GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 19550 of Advisory Neighborhood Commission 6C, pursuant to 11 DCMR Subtitle Y § 302, from decisions made by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Building Permit No. B1706219, on March 31, 2017, Building Permit No. B1805207, on April 18, 2018, and Building Permit No. B1811245, on August 2, 2018, to permit the enlargement of an attached principal dwelling for use as two principal dwellings in the RF-1 District at premises 1125 7th Street, N.E. (Square 886, Lot 35).[1]

HEARING DATES: October 18, 2017, and January 24, May 9, September 19, and October 31, 2018

DECISION DATE: December 19, 2018

ORDER DENYING APPEAL

This appeal was submitted on May 30, 2017, by Advisory Neighborhood Commission 6C ("**ANC**" or the "**Appellant**") to challenge decisions made by the Zoning Administrator, at the Department of Consumer and Regulatory Affairs ("**DCRA**"), to issue building permits authorizing the enlargement of an attached principal dwelling and its conversion to a two-family flat in the RF-1 zone at 1125 7th Street, N.E. (Square 886, Lot 35). Following a public hearing, the Board voted to deny the appeal and to affirm the determination of the Zoning Administrator.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda dated July 24, 2017, the Office of Zoning provided notice of the appeal and of the public hearing to the Zoning Administrator, the Office of Planning, the Councilmember for Ward 6 as well as the Chairman of the Council and the four At-Large Councilmembers, ANC 6C, as the affected ANC in which the subject property is located, and Single Member District/ANC 6C06. Also on July 24, 2017, the Office of Zoning mailed letters providing notice of the hearing to the Appellant (which was also the affected ANC); the Zoning

[1] The caption has been revised to reflect that the appeal, which originally challenged the issuance of Building Permit No. B1706219 (the "Original Permit"), was subsequently amended to incorporate two subsequently issued permits as well: Building Permit No. B1805207 (the "First Revised Permit") and Building Permit No. B1811245 (the "Second Revised Permit). In the absence of a showing that the Original Permit was no longer in effect or that the revised permits resolved all the claims of error made by the Appellant, the Board denied the Property Owner's motion to dismiss the appeal of the Original Permit as moot and instead incorporated the subsequent permits as modifications of the Original Permit.

Administrator; and Atlas Squared LLC, the owner of the property that is the subject of the appeal. Notice was published in the *D.C. Register* on July 28, 2017 (64 DCR 7241).[2]

Party Status. Pursuant to Subtitle Y § 501.1, the Appellant, DCRA, and Atlas Squared, LLC (the "**Property Owner**") were automatically parties in this proceeding. At a public meeting on October 18, 2017, the Board granted a request to intervene in support of the appeal by Kevin Cummins (the "**Intervenor**"), an owner and resident of an adjoining property at 1123 7th Street, N.E.

FINDINGS OF FACT

1. The property that is the subject of this appeal is located at 1125 7th Street, N.E. (Square 886, Lot 35). The lot is rectangular, approximately 20 feet wide and 116.6 feet deep, with a lot area of approximately 2,332 square feet.

2. The subject property was improved with a two-story attached principal dwelling, with a cellar, and an accessory garage structure located at the rear of the lot.

3. The dwelling was attached on either side to similar two-story attached dwellings on each of the abutting lots. The building on the abutting property to the north was enlarged while this appeal was pending.

4. The rear lot line of the subject property abuts a public alley 15 feet wide.

5. The existing building has parapet walls three feet, six inches high (42 inches) around the perimeter of the roof. (Exhibits 46F, 50.)

6. The existing building was embellished with several decorative elements extending horizontally across the front façade. The largest decorative element was a molded feature that projected out from the building, located approximately 16 inches below the top of the parapet wall. (Exhibit 46 at p. 6.)

7. The existing building had a square brick chimney located at the lot line shared with the abutting property to the south (1123 7th Street, N.E.) The abutting building had a narrow pipe serving as a flue or vent that emerged from the roof in the vicinity of the chimney on the subject property. (Exhibit 3E.)

8. The Property Owner acquired the subject property in June 2015 and began redevelopment of the site. The project entailed the removal of both a prior rear addition to the existing structure and the accessory structure as well as new construction to create (i) a third-story addition to enlarge the existing dwelling (designated "Unit 1"), (ii) a new three-story

[2] The public hearing was originally scheduled for September 13, 2017, and was moved to October 4, 2017, at the request of the Appellant. At the request of DCRA, the hearing was again rescheduled, to November 15, 2017, and then to January 24, 2018, and May 9, 2018, because an appeal on a related matter was pending at the Office of Administrative Hearings. On May 9, 2018, the Board continued the public hearing to September 19, 2018, after amending the appeal to incorporate the First Revised Permit.

structure, with a cellar, in the rear yard ("Unit 2"), and (iii) a one-story "breezeway" attached to both units, located in a closed court created between the two units. A new bay window would be created at the front of the existing building on all three floors. Two parking spaces would be provided at the rear of the lot, accessible from the abutting public alley.

9. As finally proposed, the main entrance to Unit 1 would be a door on the north (left) side of the front of the building, with stairs up from the sidewalk to reach a landing in front of the door. Unit 1 would also have a rear door providing access to the breezeway, and from there to the courtyard and to the parking area at the rear of the lot. The main entrance to Unit 2 would be located on the courtyard side, accessible via the breezeway from both the sidewalk and the rear parking area. Unit 2 would also have a door facing the rear alley.

10. Access to the courtyard and the breezeway would be provided via two below-grade corridors located along the south lot line leading from either the sidewalk or the alley to a set of stairs up to the court. The front of the property would have an areaway providing access from the front sidewalk to stairs down to the front corridor leading to stairs up to the court. Another stairway in the court would provide access down to another corridor along the south lot line leading to the alley at the rear of the property. (Exhibits 46B, 47C, 64.)

11. The breezeway would be situated along the northern property line, three feet, eight inches wide and extending 23.25 feet between the two units. The one-story breezeway would be above grade, enclosed, heated, and lit. The breezeway would consist of a door from the court providing access to a corridor containing stairs to the rear door of Unit 1, toward the front of the property, and to stairs leading to the main door into Unit 2, toward the rear of the property. (Exhibits 3D, 47, 64.)

12. The court would occupy the remainder of the space between the two units, an area approximately 15.24 feet wide and 23.25 feet deep. The court would be bounded by Unit 1 to the west, the breezeway to the north, Unit 2 to the east, and an abutting dwelling (owned by the Intervenor) to the south. (Exhibit 47C.)

13. The two dwelling units would be approximately the same size. Both would have three stories and a cellar, and both would extend the width of the lot. The existing dwelling (reconfigured as Unit 1) would extend approximately 31.8 feet from the front lot line. The new Unit 2 would extend 32.5 feet from the rear end of the breezeway toward the parking area at the rear of the lot. The total length of the building after the redevelopment would be approximately 87.6 feet. (Exhibit 47C.)

