

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 17109-C of Appeal No. 17109 of Kalorama Citizens Association, pursuant to 11 DCMR § 3100 from the administrative decision of David Clark, Director, Department of Consumer and Regulatory Affairs, from the issuance of Building Permits Nos. B455571 and B455876, dated October 6 and 13, 2003, respectively, to Montrose, LLC, to adjust the building height to 70 feet and to revise penthouse roof structure plans to construct an apartment building in the R-5-D District at 1819 Belmont Road, N.W., Washington, D.C., and from the issuance of the original Building Permit No. B449218, dated March 11, 2003.

HEARING DATES: February 17, March 9 and 16, April 6 and 20, 2004

DECISION DATES: June 22, 2004, December 7, 2004, and February 1, 2005,
December 6, 2005, July 20, 2010, and April 5, 2011

DECISION AND ORDER AFTER REMAND

Background

On November 10, 2003, the Kalorama Citizens Association (“KCA”) filed this appeal with the Office of Zoning (“OZ”) alleging that Building Permits Nos. B455571, B455876, and B449218, all pertaining to construction at 1819 Belmont Road, N.W. (“subject property”), were issued erroneously by the Department of Consumer and Regulatory Affairs (“DCRA”). The Board of Zoning Adjustment (“BZA” or “Board”) held a properly noticed hearing on the appeal, as well as several decision meetings, and at the final decision meeting on February 1, 2005, decided to partially grant and partially deny the appeal.

The Board’s decision was memorialized in Board Order No. 17109, dated November 8, 2005, which granted the appeal on the grounds that the height of the building with the roof deck exceeded the height limitations of the Height Act of 1910 (36 Stat. 452, D.C. Official Code §§ 6-601.01 – 6-601.09 (2001)), but denied the appeal with respect to the penthouse setback requirements under both the Height Act and the Zoning Regulations, and with respect to the floor area ratio (“FAR”) calculations. Order No. 17109-A, dated April 4, 2006, denied KCA’s request for reconsideration of certain aspects of the Board’s decision, including whether a sixth level

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area denoted as “attic” space on the plans would be more properly characterized as a “mezzanine” or “balcony,” thus requiring its inclusion in FAR calculations.

KCA appealed to the District of Columbia Court of Appeals (“Court”) that part of Order No. 17109 which denied its BZA appeal with respect to the FAR calculations. On appeal to the Court, KCA’s arguments as to the FAR issue went to two areas of the FAR calculations. As to the first – whether the basement was properly measured for the purposes of these calculations – the Court upheld the Board’s order. The second issue before the Court was whether the Board had adequately explained its apparent conclusion that the sixth level of the building is an “attic,” making the space potentially not countable towards FAR. The Court found that the Board had not, and remanded the case for the Board to resolve the issue. Because the Zoning Regulations do not contain a definition for the term “attic,” the Court concluded that, pursuant to 11 DCMR § 199.2(g), the Board must determine whether the space falls within one of the three sub-definitions of “attic” set forth in *Webster’s Unabridged Dictionary* (“*Webster’s Dictionary*”).

Because the Court held that the Board did not address the attic issue with sufficient particularity, it also held that the Board had not accorded Advisory Neighborhood Commission (“ANC”) 1C, the ANC within which the subject property is located, the great weight to which it is entitled pursuant to D.C. Official Code § 1-309.10(d) (2001). Therefore, the case was also remanded for the Board to make specific findings with respect to the ANC’s concern that the sixth level does not fall within the definition of “attic” and to explain why the Board does or does not agree with the ANC.

On June 14, 2010, the Board issued a Procedural Order to the parties permitting them to file legal memoranda, based on the record as it existed on the date Order No. 17109 was issued, analyzing the applicability of each of the three sub-definitions of “attic” to the space at issue, and drawing conclusions as to the effect on FAR calculations. The Procedural Order also stated that the Board would not revisit the Board holding that the space provided structural headroom of less than six feet, six inches, which is the second element that must be satisfied for attic space to be excluded from FAR. Finally, the Order indicated that the Board would deliberate on the attic issue at a special public meeting on July 20, 2010.

