GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 19961 of Advisory Neighborhood Commission 1C, pursuant to 11 DCMR Subtitle Y § 302, from the decision made on November 2, 2018 by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Building Permit No. B1806082 to allow a three-story building in the RF-1 Zone at 2910 18th Street N.W. (Square 2587, Lot 495).

HEARING DATES: April 3 and June 19, 2019
DECISION DATE: July 31, 2019

PROPOSED ORDER GRANTING APPEAL IN PART AND DENYING APPEAL IN PART

This appeal was submitted on December 31, 2018 on behalf of Advisory Neighborhood Commission 1C (the "ANC" or "Appellant") to challenge a decision made November 2, 2018 by the Zoning Administrator, at the Department of Consumer and Regulatory Affairs ("DCRA"), to approve issuance of a building permit authorizing construction of a building in the RF-1 zone at 2910 18th Street, N.W. (Square 2587, Lot 495).[1] Following a public hearing, the Board voted to grant the appeal in part and to deny the appeal in part.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda and letters dated February 14, 2019, the Office of Zoning provided notice of the appeal and of the public hearing to ANC 1C as the Appellant and the ANC in which the subject property is located, the Single Member District ANC 1C05, the Zoning Administrator, the Office of Planning, the Office of Advisory Neighborhood Commissions, and to the Chairman and the four at-large members of the D.C. Council as well as the Councilmember for Ward 1, the ward in which the subject property is located. On December 31, 2018, the Appellant provided a copy of the appeal to Kehoe 2910 18TH ST NW, LLC, the owner of the subject property ("Property Owner"). Notice was published in the *D.C. Register* on February 8, 2019 (66 DCR 1818).

Party Status. Pursuant to Subtitle Y § 501.1, ANC 1C, DCRA, and the owner of the subject property, Kehoe 2910 18th ST NW LLC, were automatically parties in this proceeding. The Board granted a request for intervenor status submitted by Guillermo and Wendy Rueda ("Intervenors"), the owners of a dwelling on a property abutting the subject property.

[1] As of October 1, 2022, the zoning functions formerly performed by the Department of Consumer and Regulatory Affairs were assumed by the new Department of Buildings. *See* D.C. Official Code § 10-561.01 *et seq*.

Appellant's Case. At a public meeting on December 5, 2018 with a quorum present, ANC 1C adopted a resolution authorizing the ANC to appeal a building permit issued for construction at the subject property. The resolution alleged that the building permit was issued in violation of certain provisions of the Construction Code as well as zoning regulations governing building height and the retention of rooftop architectural elements original to a building. (Exhibit 3.) In its revised statement, ANC 1C argued that the building permit violated zoning requirements by allowing a building that would exceed height limits in feet and number of stories, would fail to restore architectural features that had been improperly removed, and would interfere with a solar array on an abutting property. (Exhibit 21.)

DCRA. The Department of Consumer and Regulatory Affairs asked the Board to deny the appeal because the building permit was consistent with applicable zoning requirements. (Exhibit 42.)

Property Owner. Kehoe 2910 18th ST NW LLC asserted that ANC 1C had failed to meet its burden of proof to show that the Zoning Administrator erred and that the appeal therefore should be denied. The Property Owner contended that DCRA had correctly determined that the proposed building height was permitted under the applicable zoning regulations, and that the project at the subject property involved a new building, not an addition, and therefore Subtitle E § 206 did not apply. (Exhibits 39, 69.)

Intervenors. The Intervenors contended that the building permit was inconsistent with zoning requirements with respect to original rooftop architectural elements and building height, resulting in "substantial interference" with the Intervenors' solar array caused by "the additional height and massing of the construction authorized by the permit." (Exhibit 24.) The Intervenors presented expert witness testimony from Guillermo Rueda, as an expert in architecture, and Laura Richards, as an expert in zoning.

FINDINGS OF FACT

1. The property that is the subject of this appeal is an interior lot on the west side of 18th Street N.W. midblock between Summit Place and Quarry Road N.W. (Square 2587, Lot 495).

2. The subject property is rectangular, 20 feet wide and approximately 89.5 feet deep. The lot area is approximately 1,790 square feet.

3. The subject property was improved with a two-story row dwelling built circa 1925.

4. A prior owner began a project at the subject property around 2014. The prior owner removed portions of the building, including its roof, dormers, and a mansard roof at the front of the building. (Exhibit 21DD.)

