



Order on Remand, the Board explicitly stated that issue is not going be revisited. *See* BZA Order No. 17109-B at p. 3.

Appellant also attempts to impeach the Board's conclusion in Proposed Finding of Fact Nos. 6 and 9 that there is no finished ceiling attached to the collar ties. Curiously, while the Appellant believes the Board erred on this point, it cannot identify any part of the record that affirmatively indicates that a finished ceiling was installed. The closest Appellant comes to casting any doubt on the Board's finding is the statement of DCRA's Chief of the Zoning Division, Faye Orgunneye, who remarked that a finished ceiling was "not in place yet." *See Tr. of March 16, 2004* at p. 246. Ms. Orgunneye's statement is not expository to the issue at hand, as it is unclear if she is contemplating that a finished ceiling will be affixed to the roof rafters or to the collar ties. Nor does she indicate whether a finished ceiling was ever approved or if one will ever be installed.

In an appeal before the Board, the Appellant bears the burden of proof. *See* 11 DCMR § 3119.2. If the fact of whether there is a finished ceiling affixed to the collar ties is dispositive to this appeal, it was the burden of the Appellant to establish that fact. If the Appellant failed to do so, the Board must deny the appeal.

Separately, and most importantly, the issue of whether there is a finished ceiling affixed to the collar ties is a proverbial red herring. The Board has defined an attic as "the part of a building immediately below the roof and wholly or partly within the roof framing." *See Webster's Third New International Dictionary, Unabridged*. In finishing the sixth level, the builder could decide to place a finished ceiling (most likely installing drywall) on the roof rafters or it could affix a finished ceiling to the collar ties. In either event, there is no affect on the sixth level's classification as an attic. Affixing a finished ceiling to the collar ties is no different than

adding a drop or suspended ceiling to an existing room. The space above and below the drop ceiling remain part of the same story. Similarly, the space between the rafters and the collar ties is not a separate story of the building.<sup>2</sup> Accordingly, the space above and below the collar ties are both still part of the level of the building that is “immediately below the roof.” As the collar ties are a part of the roof framing, the sixth level is both “immediately below the roof” and “partly within the roof framing.”

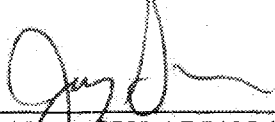
Accordingly, the Board must conclude that the sixth level meets the definition of an attic.

Respectfully Submitted,

IRVIN B. NATHAN  
Acting Attorney General

MELINDA M. BOLLING  
General Counsel

February 18, 2011



JAY A. SURABIAN (DC Bar # 977657)  
Assistant Attorney General  
Department of Consumer and  
Regulatory Affairs  
Office of the General Counsel  
1100 4<sup>th</sup> Street, SW, 5<sup>th</sup> Floor  
Washington, DC 20024  
(202) 442-8403 (office)  
(202) 442-9447 (fax)  
jay.surabian@dc.gov

---

<sup>2</sup> The developer’s architect, Norman Smith, described the space between the rafters and the collar ties as a “interstitial” or “sliver” space or “a non accessible portion of the roof.” See *Tr. of April 6, 2004* at p. 149.

**CERTIFICATE OF SERVICE**

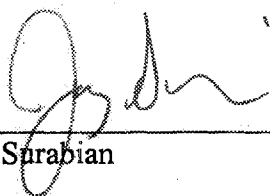
I hereby certify that a copy of the foregoing document was served by first class mail, postage prepaid, this 18 day of February 2011, to the following:

Montrose, LLC  
c/o Mary Carolyn Brown, Esq.  
Holland & Knight  
2099 Pennsylvania Ave, NW, Suite 100  
Washington, DC 20006

Kalorama Citizens Association  
c/o Anne Hughes Hargrove  
1827 Belmont Rd., NW  
Washington, DC 20009

Andrea Ferster, Esq.  
2121 Ward Court, NW, 5<sup>th</sup> Fl  
Washington, DC 20037

Chairperson ANC 1C  
P.O. Box 21009  
Washington, DC 20009

  
\_\_\_\_\_  
Jay Surabian