

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPEAL OF:

Kalorama Citizens Association from
Administrative Decision of DCRA
On Permits B455571 and B455876

BZA Appeal No. 17109

**PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

APPEAL NO. 17109 of Kalorama Citizens Association, pursuant to 11 DCMR § 310[#] and 3101, from the decision of the Department of Consumer and Regulatory Affairs to issue building permits B455571, issued October 6, 2003, and B455873, issued October 16, 2003, to Montrose, LLC for construction at 1819 Belmont Road, N.W., Washington, D.C.

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

DECISION DATE: June 8, 2004

I. FINDINGS OF FACT

1. On March 11, 2003, the Department of Consumer and Regulatory Affairs (DCRA) issued building permit B449218 to Montrose, LLC ("Montrose" or "Owner") to renovate and alter a three-story town house at 1819 Belmont Road, N.W., located in an R-5-D District, by adding two additional stories and an attic, as well as an addition at the rear of the building.
2. On September 10, 2003, the Kalorama Citizen's Association ("KCA" or "Appellant") wrote to Mr. Denzil Noble, Administrator of the Building and Land Regulation Administration (BLRA) of DCRA, alleging that the Project exceeded the allowable height of 70 feet under the 1910 Height Act and might exceed the maximum allowable Floor Area Ratio ("FAR") of 3.5 for the R-5-D District in which the property is located.
3. On September 12, 2003, DCRA issued a stop work order for the Project after concluding that the third party inspector who performed the original review for zoning compliance failed to consider the 1910 Height Act, which limited the building's maximum allowable height to 70 feet, rather than the general limitation of 90 feet in an R-5-D District.

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4. On October 6, 2003, DCRA issued revised permit #B455571 to revise permit #B449218. The revision was based upon new plans submitted by Montrose, that would bring the building height into compliance with the 70 foot limitation in the 1910 Height Act.
5. On October 16, 2003, DCRA issued revised permit #B455873, including revisions to permit #B455571, to revise the penthouse roof structure based upon the request of Montrose and in accordance with the drawings submitted by Montrose.
6. On November 4, 2003, the Kalorama Citizens Association ("KCA" or "Appellant") filed this appeal with the Board of Zoning Adjustment ("BZA" or "Board") challenging the decision of the Department of Consumer and Regulatory Affairs ("DCRA") to issue building permit B455571, dated October 6, 2003, and B455873, dated October 16, 2003, to Montrose, LLC ("Montrose"). Appellant did not initially appeal the issuance of the original permit #B449218.
7. In its appeal, Appellant alleged that: 1) the building height, including roof structure and "banister structure" in the approved plans exceeded that allowed by the 1910 Height Act; 2) the roof structure did not meet the set back requirements from exterior walls as set forth in the Height Act and the Zoning Regulations at 11 DCMR 400.7 and 411.2; 3) the portion of the building labeled "attic" did not meet the restrictions in the Zoning Regulations on exempting attic space, and therefore should have been included in the Floor Area Ratio or "FAR" calculation (with the result that the building exceeded the permissible FAR); 4) that a portion of the cellar was really basement and should have been included in the FAR calculation, (with the result that the building exceeded the permissible FAR).
8. On February 17, 2004, Montrose filed a Motion to Dismiss the Appeal, based upon the fact that there had been no appeal of the original permit (B449218) and that the first two issues raised by Appellant were encompassed by the plans accompanying the original permit application. Montrose argued that, because Appellant had not filed a timely appeal of these issues, it should be precluded from raising them, leaving only the question of whether Montrose met the FAR limitations. Appellee supported Montrose's Motion to Dismiss in this regard. Montrose also urged that that Appellant's appeal should be dismissed based upon the doctrine of laches. Appellee did not support this claim.
9. On March 2, 2004, KCA moved to amend its appeal to include the original permit #B449218.
10. On March 9, 2004, the Board decided to deny Montrose's Motion to Dismiss and grant Appellant's Motion to appeal the issuance of the original permit and the revised permits. As a result, the issuance of all three permits, B449218, B455571 and B455873, are at issue in this appeal.

11. On March 9, 2004, a hearing on the merits was commenced with the presentation of Appellant KCA's case. Ms. Ann Hargrove testified with respect to the character of the neighborhood and the fact that the building at 1819 Belmont Road was out of scale with other row houses on Belmont Road, N.W. She stressed the importance of strict compliance with the requirements of the 1910 Height Act in order to preserve the character of the neighborhood. She also urged that the side walls of the 1819 Belmont were exterior walls and that the setback requirements should apply to those walls. [Tr. 3/09/04; pp.245-251]

12. KCA urged that the building additions to 1819 Belmont violated 11 DCMR 400.7(b) and the 1910 Height Act because the penthouse and roof structure exceeded the 70 foot limitation and was not set back from all exterior walls a distance at least equal to its height. KCA urged that the side walls meet the definition of exterior walls and that the set back requirements should apply to these walls. [Tr. 3/09/04; pp. 257-260; 296-298]

