**BEFORE THE BOARD OF ZONING ADJUSTMENT**
**OF THE DISTRICT OF COLUMBIA**

**APPEAL NO. 19818 – 1267 PENN STREET, NE**

# PROPERTY OWNER'S RESPONSE TO APPELLANT'S AND INTERVENORS' SUBMISSIONS

## I. Introduction.

This Statement is being filed on behalf of 1267 PENN ST NE LLC ("Property Owner"), the owner of the property located at 1267 Penn Street, NE (the "Subject Property"), in response to the Appellant's and Intervenors' submissions alleging Zoning Administrator error. Property Owner is automatically a party to this Appeal pursuant to Subtitle Y, Section 501.1(c), and is timely filing this submission pursuant to Subtitle Y, Section 302.17.

## II. Discussion of Appellant's and Intervenors' Allegations.

### A. The Third Story Would Improperly Remove the Existing Parapets

The Appellant has included allegations that parapets are architectural elements according to 11-E DCMR§ 206.1(a). As noted in DCRA's prehearing statement, parapets are not architectural elements. Parapets are not specifically included in the provision regarding architectural elements. The Appellant claims that because the language in the Regulations uses the phrase "such as", that the term "architectural elements" must automatically include parapets. The Appellant provides no support for such an argument.[1] It is in the discretion of the Zoning Administrator to determine what is and what is not an architectural element, and he has interpreted that provision very broadly in the past. It is the Appellant's burden of proof to show that the Zoning Administrator made a clear error in finding that a straight brick wall parapet is not an architectural element. The Appellant has provided nothing beyond their opinion and therefore has clearly not met that burden.

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[1] The Appellant argues that provisions of the Zoning Regulations about undue concentration of population, and distribution of population resolve "any remaining doubt" that parapets are architectural elements. The Property Owner fails to see the logic in that argument, as there is no connection between the architectural classification of a parapet and the undue concentration, or distribution, of population.

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### B. The "Roofdeck" Would Be Improper in Both Existence and Design

The Appellant is alleging that the Zoning Administrator erred in allowing a non-compliant "roofdeck" in the building permit plans for 1267 Penn Street, NE. In an attempt to support this allegation, the Appellant is relying on the definition of a penthouse in 11-B DCMR § 100.2.

What the Appellant calls the "roofdeck" is actually just the roof of the proposed Building. Setback requirements do not apply to a flat empty roof, and there is nothing in the Zoning Regulations that prohibits the recreational use of a building's roof top. The Appellant has not met its burden of proof.

### C. The Third Story and "Roofdeck" Would Detriment the Neighborhood's Character and the Overall Environment

The Appellant has included allegations that the "roofdeck" would go against Trinidad's character by blocking some residents' views of Downtown DC and by being inconsistent with the whole neighborhood's character. It is not clear what section of the Zoning Regulations the Appellant is claiming that the Zoning Administrator failed to comply with, if any. Height and Story requirements are clearly provided in the Zoning Regulations, and Appellant does not appear to be challenging these aspects of the project. The Appellant seems to be arguing for an arbitrary standard of height – separate from the requirement that applies to all other RF-1 buildings not adjacent to his property - based on his particular sensibilities or desires. He is free to make that argument, but it has nothing to do with any Zoning Regulation and does not represent any potential instance of error by the Zoning Administrator.

### D. The "Roofdeck" Would Present Safety and Privacy Issues

In a Supplement to the Pre-Hearing Statement, the Appellant and Intervenors alleged that the *Appellant's* skylight is against the wall shared with 1267 Penn Street, NE. They also alleged that the skylight opens up into a bathroom. In an attempt to claim invasion of privacy, the Appellant and Intervenors argued that anyone on the "roofdeck" could peer over the side and see the Appellant in the bathroom because the "roofdeck" would be too large and lack the required

setbacks. As noted above, there is no penthouse being provided on the Subject Property, and therefore no setback requirements. Appellant has not alleged an error here and has not met his burden in this Appeal.

