

December 2, 2019

Zoning Board of Appeals  
c/o Ms. Kasandra Maynes, Esq.  
City of Cincinnati  
Business Development and Permit Center  
805 Central Ave., Suite 500  
Cincinnati, OH 45202

RE: 1140 Fort View Pl., Appeal #Z2019-0011, Permit #2019P09120

Dear Members of the Zoning Board of Appeals,

This response is hereby submitted in response to Appeal #Z2019-0011 and in support of permit #2019P09120 issued to Applicant Joseph Mezher regarding 1140 Fort View Place. The evidence will show that this Board's decision in the previous case (Permit 2016P06005; Case Z4037-2018)(attached herein as Exhibit 1) already addressed all the issues which Appellants raise in this appeal.

Applicant moves this Board to dismiss this Appeal as a res judicata. This Board's decision Z4037-2018 reversed the approval of permit #2016P06005 based on only two deficiencies: first, the requirement of a preliminary geotechnical report, and second, the decision to exclude the elevator and stair enclosure when calculating the building height. Permit #2019P09120 is the same building plan as #2016P06005 except that it now includes the preliminary geotechnical report, and eliminates the enclosure containing an elevator and stairs to rooftop. Except for these two changes to address this Board's decision in Z4037-2018, Permit #2019P09120 has all the same measurements for the proposed construction ("the box") as permit #2016P06005. In the decision in #Z4037-2018, this Board already approved all other aspects of

permit #2016P06005 except for the issues described above, so the issues Appellants raise about the box have already been approved by this Board. Appellants had 30 days to appeal this Board's decision to the Court of Common Pleas, but did not. Thus, this Board's decision in Z4037-2018 is final and creates a res judicata. All parties should be able to rely on the finality of this Board's decisions.

Appellees hereby move that this Board dismiss the current appeal filed by Appellants as a *res judicata*. Appellants' appeal does not contest the provisions which address the two previous deficiencies. The Appellants are attempting to relitigate the issues of the box measurements which were already decided in Z4037-2018. There are no new issues in the Appellants' appeal. Appellants (Stephen Vogel, Kenneth & Judith Kenniston) are honest enough to state that, "**The issues discussed in this appeal were previously resolved by you in ZBA Case No. Z-4037-2018 (October 18, 2018).**" (emphasis added)(Appellants' appeal letter, p. 1) Appellees have complied with the two deficiencies previously identified by this Board, so permit #2019P09120 is in compliance with CZC and CBC and this appeal should be dismissed as res judicata.

Further, the evidence will show that the building plan is compliant and this zoning approval has been issued in accordance with the Cincinnati Zoning Code Hillside District (CZC) regulations and in accordance with the requirements of the Cincinnati Building Code (CBC).

#### FACTS

Gregory Tilsley ("Tilsley") is the architect who designed the plan for 1140 Fort View Place. He has practiced at Tilsley & Associates in Mt. Adams, Cincinnati for the last 20 years. He has designed multiple homes in the Hillside District in general and on Fort View Place in particular. Mr. Tilsley will be appearing to testify at the hearing.

Mr. Jeffrey R. Barrow, P.E. at Civil Solutions Associates, 3760 Fulton Grove Rd., Cincinnati, OH 45245 is a highly qualified engineer who knows the geology of the Fort View hillside. Mr. Tilsley consulted with Mr. Barrow to provide geotechnical engineering regarding the project, including the excavation and fill to be conducted in the plan.

Mr. Weston Munzel is the zoning plan examiner employed by the City of Cincinnati Zoning Board. He verified that Mr. Tilsley's calculations were in accordance with the CZC and approved the plan for permit, for the second time.

#### THE APPEAL

Appellants (Stephen Vogel, Kenneth & Judith Kenniston) specifically admit that, "**The issues discussed in this appeal were previously resolved by you in ZBA Case No. Z-4037-2018 (October 18, 2018).**" (emphasis added)(Appellants' appeal letter, p. 1) This Board's decision in the previous case already addressed all the issues which Appellants have raised in this appeal. The decision specifically cited only two reasons for reversing the zoning approved form permit 2016P06005; first, failure to provide a preliminary geotechnical report; and second, the enclosure for and stairwell to allow access to the roof violated the building envelope (height). The current permit addresses the two deficiencies which were decided by this Board; no other deficiencies were found. Appellants did not exercise their right to appeal the decision in Z-4037-2018 to the Court of Common Pleas, and thus waived any further dispute as to this decision. Thus, this Board should dismiss the current appeal filed by Appellants as a *res judicata*.