At the special public meeting on July 20th, the Board deliberated on the attic issue and decided that the space denoted as “attic space” on the original plans submitted with the application is indeed attic space because it falls within the third sub-definition. Since the Board had already concluded that the space provided structural headroom of less than six feet, six inches, the Board reaffirmed its conclusion that the space was properly excluded from the FAR computation and therefore again denied that portion of the appeal.

The Board members participating in this remand did not personally hear the evidence in this case. When that is the case, D.C. Official Code § 2-509(d) (2001) provides that no order adverse

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to a party may be issued until a proposed order has been served upon the parties, who then must given an opportunity to present written exceptions. Therefore, at its public meeting on January 4, 2011, the Board voted to send a proposed order to the parties and established a deadline for any exceptions and responses to be filed. The Appellant timely filed exceptions with the Board on February 4, 2011. (Exhibit 110.) DCRA filed a Response to those exceptions (Exhibit 112), and the Appellant filed a Reply to DCRA's Response (Exhibit 113). Based on its exceptions, the Appellant asked the Board to revise this Order to conclude that the sixth level of the building is not an "attic," but a floor of the building whose square footage must be included in the FAR calculations.

At its public meeting on April 5, 2011, the Board discussed the Appellant's exceptions and voted, 4-0-1, to issue the order as proposed, except for an inclusion of its explanation why it found the exceptions to be unpersuasive. That discussion appears at the end of this Order's Conclusions of Law. The order has also been revised to clarify that its Findings of Facts and Conclusions of Law are based exclusively upon what was in the plans before the Zoning Administrator at the time he cleared the building permit application for zoning review.

This Order, No. 17109-C, reflects the Board's Findings of Fact and Conclusions of Law only on the two issues remanded by the Court – the attic issue and ANC great weight – and incorporates by reference Order No. 17109. This Order, therefore, will not restate all facts concerning the subject property, but only those relevant to the remand issues, and if a relevant factual finding also appeared in Order No. 17109, it is so noted herein.

FINDINGS OF FACT

1. The plans submitted with the application depict a five-story building plus basement, with each story approximately 10 feet high. The plans also depict a sixth level of the building that is six feet, five and one-quarter inches high to the ceiling. (Exhibit 107, Attached Plans.)
2. The plans denote the sixth level as an "attic."
3. The sixth level of the subject building provides less than six feet, six inches of structural headroom. (*See*, Finding of Fact No. 31 in Order No. 17109).
4. The plans show "collar ties" forming part of the unfinished "ceiling" of the building's sixth level which are part of the building's structural members and are placed six feet, five and one-quarter inches above that level's floor.
5. "Collar tie" is defined by *Webster's Dictionary* as "a board used to prevent the roof framing from spreading or sagging."

6. The plans show no finished ceiling to the sixth level because interspersed among the collar ties and ceiling rafters of the sixth level is open space; therefore, there is no full ceiling or floor between the floor of the sixth level and the roof of the building.
7. The collar ties depicted in the plans are part of the roof framing. They secure the roof rafters and work to brace the building against racking in a north-south direction. (See, Finding of Fact No. 32 in Order No. 17109.)
8. As depicted on the plans, the sixth level of the building is at least partially within the roof framing of the building.
9. Because the plans show no finished ceiling to the sixth level, all of that level would be immediately below the roof of the building. Part of the roof of the building is flat and the sixth level is just below it. Part of the roof of the building is peaked, and there would be an open area between the sixth-level ceiling rafters/collar ties and the peaked roof.

