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5333 CONNECTICUT NEIGHBORHOOD COALITION, *ET AL.*, Petitioners, v. DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS, Respondent, and CMK DEV, LLC, Intervenor.	Case No.: 2013-DCRA-00055

FINAL ORDER

I. Introduction/Procedural History

On June 11, 2013, Petitioners 5333 Connecticut Neighborhood Coalition (the Coalition) and Advisory Neighborhood Commission 3/4G (the ANC 3/4G) appealed the issuance of a building permit No. B1208792 (the Permit) on May 28, 2013, by Respondent Department of Consumer and Regulatory Affairs (DCRA) to CMK DEV, LLC, the owner of the property in question (the Owner). The Permit was for the construction of a nine story, 263 unit apartment building at 5333 Connecticut Ave., NW (the Project).

The Coalition alleged that it is an unincorporated membership association with over 500 members who live in the vicinity of the Project, and that forty-seven (47) of its members who

(35)

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live or own property in the immediate neighborhood specifically authorized the Coalition and its attorney to file the appeal. The ANC 3/4G is the Advisory Neighborhood Commission for the area where the Project is located. On June 25, 2013, the Owner moved to intervene as a party.

Petitioners sought to have the Permit voided because of various alleged violations of the District Construction Code.[1] Initially, the case was assigned to Administrative Law Judge E. Savannah Little, and on July 23, 2013, she issued an order for a status conference on August 1, 2013, to address issues in the case, including whether OAH had jurisdiction over the matter, the Owner's motion to intervene, etc.[1] As requested by Judge Little, on August 6, 2013, the Coalition filed signed statements from twenty-nine (29) of its members and the ANC filed a letter from the Chair of the ANC regarding the authorizations to file the appeal.

On September 13, 2013, the ANC filed a letter stating that it withdrew its appeal, pursuant to a settlement with Owner. Shortly thereafter, on September 18, 2013, the Owner commenced site development work, which prompted the Coalition on September 23, 2013, to file a motion for an interlocutory order to suspend the Permit, pending a hearing on the merits. Oppositions to the motion were filed by the Owner and DCRA on September 27, 2013, and September 30, 2013, respectively.

In the meantime, on September 26, 2013, the parties participated in a telephonic conference call with Judge little, and the parties agreed to participate in voluntary mediation. On September 27, 2013, three mediation sessions were scheduled.

[1] The Coalition and the ANC also appealed the issuance of the Permit to the Board of Zoning Adjustment (BZA). 1 The BZA appeal relates to conformance with zoning regulations.

After unsuccessful attempts to resolve the matter through mediation, on October 3, 2013, the case was reassigned to the undersigned for an evidentiary hearing. On October 8, 2013, I entered an order:

1) Granting the Owner's unopposed motion to intervene as a party, aligned with DCRA;

2) Dismissing the ANC as a party, based on its voluntary withdrawal;

3) Confirming the Coalition's agreement to combine the hearing on its motion for interlocutory relief with the hearing on the merits;[2] and

4) Scheduling a hearing for October 17, 2013.

At the request of the parties, the hearing was rescheduled, and it was held over four days: October 28 and 29, 30, and November 13, 2013. William J. Lenyk and Don Alexander Hawkins, testified on behalf of the Coalition. Mr. Lenyk is a registered architect, a neighbor of the Project, and a member of the Coalition. Mr. Hawkins is a retired architect. Rabbiah Sabbakhan, the Chief Building Official, (the Code Official), and Eric Colbert, the architect of record for the Project, testified on behalf of DCRA and the Owner.

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[2] The Coalition's concessum made it unnecessary to rule on the motion for interlocutory relief. The court notes, however, that the Superior Court for the District of Columbia, not this court, has inherent equitable powers to issue injunctions. *See Office of Tax and Revenue v. Shuman*, 82 A.3d 58, 70 (D.C. 2013); *Prince Constr. Co. Inc. v. D.C. Contract Appeals Bd.*, 892 A.2d 380, 384 (D.C. 2006); *Ramos v. D.C. Dep't of Consumer & Regulatory Affairs*, 601 A.2d 1069, 1073 (D.C. 1992). Also, the case concerns the issuance of a building permit which included projections approved by the Code Official, which Petitioner claimed are in derogation of the Building Code. Such projections cannot be claimed as a right, and even if approved, they are subject to prompt removal upon notice from the Code Official. 12A DCMR 3202.2. Consequently, it was not apparent that the Coalition would be entitled to interlocutory relief to prevent irreparable harm to it as a result of the construction of the building with the contested projections, and for other reasons.

