BOARD OF ZONING ADJUSTMENT FOR THE DISTRICT OF COLUMBIA

Case No. 19818

Appellant's Closing Statement

The Appellant, Stephen Cobb, thanks the Board for its time and attention to this matter. Although the issues and arguments have evolved during this appeal, there are only three issues now at stake: the third story, the penthouse, and the side yard. On each issue, the Appellant has met his burden in demonstrating that they present zoning violations. The Appellant's arguments are also echoed in the ANC 5D Report (Exhibit 46), which the Board must give "great weight." 11-Y DCMR § 503.2. Finally, while DCRA offered its interpretations of the Zoning Regulations, the Board must keep in mind that, as the D.C. Court of Appeals has "often held," it "is the Board, not the Zoning Administrator, which has final administrative responsibility to interpret the zoning regulations." *Bannum, Inc. v. D.C. Bd. of Zoning Adjustment*, 894 A.2d 423, 431 (D.C. 2006). The Appellant therefore asks that the Board grant Mr. Cobb's appeal and vacate Permit B1804093.

1. The Third Story Would Require Removing the Parapets Without a Special Exception

The first issue here concerns the third story: According to the construction plans, the parapets along the roof be removed. This would violate 11-E DCMR § 206.2, which requires a special exception before removing roof top architectural elements.

A. 11-E DCMR § 206.1(a)'s List of Roof Top Architectural Elements Is Illustrative

Under § E-206.1(a), roof top architectural elements are elements "such as cornices, porch roofs, a turret, tower, or dormers." The use of *such as* here indicates that this list provides examples of roof top architectural elements, not the only elements that would qualify as such. This interpretation is supported by common usage, the U.S. Supreme Court, the District of Columbia Court of Appeals, other zoning provisions that use the phrase, and interpretive principles outlined in the Zoning Regulations. (Exhibit 34A at 1; Exhibit 54 at 1–2). There are then, other exterior features that qualify as roof top architectural elements under § E-206.1(a). (*See also* Transcript at 230:18–233:13).

B. Parapets Are Roof Top Architectural Elements Under § E-206.1(a)

Parapets are one such exterior feature. The elements listed in § E-206.1(a) all complement the roof in a functional or design-oriented way. Parapets complement the roof in both ways: They accent the roof line, protect roof top gardens and solar panels, prevent water damage to building exteriors, and protect against falls. (Exhibit 54 at 2). And parapets, like the elements listed in § E-206.1(a), can be attached to the roof itself. In fact, cornices might not even be attached to the roof but rather directly to the wall, yet they are still considered roof top architectural elements. (Exhibit 54 at 2). Last, various District statutes and regulations implicitly acknowledge this relationship between roof tops and parapets. (Exhibit 54 at 2). Thus, in purpose and architecture, and as recognized in District law, parapets are a roof top architectural element.

At the hearing, Zoning Commissioner LeGrant pointed to § 206.1(a)'s recent amendments to argue that parapets are not included on the list. Specifically, he noted that cornices and porch roofs were added to the list in 2017, which would have been the time for the Zoning Commission to add parapets. (Transcript at 247:9–17). But regulations must be construed according to their common meaning, which the D.C. Court of Appeals "assume[s] best reflects the intent of the legislature." *Johnson v. D.C. Dep't of Employment Servs.*, 111 A.3d 9, 11 (D.C. 2015); *see also* Exhibit 54 at 1–2. Under § E-206.1(a)'s plain language, the list in that section is only illustrative and includes parapets.

But even if the Board looked past the text to the Zoning Commission's motives for creating § E-206.1(a)'s list, the same result follows. Commissioner LeGrant stated that *roof top architectural elements* "is those things that have some design aspect that have a feature that helps articulate a building that project above the roof that are usually designed by the designer or [architect] to bring interest to the building and, especially in our older buildings, are to be preserved." (Transcript at 258:20–24). Parapets' very nature is to project above the roof, and they are designed by the architect to increase the perceived height of the building, adding interest to the structure. Under § E-206.1(a)'s text and purpose, parapets belong on the list.

Finally, interpreting § 206.1(a) to include parapets would prevent an inconsistency. As Commissioner LeGrant pointed out, cornices are expressly included in § 206.1(a). Thus, a parapet would be subject to a special exception if it included a cornice. (Transcript at 285:19–23). A parapet, however, is no less an architectural element than a cornice.