14. The rear wall of Unit 2 would be located approximately 29 feet from the public alley, providing space for parking (two spaces, each eight feet wide and 19 feet deep) and two sets of stairs providing access up to Unit 2 and down to the corridor leading to the courtyard. (Exhibit 47C.)

15. The Property Owner submitted an application for Building Permit No. B1706219 (the "**Original Permit**") to DCRA on March 23, 2017.

16. DCRA issued Building Permit No. B1706219 on March 31, 2017, with the description of work stated as: "revision to building permit B1606543 and building permit B1512853 reflecting underpinning. Renovation of an existing single family dwelling unit to a 2-unit separate townhouse."[3] The Original Permit reflected the existing use of the subject property as one dwelling unit, and the proposed use as two dwelling units in a three-story building. (Exhibit 3A.)

17. The plans approved as part of the Original Permit included a drawing of the front elevation of the existing structure with an annotation stating: "Existing Front Wall to be demolished." (Exhibit 3D.)

18. The plans approved as part of the Original Permit depicted roof decks on both units. Each roof deck would be reached through a flat roof access hatch, with a guardrail, 36 inches in height, installed perpendicular to the north lot line. (Exhibit 3D.)

19. DCRA issued a notice of revocation for Building Permit No. B1706219 on the ground that the permit was issued in error in violation of the Construction Codes (12 DCMR) with respect to the proximity of the new construction to a chimney or vent on an adjacent property. The Property Owner challenged the revocation in an appeal filed at the Office of Administrative Hearings.

20. The Property Owner submitted an application for a revision to the Original Permit to DCRA on February 16, 2018. Drawings submitted with the application depicted modifications from the Original Permit including changes to the breezeway and roof structures. (Exhibit 46.)

21. DCRA issued Building Permit No. B1805207 (the "**First Revised Permit**") to the Property Owner on April 18, 2018, to "Revise Building Permit B1706219 to renovate the converted single-family dwelling to a two-unit flat. No change or expansion to the building or zoning envelope." The First Revised Permit also reflected the existing use of the subject property as one dwelling unit, and the proposed use as two dwelling units in a three-story building. (Exhibit 36.)

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[3] According to the Appellant, the Original Permit did not revise any prior building permits because the Property Owner's previous applications did not result in the issuance of final permits. The Property Owner indicated that the application for the Original Permit incorporated and consolidated two prior building permit applications (B1512853 and B1606543) into the new application. Building Permit No. B1810239 was issued on June 12, 2018, as the first extension of the Original Permit, with its scope stated as "Consolidation of permit applications B1503166, B1512853, and B1606543. Renovation of an existing single family dwelling unit to 2-unit townhouse, including underpinning." (Exhibit 47F.)

22. The First Revised Permit authorized changes to the planned redevelopment that included (a) a three-story bay addition (rather than the two stories, with a veranda, originally proposed), (b) the front door to Unit 1 on the north side (rather than relocating the door to the south side), (c) creation of below-grade corridors along the south lot line to provide access to the breezeway at grade in the courtyard (rather than locating the corridors along the north lot line), and (d) a switch to "Daylighter" roof access hatches (with enclosing walls of differing heights, 37 inches high at maximum) to provide access to the roof decks. (Exhibit 46B.)

23. DCRA issued Building Permit No. B1811245 (the "**Second Revised Permit**") to the Property Owner on August 2, 2018, with the description of work as "Revision to B1805207 to revise footers and roof top hatches …." (Exhibit 57.)

24. The Second Revised Permit authorized flat "coffin style" hatches for access to the roof decks. The revision eliminated the sloping, higher "skylight style" hatches that were approved in the First Revised Permit in favor of the same sort of flat roof hatches approved in the Original Permit. The "coffin style" hatches were less than four feet in height.

25. The subject property and abutting properties are located in a Residential Flat (RF) zone, RF-1. The purpose of the RF-1 zone is to provide for areas predominantly developed with row houses on small lots within which no more than two dwelling units are permitted. (Subtitle E § 300.1.) In the RF-1 zone, two dwelling units may be located within the principal structure or one each in the principal structure and an accessory structure. (Subtitle E § 302.1.)

26. A minimum rear yard of 20 feet must be provided in the RF-1 zone. (Subtitle E § 306.1.)

27. On March 27, 2017, the Zoning Commission took final action to adopt text amendments to the Zoning Regulations intended, among other things, to "address concerns about excessively disproportionate rear extensions adjoining attached…buildings in the…RF zones by adding language limiting a matter-of-right rear extension to such buildings … from extending further than ten feet (10 ft.) beyond the farthest rear wall of an adjoining principal residential building on an adjoining property (10-foot limitation)." (Z.C. Order No. 14-11B, effective April 28, 2017.)

28. The text amendment added a new Subtitle E § 205.4, which stated that "Notwithstanding §§ 205.1 through 205.3, a rear wall of a row or semi-detached building shall not be constructed to extend farther than ten feet (10 ft.) beyond the farthest rear wall of any adjoining principal residential building on any adjacent property."[4]

[4] Pursuant to Subtitle E § 205.1, "[a] rear yard must be provided for each structure located in an RF [zone], the minimum depth of which shall be as set forth in each zone chapter." Subtitle E § 205.2 applies only to a lot abutting three or more streets. Subtitle E § 205.3 specifies that, "[i]n the case of a building existing on or before May 12, 1958,

29. On October 30, 2017, the Zoning Commission took final action to add a vesting provision governing applications for building permits that proposed construction of a rear wall of an attached or semi-detached building extending farther than 10 feet beyond the farthest rear wall of any adjoining principal residential building on an adjoining property, if the application was filed and accepted as complete by DCRA on or before March 27, 2017, and not substantially changed after filing. The modification, which was first adopted on an emergency basis on May 22, 2017, and was re-adopted on September 14, 2017, before being made permanent, created an exception from the general rule that development rights are vested based on the Zoning Regulations in place on the date a building permit is issued. (Z.C. Order No. 14-11D, effective November 24, 2017.)

30. The general rule governing the vesting of development rights provides that, with certain exceptions stated in Subtitle A §§ 301.9 through 301.15, any construction authorized by a permit may be carried to completion pursuant to the provisions of the Zoning Regulations in effect on the date that the permit is issued, subject to the following conditions: (a) the permit holder must begin construction work within two years of the date on which the permit was issued, and (b) any amendment of the permit must comply with the provisions of DCMR Title 11 in effect on the date the permit is amended. (Subtitle A § 301.4.)

31. After the amendment adopted in connection with the 10-foot limitation, the relevant vesting provision stated that: "Notwithstanding Subtitle A § 301.4…and Subtitle E §§ 205.4 and 205.5, a rear wall of a row or semi-detached building may be constructed to extend farther than ten feet (10 ft.) beyond the farthest rear wall of any adjoining principal residential building on an adjoining property provided that the building permit application for such construction was filed and accepted as complete by the Department of Consumer and Regulatory Affairs on or before March 27, 2017 and not substantially changed after filing." (Subtitle A § 301.14.)