At the conclusion of the evidentiary hearing, the parties submitted post-hearing memoranda. As part of the Coalition's post-hearing Reply Memorandum, two exhibits were attached which were not admitted into evidence during the hearing. In response to a motion by DCRA and the Owner to strike these exhibits, the Coalition moved to reopen the hearing to have these exhibits admitted. Without ruling on the motion to strike, on February 11, 2014, I granted the Coalition's motion to reopen the evidentiary hearing for the limited purpose of allowing Petitioners to submit rebuttal testimony and the exhibits in question, and for cross-examination by DCRA and the Owner with respect thereto.

On February 21, 2014, a hearing was scheduled on a date proposed by the parties, March 14, 2014. Shortly thereafter, the Coalition withdrew its request to reopen the evidentiary hearing, making ripe for decision the motion to strike. By order dated March 26, 2014, the DCRA's and the Owner's motions to strike were granted in part and denied in part: namely, Exhibit 148, a testimonial affidavit, was stricken, and Exhibit 149, an internet map of a street near the Project, was admitted into evidence.

On May 28, 2014, DCRA moved for permission to file a supplementary brief regarding recent changes to the Construction Code which DCRA argued were relevant and should be considered by the court.[3] The Coalition filed an opposition to the motion, and DCRA filed a reply on June 9 and 18, 2014, respectively.

It appears that the changes to the Construction Code in question relate to the interpretation/meaning of the use of the term "street," or the measurement thereof, as used in the

[3] In this Final Order, unless otherwise noted, citations to the District of Columbia Municipal Regulations (DCMR) refer to the regulations in effect when DCRA issued the Permit.

Construction Code, as to which all the parties introduced evidence at the hearing. Accordingly, I find the changes to the Construction Code relevant, and I can take notice of these changes to the Code. Accordingly, I will grant DCRA's motion to file its supplementary brief, and I will consider it, along with the Coalition's opposition and DCRA's reply.

The sole for decision is whether the Code Official's issuance of the Permit with approved projections (portions of the building which extend beyond the façade of the building) was arbitrary, capricious or illegal.

Based on the evidence introduced at the hearing, the testimony of witnesses and exhibits admitted into evidence, including my assessment of the credibility of the witnesses, I make the following findings of facts and conclusions of law.

II. Findings of Fact

1. On May 28, 2013, Respondent Department of Consumer and Regulatory Affairs (DCRA) issued building permit No. B1208792 (the Permit) to CMK DEV, LLC, the owner of the property in question (the Owner) for the construction of a nine story, 263 unit apartment building at 5333 Connecticut Ave., NW (the Project).

2. Petitioner, the Coalition, filed its appeal on June 11, 2013.

3. The Chief Building Official, Rabbiah Sabbakhan (the Code Official), is responsible for interpreting and applying the District Construction Code (the Construction Code).

4. In approving the issuance of the Permit, the Code Official reviewed the submissions made by the Owner and determined that the issuance of the Permit was compliant with the Construction Code.

5. The plans and design was also reviewed by an official third-party reviewer who also certified that it complied with the Building Code.

6. The Code Official also met with the Owner's architect of record for the Project, Eric Colbert, to discuss and review the plans and drawings to ensure their compliance with the Construction Code before issuing the Permit.

7. Mr. Colbert is a highly experienced architect who has practiced exclusively in the District for over thirty (30) years, serving as architect of record for over 200 multi-family housing projects. He is intimately familiar with the Construction Code.

8. I credit Mr. Colbert's testimony that he made the same interpretations of the Construction Code as the Code Official, and determined that these interpretations were consistent with how the Construction Code has been administered for at least the past thirty years.

9. The Permit allows for the construction of a building with several projections, namely a feature of the building beyond the building façade.

10. The Code Official made specific determinations regarding the compliance with the Constructioin Code with regard to each of the projections in question.

