

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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Appeal of Kalorama Citizens Association, pursuant to)
11 DCMR § 3100, from the administrative decision of)
David Clark, Director, Department of Consumer and)
Regulatory Affairs issuing Building Permits Nos. B455571)
and B455876 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., and)
from the issuance of the original Building Permit No.)
B449218, dated March 11, 2003.)

BZA No. 17109-B

**MEMORANDUM OF APPELLANT KALORAMA CITIZENS ASSOCIATION
STATING EXCEPTIONS TO PROPOSED
ORDER ON REMAND**

In its Procedural Order on Remand, the Board addressed the single issue before it on remand for the district of Columbia Court of Appeals, and concluded that the sixth level of the subject building qualified as an "attic" under the applicable definition in *Webster's Unabridged Dictionary*.

1. The Board's conclusion that the sixth level is an "attic" is based exclusively on findings of fact that are not supported by substantial evidence in the record as a whole.

The Board is correct in its determination that, of the three alternative definitions provided by *Webster's*, the applicable dictionary definition is the third:

"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."

However, for the following reasons the Board would be in error to conclude, as the draft order now does, that as a matter of law the sixth level in the subject building qualifies as an "attic" according to that definition.

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The Board's conclusions of law must be rationally drawn from findings of fact that flow rationally from substantial evidence in the record as a whole. See D.C. Code §2-510(a) (2001); *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1094 (D.C. App. 1994); *Levy v. District of Columbia Board of Zoning Adjustment*, *supra*, at 746, 753; *Communication Workers of America v. District of Columbia Commission on Human Rights*, 367 A.2d 149, 152 (D.C. App. 1976); *Dietrich v. Board of Zoning Adjustment*, 293 A.2d 470, 473 (D.C. 1972); *Palmer v. Board of Zoning Adjustment*, D.C. App., 287 A.2d 535 (1972); *A.L.W., Inc. v. Board of Zoning Adjustment*, 338 A.2d 428, 430 (D.C. App.1975). The conclusion that the sixth level qualifies as an "attic" does not meet that test, because it rests on four essential Findings of Fact that do not flow rationally from, and in fact are contrary to, substantial evidence in the record as a whole. These are as follows:

Proposed Finding of Fact No. 6 and No. 9 (first sentence):

"6. There is 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.

"9. Because there is no finished ceiling to the sixth level, all of that level is immediately below the roof of the building. . . ."

Finding 6 is directly contrary to testimony by the developer's architect, Norman Smith, on April 6, 2004. In a colloquy about the project plans with Board Member Parsons and Board Chairman Griffis, Mr. Smith explicitly and repeatedly stated that the "attic" was to have a finished ceiling, thus removing any doubt on the issue. Attachment 1, *Transcript 04 06 04*, pp. 138-39.

Finding 6 appears to rest solely on one sentence in the Mr. Smith's testimony on the same day, in a colloquy with Board Chairman Geoffrey Griffis:

"CHAIRPERSON GRIFFIS: Let's start with the basics. What is a collar tie: If you're standing on the floor of that attic space, that level, I'm looking up and I look up to 6 feet, 5 and ¼ inches, what do I see?

MR. SMITH: You would see the bottom face of a member that is, in its rough state, an inch and a half wide and 9 and ¼ inches tall that would run from north to south, would be spaced 48 inches on center."¹

¹ *Transcript 04 06 04*, p. 145. At the Decision Meeting on July 20, 2010, Board Chairperson Moldenhauer commented on this transcript excerpt, which had been included as Attachment 4 of KCA's Memorandum, as noted in footnote 3 of the Board's draft Order.

Even if this statement had been all that Mr. Smith had said on the subject, it would in no way warrant the finding that the ceiling of the sixth level must be regarded as unfinished for purposes of determining whether the space qualifies as an “attic”. If Mr. Smith intended to say that if, at the very moment of his testimony on April 6, 2004, one stood on the sixth level floor and looked up one would see the underside of the collar ties, that would indicate at most only that no ceiling had been installed at that time, not that there would be no ceiling installed in the completed project as permitted. It must be remembered that the present appeal was a claim that the project as permitted, on the basis of its approved plans, did not comply with the Zoning Regulations in certain respects. It 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. This project was under construction during some or all of the deliberations on the Appeal, and in fact it appears likely that the ceiling had not been installed when Mr. Smith testified on April 6, 2004, because on March 16, 2004, only three weeks earlier, DCRA’s representative, Faye Ogunneye, testified about the “attic” that “the finished ceiling isn’t in place yet.” [Emphasis added] She recounted how a DCRA inspector had visited the site to confirm that the sixth level headroom would be less than 6’ 6” by measuring from the floor to the “underside of the collar ties”, not the “finished ceiling” -- clearly indicating an expectation on her part that the ceiling would be finished in the course off completion of the project as planned. *Transcript 03 16 04*, p. 246.