32. The text amendments adopted in Z.C. Order No. 14-11B also modified Subtitle E § 206, pertaining to roof top or upper floor additions in the RF-1 zone. The changes made to Subtitle E § 206.1 included the addition of "cornice" to the list of rooftop architectural elements to which that provision would apply.

33. As shown in the Notice of Proposed Rulemaking in Z.C. Case No. 14-11B, the text of Subtitle 206.1 before the amendments adopted in that proceeding was, in relevant part: "In an RF zone district, the following provisions shall apply: (a) A roof top architectural element original to the building such as a turret, tower or dormers, shall not be removed or significantly altered, including changing its shape or increasing its height, elevation, or size …." (Exhibit 10 in Z.C. Case No. 14-11B.)

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an extension or addition may be made to the building into the required rear yard; provided, that the extension or addition shall be limited to that portion of the rear yard included in the building area on May 12, 1958."

34. As amended in Z.C. Order No. 14-11B, the portion of Subtitle E § 206.1 relevant to this appeal stated that "In an RF zone district, the following provisions shall apply: (a) A roof top architectural element original to the 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 …."

CONCLUSIONS OF LAW AND OPINION

The Board is authorized by § 8 of the Zoning Act to "hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal" made by any administrative officer in the administration or enforcement of the Zoning Regulations. (D.C. Official Code § 6-641.07(g)(1) (2008 Repl.).) Appeals to the Board of Zoning Adjustment "may be taken by any person aggrieved, or organization authorized to represent that person, or by any officer or department of the government of the District of Columbia or the federal government affected, by any decision of [an administrative officer] granting or refusing a building permit or granting or withholding a certificate of occupancy, or any other administrative decision based in whole or part upon any zoning regulations or map" adopted pursuant to the Zoning Act. (D.C. Official Code § 6-641.07(f) (2008 Repl.).) *See also* Subtitle X § 1100.2, Subtitle Y § 302.1.

A zoning appeal must be filed within 60 days from the date the appellant had, or reasonably should have had, notice or knowledge of the administrative decision complained of. (Subtitle Y § 302.2.) A zoning appeal may be taken only from the first writing that reflects the administrative decision complained of to which the appellant had notice, and no subsequent document may be appealed unless that document modifies or reverses the original decision or reflects a new decision. (Subtitle Y § 302.5.)

The Appellant initially contended that the Original Permit issued for the redevelopment of the subject property violated the Zoning Regulations in four respects: the new construction would not satisfy requirements for pervious surface, would interfere with a chimney or vent on an adjoining property, would allow more dwelling units than permitted in the RF-1 zone, and would allow a second principal building on the same lot because the new construction would not be suitably connected to the existing building to create one building or comply with requirements applicable to accessory structures. (Exhibit 3.) The claim of error relating to interference with an external vent on an adjacent property was repeated in the ANC's first statement (Exhibit 20) but not in subsequent submissions. The claims relating to pervious surface and the number of dwelling units were included in the ANC's first two statements (Exhibits 20 and 35) but not in its second revised pre-hearing statement (Exhibit 46) or subsequent filings. In light of these omissions, the Board deems these three claims of error – that is, allegations of zoning error relating to interference with an external vent, pervious surface, and number of dwelling units – withdrawn by the Appellant.[5]

[5] The Appellant asserted that certain changes made in the First Revised Permit, indicating that each unit would consist of a single dwelling, were a response "to the valid objection in this appeal's initial filing that the Original Permit allowed two illegal units beyond the maximum." (Exhibit 46.) The Appellant also acknowledged that the issue relating to the amount of pervious surface at the subject property was "fixed" by "a change from the original application" "so that's no longer a basis for appeal in and of itself …." (Transcript of September 19, 2018, at 176-177.)

The Intervenor also initially alleged that the new construction would interfere with an external vent on his dwelling, which adjoined the existing building on the subject property; however, the Board deems the claim of error withdrawn by the Intervenor as well, because the Intervenor's revised prehearing statement (Exhibit 48) did not include a claim of error related to the external vent or chimney on his dwelling.

The Appellant's second revised prehearing statement (Exhibit 46), submitted on June 25, 2018, after the issuance of the First Revised Permit on April 18, 2018, repeated the claims of error relating to the alleged second principal building on the lot and made several new allegations for the first time. According to ANC 6C, the First Revised Permit violated the Zoning Regulations by allowing an illegal penthouse on each unit; by failing to provide the setbacks required for the penthouses; by allowing the removal of a rooftop architectural element, a cornice; and by allowing a rear addition that would exceed the maximum allowable depth.

The ANC did not pursue its allegation arising from approval of the penthouses after the Second Revised Permit was issued.[6] Accordingly, the Board also deems that claim of error withdrawn by the Appellant.

By the end of the public hearing, the ANC continued to allege the following errors arising from the issuance of the building permits at issue in this proceeding: the failure to provide the setbacks required for penthouse guardrails, the improper removal of a rooftop architectural element, a cornice, the excessive depth of the rear addition, and the illegal second principal building on the lot. Based on the findings of fact and for the reasons discussed below, the Board concludes that the claims of error must be dismissed as untimely, in the case of the allegations relating to requirements for penthouse setbacks and rooftop architectural elements, or denied, in the case of the allegations relating to the depth of the rear addition and the alleged second principal building, because no error in the administration of the Zoning Regulations occurred in connection with the issuance of the building permits for the redevelopment of the subject property. Accordingly, the Board affirms the determinations of the Zoning Administrator at issue in this proceeding.

Setback of the penthouse guardrail. A penthouse in the RF-1 zone is subject to the regulations of Subtitle C, Chapter 15 and the height and story limits specified for the zone. (Subtitle E § 202.1.) Except for compliance with the setbacks required by Subtitle C § 1502, a penthouse that is less than four feet in height above a roof or parapet wall is generally not subject to the penthouse regulations. (Subtitle C § 1500.2.) The setback requirements state that a penthouse, roof deck, and any guardrail on a roof must be set back from the edge of the roof on which it is located at a distance equal to its height from the front and rear building walls, as well as from the side building walls in the case of a rowhouse or flat that is adjacent to a property with an equal or lower permitted matter-of-right height. (Subtitle C § 1502.1.) The existing building at the subject property was a rowhouse, the proposed new development would be a two-unit flat in an attached building, and

[6] The ANC later stated that the switch to "a lower-profile sliding hatch" made in the Second Revised Permit was a "material change [that] adequately responds to ANC 6C's objections to the Dayliter penthouses" authorized by the First Revised Permit. (Exhibit 59.)

the adjacent properties were also zoned RF-1 and therefore had the same building height permitted as a matter of right as the building at the subject property.

