

December 8, 2017

Meridith H. Moldenhauer

Direct Phone 202-747-0763
Direct Fax 202-683-9389
mmoldenhauer@cozen.com

Frederick L. Hill, Chairperson
Board of Zoning Adjustment
441 4th Street, NW, Suite 200S
Washington, DC 20010

**RE: BZA Case No. 19573
Intervenors' Consent to DCRA's Motion to Reopen Record**

Chairperson Hill and Honorable Members of the Board:

On behalf of Intervenors Graham Smith and Alexis Diao (the "Intervenors"), please consider the following a consent to DCRA's Motion to Reopen Record to include a permit revision for a side deck/balcony guardrail, which is filed in the record at BZA Ex. No. 42. As stated in DCRA's Motion, following the November 15th Board hearing, DCRA informed the Intervenors that a guardrail would be needed on Intervenors' third-floor balcony in order to comply with the building code; although, the guardrail was not required by the zoning regulations. Thereafter, Intervenors immediately submitted a revision to DCRA to comply with this request.¹ The revision adds a guardrail to the third-floor balcony and does not change the project plans in any other capacity. The guardrail permit was issued by DCRA on November 20, 2017 as building permit number B1802077 (the "Guardrail Permit").

The guardrail issue was briefed by the parties and discussed extensively during the November 15th hearing. *See* 11/15 hearing transcript, pp. 156-159, 171-185; *see also* BZA Ex. Nos. 22, 25, 34, 36. The briefing and hearing testimony included whether a guardrail was needed on the third-floor balcony and, if necessary, whether the guardrail would need to be setback. *See* 11/15 hearing transcript, pp. 139-140, 171-175. Appellant herself asserted that a guardrail was needed on the Intervenors' third-floor balcony. *See* 11/15 hearing transcript, pp. 139-140. Ultimately, DCRA agreed that a guardrail was necessary on Intervenors' third-floor balcony in order to comply with the building code.

Further, the Board was fully briefed as to the setback issue regarding the guardrail. As attested to by DCRA, the setback requirements of Subtitle C § 1502 do not apply here because "penthouses are seen as additional to the building envelope that is permitted, so three stories are permitted, the penthouse is there for that area above that third story." *See* 11/15 hearing transcript, 169:14-16. Whereas, the Intervenors' balcony/side deck is "cutout of the third story

¹ The addition of a guardrail does not require a request to modify plans approved by the BZA under Subtitle A § 304.10.

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within the permitted envelope and, therefore, [DCRA] would assert it does not fall subject to the penthouse regulations which are relying on that area outside of those three stories.” *See* 11/15 hearing transcript, 169:19-22.

DCRA further discussed the Zoning Administrator’s determination as to a guardrail setback on a balcony/side deck. In December 2016, the Zoning Administrator determined, in writing, that a balcony with a depth of space less than 10 feet is not subject to setback requirements. *See* BZA Ex. Nos. 25, 36C. The Zoning Administrator testified during the hearing as to this determination, stating “I have settled on ten feet as the place where this is a balcony in which it would not make sense to apply the penthouse setback requirements to the railing or the decking because it would diminish the usability of that.” *See* 11/15 hearing transcript, 173:21-23. As such, Intervenors’ balcony is not a penthouse and there is no setback requirement for a guardrail on the balcony.

The guardrail on Intervenors’ third-floor balcony was part and parcel of this appeal, including in the record and during the hearing. The fact of the Guardrail Permit’s issuance is not material to the Board’s determination of this appeal, and no further hearing is needed. Therefore, Intervenors consent to DCRA’s Motion seeking to reopen the record to include the Guardrail Permit.

We look forward to the Board’s decision meeting on December 20, 2017, and we thank you for your attention to this matter.

Sincerely,

Cozen O’Connor



By: Meredith Moldenhauer

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2017, a copy of the foregoing letter was served, via electronic mail, on the following:

District of Columbia Department of
Consumer and Regulatory Affairs
c/o Maximilian Tondro, Assistant General Counsel
1100 4th Street, SW, Ste. 5266
Washington, DC 20024
Maximilian.Tondro@dc.gov
Attorney for Appellee DCRA

Nefretiti Makenta
3618 11th Street, NW
Washington, DC 20010
dcnef@earthlink.net
Appellant

ANC 1A
c/o Kent Boese, Chairperson
1A08@anc.dc.gov

ANC 1A
c/o Sharon Farmer, SMD Commissioner
1A07@anc.dc.gov



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