11. The Project will have frontage on Connecticut Ave. NW, Military Road NW, and Kanawha Street NW.

12. The Permit allows for projections including: a) bay window extensions and balconies on the Kanawha Street and Military Road sides; b) a circular support column extending from the foundation to the top floor of the building on the Kanawha Street side; c) a subsurface foundation wall on the Kanawha Street side.

13. The bay window projections are four (4) feet wide.

14. There is a feature on the Kanawha Street side which is a retaining wall, not an areaway projection.

15. On the Kanawha Street side, there is 50 feet between the private property lines on each side of the public right-of-way, which includes the roadway, sidewalk and public parking (the public right-of-way).

16. On each side of the Kanawha Street public right-of-way there is a ten foot wide area from the property lines to the building lines, or building restriction lines (BRLs). This area is private property, but by law it is "treated as public space."

17. The Construction Code provides that no projections are allowed on any "street" less than 60 feet wide.

18. The Code Official signed a modification form confirming his interpretation that the width of Kanawha Street should be measured from the BRLs on each side of the public right-of-way; namely 70 feet in width.

19. In determining compliance with the Construction Code regarding projections, DCRA code officials historically determined the width of a "street" by measuring the width between BRLs on each side.

20. In the immediate area of the Project, there are approved projections on streets with less than 60 feet wide public right-of-ways.

21. The Construction Code allows for extensions up to three (3) feet in width on streets more than 60 feet wide. The Code Official approved a modification to permit a four (4) feet wide bay window on the Kanawha Street side of the building.

22. The Code Official made his determination to grant the modification for an additional one (1) foot extension of the bay window on the Kanawha Street side after determining the existence of requisite factors for approval of the modification: namely, that the modification was warranted and appropriate because it embellished the façade of the building; it did not change the interior configuration of the units; it did not adversely impact surrounding properties; and it allowed increased light and ventilation into the units.

23. The Permit drawings which were approved by the Code Official show a vault on the Kanawha Street side which is part of the underground parking garage, with a foundation wall which is also part of the wall to a unit in the building.

24. The Permit drawings which were approved by the Code Official show a circular support column on the Kanawha Street side running from the foundation to the top floor.

25. The Project drawings show what is denominated an "areaway" on the Kanawha Street side. In fact, this area is a landscaping feature intended to adjust grading. It is not attached to the building, nor is included to allow light and air into the units of the building.

26. The bay window and balconies on the Kanawha Street and Military Road sides are 59 feet wide and 114 feet wide, respectively.

27. The Code Official determined that the bays and balconies on the Kanawha Street and the Military Road sides of the building were "multiple projections" and, as such, they are in compliance with the Construction Code.

III. Conclusions of Law

A. Jurisdiction of the Court

The issue whether this court has jurisdiction in the case was raised by the court *sua sponte*. At the initial status conference, the parties conceded that the court has subject matter jurisdiction over this case. Consent of the parties, however, cannot confer jurisdiction. So a brief examination of the issue is warranted.

D.C. Official Code §2-1831.03(b)(2) provides that this court has jurisdiction over, *inter alia*, "adjudicated cases" under the jurisdiction of the Department of Consumer and Regulatory Affairs. Under D.C. Official Code §2-1831.01.01(1) "adjudicated cases" means "a contested case or other administrative adjudicative proceeding before . . . any agency that results in a final disposition by order and in which the legal rights, duties, or privileges of specific parties are

required by any law or constitutional provision to be determined after an adjudicative hearing of any type. . . ."

The court is not aware of any statute or constitutional provision which requires the Coalition's appeal to be decided in an adjudicative proceeding. But the court of appeals has recognized explicitly that validly promulgated administrative rules or regulations have the force and effect of law, much like a statute. *See, Newspapers, Inc. v. Metropolitan Police Dep't*, 546 A.2d 990, 1000 (D.C. 1988); *Hutchinson v. District of Columbia*, 710 A.2d 227, 234 (D.C. 1998); *Teachey v. Carver*, 736 A.2d 998, 1005 (D.C. 1999); *Dankman v. District of Columbia Bd. Of Elections & Ethics*, 443 A.2d 507, 513 (D.C. 1981). So, the court of appeals has held that if administrative regulations require a trial-type hearing, the first obstacle in establishing jurisdiction would be overcome: namely, that an administrative hearing is statutorily or constitutionally compelled. *See, J.C. & Associates v. District of Columbia Board of Appeals and Review,* 778 A.2d 296, 303 (D.C. 2001); *Communications Workers of America, Local 2336 v. District of Columbia Taxicab Comm'n*, 542 A.2d 1221, 1223 n. 7 (D.C. 1988); *Palisades Citizens Ass'n v. District of Columbia Zoning Comm'n*, 368 A.2d 1143, 1147 (D.C. 1977).

