



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



FORM 129 – ADVISORY NEIGHBORHOOD COMMISSION (ANC) REPORT

Before completing this form, please review the instructions on the reverse side.

Pursuant to Subtitle Z § 406.2 and Subtitle Y § 406.2 of Title 11 DCMR Zoning Regulations, the written report of the Advisory Neighborhood Commission (ANC) shall contain the following information:

IDENTIFICATION OF APPEAL, PETITION, OR APPLICATION:

| | | | |
|---------------------------------------|---|------------|--------------|
| Case No.: | 20636 | Case Name: | Penguin, LLC |
| Address or Square/Lot(s) of Property: | 4509 Foxhall Crescent NW (Square 1397, Lot 960) | | |
| Relief Requested: | Area Variance, Special Exception | | |

ANC MEETING INFORMATION

| | | | | | | |
|--|---|---|-----|-------------------------------------|----|--------------------------|
| Date of ANC Public Meeting: | 10 / 05 / 22 | Was proper notice given?: | Yes | <input checked="" type="checkbox"/> | No | <input type="checkbox"/> |
| Description of how notice was given: | Agenda and location of meeting were posted one week in advance of the meeting date on our website, www.anc3d.org, facebook page, and local listservs. | | | | | |
| Number of members that constitutes a quorum: | 6 | Number of members present at the meeting: | 7 | | | |

MATERIAL SUBSTANCE

The issues and concerns of the ANC about the appeal, petition, or application as related to the standards of the Zoning Regulations against which the appeal, petition, or application must be judged (*a separate sheet of paper may be used*):

See attached resolution.

The recommendation, if any, of the ANC as to the disposition of the appeal, petition, or application (*a separate sheet of paper may be used*):

See attached resolution.

AUTHORIZATION

| | | | | |
|--|---|---|---|-----------|
| ANC | 3 | D | Recorded vote on the motion to adopt the report (i.e. 4-1-1): | 6-1-0 |
| Name of the person authorized by the ANC to present the report: | | | Commissioner Elkins | |
| Name of the Chairperson or Vice-Chairperson authorized to sign the report: | | | Benjamin Bergmann | |
| Signature of Chairperson/ Vice-Chairperson: | | | Date: | 5/17/2022 |

ANY APPLICATION THAT IS FOUND TO BE INCOMPLETE MAY NOT BE ACCORDED "GREAT WEIGHT" PURSUANT TO 11 DCMR SUBTITLE Z § 406 AND SUBTITLE Y § 406.

Board of Zoning Adjustment
PURSUANT TO
CASE NO. 20636
EXHIBIT NO. 39



May 11, 2022

VIA IZIS

District of Columbia Board of Zoning Adjustment
441 4th Street, NW, Suite 210S
Washington, DC 20001

Re: ANC3D Submission – BZA Case No. 20636;
4509 Foxhall Crescent N.W. (Square 1397, Lot 960)

Dear Members of the Board of Zoning Adjustment:

At its regularly scheduled and properly noticed meeting on May 11, 2022, ANC3D voted to submit this letter to the Board of Zoning Adjustment (BZA) regarding Case # 20636 (4509 Foxhall Crescents NW).

While on its face this case appears to raise rather routine issues that could be dealt with by the ANC with a few sentences, the specific circumstances of this case raise serious issues that the ANC wishes to bring to the attention of the BZA, together with its recommendations:

ISSUE #1: Applicant has knowingly and willfully violated DC law in a matter directly related to his BZA application.

The applicant in this case knowingly and willfully violated DC Code § 8–651.04a. (Protection of Heritage Trees)¹ by causing a heritage tree to be cut down on the property that is the subject to this BZA application. This intentional violation of DC law took place after the applicant, “Penguin, LLC” acting through its principal Rajai Zumot, was repeatedly told by the staff of Urban Forestry Division (DDOT) that the tree was healthy and therefore could not be legally cut down and after the applicant lost an appeal to the Mayor’s Representative. In the face of his appeal to the Mayor being denied, the applicant took this willful action only five days in advance of passage by the DC Council of emergency legislation that would authorize a stop-work order to save the tree from removal.

In a March 4, 2022 Washington Post Article² about the violation, Earl Eutsler, Associate Director of the Urban Forestry Division, is quoted as saying that although officials “provided consistent steady guidance to advise them how to remain lawful”, the applicant ignored them. Mr. Eutsler also states that the applicant’s claims that the tree was unhealthy were untrue. Mr. Eutsler said that the benefits which this “keystone tree” brought Foxhall Crescent—storm-water

¹ (a) It shall be unlawful for any person or nongovernmental entity, without a Heritage Tree removal permit issued by the Mayor, to top, cut down, remove, girdle, break, or destroy any Heritage Tree.”

² “He wanted to build his son a house. He didn’t let an old tree and D.C. law stop him” March 4, 2022 in the Washington Post.

management, air filtration, shade—were decades in the making. “I find it particularly galling for people to willfully violate established D.C. Law”, he said. “To me, that seems lawless and in some ways un-American.” While DC can take the \$49,000 fine Zumot will be charged and plant more trees, the trees won’t do the same job—at least not in his lifetime, Mr. Eutsler said. Recently, Mr. Eutsler also sent an email to one of our Commissioners indicating that he believed no one in the current Applicant’s position should be given lenience or latitude in the permitting and variance process.