5. After a snowstorm, additional portions of the building collapsed on January 26, 2016, causing damage the row dwellings on the abutting lots. DCRA undertook measures, including the construction of a brace frame at the subject property, to stabilize the remaining structure and its party walls.

6. Photographs show that, after the snowstorm, much of the front façade, the party walls, and the foundation remained in place. (Exhibits 21C, 43, 44, 73A.)

7. The Property Owner acquired the subject property in December 2017.

8. The Property Owner submitted an application for a building permit. DCRA accepted the application for Building Permit No. B1806082 as complete on May 7, 2018. (Exhibit 72; Transcript of June 19, 2019 at 38, 50.)

9. By email sent May 31, 2018 to the Zoning Administrator and other staff at the Office of the Zoning Administrator ("OZA"), Intervenor Guillermo Rueda stated that "the application submitted for the 2910 project does not identify a couple of contextual elements relevant for a proper zoning review: a chimney at 2908 and a 5.52kW solar array to the North at 2912 …." (Exhibit 21P.) DCRA issued Solar Permit No. SOL1700071 to Guillermo Rueda for the installation of a "5.52 kW Solar PV System. Parapet Mounted" at 2912 18th Street, N.W. on November 7, 2016. (Exhibit 21N.) The solar energy production system began operation in February 2017. (Exhibit 24.)

10. By email sent June 26, 2018 to the Office of the Zoning Administrator, the architect for the Property Owner's project responded to zoning review comments, stating that the "[existing] building was demolished by previous owner and the only front wall was left," as shown on sheet A101. The architect had been told by the Property Owner's attorney that "we don't need to restore the original roof elements," including a cornice that was original to the building, and asked DCRA to confirm that assertion. (Exhibit 21L.)

11. By email sent July 30, 2018 to the Office of the Zoning Administrator, the Property Owner's architect stated that (i) OZA had indicated that the project would be approved "if we brought back the roof dormer and the cornices. We had revised the drawings per [OZA's] comments" and uploaded "all updated drawings" on July 13, 2018; and (ii) "we had modified the front façade design to include the dormers and the cornices to match the neighbors" and uploaded the revised drawings on July 13. (Exhibit 21L.)

12. By email sent to Guillermo Rueda on September 4, 2018, the Zoning Administrator indicated that the "pending building permit application #B1806082 [had been placed] back under Zoning review, until the applicant addresses the following comment: 'Proposed 3rd Story [Addition] is subject to DCMR Title 11, Subsection E206.1(c), (1), (2). Provide an updated site plan and project image – A101 showing the existing condition of both neighboring properties roof design. There is an existing permit for a panel system (SOL170071) issued 12-21-16. Provide a solar shading study for the neighboring property….'" (Exhibit 21Q.)

13. By email sent September 25, 2018 from the Property Owner's architect to the Zoning Administrator and other OZA staff, the architect indicated that, at a recent meeting, the

Zoning Administrator "confirmed that if we are a raze for zoning purposes, then for zoning purposes, this is not 'an addition' and therefore Section E-206 does not apply, as it only applies to an addition. [The Zoning Administrator] agreed that we could do this, so we are submitting this revision" to A105 demolition plan and elevation. The email stated that the changes were "bubbled" on the plans to reflect removal of "a little more of the front façade, down to two feet …. [The Zoning Administrator] agreed we could be deemed a zoning raze without necessarily being a raze for building code purposes." (Exhibit 21L.)

14. By email sent October 10, 2018 to the Property Owner's architect, OZA indicated that the Property Owner "will need to provide elevations and section plans based on the proposed raze of the property. The plans will need to meet the requirements of Zoning Commission order 17-18, subsection 100.2, definitions for natural and finished grade. [The Property Owner] will need to show the natural grade and finished grade clearly labeled on all elevation and section plans." (Exhibit 21G.)

15. On November 2, 2018, DCRA issued Building Permit No. B1806082 for the subject property. The "permit type" was shown as "Addition Alteration Repair."[2] The description of work was stated as: "Keep existing use two family flat, remove existing front wall down to 4 feet above first floor, build 3 story building, cellar and underpinning. ****DEMO, ADDITON POP OUT, ALTERATION LEVEL." The number of stories and "Floors, Involved" were shown as three. (Exhibit 5.)