The Coalition cites 12A DCMR 112.1 as the basis for invoking the jurisdiction of this court for an adjudicative hearing. This regulation provides:

> Appeal to Office of Administrative Hearings. The owner of a building or structure or any person adversely affected or aggrieved by a final decision of the code official based in whole or in part upon the Construction Codes may appeal to the Office of Administrative Hearings (OAH), except where the appeal relates to or involves an interpretation of the Zoning Regulations, in which case the claimant shall appeal the decision to the Board of Zoning Adjustment pursuant to D.C. Official Code § 6-641.07. The OAH appeal shall specify that the Construction Codes or the rules legally adopted thereunder have been incorrectly interpreted or applied, the provisions of the Construction Codes do not fully apply, or an equally good or better form of

> construction can be used. The OAH shall have no authority to waive requirements of the Construction Codes.

Clearly this regulation provides the jurisdictional basis for this court to hear this case. And DCRA does not contest this. But this does not end the analysis of this court's jurisdiction, *vel non.* The further question is whether the appeal was timely filed.

12A DCMR 112.1 did not provide the time within which the appeal had to be filed, however.[4] Under such circumstances, the court of appeals has ruled that the appeal must be filed within a "reasonable period" after the Petitioners are chargeable with notice of the decision. *Woodley Park Cmty. Ass'n v. District of Columbia Bd. Of Zoning Adjustment*, 490 A.2d 628, 635, 638 (D.C. 1985). In *Waste Mgmt. of Md., Inc. v. District of Columbia Bd. Of Zoning Adjustment,* 775 A.2d 1117,1122 (D.C. 2001), the court of appeals held: "(I)n the absence of exceptional circumstances substantially impairing the ability of an aggrieved party to appeal - circumstances outside the party's control - we conceive of two months between notice of a decision and appeal therefrom as the limit of timeliness." *Accord, Sisson v. District of Columbia Board of Zoning Adjustment*, 805 A.2d 964, 969 (2002).

The Coalition files its appeal within two weeks, or ten business days, from its issuance. Accordingly, this court has jurisdiction to hear this appeal.

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[4] Subsequent revisions to the regulations included 12A DCMR 112.2.1 to provide a ten day time frame for filing an appeal to OAH, as follows: "The OAH appeal shall be filed within 10 business days after the date the person appealing the decision of the code official had notice or knowledge of the decision, or should have had notice or knowledge of the decision, whichever is earlier." See 61 D.C. Reg. 2875 (Mar. 28, 2014).

B. Burden of Proof

The Coalition asserts that DCRA and the Owner have the burden of proof, since they "are proponents of the building permit" in dispute, citing *DCRA v. Teren*, 2006 D.C. Off. Adj. Hear. LEXIS 169 (December 28, 2006). In *Teren,* this court considered whether it had jurisdiction to review a Notice of Violation/Notice to Abate issued by DCRA, and if so, what was the standard of review. The Notice of Violation in question was a Notice directing Respondent to correct an alleged building code violations on his property. This court held that it had jurisdiction over the matter, and also held that under the District of Columbia Administrative Procedure Act, (DCAPA) DCRA had the burden of proving the alleged violation, since DCRA was asserting a particular condition violated the law and, therefore, had the burden of establishing by the preponderance of the evidence that a violation occurred. In that case, DCRA, not the property owner, was seeking a change in the status quo by asserting that an existing condition on the property must be changed to comply with the law. Under the DCAPA, "the proponent of a rule or order shall have the burden of proof." D.C. Official Code §2-509(e). *See* OAH Rule 2822.1 (the proponent of an order shall have the burden of proof).

Here, the Coalition is seeking to change the *status quo* by having the outstanding building permit canceled or voided. Therefore, the Coalition has the burden of proof, the ultimate burden of persuasion, and the standard is proof by the preponderance of the evidence.