The Appellant argued that DCRA violated the setback requirement by permitting guardrails, 36 inches high, immediately adjacent to the north side building wall, without any setback. DCRA asserted that the approved guardrails were consistent with zoning requirements on the basis of the Zoning Administrator's testimony that a setback is required when a guardrail is on the roof edge or parallel to the roof edge of a building, but that the Zoning Administrator's practice has been not to require a setback when the guardrail is perpendicular to a side building wall and is for life safety purposes. (Transcript of September 19, 2018, at 61, 85-86.) The Property Owner argued that the guardrail had been properly approved and, in any event, would not be visible above the parapet wall. A witness for the Property Owner, who was accepted by the Board as an expert in building permit applications, testified that, in the late 1990s, a provision was added to the building code requiring a guardrail for any walking surface within six feet of the edge of a building, across the face or opening of the building edge, to address a life safety issue. According to the Property Owner, the guardrail that would run perpendicular to the party wall at the subject property was proposed to meet that requirement. The Property Owner also provided testimony from a witness accepted by the Board as an expert in architecture, who described the Zoning Administrator's practice not to apply the setback requirement to portions of a guardrail related to life safety functions. (Transcript of September 19, 2018, at 129-130.)

In addition to asserting that the guardrails were consistent with zoning requirements, DCRA also argued that the setback issue had not been raised in a timely manner and should therefore be dismissed. The Board agrees, in light of the "first writing" rule of Subtitle Y § 302.5. The administrative decision complained of – to permit the installation of guardrails without any setback from the north side wall of the building – was made in the issuance of the Original Permit. However, the ANC did not challenge the setback decision until the submission of its second revised prehearing statement on June 25, 2018, more than 60 days after the Original Permit was issued. The ANC did not cite any exceptional circumstances that would warrant an extension of the 60-day deadline for the filing of a timely appeal in accordance with Subtitle Y § 302.6. The ANC had notice of the setback decision, as reflected in its appeal submitted within 60 days of the issuance of the Original Permit, which raised other claims of error but did not challenge the permitted guardrails. No subsequent document modified or reversed the original decision relating to the guardrail or reflected a new decision. As the ANC later acknowledged, the Second Revised Permit, "[l]ike the predecessor permits," authorized a guardrail "immediately adjacent to the north side building wall…with zero setback." (Exhibit 70.)

The "first writing" rule of Subtitle Y § 302.5 was included in the 2016 Zoning Regulations in keeping with the Board's consistent rulings that a revised building permit is appealable only to the extent that it reflects a new zoning decision, different from the zoning decision made in the initial permit. *See, e.g.,* Appeal No. 19839 (ANC 8A, 2020) (appeal challenging statements in a letter from DCRA was dismissed as untimely where the decision complained of had been made in a building permit issued earlier; the letter did not modify or reverse the original decision or make any new decision, and therefore was not appealable as the first writing of any new zoning

decision); Appeal No. 18499 (ANC 6A, 2013) (appeal filed within 60 days of the issuance of a revised permit was dismissed as untimely because appellant's arguments all related to issues determined by the original permit, appellant had actual knowledge of the original permit within 60 days of its issuance, and the revised permit did not create a new zoning decision on the same claim of error); Appeal No. 18980 (Concerned Citizens of Argonne Place, 2016) (Board rejected the appellant's contention that an appeal was timely because the aspect of the initial permit under appeal also applied to subsequently issued permits; to the extent that the later permits merely reiterated the zoning decisions embodied in the issuance of the initial permit and did not reflect new zoning decisions, the initial permit was the only appealable decision; the appeal was untimely except with respect to new determinations made in revised permits where appellant knew of the initial permit soon after its issuance, the initial permit was not ambiguous or one of a series that hampered comprehension of the entire scope of the project, and appellant was not faced with building permit applications of a cumulative, piecemeal nature that obfuscated the full extent of the construction project); *compare*, Appeal No. 16405 (Crary, 1999); *affirmed, Sisson v. District of Columbia Bd. of Zoning Adjustment*, 805 A.2d 964 (D.C. 2002) (appeal of five permits was timely under principle of "exceptional circumstances," outside appellant's control and that impaired appellant's ability to appeal, where the full extent of a construction project could not be discerned as each individual permit was issued because of the cumulative, piecemeal nature of the permit applications, which omitted relevant information, and the permits contained zoning errors and did not reflect the entire scope of proposed renovations; appellant was not chargeable with notice of the entire scope of work at a neighboring property until all of the permits were issued.)

Removal of a rooftop architectural element. Similarly, the Appellant's second revised prehearing statement (Exhibit 46) was the first filing in which the ANC challenged the removal of what the ANC contended was a rooftop architectural element, specifically a cornice. According to the ANC, the First Revised Permit improperly authorized "the wholesale removal of the cornice on the front façade" of the existing building even though the "zoning regulations for RF zones require that '[a] roof top architectural element original to the building such as cornices, porch roofs, a turret, tower, or dormers, shall not be removed or significantly altered ….'" (Subtitle E § 206.1(a)). The ANC acknowledged that "[a]s shown on the application drawings, the scope of the Original Permit included the total removal of the front façade," including "two molded projecting bands original to the structure," and that "[a]ll permits at issue, up to and including the Second Revised Permit, authorize removal of these architectural elements." (Exhibit 70.)

The ANC argued that "the rooftop architectural element at issue falls squarely within the definition of a cornice: '1. Arch. The horizontal member (typically molded and projecting) which crowns a composition, as a façade …' found in Webster's New International Dictionary of the English Language (2d ed., unabridged)."[7] The ANC submitted photographs intended to illustrate that "the feature at issue in this case appears to be molded; it clearly projects outward; and it 'crowns the composition' as a prominent feature (above a less-ostentatious decorative brick course) on the

[7] Pursuant to Subtitle B § 100.1(g), words that are not defined in the Zoning Regulations "shall have the meanings given in Webster's Unabridged Dictionary."

front parapet wall. The cornice in question is original to the Property, not a later-added detail that can be dismissed as mere 'trim.'" The ANC acknowledged that "the cornice does fall below the top of the parapet wall, [but] it sits above the highest point on the roof …. Most importantly, the cornice's positioning slightly below the parapet wall has essentially no effect on its function as the crowning visual element on the Property's façade," especially as seen from the street. The ANC disputed that a rooftop architectural element subject to protection under the Zoning Regulations had "to be at the very top of the structure," citing the example of dormers, and emphasized that on the block where the subject property was located, the "cornices [on the Property Owner's building as well as some neighboring structures] emphatically cap the façade and visually define its top edge." (Exhibit 59.)

DCRA argued that "the alleged 'cornice' on the Property is not a rooftop architectural element" but "actually a façade element because it is located on the façade approximately 1 foot below the rooftop." (Exhibits 50, 56.) The Zoning Administrator described some "internal discussion" among his staff as to whether the feature was a "cornice," and stated his opinion that it was not a cornice and was not a feature protected under the Zoning Regulations. (Transcript of September 19, 2018, at 87-89.)