## **I. The side yard and front yard setbacks have been properly calculated**

This Board has already ruled in favor of Appellants on all the matters of setback measurements, and thus this Appeal should be dismissed on the basis of res judicata. This Board specifically decided, "I move to reverse the decision of the Zoning Administrator based on failure to have received as part of the building permit application a **preliminary geotechnical report**, and the decision to exclude the **elevator and stair enclosure** from the allowed building envelope." (emphasis added) Zoning Board of Appeals decision Z-4037-2018, p. 6 This motion was unanimously approved. Thus, this Board rejected all the other complaints raised by Appellants. If appellants felt the other issues they raised should have also been disapproved by the Board, they should have appealed the Board's decision to the Court of Common Pleas.

Appellee's architect, Gregory Tilsley, measured front and side yard setbacks ("the box") correctly taking into account the bay windows which in each instance make up the majority of the structure. Appellants specifically admit that, "**The issue of the proper application of CZC Sec. 1400-27(D) may not again be contested by Applicant.**" (emphasis added)(Appellants' appeal letter, p. 7), so this Board should not allow Appellants to again contest this Board's approval of Mr. Tilsley's measurements of "the box".

## **II. Notice was properly issued**

CZC 1433-21(a) requires notice to adjacent property owners when "the Zoning Administrator determines the application conforms to the requirements of 1433-19 and the requirements of this chapter and all other requirements of the Cincinnati Zoning Code . . . The Zoning Administrator has a duty to notify all owners of property abutting the subject property

and the community organization recognized by the Council as representing the area that includes the subject property." Thus, when the Zoning Board determined that this application conformed to the Zoning Code, the Board had the duty to give the notice to adjacent owners and trigger the 30-day appeal period.

Appellants state that, "Zoning approval is not truly final until the building permit has been approved." However, they cite no authority for that proposition for the reason that there is no authority for that proposition. The Zoning Code does not directly state when the Zoning Board should give notice and trigger the 30-day appeal period, so the Board has discretion as to when to do so. The big picture question is whether the plan is approved by the Zoning Board, not whether the final permit has been issued - so the Zoning Board properly decided to send the notice letter to trigger the 30-day appeal period. The decision to issue the notice when it was issued was based on a reasonable interpretation of the statute and thus is entitled to deference. *State ex rel. Palmer v. State Teachers Retirement Bd.* (1993), 90 Ohio App.3d 497, 502, 629 N.E.2d 1377, 1380; *State v. Mulhern* (1991), 72 Ohio App.3d 250, 594 N.E.2d 630.

Further, notice has been given and received and Appellants have exercised their opportunity to appeal. Thus, Appellants' rights have clearly NOT been violated - they were given the legally required notice, and they are here asserting their rights to appeal.

The ezTrak record dated December 1, 2019 (attached herein as Exhibit 2) shows that contrary to Appellants' assertions, only one item remains for approval (Fire Division Review) for the permit to be available for issuance. Appellants are obviously closely monitoring this permit and have raised no new issues for this Board to consider.

## CONCLUSION

The setback/setback/height issues raised by Appellants are exactly the same issues they raised during the 2018 appeal. These issues have already been decided by this Board and thus are a *res judicata*.

Appellants state that Appellee uses a "moving target" approach which is a tactic they are clearly using themselves. Appellants are on a fishing expedition attempting to relitigate the building envelope in every respect. In the previous decision, this Board reversed the permit based on up two deficiencies, which have been addressed by Appellee in the current permit. Thus, permit 2019P09120 was properly issued.

Appellee along with his experts presented a building plan which was approved and the City issued a notice of zoning approval. Appellee is being unjustly delayed in beginning his project and is suffering irreparable damages based on a frivolous appeal which presents the same issues for appeal that Mr. Vogel and Mr. Kenniston unsuccessfully brought before this Board on a past occasion in Z4037-2018. These issues were heard by this Board and this Board did not find any deficiency in the setback measurements. It is proper to conclude that this Board did not disapprove the setback measurements because the decision does not reflect disapproval of the setback measurements. Citizens should be able to rely on the finality of this Board's decisions.

Appellee used the proper measurements and submitted a plan based on expert analysis and consultation with a highly qualified architect (Gregory Tilsley), engineer (Jeffrey R. Barrow, P.E.), and surveyor. The Zoning Department approved the plan based on the requirements of the CZC and CBC. This same plan has now received zoning approval twice (except for two deficiencies in the first application which were addressed in the 2019 application). The zoning

approval is compliant and must stand as is; there is no basis for a variance requirement. The permit was properly issued and Appellants' appeal should be denied as a res judicata.