At the commencement of the hearing, I determined that it was appropriate to place the initial burden on DCRA and the Owner to produce evidence on the issuance of the Permit. This was not to shift the burden of proof, or the burden of persuasion, but rather it was in accordance with what I determined to be my duty to "allocate the burden of producing evidence to promote

fairness, equity, substantial justice, and sound judicial administration." OAH Rule 2822.3 It would have been unfair to expect the Coalition to produce evidence surrounding DCRA's and the Owner's actions or inactions, without discovery or subpoenas, to support its case and withstand a motion to dismiss. Moreover, none of the parties objected to proceeding in this fashion.

Accordingly, the Coalition has the burden of proof, and the manner in which the hearing proceeded does not alter or change this.

C. Standard of Review

The standard of review of the Code Official's actions in issuing the Permit is whether his approval was "arbitrary, capricious, or an abuse of discretion." *D.C. Office of Human Rights v. D.C. Dep't of Corr.*, 40 A.3d 917, 923 (D.C. 2012); *see* D.C. Official Code § 2-510 (a)(3).(2001). Although the review of legal issues (such as interpretation of statutes and regulations) is *de novo*, deference is given to the agency's interpretation of the statute and regulations it is charged by the legislature to administer, unless its interpretation is unreasonable or is inconsistent with the statutory language or purpose.

In other words:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984). Accord, *Timus v. District of Columbia Dep't of Human Rights*, 633 A.2d 751, 759 (D.C. 1992); *See, e.g., District of Columbia Dep't of Env't v. East Capitol Exxon*, 64 A.3d 878-880-81 (D.C. 2013); *Schlank v. Williams*, 572 A.2d 101, 107 (D.C. 1990); *Superior Beverage, Inc. v. District of Columbia Alcoholic Beverages Control Bd.*, 567 A.2d 1319 (D.C. 1989); *Smith v. Department of Employment Servs.*, 548 A.2d 95, 97 (D.C. 1988).

The Code Official is specifically authorized and directed to enforce the provisions of the Construction Codes. He is delegated "the authority to render interpretations of the Construction Codes and to adopt policies and procedures in order to clarify the application of its provisions. Such interpretations, policies and procedures shall be in compliance with the intent and purpose of the Construction Codes." 12A DCMR 104.1

Accordingly, when the construction of an administrative regulation rather than a statute is in issue, "deference is even more clearly in order." *1330 Connecticut Ave., Inc. v. District of Columbia Zoning Comm'n*, 669 A.2d 708, 714-15 (D.C. 1995). If a regulation is susceptible to differing interpretations, deference must be given to the agency's interpretation. *See Appleseed Ctr. for Law & Justice, Inc. v. District of Columbia Dept. of Ins., Sec., & Banking*, 54 A.3d 1188, 1211 (D.C. 2012).

D. The Coalition's Challenges to the Permit

The Coalition claims that the Permit should be revoked because the Code Official abused his discretion in allowing "projections" beyond the façade of the building which are prohibited.

The projections complained of include: 1) bay window extensions and balconies on the Kanawha Street and Military Road sides; 2) a circular support column on the Kanawha Street side extending from the foundation to the top floor of the building; 3) a below grade foundation wall on the Kanawha Street side; and 4) an areaway or retaining wall on the Kanawha Street side.

1. Projections on the Kanawha Street Side

The Construction Code restricts projections in several ways. One is that they are not allowed on a "street" less than 60 feet wide, with certain exceptions not relevant here. 12A DCMR 3202.7.1 provides:

> Limitations based on street width. Except as otherwise permitted by this chapter, projections shall not be allowed on any street less than 60 feet (18288 mm) in width. Exception: Projecting cornices, bases, water tables, pilasters or uncovered steps.

The Construction Code at the time of the Permit approval did not define "street" or how a street was to be measured. The Coalition contends that the measurement should be based on the recorded plat prepared by the Office of the Surveyor. DCRA and the Owner point out that historically BRLs are an integral part of the street system in the District: namely, the District can accept the dedication of a street less than 90 feet wide if BRLs are created which correspond to the width of the street on the highway plan. D.C. Official Code § 9-203.03(a).