The Property Owner asserted that the feature was "façade trim" and not a rooftop architectural element because "this element is located approximately sixteen (16) inches below the top of the parapet wall and clearly separate, distinct and unrelated from the top of the parapet wall or roof top." The Property Owner disputed the Appellant's claim that the feature met the dictionary definition of a "cornice" because "[w]hile the façade trim may be molded, it cannot reasonably be characterized as roof top, crowning, uppermost or top course."[8] Instead, the Property Owner provided a definition of "cornice" from Webster's Unabridged Dictionary, emphasizing that a

[8] The Property Owner provided testimony from a witness recognized by the Board as an expert in architecture, who stated that "the entire assembly" of decorative elements on the façade "would be viewed as an entablature" because "several elements … form the crown … of the building" at the subject property; a cornice could be a part of an entablature, but "just the top-most portion." The witness explained that, in this case, the building had "somewhere between three and four courses of brick, and then there's an applied architectural element that sits below that. Overall, you could consider the entire assemblage an entablature but … only the top-most portion would be considered a cornice, as per the definition and graphic." According to the witness, the "façade trim element" was not "what zoning defines as a rooftop architectural element" or a cornice, which was "just [the] top cornice … [a] portion of that overall assemblage … at the very top," and "[n]ot the portion that sits below the brick," because there was "an existing masonry section of wall below the cornice, and then there is a piece of façade trim or architectural … ornamentation that sits below that brick." The witness stated his "understanding and … view" of the façade of the existing building "would be that the top-most piece is the cornice. The pieces below, overall, they might compose an entablature, but it's only the top-most portion that's the cornice …. This seems to be more of an architectural embellishment of the façade of the building." (Transcript of September 19, 2018, at 135-138.)

cornice is defined as a feature that *crowns* an architectural composition, as the *uppermost* member of an entablature or the *top course* of a wall when treated as a finish or crowning member. (Exhibit 63.)

The Property Owner also asserted that DCRA authorized the removal of the feature at issue in the Original Permit, and that the "[First] Revised Permit did not revise the previously approved removal of the façade trim or element." (Exhibit 47.) The Appellant contended that the claim of error could not have been raised earlier, before Subtitle E § 206.1(a) was amended to list "cornices" specifically among the types of original rooftop architectural elements that cannot be removed without Board approval.

The Board was not persuaded that the feature at issue should be considered a cornice but concludes that, under the circumstances of this case, there is no need to make that determination. As the ANC itself noted, "[e]ven if the Board were to find that the feature at issue is not a 'cornice' per se, [Subtitle E §] 206.1(a) would still apply" because that "regulation protects not only cornices and other features, but also other similar elements. The phrase 'such as' makes clear that the enumerated list of features is not exclusive, but rather illustrative of the section's overall intent." (Exhibit 46.) The ANC argued that Subtitle E § 206.1(a) "is not limited to the list of features named in its text" but "explicitly applies to elements … 'such as the listed items.' So it's clear that its protections extend to other similar but un-enumerated architectural features." According to the ANC, regardless of whether it met the definition of "cornice," "the feature here functions in the same fashion as a cornice" in that "it defines the top of the façade" and therefore the removal of feature should not have been permitted. (Transcript of September 19, 2018, at 21-22.)

The Board agrees with ANC 6C that if the feature at issue was a rooftop architectural element protected under the Zoning Regulations, it would have been protected whether or not the feature could be classified as a "cornice." The regulation at issue, Subtitle E § 206.1(a), prohibited the removal of a rooftop architectural element original to a building without prior Board approval, both before and after the text amendment that added "cornice" to the provision. That text amendment did not enlarge the scope of the regulation so as to encompass features not previously subject to protection. Instead, the amendment added to the "such as" phrase to provide additional guidance as to the type of rooftop architectural element that cannot be removed without prior approval.[9]

The Board finds no merit in the Appellant's alternative contention that "when that first permit was issued that entailed the removal of the front façade and therefore the cornice, the regulations didn't protect the cornice." (Transcript of October 31, 2018, at 256-257.) The ANC emphasized the location of the feature as at the roofline (but also, the Board notes, more than a foot below the top of the parapet wall, which appeared to be the top of the roof of the building) as well as the purported intent of the regulation and especially of the amendment that specifically mentioned cornices.

[9] The Zoning Administrator acknowledged that, after the initial provision went into effect, some inconsistencies might have occurred in DCRA's case-by-case treatment of features that might be considered cornices or other protected features, until the Zoning Commission "was very clear in adding" cornices to the list of protected rooftop architectural elements. (Transcript of September 19, 2018, at 74-75.)

However, the ANC did not provide a persuasive argument that the Zoning Administrator erred in making a determination that the feature at issue – a cornice or in the nature of a cornice, according to the ANC – was not a "rooftop architectural element."

Because the application for the Original Permit called for the removal of the front façade of the existing building, DCRA had to make a determination before the issuance of the Original Permit as to whether the application entailed the removal of any rooftop architectural element protected under the Zoning Regulations. By approving issuance of the Original Permit, the Zoning Administrator made a determination that neither the alleged "cornice" nor any other aspect of the façade constituted a rooftop architectural element that could not be removed without Board approval. Accordingly, the Board concludes that the Original Permit was the first writing of DCRA's determination that no feature of the existing building at the subject property constituted "a rooftop architectural element" subject to protection under Subtitle E § 206.1(a).

As discussed above, the "first writing" rule specifies that a zoning appeal may be taken only from the first writing that reflects the administrative decision complained of to which the appellant had notice, and no subsequent document may be appealed unless that document modifies or reverses the original decision or reflects a new decision. (Subtitle Y § 302.5.) With respect to the ANC's claim of error relating to the removal of a rooftop architectural element, the administrative decision complained of was made in the issuance of the Original Permit. The ANC did not challenge that decision until the submission of its second revised prehearing statement on June 25, 2018, more than 60 days after the Original Permit was issued. The ANC did not cite any exceptional circumstances that would warrant an extension of the 60-day deadline for the filing of a timely appeal in accordance with Subtitle Y § 302.6, except that the text of Subtitle E § 206.1(a) was amended to mention "cornices" specifically. That text amendment did not alter the substance of Subtitle E § 206.1(a) or create any new category of protected elements; if the feature at issue had been a "roof top architectural element" subject to protection under the Zoning Regulations, it would have been subject to protection before the Original Permit was issued, regardless of whether the Board later concluded that the element was in fact a cornice. The ANC had notice of DCRA's decision to allow the removal of the feature, as reflected in its appeal submitted within 60 days of the issuance of the Original Permit, which raised other claims of error but did not challenge the permitted removal of the feature. No subsequent document modified or reversed the original decision relating to the feature or reflected a new decision, and therefore the revised permits were not appealable on this issue because they did not reflect a new zoning decision, different from the zoning decision made in the initial permit.