16. The plans for Building Permit No. B1806082 include a "building elevation" (A301) that showed the building height measuring point ("BHMP") at the center of the building, at existing grade under the porch. The "Building Section & Details" plan (A402) indicated that the building height of the Property Owner's project would be 34 feet, 11 inches as measured from the BHMP. (Exhibits 40, 41.)

17. The "Building Section & Details" plan (A402) indicated that the distance between the ceiling of the lowest level of the building (labeled a "cellar") and the existing/natural grade of the subject property would be three feet, eight inches. (Exhibit 41.)

18. By email sent to Guillermo Rueda on November 5, 2018, the Zoning Administrator stated:

> The current owner, who submitted building permit application #B1806082, originally proposed keeping enough of the existing building and adding a new third level so as to be classified as an upper floor addition. You raised concerns over impacts of the third floor addition on the solar array on your property, and raised the limitations under

[2] The Zoning Administrator testified that terminology used to denote the type of permit (in this case, "Addition Alteration Repair") was decided by a different division of DCRA, not OZA, and "does not always jive with the zoning regulations." (Transcript of June 19, 2019 at 170-171.) The Zoning Administrator explained that he would make an independent determination of permit description or permit category based on plans and the permit applicant's representations about a particular project.

> Section E-206.1(c). However, the [Property Owner] decided to instead remove the existing building so as to be classified as a 'zoning raze' and to construct a new three story building. The provision of the zoning regulations that would have applied to the first scenario is Section E-206:
>
> E-206 ROOF TOP OR UPPER FLOOR ADDITIONS
> E-206.1 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. For interior lots, not including through lots, the roof top architectural elements shall not include identified roof top architectural elements facing the structure's rear lot line. For all other lots, the roof top architectural elements shall include identified rooftop architectural elements on all sides of the structure;
> (b) Any addition, including a roof structure or penthouse, shall not block or impede the functioning of a chimney or other external vent compliant with any District of Columbia municipal code on an adjacent property. A chimney or other external vent must be existing and operative at the date of the building permit application for the addition; and
> (c) Any addition, including a roof structure or penthouse, shall not significantly interfere with the operation of an existing solar energy system of at least 2kW on an adjacent property unless agreed to by the owner of the adjacent solar energy system. For the purposes of this paragraph, the following quoted phrases shall have the associated meanings:
> (1) "Significantly interfere" shall mean an impact caused solely by the addition that decreases the energy produced by the adjacent solar energy system by more than five percent (5%) on an annual basis, as demonstrated by a comparative solar shading study acceptable to the Zoning Administrator; and
> (2) "Existing solar energy system" shall mean a solar energy system that is, at the time the application for the building permit for the adjacent addition is officially accepted as complete by the Department of Consumer and Regulatory Affairs or an application for zoning relief or approval for the adjacent addition is officially accepted as complete by the Office of Zoning, either:
> (A) Legally permitted, installed, and operating; or
> (B) Authorized by an issued permit; provided that the permitted solar energy system is operative within six (6) months after the issuance of the solar energy system permit not including grid interconnection delays caused solely by a utility company connecting to the solar energy system.

(Exhibit 28; underlining provided in email.)

19. The November 5, 2018 email indicated that "However, the approved application for a new three story building and is not an addition, and therefore is not subject to the above provision because there is no existing building that is being added to." The Zoning

Administrator concluded "that the revised application was not subject to Section E-206.1, and as per [the Zoning Administrator's] direction, the Zoning reviewer approved it after documenting compliance with all applicable zoning standards." (Exhibit 28.)

20. By letter dated December 21, 2018, DCRA issued a "notice to correct" to the Property Owner. The letter provided notice of a need to correct deficiencies in the plans affiliated with Building Permit No. B1806082, or DCRA would revoke the building permit. Specifically, citing provisions of the Construction Codes (12A DCMR), DCRA directed the Property Owner, at a minimum, to:

(a) apply for a revised building permit referencing and including the supporting documents for the original permit;

(b) upload all technical objections and responses between Guillermo Rueda and the Property Owner and its contractors and employees;

(c) revise and upload Architectural Plan A101 to depict the solar panels at 2912 18th Street N.W. and to show the existing conditions at the subject property and the adjoining properties to the east and west;