The area between the BRLs and the property lines is treated as public space, just like the public right-of-way (consisting of the roadway, sidewalk and parking), although it is private property. D.C. Official Code § 9-203.05 provides:

> Any area between the property line and the building restriction line shall be considered as private property set aside and treated as public space under the care and maintenance of the property owner. The use of this area shall be controlled by the District of Columbia police regulations with respect to the use of public space and the projection of buildings beyond the building line. The District shall have a right-of-way through this area for sewers and water mains free of charge. The Mayor may build sidewalks on this area if in the judgment of the Mayor the space between the street lines is not sufficient to permit the construction of sidewalks within the street lines.

Accordingly, the argument is that the BRLs should be considered to be like the property lines, which define the public-right-of-way, for determining the width of a street for approval of projections.

The Code Official interpreted the regulation to allow measuring a street for purposes of encroachments from the BRLs on each side of the public right-of-way. Measuring the area from BRL to BRL on Kanawha Street means that Kanawha Street is a 70 feet wide street for purposes of approval of projections. This encompasses the area from the BRLs to the property lines, totaling 20 feet, plus the public right-of-way, including the roadway, sidewalk and parking, 50 feet.

According to the Code Official, historically this is the manner in which the measurement was made by DCRA code officials regarding approvals of projections. And I credit Mr. Colbert's testimony that there are numerous buildings in the neighborhood of the Project and throughout the District with projections on buildings which are located on streets measuring more than 60 feet wide, only if the BRLs are taken into consideration in the measurement.

A review of the history of the pertinent regulation in the Building Codes over many years bears this out. Restricting projections on streets less than 60 feet wide has been in the Building Code since at least 1930. The 1930 Code, as well as every Code until 1961, also provided that

the measurement of the "street" should be "from building line to building line" (the building restriction line). *See* 1930 Building Code, Part 5.A; 1941 Building Code § 405(a); 1951 Building Code § 405(b). The Code Official's interpretation of the term "street" as encompassing the area from BRL to BRL was expressly provided for in these Building Codes until 1961, and it is, therefore, grounded in history. In 1961, §405(b) was amended and, for some unexplained reason, the sentence stating how to measure a street width for purposes of projections was dropped.

Recently, the Construction Code was amended, effective May 9, 2014, to expressly confirm the consistent long-standing interpretation of the Code that for purposes of projections the measurement of a "street" includes the area from the BRLs to the property lines, not the just the public right of-way (measured from property line to property line). 12A DCMR 3202.7.1.

DCRA and the Owner argue that this amendment makes moot this appeal because, in the event the court decides that the Construction Code in effect at the time the Permit was issued did not allow projections on Kanawha Street, the Owner will simply file a new application with the same projections.

I do not find that the amendment to the Construction Code should be given retroactive effect or that it makes this appeal moot, however. See *1880 Columbia Rd. N.W. v. District of Columbia Rental Accomm. Com.,* 400 A.2d 333, 338 (D.C. 1979) (adopting general rule that agency regulations are prospective and binding only on actions initiated after the release date of the regulations).

I consider the recent amendment to the Construction Code to be relevant in that it appears to be for the purpose, and has the effect, of conforming the code to the long standing

interpretation made by the Code Officials of the provision regarding the measurement of a street in the context of approval of projections; namely from BRLs. In other words, I do not find that the amendment reverses or changes the interpretation of the code provision, such that it should not be considered in deciding whether the Code Official's interpretation of the existing code was arbitrary or illegal. In *1880 Columbia Rd.,* 400 A.2d at 338, the court said:

> Although an administrative agency is not bound to rigid adherence to its precedents, it is equally essential that ***when it decides to reverse its course, it must give notice that the standard is being changed, . . . and apply the changed standard only to those actions taken by parties after the new standard has been proclaimed as in effect.*** (emphasis added; citation omitted)

The Coalition has not shown that the Code Official's interpretation of the regulation to allow measuring the street for purposes of encroachments from the BRL on each side of the public right-of-way is arbitrary, capricious, or illegal.

2. Modification to Allow a Four Feet Wide Bay

Since Kanawha Street is considered to be a 70 feet wide street, the four foot bay window projections on Kanawha Street extend only a single foot further than what is expressly permitted under 12A DCMR 3202.10.3.3. The Code Official exercised his discretion and signed an official DCRA variance application form authorizing the modification to extend the width of the bay by a foot. The Code Official has the discretion to do this.