The Board was not persuaded by the Appellant's contention that, because the Original Permit was revised twice in 2018 – after the text amendment that added "cornice" to Subtitle E § 206.1(a) effective April 28, 2017 – the revised permits "were subject to the new language" and the element could not be removed absent special exception relief. (Transcript of September 19, 2018, at 252-253; Exhibit 46.) Instead, the Board agrees with DCRA that the First Revised Permit did not alter the original zoning determination with respect to Subtitle E § 206.1(a), and concludes that the Zoning Administrator reasonably determined that the two revised permits were not subject to the amended form of Subtitle E § 206.1(a) because neither of the revised permits substantially altered

the Original Permit with respect to rooftop architectural elements. Therefore, even if the Board now determined that the existing building had a cornice, original to the building, the amended zoning regulation that specifically mentioned cornices would not apply to the revised permits. The Board agrees with the Zoning Administrator's determination that the Original Permit, "which allowed changing of the façade and removal of that element which was characterized as a cornice was vested prior to the enactment of the new regulation …." (Transcript of October 31, 2018, at 244-245.)

The Zoning Administrator's determination that the feature at issue was not a rooftop architectural element whose removal was prohibited by the Zoning Regulations was made in the issuance of the Original Permit. The Board credits the Zoning Administrator's testimony that in this case the Original Permit authorized the removal of the feature at issue and "therefore was vested before the effective date of [Z.C. Order No.] 14-11B." The modifications made by the First Revised Permit were not substantial or germane to the issue of rooftop architectural elements and did not change anything that would have been "caught by" the new regulation. (Transcript of September 19, 2018, at 93.) The Second Revised Permit modified only the roof access hatches and similarly did not authorize changes that were substantial or germane to the issue of rooftop architectural elements. This conclusion is consistent with the ANC's assertion, in its initial prehearing statement, that "the scope of the Original Permit includes the total removal of the front façade and construction of a newly configured façade with bay projection" as "shown on the permit application drawings filed with this appeal." (Exhibits 3D, 20.)

The Board notes that the Intervenor included a claim in his initial prehearing statement that the Original Permit violated "requirements for roof top or upper floor additions," asserting that the removal of "the original façade, including the cornice" was inconsistent with Subtitle E § 206.1.[10] (Exhibit 40.) Even assuming that an intervenor should be permitted to raise a new issue not included in the appellant's statement of the appeal,[11] the Board was not persuaded that the Intervenor's filing required a different result in this case. The Intervenor did not demonstrate that

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[10] Although the Intervenor's revised prehearing statement (Exhibit 48) did not include a claim of error related to the removal of a rooftop architectural element, the issue was included in the Intervenor's post-hearing submission (Exhibit 65). The Intervenor acknowledged that the "original … permit B1706219 did propose completely removing the front façade, including the cornice and parapet, and replacing it with a new two-story bay projection and veranda" before arguing that the First Revised Permit made "significant changes to the front, including by replacing the veranda and making the bay projection three stories tall." The Board finds no merit in the Intervenor's contention that "[t]his new design and construction is subject to the Zoning Regulations as they existed on April 18, 2018, when the [First Revised] permit was issued." For the reasons discussed in this order, the first writing of the zoning decision complained of with respect to removal of the façade element was the Original Permit, and the First Revised Permit did not reflect a new zoning decision in that regard.

[11] An appellant is required to provide a "statement of the issues on appeal" at the "time of filing" an appeal. (Subtitle Y § 302.12(g).) An appeal may not be amended to add issues not identified in the statement of the issues on appeal submitted in response to Subtitle Y § 302.12(g) unless the appellee impeded the appellant's ability to identify the new issues identified. (Subtitle Y § 302.13.) The ANC made no such showing in this case. Moreover, the Board should not grant a motion to intervene in an appeal unless "the intervention would not unduly broaden the issues …." (Subtitle Y § 501.3.) An appeal would be unduly broadened if the Board allowed an intervenor to introduce new issues after the filing of the appellant's statement of issues, without compliance with the requirements of Subtitle Y.

the Zoning Administrator's determination – that a feature located more than a foot from the top of the parapet wall was not a "roof top architectural element" subject to the protection of Subtitle E § 206.1 – was unreasonable or otherwise in error.

Depth of the rear addition. The Appellant argued that DCRA erred in issuing the First Revised Permit because "the current zoning regulations prohibit the construction of a rear addition extending more than 10' past the rear wall of any adjacent dwelling" and "no vesting provision exempts it from this restriction." According to the ANC, the First Revised Permit was subject to the 10-foot limit created in new Subtitle E § 205.4 because it was issued "well after the current text … came into effect" and the Zoning Regulations, at Subtitle A § 301.4, required that any amendment of a permit must comply with the zoning provisions in effect on the date the permit is amended.

The ANC argued that any claim that Subtitle A § 301.14 exempted the First Revised Permit from the vesting rule of Subtitle A § 301.4 would be wrong because neither condition for an exemption was met in this case, where the building permit application was not accepted as complete by DCRA on or before March 27, 2017 and the permit application was not unchanged. (Exhibit 46.) In support of its claim that DCRA did not accept the Property Owner's application for a building permit as complete until March 29, 2017, the Appellant cited an internal email by a DCRA employee (*see* Exhibit 46H). With regard to the second condition, the Appellant asserted that "[c]ompared to the Original Permit application, the [First] Revised Permit application changed substantially by any rational measure," referring to modifications to the internal configuration of both the existing building and the new construction, changes to the materials planned for the front façade, an increase in the height of the projecting bay to three stories, "a markedly different set of proposed roof structures," and alterations to the breezeway "to bring it above grade." (Exhibit 46.)

According to DCRA, construction of the rear addition was authorized by the Original Permit, which was issued on March 31, 2017, at a time when the Zoning Regulations "did not limit rear extensions" since the 10-foot limit did not become effective until almost a month later, on April 28, 2017. DCRA asserted that the First Revised Permit did not trigger the recently adopted text amendments because it did not include any amendments to the authorized construction. (Exhibit 50.) DCRA argued that the application for the Original Permit was accepted as complete on March 24, 2017, and was not substantially changed after filing.

The Property Owner also contended that the permitted construction was not subject to the 10-foot limitation because the Original Permit authorized the construction of a rear addition extending further than 10 feet before the Zoning Regulations were amended and the First Revised Permit modified the Original Permit only "in a very limited manner" unrelated to the extension of the rear addition. According to the Property Owner, "the changes claimed by ANC 6C, including interior reconfiguration of the dwelling units and above grade connection, and redesign of the bay window in public space do not constitute a substantial change that would impose the 10 foot rear yard addition limitation" on the permitted construction. (Exhibit 47.)