CONCLUSIONS OF LAW

The calculation of “gross floor area” of a building includes only attic space that provides “structural headroom of six feet, six inches (6ft., 6 in.) or more.” (11 DCMR § 199.1, definition of “Gross floor area.”) In Order No. 17109, the Board stated its determination that the sixth level does not provide structural headroom of at least six feet, six inches. (Order No. 17109, at 14.) In that Order, however, the Board failed to specifically find whether the sixth level was an attic. This omission prompted a remand from the Court of Appeals with instructions that the Board determine whether the sixth level fell within one of the three sub-definitions of “attic” in *Webster’s Dictionary*. The Board now holds that the sixth level is an attic, and specifically falls within the third sub-definition.

Section 199.2 of the Zoning Regulations (“Regulations”) directs the Board to *Webster’s Unabridged Dictionary* for words not defined by the Regulations themselves. (11 DCMR § 199.2.) “Attic” is not defined by the Regulations, so the Board turns to the tripartite definition of “attic” in the most current version of *Webster’s Unabridged Dictionary* set out below:

- a. a low story or wall above the main order or orders of a façade in the classical styles;
- b. a room or rooms behind an attic;
- c. the part of a building immediately below the roof and wholly or partly within the roof framing: a garret or storage space under the roof.

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(*Webster's Unabridged Third New International Dictionary*). Sub-definition (b) does not provide any illumination of the question before the Board and is somewhat difficult to interpret as it uses the word being defined in the definition.

Sub-definition (a) is more helpful, and may or may not apply to the sixth level of the subject building. There is some question as to its precise meaning, and as to the nature of a "façade in the classical styles."

Sub-definition (c), however, provides the Board with an understandable, workable definition of "attic" within which the sixth level of the subject building clearly falls. Sub-definition (c) has two parts to it, both of which apply to the sixth level here. First, an attic is "the part of the building immediately below the roof." The sixth level is immediately below the roof. This is evident under the flat-roofed part of the building, where the roof is at the top of the sixth level. It is less clear under the peaked-roof part of the building because immediately above the ceiling rafter/collar ties at the top of the sixth level is an open space that varies in height due to the peak of the roof. (*See*, Exhibit 107, Attachment 3 (relevant page of plans).)

Under the peaked-roof area, the floor of the sixth level is further from the roof of the building than it is under the flat-roofed area. Under the peak, the sixth level floor is anywhere from approximately eight feet, five and one-quarter inches¹ to 16 feet, five and one-quarter inches² below the roof of the building. There is nothing on the relevant page of the plans that indicates a finished ceiling between the floor of the sixth level and the peaked roof of the building. (Exhibit 107, Attachment 3.) Therefore, the sixth level is not less "immediately below the roof" in the peaked-roof area than in the flat-roofed area, making the whole open area between the sixth level floor and the roof "immediately below the roof," thus satisfying the first part of sub-definition (c).

The second part of sub-definition (c) states that an attic is "wholly or partly within the roof framing." The sixth level of the subject building as shown on the plans includes the collar ties which help stabilize the building. They were not proposed for ornamental purposes, but are structural members of the building's skeleton.³ The collar ties are interspersed with the ceiling rafters of the sixth level, but this "ceiling" is, essentially, unfinished, with open spaces among the rafters and collar ties. The collar ties form the base of the triangle the other two sides of which

¹This number is derived by adding the height of the sixth level -- six foot, five and one-quarter inches -- plus the two feet between the ceiling rafters/collar ties and the low point of the peaked roof.

² This number is derived by adding the height of the sixth level -- six feet, five and one-quarter inches -- plus the 10 feet or so to the top of the peak.

³Board Order No. 17109, at 14, states that "structural" is defined by *Webster's Dictionary* as "of or relating to the load bearing members or scheme of a building, as opposed to the screening or ornamental elements."

are the sloping sides of the peaked roof. The Board considers the whole triangle, including its base, to be part of the roof framing. The collar ties are, therefore, structural members which are part of the roof framing, making the sixth level “within the roof framing,” thus satisfying the second part of sub-definition (c).