12 A DCMR 3202.4 deals specifically with modifications to projection requirements. It gives the Code Official discretion to grant modifications of requirements on projections if he deems it in the general public interest as defined in Section 3202.4.1.

Here the Code Official exercised his discretion and granted the modification to allow an extra foot in the width of the bay window on Kanawha Street side, after determining that the bay was an embellishments of the building in the general public interest, meeting the criteria set forth in 12A DCMR 3202.4.1:

> Modifications in the general public interest are those requested to embellish the building, provided that:
>
> 1. The primary object of the modification is not the occupation of additional public space;
> 2. The primary object of the modification is not changing of interior arrangements;
> 3. In the opinion of the code official such modification will not interfere with adjacent buildings; and
> 4. In the opinion of the code official such modification will not interfere with the general public interest.

The Coalition has not shown the Code Official's grant of the modification to the bay window is arbitrary, capricious or illegal.

3. The Width of the Bays

The parties agree that whether the bay projections on the Kanawha Street and Military Road sides are within the allowable maximum width under the formula for calculating the maximum width of "multiple projections" in the Construction Code depends on whether they are considered separate projections or multiple projections.. If the projections are considered as "separate projections" they are too wide. But greater aggregate width is allowed for multiple bay projections.

The Coalition argues that the correct interpretation of 12A DCMR 3202 10.3.1 is that the projections on each side of the building must be considered separately when calculating the

allowable width. The Code Official determined otherwise, however. His interpretation of the regulation was that they are "multiple projections."

"Multiple projections" is defined as "two or more separate projections." 12A DCMR 3202 10.3.1.5. The Code Official testified that based on his interpretation of the regulation, there were multiple projections because the projections on Military Road side and the Kanawha side, considered together, constituted "multiple projections." The interpretation of the regulation was within the responsibility of the Code Official, and the Coalition has not shown that it was arbitrary, capricious or illegal.

4. Removability of Projections

12A DCMR 3202.1 provides that

> Encroachments (hereinafter referred to in this Section as 'projections') are a privilege. They cannot be claimed as a right, and require a permit issued by the code official. . . . The code official is authorized to further restrict or refuse proposed projections if the code official considers such action best for the public interest.

12A DCMR 3201.2 provides that permits for "projections shall be issued with the understanding and agreement that they will be promptly removed upon notice by the code official." On the Kanawha Street side of the building there is a circular support column which the Coalition contends is not subject to prompt removal, because it is a permanent structural element that is an integral part of the building, the removal of which would cause a substantial portion of the building to collapse. In addition, it contends that the below grade foundation wall associated with the underground vault and the cellar unit on the Kanawha Street side is also a

permanent structural part of the building extending beyond the BRL. Petitioner offered no evidence of the amount of time, effort or cost that would be associated with the "prompt removal" of any projection, to prove that these elements could not be promptly removed if requested by DCRA.

The regulation makes it abundantly clear that approval of an encroachment is not a matter of right, and that on notice from the Code Official it must be promptly removed. There is no requirement that the removal be without difficulty or substantial cost, however. If that is the result of having to remove an encroachment, that is the risk that the applicant for the encroachment must bear.

I credit the Code Official's and Mr. Colbert's testimony that the column in question was removable. In addition, Mr. Colbert testified that he designed the building with the full understanding that the projections are subject to possible removal, that he communicated this to the Owner, and that the Owner understood that they were subject to possible removal.

The Coalition has not shown that the Code Official's action in approving any of the projections was arbitrary, capricious, or illegal: namely, that the approval was in derogation of the requirements of 12A DCMR 3201.2.

Regarding the below grade foundation wall on the Kanawha Street side, the Coalition's contends that the wall is part of a vault projection which "supports habitable space" below grade. The vault in question was reflected in the Permit drawings which were approved by the Code Official. There is no requirement that the Code Official make specific findings when he approves a vault projection under 12A DCMR 3202.9.2.2. And even if the wall in question

supports habitable space, the Code Official has authority to "approve other uses (for vault space) not forbidden by law, code, or regulation. 12A DCMR 3202.9.2.3(6).

The Coalition has not shown that the approval here in any way was arbitrary, capricious or illegal.