Interpreting § E-206.1(a) to include parapets would not cause a mass of other exterior features to be included on the list. For something to be included in § E-206.1(a), it must be (1) a roof top element that is (2) architectural in nature. So elements that are simply attached to load-bearing walls (such as window sills) would not be included, because they are not roof top elements. And elements that are purely design-oriented (such as exterior paint) would not be included, because they are in no way architectural. Were the Board to interpret § E-206.1(a) to include parapets, it would not open the door to a flood of other items being included on the list.

Nor would such an interpretation pose a mass of new practical problems for developers. Commissioner LeGrant confirmed that, if a developer preserved the parapet, he or she could still build a third story right behind that parapet. (Transcript at 285:24–286:2). The parapet could also be incorporated into the third-story exterior wall. Indeed, this is consistent with what developers have done in the District, when they keep the exterior walls, gut and rebuild the interior, and add a third story. And of course, not all homes in the District even have parapets. (Transcript at 272:21–22). Interpreting § E-206.1(a) to include parapets would thus result in little practical change to current practice.

Section E-206.1(a) includes a list of roof top architectural elements. This list is only illustrative, and other elements may be included on the list. From any perspective, parapets belong on that list. It would be consistent with the Zoning Regulations' text and purpose; parapets share critical features with the named roof top architectural elements; excluding parapets would create an interpretive inconsistency; and including parapets would not create any major burdens for the Board or developers. The Board should thus interpret § E-206.1(a) to include parapets.

2. The Roofdeck Penthouse Is Too Large and Lacks the Required Setbacks

Under the Zoning Regulations and by the Appellee's own description, the roof structure here is a penthouse. It is thus subject to the penthouse regulations for RF-1 properties. The penthouse is thus three times too large and lacks the necessary one-to-one setbacks.

A. The Roof Structure Proposed Here Is a Penthouse

The roof structure has been designed to be a deck. Roof decks have two basic elements: the floor and the guardrails. Here, the proposed penthouse floor would be the roof itself. This roof, however, will not be composed of shingles, tar, or other roofing material. Rather, it will be made up of Versadeck "flooring veneer," like one might find on an outdoor deck. (*See* Transcript at 250:12, 250:17–19). What is more, the roof structure here has guardrails in the form of parapet walls. This floor and the parapet walls will be attached to the load-bearing walls, which has a permanent location on the ground. Thus, the structure here has been designed to be a penthouse that is combined with the house. (Exhibit 34A at 1–2; Exhibit 54 at 2–3).

This conclusion is bolstered by the Appellee's own plans submitted in support of the building application, which repeatedly label the roof structure as a roof deck. (Exhibit 33A at 8; Exhibit 54 at 3). In design, intended use, and the Appellee's submissions, the roof structure is a penthouse.

B. The Penthouse Is Too Large and Lacks the Required One-to-One Setbacks

Penthouses on RF-1 properties may take up only one-third of the roof space, yet the penthouse proposed here would take up the entire roof. And while penthouses on RF-1 properties must have one-to-one setbacks, the penthouse here would have none. It thus violates the Zoning Regulations in both respects. (Exhibit 2 at 2–3; Exhibit 34A at 2; Exhibit 54 at 3).

At the hearing, Mr. Cobb introduced a Zoning Administrator Determination Letter. (Exhibit 55A). Mr. Sullivan later cited this letter to argue that setbacks are not necessary because the parapets are less than four feet high. (Transcript at 286:17–20). But in this case, such a conclusion would directly contradict the Zoning Regulations. *See* 11-C DCMR § 1502.1(a), (b), (c)(2). Instead, this conclusion seems to conflate the setback requirement and the use limitation. Section C-1500.2 states, "*Except for compliance with the setbacks required by Subtitle C § 1502* and as otherwise noted in this section, a penthouse that is less than four feet (4 ft.) in height above a roof or parapet wall shall not be subject to the requirements of this section." (emphasis added). Thus, no matter a penthouse's height, it is still subject to the setback requirements. Because the roof structure here is a penthouse, is too large, and lacks any setbacks, it violates the Zoning Regulations.

3. The Side Yard Does Not Meet the Five-Foot Minimum Width

At the December 19 hearing, the Office of the Attorney General's representative notified the Board that the side-yard issue may be untimely. But even if it is untimely, the Board has the authority to consider the issue, and should do so here.

While a side yard is not required here, if it exists then it must be at least five feet wide. The plans here do not provide for that. Nor can the Appellee claim that the side bump-out creates an

exception: The prior house was demolished and so is not being altered, the bump-out cannot be considered in measuring the previous building's footprint, and the plans call for a side extension into the side yard beyond the bump-out. Even if the proposed side extension is allowed, however, it is still too narrow.