The Board finds no error arising from DCRA's approval of building permits allowing the construction of a rear addition at the subject property extending more than 10 feet beyond the rear wall of the principal dwellings on the adjoining lots. The rear addition was authorized by the Original Permit, which was issued before the 10-foot limit went into effect. The modifications approved in the subsequently issued revised permits were not substantial or germane with respect to the authorized construction of the rear addition. The Board credits the testimony of the Zoning Administrator that the First Revised Permit did not trigger the application of the amended regulations because the permit revisions did not effect substantial changes to the approved plans, considering that the intensity of use of the building did not change with respect to number of units or gross floor area, and the mass of the building did not change with respect to height or number of stories; the changes to the building interior, roof hatches, and exterior cladding made in connection with the First Revised Permit "did not rise to a level of being a substantial change" that affected the vesting of the project before the effective date of Z.C. Case No. 14-11B. (Transcript of September 19, 2018, at 65-66, 71.) This determination was consistent with the Zoning Administrator's "long-standing interpretation [regarding] the application of [Subtitle]A [§] 301.4." (Transcript of September 19, 2018, at 215-216.) The Board concludes that the proposed rear addition was appropriately approved by the Original Permit, consistent with the zoning requirements then in effect, and the authorized construction could be carried to completion as permitted, pursuant to Subtitle A § 301.4, because the subsequent revisions authorized by the later building permits were not substantial changes that should have triggered the application of the text amendment imposing a 10-foot limit on rear additions.

The Board does not agree with the ANC's contention that any subsequent amendment of a permit must comply with the requirements of the Zoning Regulations in effect on the date the permit is amended. *See, e.g.*, Appeal No. 19839 (ANC 8A, 2020) ("minor revisions" to plans approved with issuance of a building permit could be made without affecting the vesting of the permit pursuant to Subtitle A §§ 301.4 and 301.5(a).)[12] Such an interpretation would vitiate the protections afforded by the general rule governing the vesting of development rights. Instead, the Zoning Administrator reasonably determined that the subsequent revisions of the Original Permit were not significant or germane with respect to the approved rear addition. The application for the Original Permit was not substantially changed after filing. The modifications listed by the ANC – changes to the breezeway and to internal configurations, materials, the height of the new bay projection, and roof hatches – were not substantial changes germane to the size of the rear addition. Neither revised permit altered the building footprint, its height, or use.

The Board also disagrees with the ANC's contention that the criteria of Subtitle A § 301.14 were not met in this case. The Board credits the Zoning Administrator's testimony that DCRA accepted the building permit application as complete on March 24, 2017; *i.e.*, before March 27, 2017. The Zoning Administrator described DCRA's use of two systems, Projectdox and Accela, to track

[12] Pursuant to Subtitle A § 301.4, any construction authorized by a permit may be carried to completion pursuant to the provisions of the Zoning Regulations in effect on the date that the permit is issued, subject to certain conditions and exceptions. Subtitle A § 301.5(a) governs the processing of an application for a building permit filed when the Zoning Commission has pending before it a proceeding to consider an amendment of the zone classification of the site of the proposed construction.

permit applications. The building permit application was shown as accepted on March 23, 2017, under the plan review coordinator in Projectdox, the software for managing planned submissions, but the Zoning Administrator did not "construe the words Projectdox accepted as the same as complete for processing." DCRA's permit application tracking software, Accela, reflected an acceptance date of March 24, 2017. The Zoning Administrator testified that the email cited by ANC 6C as establishing an acceptance date of March 29, 2017, was treated, "[a]s with other internal deliberations," as information that was "asserted at that point in time." Subsequently, "looking at all the information available," the Zoning Administrator "concluded that it was a different date" – *i.e.*, March 24, 2017 – when the permit application was accepted as complete. According to the Zoning Administrator, March 29, 2017, was "when the plans were deemed ready for review under the [Projectdox] system" and March 24, 2017, was the date when the application "was deemed sufficiently complete for review …. [T]hat was the date that is important, in terms of the vesting date." (Transcript of September 19, 2018, at 102, 112.)

The Zoning Administrator also testified that a relatively short period between the time a permit application is filed and the time the application is accepted as complete "does occur, where an application is then deemed to have enough information, in that time frame, to be complete." According to the Zoning Administrator, the duration of the period between filing and acceptance "varies, depending upon the completeness and robustness of the information submitted" by the permit applicant. (Transcript of September 19, 2018, at 113.) The Property Owner asserted that both the permit applicant and DCRA had prior information that facilitated DCRA's review and approval of the permit application, citing earlier permit applications for the property that were "extensively reviewed" by DCRA for several months before being incorporated "with no substantial changes into a consolidated set of permit plans for resubmission to DCRA" as part of the application for the Original Permit. (Exhibit 47; Transcript of September 19, 2018, at 120-121.)

DCRA and the Property Owner argued that the vesting rule of Subtitle A § 301.14 was properly applied in this case because the subsequently issued permits did not significantly modify the Original Permit, and thus the building permit application, which called for construction of a rear wall extending more than 10 feet beyond the farthest rear wall of an adjoining principal dwelling, was not substantially changed after filing. The Zoning Administrator testified that none of the modifications authorized by the revised permits changed the redevelopment project significantly enough to affect the vesting of the building permit. (Transcript of September 19, 2018, at 104.)

The Board concludes that DCRA properly authorized construction of the planned rear addition at issue in this appeal. The planned construction was not subject to the 10-foot limitation because that limit was not yet in effect when the plans were approved in the issuance of the Original Permit. The authorized construction was not significantly modified by the subsequently issued revised permits. The permits also met the requirements for vesting under Subtitle A § 301.14.

Second principal building. The Appellant argued that the building permits issued for the redevelopment project at the subject property violated the Zoning Regulations by allowing the construction of a second principal building on the same lot. According to the ANC, the new

construction constituted a separate building, as defined in the Zoning Regulations, because the planned connection between the existing building and the new construction would not satisfy applicable requirements sufficient to make the two structures into a single building. The ANC also argued that the new structure would not qualify as an accessory building because it would not be subordinate to the existing principal building and would exceed the limits on building height and number of stories applicable to accessory structures. (Exhibits 3, 20, 35.)

The Zoning Regulations specify that structures that are separated from the ground up by common division walls or contain multiple sections separated horizontally, such as wings or additions, are separate buildings.[13] Structures or sections are considered parts of a single building if they are joined by a connection that is: (a) fully above grade, (b) enclosed, (c) heated and artificially lit, and (d) either (1) common space shared by users of all portions of the building, such as a lobby or recreation room, loading dock or service bay or (2) space that is designed and used to provide free and unrestricted passage between separate portions of the building, such as an unrestricted doorway or walkway. (Subtitle B § 309.1.) A single building shell may contain multiple uses or dwelling units that do not share access. (Subtitle B § 309.2.)

The "breezeway" connection authorized by DCRA in the Original Permit was modified by the First Revised Permit. As finally approved, the breezeway constituted a connection that would be fully above grade, enclosed, heated, and artificially lit. The Appellant acknowledged that "the first three prongs of that test are not at issue," referring to the requirements of Subtitle B § 309.1(a)-(c); that is, a connection that is (a) fully above grade, (b) enclosed, and (c) heated and artificially lit. (Transcript of September 19, 2018, at 24.)