(d) upload, for the revised permit, an engineer's report documenting the existing bracing design, the plan for how the party walls will be supported during various phases of construction, the plan for additional shoring and bracing for the removal of the front wall at the subject property, and an explanation for how the second-floor sleeping porch addition at 2912 18th Street will be supported during each phase of the construction, with photographs of the existing bracing design as well as any other conditions related to the stability of the party walls, party wall foundations, and soil conditions at the party wall foundations;

(e) upload a revision notification form reflecting that the Property Owner renotified 2912 18th Street and requested access to the roof of that property to inspect its roof assembly and to verify that the height of the parapet wall above the roof level of 2912 18th Street is consistent with the assumptions made by the engineer in the snow drift calculations provided for the original building permit.

(f) upload a revised Architectural Plan A105 to depict existing bracing conditions at the subject property, identifying all member sizing, posts, footings, etc.; and

(g) upload the monitoring plan, containing the signature and seal of a licensed structural engineer, for the party wall at 2908 18th Street as part of the underpinning drawings submittal, and the temporary party wall bracing design and construction drawing details for 2908 18th Street.

(Exhibit 21D.)

21. The Applicant subsequently applied for a revised building permit (No. B1904575). The revised permit was issued around June 2019 to address structural issues pertaining to provisions set forth in the Construction Codes.

22. By order effective August 17, 2018, the Zoning Commission approved text amendments to certain subtitles of the Zoning Regulations, including Subtitle B (Definitions, Rules of Measurement, and Use Categories) and Subtitle E (Residential Flat (RF) Zones), regarding the measurement of height. The adopted rules altered Subtitle B, Chapter 1 by revising certain definitions, including the definitions of "basement" and "cellar," as well as amending the rules of measurement in Chapter 3 pertaining to building height. Conforming amendments were made to Subtitle E. (See Zoning Commission Order No. 17-18 in Z.C. Case No. 17-18.)

23. The text amendments adopted in Z.C. Order No. 17-18 changed provisions governing the administration and enforcement of the Zoning Regulations by adding a new vesting provision to protect foundation to grade permit applications that were then in process.
    (a) Subtitle A § 301.4 was amended: "Except as provided in Subtitle A §§ 301.9 through 301.15, any construction authorized by a permit may be carried to completion pursuant to the provisions of this title in effect on the date that the permit is issued, subject to the following conditions: (a) The permit holder shall begin construction work within two (2) years of the date on which the permit is issued; and (b) Any amendment of the permit shall comply with the provisions of this title in effect on the date the permit is amended…."

    (b) New Subtitle A § 301.15 was added: "Notwithstanding Subtitle A § 301.4, any building permit application including a foundation-to-grade permit application (the Permit Application), shall be processed, and any work authorized by the permit may be carried to completion pursuant to the rules for measuring floor area ratio, height, and stories as existed on August 17, 2018 if the Permit Application was legally filed with, and accepted as complete by the Department of Consumer and Regulatory Affairs on or before that date and not substantially changed after filing."

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).) 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 based in whole or part on any zoning regulations or map adopted pursuant to the Zoning Act. (D.C. Official Code § 6-641.07(f).) *See also* Subtitle Y § 302.1.

The Appellant argued that the building permit at issue in this appeal failed to meet zoning requirements principally in two respects: (i) by allowing building height in excess of applicable limits, both with respect to feet and number of stories, due to an incorrect measurement of building height and (ii) by failing to comply with Subtitle E § 206. For the reasons discussed below, the Board finds no error with respect to building height but agrees that the building permit was improperly issued without a determination that the approved construction would satisfy the requirements of Subtitle E § 206.

Building height. The subject property is located in a Residential Flat zone, RF-1, where the maximum permitted height of buildings and any additions is limited to 35 feet and three stories (with certain exceptions not relevant to this appeal). (Subtitle E § 303.1.) The zoning regulations in effect when the application for Building Permit No. B1806082 was accepted as complete provided rules of measurement for the determination of the height of buildings in the RF zones. The rules of measurement included that the building height measuring point ("BHMP") must be established at the existing grade at the mid-point of the building façade of the principal building that is closest to a street lot line. (Subtitle B § 308.2.)