The third part of sub-definition (c) comes at the end, after a colon, and essentially provides two examples of what the first two parts of the definition try to define. It is not necessary that the sixth level actually fit either category, but in this case it does. The examples given are of “a garret or storage space under the roof.” The sixth level of the subject building is exactly that – a garret or storage space under the roof. A “garret” is defined by *Webster’s Dictionary* as “(1) an unfinished part of a house immediately under or within the roof: loft – compare ATTIC, (2) a room on the top floor of a house.” The sixth level would be an unfinished part of the building just under the roof and within the roof framing, and thus falls within garret definition number one.

ANC 1C filed a submission with the Board on December 2, 2003 (Exhibit 20) supporting the appeal and stating that the sixth level is not an attic under the dictionary definition or any commonly accepted sense of the term. The ANC claimed that the labeling of the sixth level as an attic was a “subterfuge” to avoid counting in FAR calculations space that it claims is intended to be used for human habitation. (Exhibit 20, at 3.) For all of the reasons set forth above, the Board disagrees with the ANC’s position that the sixth level as depicted on the plans is not an attic. The Board instead finds that the proposed sixth level falls within the third sub-definition of “attic” enunciated in *Webster’s Dictionary*. And, as noted by the Court, the issue of habitability is not relevant to whether a space is or is not an attic.⁴

Discussion of Exceptions

The Appellant took exception to several of the Findings of Fact and Conclusions of Law set forth in the-then Proposed (now Final) Order. (Exhibit 110.) The Appellant claimed that Finding of Fact No. 6 and the first sentence of Finding No. 9 were not based on substantial evidence in the record. Taken together, Finding No. 6 and the first sentence of No. 9 discuss the absence of a finished ceiling to the sixth level, and find that, due to the lack of such a finished ceiling, all of the sixth level is “immediately below the roof of the building.” The Appellant’s exception states that the Board, in the final analysis, failed to rely on what was shown on the plans, and instead, based its decision on whether the sixth level had a finished ceiling either during construction, or, alternatively, after construction of the building was complete. The Appellant states that “[i]t is axiomatic that what controls in such a dispute are the plans for the completed project as permitted, not the physical configuration of the project at various stages of completion.” (Exhibit 110, at 3.)

⁴*Kalorama Citizens Association v. D.C. Bd. of Zoning Adjustment*, 934 A.2d at 407 (D.C. 2007).

The Board agrees with the Appellant in principal, but disagrees in substance. The Board agreed that its principal focus should be on the plans before the Zoning Administrator at the time the building permit was being reviewed for zoning compliance. In fact the plans do not authorize a finished ceiling between the floor of the sixth level and the building's roof.

Looking at the relevant sheet of the originally-submitted plans, attached to Exhibit 107, there is no indication that a finished ceiling was to be installed above the sixth level of the building. Since a building may only be constructed in accordance with the plans approved by DCRA, this Board can only conclude that the building permit did not authorize the construction of a finished ceiling at this level. The Appellant cites the testimony of the developer's representative as to whether there exists a finished ceiling to the sixth level, but, as conceded by the Appellant, this testimony is not controlling as to the issue. (Exhibit 110, at 2.) What is controlling are the plans, and the Board does not read the plans to show a finished ceiling. All that a constructed ceiling would prove is unlawful construction, which is an enforcement issue not before the Board.

The Appellant's next exception alleges that Findings of Fact Nos. 7 and 8 are not supported by substantial evidence, claiming that there is no support for the findings that either the collar ties or the sixth level are at least partially within the roof framing. The Board has already found that the collar ties are structural members of the building and this finding was not at issue in the remand. The collar ties, as part of the structure of the building, and not merely ornamental, must be part of the structure of some aspect of the building, and, in fact, they are part of the roof framing. They are not found distributed throughout the building, but only at the top of the sixth level, under the flat roof and forming the base of the triangle made by the peaked roof. The whole triangle, including its base, are part of the roof framing; therefore, the Board maintains its finding that the collar ties and the sixth level are at least partially within the roof framing.