5. The Areaway or Retaining Wall

An areaway is a below grade projection that is open at the top. The most common type of areaways are window wells and lead walks to a basement or below grade residential units. A drawing submitted by the Owner to the Code Official referenced an area on the Kanawha Street side as an "areaway." I credit Mr. Colbert's testimony that this was an error, however, and the referenced area is not an areaway, but is in fact a retaining wall - a landscaping feature to control grade and drainage along the side of the building. Retaining walls are not projections, and they are subject to the jurisdiction of the District Department of Transportation, not the Code Official.

Petitioner has not shown that the Code Official in any way acted in an arbitrary, capricious or illegal manner with respect to the retaining wall in question.

IV. Order

Based on the foregoing findings of fact and conclusions of law, it is this 20th day of March 2015:

ORDERED, that DCRA's motion to file its supplementary brief is **GRANTED**, and it, along with the Coalition's opposition and DCRA's reply, are accepted for filing; and it is further

ORDERED, that the Coalition's challenges to building permit No. B1208792 issued by the DCRA to CMK DEV, LLC, for the construction of an apartment building at 5333 Connecticut Ave., NW (the Permit) are hereby **DENIED**; and it is further

ORDERED, the Coalition's appeal of the issuance of the Permit is **DISMISSED WITH PREJUDICE**; and it is further

ORDERED, that the reconsideration and appeal rights of any party aggrieved by this order are set forth below.

Robert E. Sharkey
Administrative Law Judge

HOW TO REQUEST THE ADMINISTRATIVE LAW JUDGE TO CHANGE THE FINAL ORDER

Under certain limited circumstances and within certain time limits, a party may file a written request asking the administrative law judge to change a final order. OAH Rule 2828 explains the circumstances under which such a request may be made. Rule 2828 and other OAH rules are available at www.oah.dc.gov and at OAH's office.

A request to change a final order does not affect the party's obligation to comply with the final order and to pay any fine or penalty. If a request to change a final order is received at OAH **within 10 calendar days** of the date the Final Order was filed (**15 calendar days** if OAH mailed the final order to you), the period for filing an appeal with the District of Columbia Court of Appeals does not begin to run until the Administrative Law Judge rules on the request. **A request for a change in a final order will not be considered if it is received at OAH more than 120 calendar days of the date the Final Order was filed (125 calendar days** if OAH mailed the Final Order to you).

HOW TO APPEAL THE FINAL ORDER TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Pursuant to D.C. Official Code § 2-1831.16(c)-(e), any party suffering a legal wrong or adversely affected or aggrieved by this Order may seek judicial review by filing a Petition for Review and six copies with the District of Columbia Court of Appeals at the following address:

Clerk
District of Columbia Court of Appeals
430 E Street, NW, Room 115
Washington, DC 20001

The Petition for Review (and required copies) may be mailed or delivered to the Court of Appeals, and must be received there within 30 calendar days of the mailing date of this Order, pursuant to D.C. App. R. 15(a)(2). There is a $100 fee for filing a Petition for Review. Persons who are unable to pay the filing fee may file a motion and affidavit to proceed without the payment of the fee when they file the Petition for Review. Information on petitions for review can be found in Title III of the Court of Appeals' Rules, which are available from the Clerk of the Court of Appeals, or at www.dcappeals.gov.

Certificate of Service:

By First-Class Mail (Postage Paid):

Andrea C. Ferster, Esquire
2121 Ward Court, NW, 5th Floor
Washington, DC 20037

ANC 3/4 G
P.O. Box 6252 Northwest Station
Washington, DC 20015
Attn: Randy Speck, Chair

By Interagency Mail:

Charles Thomas,
Interim General Counsel
Dep't of Consumer & Regulatory Affairs
1100 4th Street, SW
5th Floor
Washington, DC 20024
Attn: John Postulka,
Assistant General Counsel

By First-Class Mail (Postage Paid):

Philip T. Evans, Esquire
Whayne Quinn, Esquire
Paul J. Kiernan, Esquire
Holland & Knight LLP
800 17th Street, NW
Suite 100
Washington, DC 20006

I hereby certify that on March 23, 2015 this document was served upon the parties named on this page at the address(es) and by the means stated.

Clerk / Deputy Clerk