The Appellant argued that the BHMP had been determined incorrectly and, as a result, the building at the subject property would be four stories and in excess of 35 feet in height. According to the Appellant, the project plans misrepresented the grade at which the BHMP should be located pursuant to Subtitle B §§ 308 and 310. The Appellant contended that a site plan identified "a modified BHMP … that is neither the 'existing' nor 'natural grade' as described in Subtitle B, which states: the established elevation of the ground, exclusive of the improvements or adjustments to the grade made in the five (5) years prior to applying for a building permit." (Exhibit 21.) Instead, according to the Appellant, the "modified BHMP" was incorrectly located "at a fictional point shown on the developer's survey, six inches (6 inches) above 'natural or existing grade….'" (Exhibit 21.) The Appellant contended that, as a result of the misplaced BHMP, the lowest level of the building had been incorrectly characterized as a "cellar" rather than a basement so that it would not be counted as a story.

In disputing the Appellant's contention, DCRA cited the plans submitted by the Property Owner as part of the building permit application, especially a building elevation (A301) and a "building section & details plan" (A4021) (see Exhibits 40, 41). According to DCRA, the Zoning Administrator correctly identified the lowest level as a cellar because the finished floor of the ground floor would be less than four feet above the adjacent grade, and appropriately determined that the planned construction would create three stories above a cellar, with a building height that would not exceed 35 feet.[3]

[3] The Zoning Regulations defined a "cellar" as "that portion of a story, the ceiling of which is less than four feet (4 ft.) above the adjacent finished grade." (Subtitle B § 100.2.) For the purpose of determining the maximum number of permitted stories, the term "story" does not include cellars or penthouses. (Subtitle B § 310.2.)

The Board concludes that the Zoning Administrator properly made determinations regarding building height in accordance with the regulations in effect at the time the Property Owner's building permit application was accepted as complete; that is, before the effective date of the text amendments adopted by the Zoning Commission in Z.C. Case No. 17-18.[4] The Board credits the Zoning Administrator's explanation about why the subsequent revisions made to the plans were not of a significant magnitude to warrant processing under the recent text amendments. Consistent with a long-standing practice, the Zoning Administrator determined that the original building permit application was complete based on the adequacy of information provided, which was sufficient for the Office of the Zoning Administrator and other DCRA disciplines to perform the necessary reviews. (Transcript of June 19, 2019 at 39-40, 43.) In this case, the Zoning Administrator reasonably determined that the vesting date of the permit application was not altered after the application was accepted as complete, even though the Office of the Zoning Administrator sought certain corrections, because the resulting revisions did not result in a "substantial deviation of plans" affecting a "major element" such as, for example, a change in the number of stories, the gross square footage, lot occupancy, or use. The Zoning Administrator described the revisions obtained from the Property Owner as some clarification of dimensions that were not substantial deviations. Accordingly, the Zoning Administrator reasonably determined that the recent text amendments adopted in Z.C. Case No. 17-18 did not apply to the Property Owner's building permit application.

Addition or new building. The Appellant argued that the Zoning Administrator made an unauthorized determination "that the proposed addition and alteration could be viewed as a 'new building' to improperly allow the addition of a new story to the illegally demolished and collapsed building." As a result, according to the Appellant, the "building permit violates Subtitle E, §206.1(a) by approving a new story to what was the existing building and includes a design that significantly alters the size and height of the architectural rooftop elements that were unlawfully removed [in violation of] Subtitle E, §206.1(a)" and Subtitle E § 206.1(c). (Exhibit 21.)

DCRA and the Property Owner contended that the project was properly approved as a new building, which was not subject to Subtitle E § 206 because that provision, by its terms, applies only to an addition to an existing building.[5] (Exhibits 39, 42.) DCRA noted that the roof of the

[4] DCRA initially believed that the new text amendments were applicable to the building permit application because the permit was issued November 2, 2018, after Zoning Commission Order No. 17-18 became effective on August 17, 2018 (see Exhibit No. 66). However, after review of the vesting rules adopted to implement the text amendments (see Subtitle A §§ 301.4, 301.5), DCRA reconsidered the question and determined that the building permit application should be processed under the previous regulations because the application had already been accepted as complete before the effective date of the text amendments and was not substantially changed after filing. (Exhibit 72; Transcript of June 19, 2019 at 74-75.)

