BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

APPEAL NO. 19818 – 1267 PENN STREET, NE

PROPERTY OWNER'S CLOSING ARGUMENT

I. Introduction.

This Closing Argument 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"), an automatic party to this Appeal.

II. Procedural Matters.

This Appeal, as a matter of law, is limited to the specific claims of Zoning Administrator error raised by the Appellant, Stephen Cobb, in his initial filing. The Appellant is not permitted to add new claims after the initial filing, and Intervenors are also not permitted to unduly broaden the appeal by adding new claims. Therefore, any issues raised after the Appellant's initial filing are not properly before the Board, and should be dismissed, including the later-filed claims of a side yard violation, zoning raze, and rear yard setback violation.

A. Claims Cited in Initial Filing.

The Appellant, upon his initiation of this Appeal, was required, pursuant to 11-Y DCMR § 101.12(g), to file **"[a] statement of the issues on appeal, identifying the relevant subsection(s) for each issue of the Zoning Regulations**." He was then prohibited from amending the appeal to add issues not identified in his initial statement of the issues, pursuant to 11-Y DCMR § 101.13. In the initial Appeal filing, the Appellant cites four sections of the Zoning Regulations, two of which relate to this Appeal's two specific claims: that the third story addition and the "roof deck" were approved in violation of the cited provisions.[1]

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[1] An appellant does not have the right to file a general appeal, or an appeal of the "entire permit." The claims of Zoning Administrator error must be alleged specifically, with the relevant section of the Zoning Regulations cited. Although, even in the instance of Mr. Cobb taking exception to the "entire permit," it appears that this was done only for the specific claim of error that the permit was issued in the name of a previous owner. This, however, would not be an error in the

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As to the third story, the Appellant cited 11-E § 206.2(a), claiming that a parapet is an architectural element and as such cannot be altered. As to the "roof deck", the Appellant cited 11-C § 1502.1 (a)-(c), claiming that the roof of the structure itself was a "penthouse" and subject to setback requirements. The other two citations to the Zoning Regulations include the entire definition section, and a general purpose and intention statement, which does not include any specific zoning restriction, but is merely a statement of purpose describing the intent behind the specific Zoning Regulations for the RF-1 zone.

B. Appellant May Not Add Issues after Initial Filing.

11-Y DCMR § 101.13 provides that **"[a]n 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**." Any attempt by the Appellant to add new issues beyond the two narrow issues presented in his initial filing relating to the parapet and the "roof deck" is prohibited and must be dismissed by the Board. This would include the claim of a side yard violation as well as the claim that the structure has been razed, as well as any other claims raised at any time after the initial filing.

C. Intervenors May Not Unduly Broaden the Appeal by Adding New Issues.

11-Y DCMR § 103.3 provides that: "[a]ny person may move to intervene in a zoning appeal and may become an intervenor thereto if the Board finds that the party has an interest that may not be adequately represented by the automatic parties; **provided, that the intervention would not unduly broaden the issues or delay the proceedings.**"

The Intervenors initially attempted to file a separate appeal, in which, it is presumed, they would allege new issues not included in the Appeal (including an allegation of a side yard violation and an allegation that the structure has been razed). When told by the Office of Zoning staff that their appeal would be untimely, they instead filed a Motion to Intervene, in which they are attempting to do exactly what they were procedurally prevented from doing in filing an

administration or enforcement of the Zoning Regulations, as is required for the Board to have the jurisdiction to consider that claim. (11-Y DCMR § 100.4.)

appeal. The BZA's rules of procedure, however, do not permit an appellant or an intervenor to expand the issues in an Appeal after the initial filing date.

Further support for that position can be found by reviewing the intervenor filing requirements, under 11-Y DCMR § 104.1(i)(1). An intervenor must state how their interest would be "affected by the action requested of the Board." The "action requested of the Board" at that point, and now, is only what was claimed in the Appellant's initial filing.