Sincerely,  
KATHLEEN MEZHER & ASSOCIATES, LLC



By: Kathleen D. Mezher  
Attorney at Law

**DECISION  
ZONING BOARD OF APPEALS  
CITY OF CINCINNATI  
HEARING DATE: October 18, 2018**

**In re:**

An appeal challenging zoning approval  
for Building Permit No. 2016P06005

1140 Fort View Place

**Appellants:**

**Kenneth and Judith Kenniston &  
Stephen F. Vogel**

Tim Burke, Esq.  
Kathy Ryan, Esq.  
Counsel for Appellant  
Manley Burke, LPA  
225 W. Court Street  
Cincinnati, Ohio 45202

Case No.: Z-4037-2018

**Appellee:**

**Joseph R. Mehzer**

Mrs. Kathleen Mehzer, Esq.  
Counsel for Appellees  
8075 Beechmont Avenue  
Cincinnati, Ohio 45255

**DECISION SUMMARY:**

The Zoning Board of Appeals (the "Board") **REVERSES** the zoning approval for Building Permit No. 2016P06005.

**THE ZBA RECORD:**

1. Notice of Appeal to the Board, including appeal justification letter and Appellant Exhibit List.
2. Appellee Reply and Exhibit List.
3. Zoning Board of Appeals transcript of proceedings.



## **PUBLIC HEARING:**

Pursuant to Cincinnati Zoning Code (CZC) Chapter 1449, the Board is a quasi-judicial body empowered to find that the order, adjudication, or decision underlying a zoning appeal is illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record.

The Board conducted a de-novo public hearing on October 18, 2018, ("Hearing") on the above-cited appeal. The Board mailed notice to all persons entitled to receive notice of the appeal. Also, the Board published prior notice of the Hearing on the appeal in The City Bulletin. A quorum of Board members under Section 4 of the Rules of Procedure were present throughout the Hearing.

Having reviewed and considered the evidence filed with the Board, and the arguments presented to the Board at the Hearing, the Board makes the following findings of fact and conclusions of law.

## **FINDINGS OF FACT:**

1. Joseph R. Mehzer owns certain real property commonly identified as 1140 Fort View Place ("Subject Property").
2. The Subject Property is on the east side of Fort View Place in the Mount Adams neighborhood. The Subject Property is in a Single-Family ("SF-2") zoning district and a Hillside Overlay District ("HS District").<sup>1</sup>
3. Kenneth and Judith Kenniston own certain real property commonly identified as 1142 Fort View Place ("Kenniston Property"). The Kenniston Property is on the east side of Fort View Place at the southeast corner of Fort View Place and Hatch Street, abutting the Subject Property to the south.
4. Stephen F. Vogel owns certain real property commonly identified as 1136 Fort View Place ("Vogel Property"). The Vogel Property is on the east side of Fort View Place, and 1138 Fort View Place ("Schrand Property") separates the Vogel Property and the Subject Property.
5. Tim Burke and Kathleen Ryan represented Kenneth and Judith Kenniston and Stephen F. Vogel ("Appellants") before the Board at the Hearing.
6. Kathleen Mehzer represented Joseph R. Mehzer ("Appellee") before the Board at the Hearing.
7. The Appellee applied for building permits to demolish an existing structure on the Subject Property to build a new single-family home ("New Structure").

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<sup>1</sup> Cincinnati Municipal Code Section 1400-17

8. An application to build a new structure in an HS District is subject to review under CZC Section 1433-13. CZC Section 1433-15 provides the documents required for submission for HS District application review, including, but not limited to, a preliminary geotechnical evaluation and a determination of the Maximum Building Envelope ("MBE").
9. CZC Section 1433-17 establishes that the MBE is calculated through averaging the front, side, and rear yard setbacks of abutting properties flanking the subject property, as well as the heights of the front and rear of those properties.
10. HS District applications that conform to MBE calculations are approved administratively by the Department of Buildings and Inspections ("B&I"); whereas, applications that fail to conform to MBE calculations require a public hearing before the Zoning Hearing Examiner.
11. B&I approved the Appellee's HS District application, including MBE and issued Building Permit No. 2016P06005, on July 12, 2018.
12. The Appellants appealed the zoning approval issued under Building Permit No. 2016P06005, on August 14, 2018.
13. The Appellants argued the New Structure fails to comply with HS District regulations. The Appellants contended the Appellee's HS District application is deficient because the Appellee's design professional, Greg Tilsley failed to submit a preliminary geotechnical evaluation. Also, they alleged that Mr. Tilsley miscalculated the MBE for the New Structure because it is taller than abutting properties.
14. Mr. Tilsley asserted that he was unable to conduct a preliminary geotechnical evaluation on the Subject Property because there is an existing structure that occupies the property. He testified that, instead of performing a preliminary geotechnical evaluation, he consulted Jeff Barrow of Civil Solutions Associates and signed a declaration contract to perform geotechnical services based on Mr. Barrow's verbal recommendations. Mr. Tilsley stated that he discussed with Civil Solutions Associates certain finding that that firm had discovered in working on other projects in the area, and he relied on that correspondence to design the New Structure.
15. Mr. Tilsley acknowledged that CZC Section 1433-15 requires applications subject to HS District regulations to include a preliminary geotechnical evaluation and declared that he submitted the declaration contract but did not submit a written preliminary geotechnical evaluation.
16. Matthew Shad, the City's Zoning Administrator, testified before the Board. Mr. Shad asserted it is a standard practice for B&I to accept a contract for geotechnical services in place of a preliminary geotechnical report. He maintained that the Building Plans Examiner determined that a preliminary geotechnical report was unnecessary, but he