[5] DCRA and the Property Owner emphasized the heading of Subtitle E § 206 – "Roof Top Or Upper Floor Additions" – in support of their assertions that Subtitle E § 206 applies only to additions. (Exhibits 39, 42.) However, "[t]itles are of limited utility when weighed against plain statutory language." *Facebook, Inc. v. Wint*, 199 A.3d 625, 629-630 (D.C. 2019), *quoting Cherry v. District of Columbia*, 164 A.3d 922, 928 (D.C. 2017) ("The significance of a title of [a] statute should not be exaggerated …. It cannot limit the plain meaning of the text.") and *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.,* 331 U.S. 519, 528-529, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947) ("[H]eadings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions

building at the subject property "collapsed during a snow storm" and soon thereafter "a bracing system was installed against the party walls of 2910 18th Street to preserve the integrity of the neighboring party walls," so that "[a]s a result, the property presently consists of no rear wall, two party walls, approximately four feet of the original front wall and a bracing system…[without] floors [or] roof."[6] (Exhibits 42-44.) DCRA asserted that, "[b]ased on the current state of the property, the Owner is not adding, extending or enlarging anything, because no building currently exists. Accordingly, the Zoning Administrator correctly determined that the proposed construction was a new building and no 'addition' was involved." (Exhibit 42.)

The Board was not persuaded by arguments presented by the Appellant and the Intervenors that challenged the Zoning Administrator's authority to determine the existence of a "zoning raze" (as distinguished from a raze undertaken consistent with Construction Code requirements).[7] However, the Board did not agree with DCRA or the Property Owner that the project at the subject property should be considered a new building and not an addition to the existing building. The building permit at issue in this appeal was obtained for "Addition Alteration Repair" with the description of work that would include "remov[al of] existing front wall down to 4 feet above first floor," which indicated an intent to retain the existing structure.

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in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text.").

The wording of Subtitle E § 206 does not uniformly limit its applicability only to additions. Two provisions state restrictions applicable to "any addition, including a roof structure or penthouse"; that is, Subtitle E § 206.1(b), concerning a chimney or other external vent on an adjacent property, and Subtitle E § 206.1(c), concerning the operation of an existing solar energy system on an adjacent property. However, pursuant to Subtitle E § 206.1(a), a "roof top architectural element original to the building, such as cornices [etc.] shall not be removed or significantly altered, including shifting its location, changing its shape or increasing its height, elevation, or size. For interior lots…." By its terms, the proscription stated in Subtitle E § 206.1(a) is not limited to an addition to an existing building, and the provision does not specifically exempt the removal of a rooftop architectural element in connection with the raze of an existing building. The Board makes no determination in this proceeding with respect to the Zoning Administrator's interpretation of Subtitle E § 206 as applicable only to an addition.

[6] The reference to "approximately four feet of the original front wall" was not consistent with the photographs DCRA submitted to the record, which showed that most of the front façade remained (as seen from the rear of the site). The reference apparently reflected the Property Owner's proposed project, for which the building permit was issued.

[7] DCRA acknowledged that the Zoning Regulations do not provide a definition for "raze" and explained that the Office of the Zoning Administrator created a standard to distinguish a raze or zoning raze from a demolition or partial building removal. "The Office of the Zoning Administrator generally finds that a raze has occurred if there was a change in lot occupancy and [depending on] whether a minimum of 40% of the pre-existing wall surface area was retained. If more than 40% of the pre-existing wall surface remains, the construction is deemed a demolition." (Exhibit 72.) The Zoning Administrator testified that "[i]f the footprint of the building has not changed," then OZA will require retention of "at least four feet of the enclosing perimeter walls of that building" to avoid classification as a zoning raze; "the 40 percent standard" applies "[i]f the building footprint is changed." (Transcript of June 19, 2019 at 164.)

In this case, the Zoning Administrator determined that neither standard applied "because the distinguishing characteristic is the building collapsed … there's no present building there to retain." Instead, the Zoning Administrator concluded that "The building had collapsed [and therefore the Property Owner's project is] new construction of a new building." (Transcript of June 19, 2019 at 164-165.)