In other ways the record as a whole indicates such an understanding and expectation: The section drawings of the project consistently label the sixth level as having a “ceiling” located 6’ 5 ¼” above the sixth level floor.² The *ceiling* beams or rafters (noted by the Board in proposed Finding of Fact 6), which were interspersed among the collar ties at the same level above the floor, served no purpose in the building other than to provide the necessary support for a ceiling. This is because, on the one hand, the spans between the collar ties were as much

² See, e.g., Attachment 2, *Memorandum of KCA Regarding Definition of “attic” in Response to Procedural Order on Remand (“KCA Memorandum”)*; *Record Exhibit 31* – Four drawings from project plans, attached to Motion to Dismiss filed by Montrose LLC.

as 4 feet on center³ and thus were too wide for the collar ties alone to provide adequate support for a ceiling, and on the other hand only the collar ties were found to be structural members.⁴

Consequently, proposed findings of Fact 6 and 9 are unsupported by, and in fact contrary to, substantial evidence in the record as a whole, and cannot be used as a basis for concluding that the sixth level qualified as an “attic” under the applicable definition.

Proposed Finding of Fact Nos. 7 and 8:

“7. The collar ties in the subject building are a 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. The sixth level of the building is at least partially within the roof framing.”

Except for the clause asserting that the collar ties “work to brace the building against racking in a north-south direction,” which simply repeats the Board’s Finding No. 32 in Order 17109, these findings are not supported by substantial evidence in the record as a whole. The developer, Montrose LLC, made no claim that the collar ties “secured the roof rafters” or were connected to the roof rafters or played any role in framing or otherwise supporting the roof, and introduced no evidence to that effect. Montrose’s architect, Norman Smith, was at pains to describe their function as bracing the building against north-south racking, noting that they were affixed to the bearing walls, in an ultimately successful effort to convince the Board that the collar ties were necessary structural members. *See Attachment 2, Transcript 04 06 04, p. 134.*

³ *Testimony of Norman Smith, Transcript 04 06 04, p. 134.*

⁴ An expert witness for KCA and the ANC testified that neither the collar ties nor the ceiling beams were structural in character, and thus that they did not provide “structural headroom”. *Testimony of Don Hawkins, Architect, Transcript 04 06 04, pp. 175-76.* The Board concluded that the collar ties were structural in character (Order, p. 14), and thus could suffice for purposes of the reference to attics in 11 DCMR §199.1, definition of “gross floor area”, but made no such finding or conclusion as to the ceiling beams, and there was no claim or evidence that the ceiling beams were structural.

In any event, even if the collar ties were a part of the roof framing, they would be separated from the sixth level by a finished ceiling and thus the sixth level could not be “wholly or partly within the roof framing”.

Consequently, proposed findings of Fact 7 and 8 are unsupported by, and in fact contrary to, substantial evidence in the record as a whole, and also cannot be used as a basis for concluding that the sixth level qualified as an “attic” under the applicable definition.

2. The Board’s conclusion that the sixth level is a “garret” and thus qualifies as an “attic” is not based on findings of fact supported by substantial evidence in the record as a whole.

Noting that the Webster’s definition of “attic” characterizes a “garret” as a type of attic, and that the Webster’s definition of “garret” is “(1) an unfinished part of a house immediately under or within the roof . . . ,” the Board concludes that the sixth level in the subject building is “an unfinished part of the building just under the roof and within the roof framing,” and thus qualifies as a “garret”. Draft Order, p. 5. However, we have already shown that, so far as can be demonstrated from the record,

- the sixth level is not “just under the roof”, but rather is “just under” its own ceiling, which is interposed between it and the roof;
- it is not “within the roof framing”; and
- it is not “unfinished” at least as to its ceiling.