conceded that the HS District regulations require the submission of a preliminary geotechnical evaluation.

17. The Appellants argued the MBE calculation for the New Structure's north side yard setback is incorrect. Mr. Tilsley asserted that he determined the side yard setback on the north side of the Subject Property to be two feet. Mr. Tilsley declared that he obtained that figure by averaging the north side setback of abutting properties: particularly, relating to the Kenniston Property measuring from the Hatch Street right-of-way to a projecting bay window on the north side of the Kenniston Property.

The Appellants advanced that the measurement using the bay window violated CZC Section 1400-27-D(d), which section provides that measurements must be "made to the closest wall of the structure, Chimneys, eaves and bay windows up to 12 feet in length, are not included in the measurement."

Mr. Tilsley conceded that if he had measured to the wall of the Kenniston Property instead of a projecting bay window, then the New Structure's MBE would be smaller. However, he maintained that the bay windows on the north wall of the Kenniston Property occupy a significant amount of wall space with a combined measurement that he estimated at approximately 20 feet. He was unable to cite to a zoning code provision that provided an exception to CZC Section 1400-27-D(d).

18. The Appellants argued the MBE calculation for the New Structure's front setback is wrong. Mr. Tilsley stated that he measured to a front bay window on the Schrand Property to obtain one of the inputs for the front setback average. The Appellant stressed that measuring to the bay window violated CZC Section 1400-27-D(d), and Mr. Tilsley conceded that measurement to the wall would shrink the MBE.
19. The Appellants argued the MBE calculation for the New Structure's rear setback is wrong, asserting the design professional measured inconsistently among the abutting properties.
20. The Appellants argued the MBE calculation for the New Structure's rear height is wrong, and the proposed structure height erroneously excludes portions of the structure from the MBE. The Appellant contended the New Structure proposes a roof deck, outdoor amenities, an access stairwell, and an elevator shaft above the maximum height permitted by the MBE. The Appellant declared that the zoning code includes two sections in which certain parts of a structure are excluded from measurement in CZC Sections 1400-27-D and 1421-19, and those exceptions do not apply to those portions of the New Structure rising above the MBE.
21. The Appellants stressed that the New Structure violates CZC Section 1433-19(a) because the proposed height exceeds the MBE calculation.
22. Mr. Tilsley testified that the proposed access stairwell and elevator shaft is not habitable space and argued that that portion of the structure should be excluded from the MBE.

23. Mr. Shad testified that he excluded the roof amenities, access stair, and an elevator shaft by interpreting CZC Section 1421-19. He stated that he looked to the character of the items excluded from height limitations in CZC Section 1421-19, concluding that those items do not include habitable space, typically do not occupy a lot of space, and many of those items are similar to mechanical equipment; therefore, he declared that his interpretation of the zoning code excludes elevator shafts, access stairs, and other uninhabitable access points.
24. Mr. Shad conceded that the zoning code provides no height exceptions to structures that exceed the calculated MBE.
25. Ken Kenniston testified before the Board to express concerns about the stability of the hillside. Also, Stephen Vogel testified before the Board about concerns related to the amount of cut and fill listed on the Appellee's building permit application.
26. John Senhauser, an architect with knowledge and experience building homes in the area, testified before the Board to provide his professional opinion related to certain deficiencies that he perceived in calculating the MBE for the New Structure.
27. The Appellee argued that the MBE calculation is accurate. The Appellee declared that Mr. Senhauser designed the homes on the Kenniston Property and the Schrand Property, and Mr. Tilsley used the building plans for those properties to calculate the MBE for the New Structure.
28. Eric Russo, executive director of the Hillside Trust, testified before the Board and stressed the importance of preliminary geotechnical reports.