A. The Board Should Consider the Side-Yard Issue

a. The Board Has Already Ruled That the Intervenors' Claim Is Timely and Proper for Consideration

At the December hearing, the Office of the Attorney General's representative informed the Board that the Intervenors' claim might have been brought too late. (Transcript at 219:5–221:10). The Zoning Regulations, however, do not impose the 60-day filing deadline on intervenors. Rather, the deadline applies only to appellants. The Regulations state only, "A zoning appeal shall be filed within sixty (60) days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier." 11-Y DCMR § 302.2. This regulation says nothing about the intervenor.

Instead, there is a separate regulation for intervenors: If someone otherwise qualifies for intervenor status, she may become an intervenor only if "the intervention would not unduly broaden the issues or delay the proceedings." 11-Y DCMR §§ 501.3, 502.13(b)(4). The only inference to draw from this is that intervenors may broaden the issues—but not unduly—and may not delay the proceedings.

The Board has already ruled that the Telles' intervention does neither. The Board must grant intervenor status only if the person requesting intervenor status satisfies certain requirements, including clearly demonstrating that the intervention would not unduly broaden the issues or delay the proceedings. 11-Y DCMR § 502.13(b)(4). Because the Board has already made this ruling, it cannot backtrack and reverse that decision. Indeed, the Zoning Regulations provide no way for the Board to undo this decision. The only way to undo it is if the intervenor withdraws from the appeal. *See, e.g.*, *id.* § Y-502.17.

This appeal's procedure supports this conclusion. While "undue" is a matter of interpretation rather than a matter of fact, whether a delay has occurred is a matter of fact. And the facts show that the Telle's intervention has caused no delay. The Board considered and granted the Telle's motion to intervene during the hearing on September 26. Consideration of the merits was then postponed because Administrator LeGrant was out sick. (Sept. 26 Transcript at 46:21–47:4). Then, at the hearing on November 28, the Board granted the Appellee's motion to postpone so that DCRA and the Appellee's newly acquired counsel could respond to the Appellant's and Intervenors' claims. (Nov. 28 Transcript at 44:24–45:16, 45:23–46:1). While there was some delay in this case, it was due to procedural matters unrelated to the breadth or timing of the Telles' claim. Their intervention, as the Board ruled on September 26, has not unduly broadened the issues or delayed these proceedings.

b. The Appellant and Intervenors Have a Reliance Interest in the Board's Previous Ruling

Not only has the Board already ruled that the Intervenors may present their side-yard argument, but also the Appellant and Intervenors have a reliance interest in that ruling. Since September, all the parties have fully briefed and argued the side-yard issues. The Appellant and Intervenors put in the effort for these arguments, and the Intervenors appeared at the hearings, in reliance on the Board's ruling granting the Telles' motion to intervene and state their claim. (*See* Transcript at 298:7–14). This reliance is especially critical here because, as Chairman Hill noted, the Appellant and Intervenors are not land-use attorneys or zoning-appeal professionals. (Transcript at 218:6–18). Were the Board to deem the Intervenors' claim improper, it would undercut that reliance interest.

c. Allowing the Intervenors' Claim to Proceed Would Not Prejudice the Appellee or DCRA

Because the Appellant and Intervenors would make the same arguments on this point, the Appellant will simply note his concurrence with the Intervenors' arguments as if they had been made separately here.

B. The Side Yard Is Too Narrow

In the RF-1 zone, principal buildings do not require a side yard. But if one is provided, it must be at least five feet wide. 11-E DCMR § E-307.3. Here, the plans provide for a side yard that would be too narrow in the rear of the house. (Exhibit 29C). The side yard is thus too narrow in that portion of the house. (Exhibit 31 at 2). The Appellant also agrees with the Intervenor's arguments on this point.

C. The Previous Property Was Razed, So the Project Here Is Not an Alteration

Here too, because the Appellant and Intervenors would make the same arguments on this point, the Appellant will simply note his concurrence with the Intervenors' arguments as if they had been made separately here.

Conclusion

Mr. Cobb thanks the Board again for its time, attention, and patience throughout this matter. Despite this appeal, Mr. Cobb would like to emphasize that he truly does want the property to be renovated. Before demolition, it was an eyesore and unfit for living. Mr. Cobb wants nothing more than for that house to be turned into a home.

Still, that home must comply with the Zoning Regulations. And as Mr. Cobb, the Telles, and the ANC have demonstrated, there are issues with the third story, the roof structure, and the side yard. So for the reasons outlined here, in Mr. Cobb's other pleadings, in the Telles' pleadings, and in the ANC Report, Mr. Cobb asks that the Board vacate Permit B1804093.