simultaneous Speaking)

16 CHAIRMAN HILL: Not testimony. You guys aren't
17 come and give us anything new. Everything that we're getting
18 from you is what we may or may not have questions for you,
19 and we might not have any questions for you. I don't know.
20 But then you'll do your conclusions. Are we done?

21 MR. MOY: I believe so.

22 CHAIRMAN HILL: Okay, so we're going to break for
23 lunch, and nice seeing you guys. See you on Halloween.

24 (Whereupon, the above-entitled matter went off the
25 record at 3:00 p.m. and resumed at 3:38 p.m.)

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Tab B

CHRONOLOGY

2017

March 23: Property Owner begins the process of uploading application documents for Original Permit (B1706219)

March 24:

- Property Owner uploads last application document (at 1:51:49 a.m.)
- DCRA Projectdox automatically (at 1:51:51 a.m.) creates entry for “Pre-Screen Review” task to be performed by human reviewer

March 29: DCRA employee Shaun Baskerville completes “Pre-Screen Review” and accepts application as complete

March 31: Original Permit issued

April 28: ZC 14-11B takes effect, adding cornice language to 11-E DCMR § 206

May 30: Appeal filed

2018

April 18: First Revised Permit (B1805207) issued

August 2: Second Revised Permit (B1811245) issued

(**Bold text** indicates legally significant events.)

Tab C

1 Second, I want to anticipate, a little bit,
2 something that Mr. Brown went into earlier in his questioning
3 about the fact that the railing setback defect was not raised
4 in our initial appeal. That's true. I anticipate that Mr.
5 Brown's going to argue later that we're time barred with
6 that, and I just want to remind the Board that when we went
7 through the initial motion to incorporate, so that was the
8 first revised permit, ANC 6C thought that was not the proper
9 way to proceed. We thought that the appropriate way to
10 proceed was simply for us to file a new appeal because that
11 starts the clock all over again.

12 It truly is a brand-new permit. I'm just going
13 to say I hope you will reject the suggestion that we're time
14 barred. Every time they keep revising this permit, that
15 opens it up again for us to raise those issues. That's all
16 that I'll say on the railing.

17 CHAIRMAN HILL: I'll agree with you. Okay.

18 MR. ECKENWILER: With respect to the cornice, one,
19 this is not rebuttal. I think it's remarkable that Mr. Teass
20 admitted that there is a cornice on the front of this
21 building, and the plans show -- now he says it's a different
22 thing from what we've alleged. We've alleged it's that great
23 big band. He says it's that smaller band that does, in fact,
24 sit at the top of the parapet wall.

25 I'm happy -- if that's what he wants to argue,

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