The applicant’s willful violation of DC law is *directly* related to the relief that the applicant is requesting from the BZA in the form of a special exception and a variance. The tree was cut down in order to allow the applicant to place a house of the size he wishes on the property where the applicant wants it and for which he needs both a special exception and a variance. This direct connection between the violation of DC law and the BZA application makes this violation a proper matter for the BZA to consider in its determination of whether or not this relief should be granted to the applicant.

While we recognize that the BZA is not expert in matters of tree protection, this DC law is clear and unambiguous, and in this case, the applicant has freely admitted that he intended to violate the law and take the consequences.

Consistent with the general concept of “clean hands”, it is the position of ANC3D that where an applicant seeking relief from the District has, in association with the same property and with the objective to construct a house requiring a special exception and a variance, such an applicant should not be afforded the benefit of the BZA’s services and instead should have the requested relief denied.

Should the applicant argue “it was only a tree”, as he did in the ANC3D meeting on April 6, we believe the BZA should be aware that legislation that has been reported out of Council Committee and is working its way through the Council at this time has provisions that state that in future cases of such willful violation of the heritage tree law, the violator should be denied a building permit for three years and be subjected to a two-year suspension of his/her business license to operate in the District of Columbia. While this law, if enacted, would not apply retroactively to the current applicant, this draft legislation does provide an indication of how seriously the Council’s Committee on Transportation and the Environment, which authored the bill, takes the protection of the District’s heritage trees and the seriousness with which it views willful violators of the law.

ANC3D therefore requests that the BZA deny the applicant the special exception and variance relief he is requesting or at a minimum postpone action on this application until the full Council has acted on the Committee’s bill and thereby expresses the will of the Council with regard to persons who willfully cutting down Heritage trees is clear. While this bill, as currently written, would not apply retroactively to the Applicant, the Council’s action would serve as guidance to the BZA as to whether the Applicant’s actions are such seriousness that the BZA should, of its own volition, deny the applicant the relief he seeks as we have argued above.

ISSUE #2: Potential Storm Water damage to the community from this development

Should the BZA determine not to withhold approval of the relief requested by the applicant, ANC3D asks that the BZA make the storm water management commitments expressed in the Prehearing Submission of the Applicant a condition of the BZA's Order. The applicant's lot is fairly steep and is located above the rest of the community. Storm water problems have been reported by at least one adjoining property owner in the past. Now that the Applicant has chosen to cut a large number of trees on the lot, thereby disturbing the soil and removing one of the natural barriers to storm water, there is good reason to believe that, if left uncontrolled, the new development could pose storm water danger not only during construction but also afterwards, unless it is managed correctly.

However, after consultations between the ANC and the representative of the Applicant, the Applicant and its consultant in its Pre-Hearing Submission of April 27, 2022, freely acknowledge major land-disturbing activity on the site of 5000 square feet or more, thereby triggering the Department of Energy and the Environment's requirement that the applicant submit a Storm Water Management Plan for the Department's approval prior to construction. The applicant also stipulates in paragraph 6 of its Construction Management Plan (Exhibit C of the Prehearing Submission) that "there is no intention to request any special DOEE storm water accommodations on the property, but if such a need should arise, [the applicant] will provide at least 10 days prior notice of such a request to the abutting property owners and ANC3D01." The importance of this last stipulation is that such notice would allow the abutting property owners and the ANC to intervene with DOEE, if they wish, in order to protest any such special accommodation and submit information relevant to the matter before DOEE makes any determination in the matter.

Should the BZA decide to grant the relief requested by the Applicant, ANC3D asks that the BZA especially note this commitment by the applicant and make the Applicant's performance of this commitment in paragraph #6 of Exhibit C a condition of the zoning relief granted.

Such a condition would be entirely consistent with the decision of the BZA in the previous case involving this very same property and the same requested relief (Application # 18708). In that case, the BZA made its approval of the requested relief subject to a user agreement that incorporated even more extensive requirements with relation to storm water and sediment. At the time of that decision by the BZA, only two trees were expected to be cut down on the property, according to Order. Today, this steeply sloped lot is devoid of twenty or more trees that at the time of the BZA's previous order, thereby, increasing substantially the potential for storm water damage if it is not properly managed.³

³ The DDOE Stormwater Management Guidebook of January 2020 states (page 251): Tree canopy can intercept a significant amount of rainfall before it becomes runoff, particularly if the tree canopy covers impervious surfaces, as in the case of street trees. Through the processes of evapotranspiration and nutrient uptake, trees—even when located on a development site—have the capacity to reduce stormwater runoff volumes and improve water quality. Further, through root growth, trees can improve the infiltration capacity of the soils in which they grow.
<https://doee.dc.gov/swguidebook>

In conclusion, ANC3D asks that:

- the BZA deny the relief requested by the applicant because of his willful and intentional violation of DC law in order to build his desired house on this very same property, and
- if the BZA concludes that it cannot or will not so deny the requested relief, then that the BZA condition any approval upon the performance of the commitment by the Applicant expressed in Paragraph #6 of Exhibit C of the Prehearing Submission of April 27, 2022, to declare a major land-disturbing activity of more than 5000 square feet, submit a storm water management plan to DOEE as a condition of building on the lot, and, should any accommodation from DOEE be contemplated, to give the adjoining neighbors and the ANC3D 01 Commissioner 10 days advance notice of any such request to DOEE.

ANC3D requests that the BZA accord these recommendations “great weight” in accordance with the ANC statute.

Sincerely yours,

A handwritten signature in blue ink, appearing to be 'Ben Bergmann', with a long horizontal flourish extending to the right.

Ben Bergmann, Chair