**E. <u>Changes to the "Bump-Out" Structure Represent an Addition to a Nonconforming Structure.</u>**

The Intervenors inaccurately claim that the footprint of the "bump-out" is being expanded, by adding basement space and a terrace. The basement space is below grade, and is not considered an addition, and in no way expands the footprint or the scale of the above-ground "bump-out". Likewise, the provision of parapets or railings on top of the existing one-story "bump-out" do not represent an "addition" and therefore also do not expand the existing nonconforming structure.[2]

**F. <u>The Rear Wall, as Built, Would Not Adhere to the Rear-Yard Requirements</u>**

The Appellant and Intervenors allege that the rear wall is only seventeen feet and ten inches (17'10") from the rear property line plus or minus two inches (+/- 2") and would therefore not adhere to the relevant rear-yard requirements. They also allege that a rear wall is not grandfathered in even though 1267 Penn Street, NE was built in 1927 and extensions may be made into the required rear yard for buildings existing on or before May 12, 1958.

[2] See BZA Order No. 17971 (p.6-7), in which the Board discussed the addition of railings and the creation of a roof terrace: "With regard to the roof deck, the Board was not persuaded by the Appellant's contention that the deck was an "addition" by virtue of the transformation of an "unusable" roof into a usable deck, thereby increasing the value of the dwelling. Rather, the Board credits the ZA's testimony that the deck did not constitute an addition because the deck was not an enclosed space and thus did not create interior useable space in the dwelling, did not create any additional space that was not already available to the homeowner, did not increase the floor area ratio of the dwelling, and did not increase the lot occupancy because the extension of the dwelling under the roof was already part of the calculation. Further, the roof was not previously "unusable" but served as the roof over a portion of the dwelling. While the occupants of the dwelling are more likely to venture out on the roof after the installation of flooring, a railing, and a convenient means of access, the outdoor space occupied by the deck already existed and thus the new deck did not comprise an addition to the dwelling that required relief as an enlargement of a nonconforming structure."

At the time of the Appellant’s original citation of this issue, the originally approved plans contained a dimensional error. That error has since been corrected, and the plans have been revised and approved. The rear wall will be a distance of 18’ 6” from the rear lot line, as measured pursuant to Subtitle B, Section 318.3. This is permissible because it was the previously existing nonconforming location of the rear building wall. Attached as Exhibit A is a copy of the revised Surveyor’s Plat.

**G. The Driveways Will Not Meet the Size and Layout Requirements**

In a Final Supplemental Pre-Hearing Statement, the Appellant alleged that two parking spaces will violate the parking requirements of 11-C DCMR § 712.5 because the rear wall is “roughly 17’ 10” from the rear property line” and will thus restrict the driveway length to 17’ 10”.

No parking was required for buildings built prior to May 12, 1958. The Zoning Regulations do, however, prohibit the removal or reduction of any parking space which has been provided for such a building. This parking space is not being eliminated, or reduced from its previously existing size, and therefore is not in violation.

**H. Intervenor Claims the Structure was Demolished**

The front façade and the east party wall of the existing Building have been retained, and the Zoning Administrator has made the determination, based on consistent application over many years, that this level of demolition does not represent a “full zoning raze.” There is no definition of “raze” in the Zoning Regulations. There is a definition in the Building Code, and it is a much more difficult standard to meet than the policy that the Zoning Administrator has adopted. As currently constituted, the front façade would have to be removed entirely before being considered a raze under Building Code.

Furthermore, it is not clear what grievance the Appellant is attempting to cure by arguing that the Building has been demolished. If this were determined to be a full raze, the Property Owner could design a building with a larger footprint, but for one and a half feet of rear yard. In addition, the Appellant’s “parapet” argument would be irrelevant, as the architectural element retention provision does not apply to new construction.