13. With respect to the FAR, KCA, through the testimony of its architect, Don Hawkins, urged that the building at 1819 Belmont violated the maximum allowable FAR of 3.5, because Montrose erroneously labeled the top floor of the building as an "attic." As a result, DCRA should have included the attic in the FAR calculations. [Tr. 3/09/04; pp. 271-283]

14. KCA, through the testimony of its architect, Don Hawkins, also urged that DCRA erred in using the "perimeter wall method" for calculating the gross floor area of the ground level. Instead, KCA urged that the "grade plane method" should have been used, which would have resulted in the entire ground level being counted toward the gross floor area of the building. According to KCA, if the ground level and attic are included in the gross floor area calculation, the overall FAR would be 4.13, rather than the permissible 3.5 FAR. [Tr. 3/09/04; pp. 283-295]

15. Appellee, DCRA, commenced presentation of its case on March 16, 2004. Ms. Faye Ogunneye, Chief of the Zoning Review Branch, testified on behalf of DCRA. She testified that the permissible height for the structure at 1819 Belmont Road, N.W. was 70 feet, 10 feet less than the right of way on Belmont Road of 80 feet. [Tr. 3/16/04, beginning p. 159]

16. According to Ms. Ogunneye, a height of 90 feet was initially authorized by DCRA in error, in permit B449218; however, a Stop Work Order was issued on September 12, 2003. The Stop Work Order was introduced as Appellee's Exhibit #1. [Tr. 3/16/04; p.163]

17. As a result of the issuance of the Stop Work Order, Montrose submitted new plans, a "section through the building that showed the height from the measuring point which is the curb to the roof, to the . . . highest point of the parapet or roof." These plans showed a height of 69 feet 9 and 3/8 inches. A letter from Geo-Environ Engineers, dated September 25, 2003, confirmed the actual building height of 69 feet 3 inches. Therefore,

the building at 1819 Belmont meets the limitations under the 1910 Height Act. [Tr. 3/16/04; p.166]

18. Ms. Ogunneye further testified that DCRA reviewed and approved a penthouse and roof deck with railings pursuant to 11 DCMR 400.7 and 411.7. Section 441.7 states that roof structures, including elevator penthouses, can be placed on a building as long as they meet the height and setback requirements. A penthouse structure cannot exceed 18 feet 6 inches. The penthouse at 1819 Belmont measures 10 feet 4 ½ inches and meets the height requirements. [Tr. 3/16/04; p. 168]

19. Roof structures are also required to meet the setback requirements from all exterior walls, that is, a distance at least equal to its height above the roof upon which it is located, pursuant to 11 DCMR 400.7. According to DCRA, a row house has only two (2) exterior walls, one at the front and the other at the back of the building. The sidewalls are party walls and are treated as such even if they extend above the next door neighbors' party walls, since the next door neighbors also have the ability to build up to the height allowed in the regulations. The building at 1819 Belmont met the front and back setbacks. No set back was required for the side walls. [Tr. 3/16/04; pp.160-170]

20. The roof deck is less than four (4) feet above the roof or parapet and pursuant to 11 DCMR 411.17 is not required to be included in the determination of the building height. [Tr. 3/16/04; pp171-172]

21. The railing for the deck exceeds four (4) feet, but the Zoning Administrator has determined that the height of the railing need not be included in the calculation of height, since it is required under the Construction Codes for life safety reasons. 11 DCMR 2503 supports this interpretation. [Tr. 3/16/04; p.173]

22. The attic space at 1819 Belmont Road is less than 6 feet 6 inches in height from the floor level of the attic space to the underside of the collar ties, which are structural members. Therefore the attic is properly excluded from the measurement of the gross floor area and the calculation of the FAR. The Board is satisfied that the space meets the definition of an attic. [See Tr. 3/16/04; pp.174-177]

23. The Zoning Administrator used the "perimeter" method to determine what portion of the ground floor at 1819 Belmont is "basement" which is required to be included in the gross floor area and calculation of the FAR. and what portion of the ground floor is "cellar", which is excluded from the gross floor area and calculation of the FAR. A basement is four feet or more above adjacent finished grade and a cellar is less than four feet above adjacent finished grade. [Tr. 3/16/04; pp. 177-178]

24. The Board is satisfied that the building at 1819 Belmont meets the maximum allowable FAR of 3.5 based upon both the calculations of the Zoning Administrator and the submissions by Montrose. [FAR Calculations submitted by DCRA dated March '04; Tr. 3/16/04 pp.178]