Nor does the Board agree that the existing building entirely collapsed. The testimony and photographs in the record demonstrated that the party walls, a substantial portion of the front façade, and the foundation remained in place, although the floors and other interior aspects had been destroyed. DCRA acknowledged that "the two pre-existing party walls of the row home exist, which constitutes 50% of the pre-existing wall surface area" – that is, more than the 40-percent retention that usually denotes demolition, not raze – but DCRA rejected that "narrowly tailored view," asserting that "the general Zoning Administrator's analysis is inapplicable here because no building exists at the site."[8] According to DCRA, "The current state of the site was not the result of a raze or demolition, but an act of God. Given that the current condition of the property is neither the result of a raze nor a demolition, the proposed activity is considered new construction." (Exhibit 72.) The Intervenors disputed that contention, arguing that the collapse was the result of the actions and inactions of the prior owner; the Intervenors had warned DCRA of the likelihood of a collapse before the 2016 snowstorm (see Exhibit 25).

The Board makes no findings about the exact cause or circumstances of the building collapse based on the record in this proceeding. Regardless of the cause of the collapse, the Board concluded that a sufficient portion of the existing building remained so that the Property Owner's project did not constitute a new building. The Board was not persuaded by the Property Owner's contention that the existing building, in its current form, did not meet the zoning definition of building, and instead viewed the issue in terms of whether a "zoning raze" had occurred, since there is no dispute that the subject property formerly contained a building that had been partially destroyed.

The Property Owner sought to characterize the project as new construction to avoid the restrictions imposed by Subtitle E § 206, leading to the submission of revised plans and an intention to remove more of the front façade so that the project could be characterized as a raze. The Property Owner may have known about the zoning irregularities before acquiring the subject property, and certainly became aware of the Intervenors' concerns about their solar array and the issues raised by ANC 1C about the removal of rooftop architectural elements before seeking a building permit. In response, the Property Owner attempted to modify the project for consideration as "new construction" instead of an addition and DCRA accepted that characterization. Agreeing with the Property Owner, DCRA argued that "there is no building at 2910 18th Street, N.W. The proposed construction consists of an entirely new building." (Exhibit 42)

In light of the portions of the existing building that remain on the site, the Board did not agree with DCRA or the Property Owner that the project should be considered a new building not subject to

[8] The Zoning Administrator's determination was based in part on a finding that the collapse was "something that was beyond the control of the property owner" that resulted in a "situation now [that] there's no building to build an addition to." (Transcript of June 19, 2019 at 160.) In response to a question by Intervenors' counsel, about whether the project would have been considered new construction "if there were no act of God here, if, in fact, the removal had been the result of just illegal demolition or neglect," the Zoning Administrator acknowledged that "in the absence of an act of God then it would be treated differently." (Transcript of June 19, 2019 at 172-173.) Both the Property Owner and the Intervenors argued "that the whole question of act of God is legally irrelevant to the question of whether or not this is an addition" and a "red herring." (Transcript of June 19, 2019 at 193, 214.) However, the parties did not agree on whether the collapse necessitated the characterization of the Property Owner's project as a new building.

Subtitle E § 206. Under the circumstances, the Board concludes that the existing building was not razed and was not completely destroyed in the 2016 collapse; therefore the project must be considered an addition, not a new building. Accordingly, the Board determines that Building Permit No. B1806082 was issued in error due to the lack of a determination of compliance with Subtitle E § 206, including with respect to rooftop architectural elements and the potential interference with the operation of an existing solar energy system on an adjacent property.

Great weight. The Board is required to give "great weight" to the issues and concerns raised by an 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 1C submitted the appeal. For the reasons discussed above, the Board concluded that the appeal should be granted in part and denied in part.

Exceptions to the Proposed Order. Because a majority of the Board members participating in the issuance of this order did not personally hear the evidence in this appeal, a proposed order was provided to the parties to afford them an opportunity to present written exceptions, in accordance with D.C. Official Code § 2-509(d).

Based on the findings of fact and conclusion of law, the Board concludes that the Zoning Administrator erred in not applying Subtitle E § 206 but did not err in the determination of building height in the issuance of Building Permit No. B1806082 to allow a three-story building in the RF-1 Zone at 2910 18th Street, N.W. (Square 2587, Lot 495). Accordingly, it is therefore **ORDERED** that the **APPEAL** is **GRANTED** in part and **DENIED** in part, and the Zoning Administrator's determination is **SUSTAINED** in part and **REVERSED** in part.

VOTE: 4-0-1 (Frederick L. Hill, Carlton E. Hart, Lesyllee M. White, and Peter G. May voting to grant the appeal in part and deny the appeal in part; Lorna L. John opposed)

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

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

FINAL DATE OF ORDER: _____