The Appellant last takes exception with the Board's conclusion that the sixth level is a "garret." This exception relies on the Appellant's three earlier conclusions that the sixth level is not immediately under the roof, but under its own ceiling, that it is not within the roof framing, and that its ceiling is finished. But the Board disagrees with all of these conclusions. *Webster's Dictionary* definition of "attic" uses the word "garret" as an example of what is defined, essentially as a synonym for "attic." The definition of "garret" itself is "an unfinished part of a house immediately under or within the roof." (*See*, definitions set forth below.) The Board reiterates that the sixth level is an unfinished part of the building immediately under the roof, and so qualifies as a garret. But, in any event, it is not necessary that the sixth level actually be a garret, as long as it falls within one of the three sub-definitions of "attic."

Lastly, contrary to the Appellant's implication (Exhibit 110, at 5-6), any evidence of habitability is not relevant to the Board's determination that the sixth level is an attic. *Kalorama Citizens Association v. D.C. Bd. of Zoning Adjustment*, 934 A.2d 393, 407 (D.C. 2007).

CONCLUSIONS

On remand the Board concludes that the sixth level of the subject building is an attic. Having already concluded that the space has less than six feet, six inches of structural headroom, the area was properly excluded by the Zoning Administrator from the calculation of the gross floor area of the building. Therefore, the building does not exceed the maximum floor area ratio permitted in this R-5-D Zone District. Accordingly, the Board affirms its denial of Appeal No. 17109 with respect to the FAR calculations.

VOTE TO AFFIRM REMANDED PORTION OF APPEAL:

3-0-2 (Meridith H. Moldenhauer, Konrad W. Schlater, and Shane L. Dettman to affirm.
No other Board members participating)

VOTE TO ISSUE AN ORDER ADVERSE TO A PARTY:

4-0-1 (Meridith H. Moldenhauer, Nicole C. Sorg, Jeffrey L. Hinkle, and Konrad W. Schlater to issue; No other Board member (vacant) participating)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

A majority of Board members approved the issuance of this Order.

ATTESTED BY: _____



JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: JUN 15 2011

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



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As Director of the Office of Zoning, I hereby certify and attest that on June 15, 2011, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party who appeared and participated in the public hearing concerning the matter and to each public agency listed below:

Kalorama Citizens Association
c/o Anne Hughes Hargrove
1827 Belmont Road, N.W.
Washington, D.C. 20009

Montrose, LLC
c/o Mary Carolyn Brown, Esq.
Holland & Knight, LLP
2099 Pennsylvania Avenue, N.W., Suite 100
Washington, D.C. 20006-6801

Andrea Ferster
1100 17th Street, N.W., 10th Floor
Washington, D.C. 20036

Chairperson
Advisory Neighborhood Commission 1C
P.O. Box 21009
Washington, D.C. 20009

Single Member District Commissioner 1C
Advisory Neighborhood Commission 1C03
P.O. Box 21009
Washington, D.C. 20009

Matthew LeGrant, Zoning Administrator
Department of Consumer and Regulatory Affairs
1100 4th Street, S.W., Room 3100
Washington, D.C. 20024

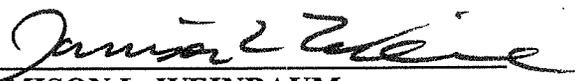
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Councilmember Jim Graham
Ward 1
1350 Pennsylvania Avenue, N.W., Suite 105
Washington, D.C. 20004

Harriet Tregoning, Director
Office of Planning
1100 4th Street, S.W., Suite E650
Washington, D.C. 20024

Melinda Bolling, Esquire
Acting General Counsel
Department of Consumer and Regulatory Affairs
1100 4th Street, S.W., 5th Floor
Washington, D.C. 20024

ATTESTED BY:


JAMISON L. WEINBAUM
Director, Office of Zoning