#### CONCLUSIONS OF LAW:

1. Pursuant to CZC 1449-17 the Board considers whether the decision that is the subject of the appeal is illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the Board may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the Board.
2. The Appellant has the burden of proof.
3. After considering the evidence and the arguments received at the Hearing, the Board reverses the zoning approval for Building Permit No. 2016P06005.
4. CZC Section 1433-15(b) is unambiguous, requiring all development applications in HS Districts to include a preliminary geotechnical evaluation. The application for Building Permit No. 2016P06005 did not include a preliminary geotechnical evaluation;

therefore, the Board reverses the zoning approval for Building Permit No. 2016P06005 for failure to receive the required preliminary geotechnical evaluation.

5. CZC Section 1433-19(a) is unambiguous, requiring a new structure to be contained within the calculated MBE. Portions of the New Structure exceed the calculated MBE, and those portions of the New Structure do not satisfy any zoning code exception to be excluded from the measurement provisions of the zoning code.

Based on the foregoing, the Board reverses the zoning approval for Building Permit No. 2016P06005.

**DECISION:**

And now, this 18<sup>th</sup> day of October 2018, in consideration of the foregoing findings of fact and conclusions of law, the Board REVERSES the zoning approval for Building Permit No. 2016P06005.

**MOTION:** Mr. Robert Zielasko:

I move to reverse the decision of the Zoning Administrator based on failure to have received as part of the building permit application a preliminary geotechnical report, and the decision to exclude the elevator and stair enclosure from the allowed building envelope.

**SECOND:** Mr. Michael Moran

**VOTE:**

Affirmative:

Mrs. Supinger  
Mr. Sweeney  
Mr. Moran  
Mr. Zielasko

s. Emily Supinger  
Emily Supinger, Vice-Chair  
Zoning Board of Appeals

s. Charles Martinez  
Charles Martinez, Staff Attorney  
Zoning Board of Appeals

**APPEALS:**

This decision represents the final appealable order of the Zoning Board of Appeals and may be appealed to a court of competent jurisdiction pursuant to Ohio law.

The Board transmits a true and accurate copy of this final order by certified mail on this 27<sup>th</sup> day of December 2018, to the following persons:

**Tim Burke, Esq.  
Kathy Ryan, Esq.  
Counsel for Appellant  
Manley Burke, LPA  
225 W. Court Street  
Cincinnati, Ohio 45202**

**Mrs. Kathleen Mehzer, Esq.  
Counsel for Appellees  
8075 Beechmont Avenue  
Cincinnati, Ohio 45255**

The Board transmits a true and accurate copy of this final order by interdepartmental mail to the following persons:

**Matthew Shad  
Zoning Administrator**

- 
- ezTrak Home
- Review Records
- Contractors »
- Pay Online »
- ezLinks »
- Apply-Permits »
- Sign In
- ezTrak Registration

## ezTrak Record Details

Detailed Information for Project/Case#:2019P09120 at 1140 Fort view pl, Cincinnati

Please select the relevant tab below to view more information.

### THIS PERMIT IS NOT READY FOR ISSUANCE

- General Information
- Approvals
- Inspections

### Approvals:

Please click a heading below to display more detailed information.

<b>Building Dept Plan Review - Approved (Required)</b> <input checked="" type="checkbox"/>
<b>Building Dept Zoning Review - Approved (Required)</b> <input checked="" type="checkbox"/>
<b>DOTe Permit &amp; License Center Review - Approved (Required)</b> <input checked="" type="checkbox"/>
<b>Fire Division Review - Not Approved (Required)</b> <input type="checkbox"/>
<b>MSD Eng-Building Permit Review - Approved (Required)</b> <input checked="" type="checkbox"/>
<b>SMU Stormwater Eng Review - Approved (Required)</b> <input checked="" type="checkbox"/>
<b>Water Works Building Permit Review - Conditionally Approved (Required)</b> <input type="checkbox"/>
<b>Contractor Registration (This approval is reviewed upon the completion of all other required approvals) - Not Approved (Required)</b> <input type="checkbox"/>
<b>BPE - Adding Inspectns NA - Task Not Completed (Optional)</b>
<b>BPE-Additional Inspections Req - Task Complete (Optional)</b>
<b>Engineering Changes - None Submitted (Optional)</b>
<b>Plans Scanned - Task Complete (Optional)</b>