II. CONCLUSIONS OF LAW

1. The R-5-D District permits a building height of ninety feet with no limit on the number of stories. 11 DCMR § 400.1 (Feb. 2003). The Zoning Regulations also provide that all buildings or other structures shall comply with the 1910 Height Act. 11 DCMR § 2510.
2. The 1910 Height Act limits the height of buildings on a residential street to the width of the street diminished by ten feet. D.C. Code Ann. § 6-601.05(c) (2001 ed.). The width of the 1800 block of Belmont Road, N.W., is 80 feet, yielding a maximum building height of 70 feet.
3. Building height is measured from the level of the curb opposite the middle of the front of the building to the highest point of the roof or parapet. 11 DCMR § 199 (Feb. 2003)
4. The building at 1819 Belmont Road, N.W., measures 69 feet, 9 and 3/8ths inches from the level of the curb opposite the middle of the front of the building to the highest point of the roof. The Board concludes that the building at 1819 Belmont complies with the provisions of both the Zoning Regulations and the 1910 Height Act.
5. Pursuant to 11 DCMR 400.7, a stairway or elevator penthouse is permissible, up to a height of eighteen feet six inches above the height of the roof, provided it meets the requirements of 11 DCMR 411 and the set back requirements from all exterior walls of a distance at least equal to its height above the roof upon which it is located. The elevator penthouse meets the height requirement since it is only 10 feet 4 ½ inches.
6. 11 DCMR 411 includes certain requirements for penthouses, including that they shall harmonize with the main structure in architectural character, material and color. These matters are not at issue in this appeal.
7. The Board accepts the interpretation of the Zoning Administrator that the party walls of a row house or the common division walls are not exterior walls and should not be considered as exterior walls for the purposes of the set back requirements. Therefore, the penthouse structure at 1819 Belmont was only required to be set back from the front and back exterior walls and properly met the set back requirements of 11 DCMR 400.7.
8. 11 DCMR 411.17 provides that roof structures under four feet in height are exempt from the requirements of §411 including §411.1 which references the 1910 Height Act. The Board agrees, therefore, with the interpretation of the Zoning

Administrator that a roof structure under four feet in height is not required to be included in the calculation of height under the 1910 Height Act and complies with the requirements of the Zoning Regulations.

9. The Board also accepts the conclusion of the Zoning Administrator that the railing for the roof structure, which is required pursuant to 12 DCMR, the Construction Codes, is not required to be included in the height calculation of the roof structure. Pursuant to 11 DCMR 2503, a structure, not including a building, less than four feet above grade, may occupy a yard, and any railing required by the DC Construction Codes, 12 DCMR, shall not be calculated in the measurement of height. Although there is not a specific exception pertaining to railings for roof decks in the Zoning Regulations, the Board gives deference to the administrative interpretation of the Zoning Administrator.

10. Pursuant to 11 DCMR 199.1, the “term ‘gross floor area’ shall include basements, . . . penthouses; attic space (whether or not a floor has actually been laid, providing structural headroom of six feet, six inches (6 ft., 6 in.) or more); interior balconies; and mezzanines.”

11. The basement of the 1819 Belmont has been properly determined following the perimeter method, and included in the gross floor area calculations and FAR calculations submitted by Montrose and the confirming calculations prepared by DCRA and submitted to the Board, dated March '04.

12. The “attic space” at 1819 Belmont Road does not provide structural headroom of six feet, six inches or more, and therefore is not required to be included in the gross floor area calculations.

13. The maximum Floor Area Ratio or FAR for all structures in a R-5-D zone district is 3.5 pursuant to 11 DCMR 402.4. Based upon the plans submitted by Montrose and the calculations prepared by DCRA, the 1819 Building does not exceed the allowable FAR.

14. The Zoning Administrator is charged with the implementation of the Zoning Regulations.

15. The Board of Zoning Adjustment (BZA) is authorized to hear appeals by any person aggrieved by any decision of the “Inspector of Buildings” [or Zoning Administrator] granting or refusing a building permit or other administrative decision based upon the zoning regulations or a zoning map. The Board, however, has not found any reversible error in the determinations made by DCRA in issuing the three (3) building permits at issue in this case, B449218, B455571, and B455873.

15. The Board will not interfere with the Zoning Administrator’s interpretation or substitute its own judgment where the Zoning Administrator’s interpretation is reasonable and there has been no abuse of discretion.

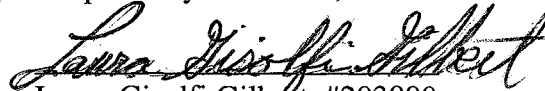
ORDER

Based on the record taken as a whole, including the testimony and evidence of record including the building permit applications, plans and all documentation submitted by the parties to this appeal, the Board concludes that DCRA did not error in issuing the permits. Accordingly, the Board denies the appeal.

Geoffrey H. Griffis, Chairman

Vote: _____

Respectfully submitted,



Laura Gisolfi Gilbert, #203000

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Certificate of Service


I hereby certify that a copy of the foregoing is being served on the following parties and counsel:

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by first class mail on this 25th day of May 2004.



Laura Gisolfi Gilbert, Esq.

**District of Columbia
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