However, the Appellant continued to assert that DCRA had improperly allowed the construction of a second principal building on the lot on the ground that the breezeway, as finally approved, would not serve as either common space shared by users of all portions of the building or as space designed and used to provide free and unrestricted passage between separate portions of the building, as is required under Subtitle B § 309.1(d) so that the two structures could qualify as a single building. According to the Appellant, the breezeway did not meet the requirement of Subtitle B § 309.1(d)(1) because the "narrow (3'8") connecting corridor is not a lobby, recreation room or other qualifying area" and would not serve "as a 'common space' intended for shared functional use, but instead strictly as a means of passage between different portions of the Property …." The Appellant contended that any claim that the breezeway could satisfy Subtitle B § 309.1(d)(2) as a space "designed and used to provide free and unrestricted passage between separate portions of the building, such as an unrestricted doorway or walkway," was "equally unavailing" because "the corridor starts at the rear door – obviously locked – of Unit #1's kitchen

[13] For zoning purposes, "[s]tructures that are separated from the ground up by common division walls or contain multiple sections separated horizontally, such as wings or additions, are separate buildings. Structures or sections shall be considered parts of a single building if they are joined by an enclosed connection that is fully above grade, is heated and artificially lit; and either a common space shared by users of all portions of the building, such as a lobby or recreation room, or space that is designed and used to provide free and unrestricted passage between separate portions of the building, such as an unrestricted doorway or walkway." (Subtitle B § 100.2, definition of "Building, Separate.")

and ends at the entrance – also obviously locked – of Unit #2's living room," and "the locked dwelling-unit entrances at either end of the corridor disqualify it from providing 'free and unrestricted passage between separate portions of the building.'" ANC 6C urged the Board to "see the 'breezeway' for what it is: a fig-leaf connection between two functionally separate buildings that house entirely separate dwelling units." (Exhibits 46, 59.)

DCRA disputed the Appellant's assertions, arguing instead that the existing building and new construction would "have a meaningful connection between them, which makes it a single building" under Subtitle B § 309.1. According to DCRA, the connection satisfied zoning requirements for the creation of a single building because "the lobby connecting the towers [*i.e.*, Units 1 and 2] is designed and intended to provide free and unrestricted passage between the front and rear towers. The connection is enclosed, fully above grade, and heated. The connection is an artificially lit breezeway with a handrail, providing unrestricted passage between the front and rear towers." (Exhibit 56.) The Zoning Administrator testified that his determination that the breezeway satisfied the requirements of Subtitle B § 309.1 was based on his finding that the breezeway would function as a common space shared by users of all portions of the building, similar to a lobby, but that the breezeway arguably would also serve as a space designed and used to provide free and unrestricted passage between separate portions of the building, despite the locked doors leading to the individual units. (Transcript of September 19, 2018, at 68-69.)

The Zoning Administrator testified that the breezeway connection would function as a lobby, similar to a lobby in an apartment house, by providing access to each unit from the adjacent closed court; in that manner, users of all portions of the building would share the breezeway as a common space when traveling between the courtyard and the individual dwelling units. The presence of locked doors leading to the units had no bearing on the Zoning Administrator's determination that the breezeway would serve as common space just as a lobby in an apartment house provides access to individual apartments, each of which would likely have a locked door. (Transcript of September 19, 2018, at 78.)

The Property Owner argued that the permitted project was physically and functionally a single building consistent with zoning requirements because the above-grade connection would be enclosed, heated, and artificially lit, and would provide common space shared by all users of the building as well as space used to provide free and unrestricted passage between separate portions of the building. The Property Owner provided diagrams of travel paths purporting to show how the connection would be common space allowing "use by all the owners, occupants and visitors of the front or rear units to access both the common courtyard and the front and rear of the building by way of the connected corridors" as well as "free, unrestricted and reciprocal access for the owners, occupants and visitors of each dwelling unit to other portions of the building." According to the Property Owner, the regulations governing a connection sufficient to create a single building for zoning purposes did not include a "requirement that each of the units have shared access to the other dwelling units." (Exhibit 47.)

The Board agrees with DCRA and the Property Owner that the breezeway connection satisfied the requirement of Subtitle B § 309.1(d)(1) as a common space shared by users of all portions of the

building, such as a lobby. As proposed, elements of the project would be configured so as to allow access to each of the dwelling units from both the street, at the front of the lot, and from the parking area off the alley at the rear of the property. The property owner designed the project to incorporate access routes below grade both in front of and to the rear of the courtyard, with a shared space at grade – the breezeway – to provide access to each dwelling unit. The breezeway would offer the only means of access to the courtyard from each unit as well as access between the rear entrance of Unit 1 and the alley (for purposes, *e.g.*, of parking and trash collection) and access to the main entrance of Unit 2 (via the courtyard) from the front sidewalk. The Appellant's contention that "[n]either set of residents would ever have any reason to use, or even enter, the half of the breezeway adjacent to the other unit" (Exhibit 59) was not persuasive to counter the conclusion that the breezeway would function as a lobby. The purpose of a lobby is to provide access to a final destination; a lobby does not require all users to travel to all parts of the building served by that lobby. The breezeway would function as a common space that occupants of each unit could use to reach the front or rear of the building, which otherwise would not be possible without a long detour around the block, given the attached nature of the abutting dwellings and thus the absence of side yards. The fact that occupants of Unit 1 would walk toward the west once inside the breezeway, while occupants of Unit 2 would head east, would not convert the single common-area lobby, accessible via a single door from the courtyard, into "functionally two separate, abutting corridors." Similarly, the Board agrees with the Zoning Administrator's determination that the presence of locked doors at the individual units would not negate the shared nature of the use of the breezeway as a lobby.

The Board concludes that the planned breezeway connection between the existing building and new construction was sufficient to meet the requirements of Subtitle B § 309.1, and therefore that the permitted redevelopment project would result in one building at the subject property. In light of this conclusion, the Appellant's arguments with respect to zoning requirements applicable to accessory structures are inapposite, because the permitted new construction would not create an accessory structure at the subject property.

The Board is required to give "great weight" to the issues and concerns raised by the affected ANC. Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)(3)(A) (2012 Repl.)). In this case, ANC 1A was also the Appellant. For the reasons discussed above, the Board concludes that the claims of error raised in this appeal must be dismissed or denied.

Based on the findings of fact and conclusion of law, the Board concludes that the Appellant has not satisfied the burden of proof in its claims of error in the decisions of the Zoning Administrator to approve the issuance of Building Permit No. B1706219, on March 31, 2017, Building Permit No. B1805207, on April 18, 2018, and Building Permit No. B1811245, on August 2, 2018, to permit the enlargement of an attached principal dwelling for use as two principal dwellings in the RF-1 district at 1125 7th Street, N.E. (Square 886, Lot 35). Accordingly, it is therefore **ORDERED** that the **APPEAL** is **DENIED** and the Zoning Administrator's determination is **SUSTAINED**.

VOTE: 5-0-0 (Frederick L. Hill, Carlton E. Hart, Lesylleé M. White, Lorna L. John, and Michael G. Turnbull voting to deny the appeal and affirm the Zoning Administrator's determination)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

ATTESTED BY: _____
SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: August 11, 2021

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.