## III. The Intervenor's Complaint Was Not Timely Filed and Was Waived Based on False Information.

At a hearing session on September 26, 2018, the Appellant stated (and the Intervenor did not dispute), that "there was no way that the Telle's could have known about [the alleged side yard violation] until building actually began on July 30th." Based in no small part on this statement, the Board decided to waive the 60-day requirement for a timely appeal filing.[3] This is a decision that the Property Owner would not disagree with except for the fact that the testimony was simply not true and was critically misleading. Effectively, the Intervenor's and Appellant's argument was that they did not know of the administrative decision they were now complaining of until July 30, 2018.

In a subsequent filing, however, Intervenors were much more forthcoming about their knowledge of the alleged side yard violation, noting that they knew about the administrative decision as early as April 10, 2018 – more than five (5) months prior to their intervenor request. On that date, the Intervenors sent the previous property owner a letter noting "that the proposed plans do not comply with the 5-ft side yard requirement." The Intervenor's Exhibit B to their prehearing submission is a copy of that letter. The letter provides very specific detail about the alleged side yard violation, including citation of specific sections of the Zoning Regulations.

So by their own late admission, Intervenors had actual and apparently well-informed knowledge of the administrative decision it now complains of, more than five (5) months prior to the time it made its first filing in this Appeal. And the side yard issues raised by Intervenors was not raised by the Appellant in his filings. In that five-month period, while Intervenors held the knowledge of their eventual claim, the Property Owner proceeded with significant construction involving the "bump-out" area now being challenged by Intervenors.

The timeliness requirement can only be waived if the appellant (intervenor) demonstrates that: (a) There are exceptional circumstances that are outside of the appellant's control and that could not have been reasonably anticipated that substantially impaired the appellant's ability to

[3] Boardmember John stated: "I'm in support of waiving the time requirement based on the explanation given by the intervener. And, also the applicant's explanation that he might not reasonably have known of the potential problem until his side yard collapsed [per the Appellant, July 30th]."

file a zoning appeal; and (b) the extension of time will not prejudice the parties to the zoning appeal. The Intervenor did not claim any such circumstances of impaired ability, and the extension of time clearly prejudices the Property Owner.[4]

The Property Owner was present when the issue of timeliness was first discussed, and based on the testimony submitted at that time, did not oppose the Intervenor's request. However, based on the newly provided evidence showing that the Intervenors researched the Zoning Regulations and laid out a detailed argument for the alleged side yard violation five (5) months prior to their first filing - the Property Owner requests that the Board reconsider its original decision and find Intervenor's claim to be untimely filed, based on the corrected record.

## IV. The Side Yard Collapse.

The Property Owner deeply regrets the situation which led to the side yard collapse on the Intervenor's property. On Sunday morning, September 8th, the contractor received a call from Shelby Telle, the neighbor, stating that due to excessive rain a tree had fallen over and created a crater in their side yard. The contractor, with a staff of eight (8), was at the site promptly. They cut the tree down and covered Intervenors' yard with a tarp to keep it from getting more saturated. The contractor then agreed that it would take care of all remediation of the issue including back-filling the yard, providing new sod, and fixing the damaged cedar fence. The Telle's notified the contractor that they, understandably, wanted to be in charge of the final landscaping and fence replacement. As soon as conditions allowed, the Telle's side yard was back-filled with dirt, and their fence was replaced temporarily for safety. At that point, and through this day, the Property Owner stands ready to cause, or pay for, the completion of the landscaping and fence replacement. The Telle's have informed the Property Owner that they prefer to wait until the Appeal is resolved. At any rate, the Property Owner will do whatever is necessary to restore the Intervenors' property back to its original condition.

## V. Conclusion.

[4] It is important to note, also, that on the issue of timeliness, the Appellant and Intervenor, on September 26, claimed ignorance of the Zoning Regulations as a defense to Intervenor's late filing. Yet, they bring this Appeal with absolute certainty of their expertise in those same Zoning Regulations.

The Appellants have failed to meet their burden of proof to show that the Zoning Administrator erred in approving the subject building permit. The Appeal should therefore be denied.

Respectfully Submitted,

Martin P Sullivan

Martin P. Sullivan

**CERTIFICATE OF SERVICE**

I hereby certify that on December 12, 2018 a copy of the foregoing submission was served via electronic mail to:

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