Furthermore, there is no evidence in the record that the sixth level was to be unfinished in any other respect, or treated any differently as to finishing from the other levels of the building, all of which include areas assigned to individual apartments in this five-unit building. On the contrary -- and notwithstanding the fact that, because of its ceiling height, it did not legally qualify as “habitable space”-- the plans give the sixth level numerous amenities of a space that would be attractive for regular occupancy by the residents of the top apartment: it has three ceiling light fixtures, enough electrical outlets to accommodate 20 electrical appliances, a total of eight windows and a door to the rear opening onto a roof deck,⁵ and at

⁵ See *Testimony of Don Hawkins, Architect, Transcript 04 06 04*, pp. 176-78.

the front commands a spectacular view of the of the Capitol and Washington Monument to the south.

Conclusion

The Board is correct in its determination that, of the three alternative definitions of "attic" found in Webster's, the applicable definition is the third. However, the Board's proposed conclusion that the sixth level of the building qualifies as an "attic" by that definition rests on findings of fact that are not supported by, and in some cases contradict, substantial evidence in the record. Consequently its conclusion does not meet the basic requirement that it be rationally drawn from findings of fact that rationally flow from substantial evidence in the record as a whole. Since, for reasons set out above as well as in KCA's Memorandum submitted on July 2, 2010, the sixth level of the building thus does not qualify as an attic by any definition found in *Webster's Unabridged Third New International Dictionary*, we respectfully request the Board to revise its draft Order accordingly, concluding that the sixth level of the building is not an "attic" by any definition applicable under 11 DCMR §199.2(g), but rather one of the "several floors" that must be included in the calculation of gross floor area.

Respectfully submitted,



John Lawrence Hargrove
Counsel for Kalorama Citizens Association
D.C. Bar No. 35413

CERTIFICATE OF SERVICE

A copy of this instrument on this 4th day of February, 2011 was sent by United States mail, first class postage prepaid, to:

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ATTACHMENT 1

Transcript 04 06 04, pp. 138-39.

11 COMMISSIONER PARSONS: New question. Is
12 there actually a ceiling panel at the line shown on
13 this drawing as ceiling? Certainly, you have seen
14 this drawing. I don't have an exhibit number, but
15 it's --

16 CHAIRPERSON GRIFFIS: It's attached to --

17 MR. SMITH: Yes.

18 COMMISSIONER PARSONS: So there is a
19 ceiling measurement here and then a line that goes all
20 the way to the back of the building.

21 MR. SMITH: Yes.

22 COMMISSIONER PARSONS: There is a ceiling
23 along that entire length even though there is no use
24 for it, I mean, as in ceiling in this room?

25 MR. SMITH: Well, it's --

NEAL R. GROSS

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1 COMMISSIONER PARSONS: A finished ceiling?

2 MR. SMITH: There is a finished ceiling in
3 a two story space and there is a finished ceiling
4 plane in the attic space, yes.

5 COMMISSIONER PARSONS: Plane?

6 MR. SMITH: Well, I use the word plane,
7 because the collar ties are spaced at 48 inches on
8 center, and so the drywall, the wall board, goes
9 across and down and back up. But to answer your
10 question, there is a finished -- yes, there is a
11 finished ceiling surface.

ATTACHMENT 2

Transcript 04 06 04, p. 134

1 since the stair has been counted in the FAR
2 calculations of the floors below, it is not counted
3 here. So therefore, we have 1270.5 FAR square
4 footage, square feet on this floor.

5 In regard to the attic, the attic is an
6 attic under the Zoning Regulations since it has
7 structural headroom of 6 foot, 5 and 1/4 inches, which
8 is less than the structural headroom of 6 foot, 6
9 inches or 6.5 feet, which is the threshold under the
10 Zoning Regulations for the level to count toward FAR.

11 This headroom is created by the use of
12 permanently attached collar ties, which are spaced at
13 a maximum of 48 inches on center in all the structural
14 bays of the attic, that is from front to back, from
15 north to south. These collar ties are attached to the
16 steel stud load bearing walls with screw applied
17 framing anchors and like the cross or rack bracing in
18 the walls contribute to the north/south stiffness of
19 the building structure. Based on that, it is my
20 opinion that there is no FAR square footage assignable
21 to the attic space.

22 The roof structure. In the roof
23 structure, the area of the short stair, that is the
24 short stair leading up to the actual deck, the landing
25 and then the stair down to the attic is included for a

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