The Intervenor may therefore only intervene for the purposes of participating in discussion of the two narrow issues filed in the original Appeal. To find otherwise would make the Intervenor a separate Appellant, which is something they did not apply for and which was not accepted, as it was untimely, but it would also leave the door wide open for anybody to introduce completely new claims to an existing appeal at any time, since there is no time limit for a Motion to Intervene.[2]

D. Summary of Procedural Matters.

As discussed above, the Appellant raised only the architectural element and "roof deck" claims in his original filing. He is not permitted to add new issues after that date. The Intervenor is not permitted to unduly broaden the Appeal by adding new claims. Therefore, this Appeal is limited to the claims made in the Appellant's original filing, namely, that the parapet is an architectural element, that the "roof deck" is subject to penthouse setback requirements, and that the third story should be prevented pursuant to sections of the Regulations which generally relate to the purpose behind the Zoning Regulations. Claims of a side yard violation, zoning raze, or rear yard setback violation are not properly before this Board and should be dismissed.

III. Discussion of The Issues in the Appeal.

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

[2] As was proven in previous filings, the Intervenors knew of an alleged side yard violation as early as five (5) months before they attempted to join this Appeal.

architectural elements. The subject parapet, in particular, is simply additional rows of bricks, with no cornice or any other type of ornamental or architectural embellishment. Additionally, Parapets are not specifically identified as being 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 Owner agrees in part: The use of the phrase "such as" does indeed mean that a feature does not need to be specifically listed to be included as an architectural element. It does not mean, however, that parapets are automatically one of those other included items. The Appellant provides no other support for his position. No opinion from an architect. No example of a parapet ever being identified as an architectural element for the purpose of invoking E-206, or for any other purpose for that matter. No evidence of the Zoning Administrator ever invoking E-206 against a parapet.

It is in the discretion of the Zoning Administrator to determine what is and what is not an architectural element, and even though he has broadly interpreted that provision to date, he has never identified a parapet as an architectural element. 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 his own opinion. He therefore has not met his burden of proof.[3]

B. <u>The "Roofdeck" Would Violate Penthouse Setback Requirements</u>.

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

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[3] 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, as there is no connection between the architectural classification of a parapet and the undue concentration, or distribution, of population. Even if the parapet was considered an architectural element, the Owner could still build a third story directly the parapet. So the existence of an architectural element here would have no effect on the density of this building.

Regulations that prohibits the recreational use of a building's roof top. The Appellant is correct that a penthouse is defined as a "structure on a roof." By this definition alone, the Appellant disproves his own case, as the penthouse is indeed a structure on a roof. As such, it cannot also be the roof itself. There is no penthouse in this project. Therefore, there can be no penthouse setback violations or any other violation relating to a penthouse. The Appellant has not met his 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 neighborhood's character. To support this claim, the Appellant cites a general purpose provision of the RF-1 Zoning Regulations, which is merely a statement describing the general purpose behind specific Zoning Regulations which then follow in specific detail. Of those following Zoning Regulations are provisions which allow a building to be constructed to thirty-five (35) feet in height and three (3) stories. In adopting such specific provisions, the Zoning Commission is stating in as clear of terms as possible, that three (3) stories and thirty-five (35) feet in height do indeed comply with the precursor general purpose statement of 11-E DCMR § 100.3(a).

If the Appellant were correct, that the Zoning Administrator is ***required*** (not just permitted) to arbitrarily restrict heights beyond the specifically-provided limits, in cases where he sees fit based on a universe of factors, then every single decision of the Zoning Administrator could be subject to an appeal and a general, wide-ranging discussion of views, character, etc. Such an exercise is not even remotely an aspect of the zoning scheme, in this City or anywhere else, as one purpose of the Zoning Regulations is to provide clarity and reliability for all parties as to what is and is not permitted in a particular zone. In any event, the Appellant has not met his burden to prove Zoning Administrator error.

V. Conclusion.

Regarding the three claims of error legitimately before the Board in this Appeal, the Appellant has failed to meet his burden of proof to show any error by the Zoning Administrator. Claims made by the Appellant or the Intervenor after the initial filing of the Appeal should be dismissed. The Property Owner therefore respectfully requests that the Board deny the Appeal.

Respectfully Submitted,

Martin P Sullivan

Martin P. Sullivan, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2019 a copy of the foregoing submission was served via electronic mail to:

Clarence Lee, Chairperson
ANC 5D
5D07@anc.dc.gov

Adrianne Lord-Sorensen, DCRA
Adrianne.lord-sorensen@dc.gov

Stephen Cobb, Appellant
sacobbva@gmail.com

Adam and Shelley Telle, Intervenors
shelbytelle@gmail.com

Martin P Sullivan
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Martin P. Sullivan