

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



July 27, 2017

To the Parties in Appeal No. 17109:

This letter is being sent to you on behalf of the Board of Zoning Adjustment ("Board" or "BZA") because you are parties in this case. This appeal was submitted on November 10, 2003 by Ann Hargrove on behalf of the Kalorama Citizens Association ("KCA") to challenge building permits issued to the owner of 1819 Belmont Road, N.W.

Following a public hearing, the Board voted on February 1, 2005 to partially grant and partially deny the appeal. An order reflecting that decision was issued on November 8, 2005.

The portion of the order denying the appeal on the Floor Area Ratio issue was appealed and subsequently affirmed in part and remanded by the District of Columbia Court of Appeals in *Kalorama Citizens Ass'n v. D.C. Bd. of Zoning Adjustment*, 934 A.2d 393 (D.C. 2007).

After receiving submissions from the Appellant, DCRA, Montrose LLC, and ANC 1A, the Board held additional deliberations and voted, at its public meeting on July 20, 2010, to reaffirm its conclusion related to the remaining FAR issue and deny that portion of the appeal. (See Order No. 17109-C.)

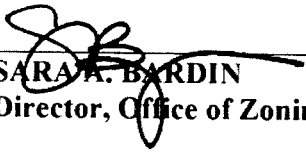
KCA petitioned the Court of Appeals to review Order No. 17109-C. After the parties briefed the issues, the Board requested that the Court remand the case back to it for additional deliberations on the issues and so it could better articulate its reasoning. By Order dated May 10, 2012, the Court granted that request. The Board deliberated at a public meeting on October 28, 2014, and again reaffirmed the Zoning Administrator's decision on the remaining FAR issue and again denied this portion of the appeal. That determination is reflected in the attached **Proposed Order**.

Because a majority of the Board members participating in this remand did not personally hear the evidence in this case, this **Proposed Order** is being provided to the parties to afford you an opportunity to present written exceptions, pursuant to D.C. Official Code § 2-509(d) (2012 Repl.).

Written exceptions and arguments must be filed with the Office of Zoning, and served upon the other parties, no later than September 15, 2017.

Questions should be addressed to Mr. Clifford W. Moy, Secretary to the Board of Zoning Adjustment, at (202) 727-6311.

Regards,


SARA A. BARDIN
Director, Office of Zoning

Attachment:
Proposed Order No. 17109-D in BZA Appeal No. 17109

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



BZA APPEAL NO. 17109-D - PROPOSED ORDER

As Director of the Office of Zoning, I hereby certify and attest that on July 27, 2017, pursuant to 11 DCMR Subtitle Y §§ 205.3 and 604.5, a copy of the proposed order in this matter was mailed first class, delivered via inter-agency mail, or delivered by electronic mail to each party concerning the matter, all of whom are listed below:

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BZA APPEAL NO. 17109-D - PROPOSED ORDER
PAGE NO. 2

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ATTESTED BY:


SARAH A. BARDIN
Director, Office of Zoning

EXCEPTIONS PROCESS

PROPOSED ORDER

BZA #17109-D

**Appeal
of**

**Kalorama Citizens
Association**

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 17109-D of Appeal No. 17109 of Kalorama Citizens Association, pursuant to 11 DCMR § 3100¹ 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., (Square 2551, Lot 45) 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, April 5, 2011, and October 28, 2014

PROPOSED DECISION AND ORDER AFTER REMAND

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, approved June 1, 1910, (36 Stat. 452; D.C. Official Code §§ 6-601.01 – 6-601.09), 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. The permitted FAR for an apartment house in the R-5-D zone was 3.5. The Zoning Administrator calculated the proposed building’s FAR at 3.49. The Board

¹ This and all other references in this Order to provisions contained in Title 11 DCMR, except those references made in the final all-capitalized paragraph, are to provisions that were in effect on the dates that the Board deliberated on this appeal (“the 1958 Regulations”), but which were repealed as of September 6, 2016 and replaced by new text. Also all zone districts described in this order were renamed as of that date. The repeal and replacement of the 1958 Regulations and the renaming of the zone districts has no effect on the validity of the Board’s decision reflected in this order.

concluded that the Zoning Administrator had properly excluded a portion of the building's lower level from FAR based upon the use of the perimeter wall method, and properly excluded the building's sixth level from the FAR computation because the space provided structural headroom of less than six feet, six inches, which would be a relevant finding if the space was an attic.

KCA appealed to the District of Columbia Court of Appeals ("Court") that part of Order No. 17109 pertaining to FAR. The Court of Appeals affirmed in part and remanded. *Kalorama Citizens Ass'n v. D.C. Bd. of Zoning Adjustment*, 934 A.2d 393 (D.C. 2007). The Court affirmed the Board's decision as to the FAR calculations for the lower-level and found that the potential habitability of the sixth-level irrelevant to determining whether that space was an attic. *Kalorama Citizens Ass'n*, 934 A.2d at 406. However, the Court found that the Board had inadequately explained its implicit conclusion that the sixth level of the building is an "attic." 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 affected Advisory Neighborhood Commission ("ANC") had specifically asserted that the sixth level did not fall within the definition of "attic", the Court found that the Board's failure to analyze that definition meant that the Board had not given great weight to the ANC.

The Board did not hold a further hearing on the issue, but requested legal memoranda from the parties. At a Special Public Meeting held July 20, 2010, the Board deliberated on the remanded issue and concluded that the space denoted as "attic space" on the original plans contained in the record met the third sub-definition of "attic". 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. Board Order No. 17109-C formally stated the Board's decision.

KCA petitioned the Court of Appeals to review Order No. 17109-C. After the parties briefed the issues, the Board requested that the Court remand the case back to it for additional deliberations on the issues and so it could better articulate its reasoning. By Order dated May 10, 2012, the Court granted that request. The Board deliberated at a public meeting on October 28, 2014, and again reaffirmed the Zoning Administrator's decision on the remaining FAR issue and again denied this portion of the appeal.

The Board members participating in this remand did not personally hear the evidence in this case. Therefore, the Board sent this Proposed Order to the parties to afford them an opportunity to present written exceptions, pursuant to D.C. Official Code § 2-509 (d). [No exceptions were received] [Exceptions were received from _____ and are discussed in the conclusions of law.]

This Order, No. 17109-D, 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 the 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. As part of Exhibit 29, the Appellant submitted a portion of the revised plans approved by DCRA, which the Appellant referred to as "Exhibit 6" of that exhibit and which hereinafter will be referred to as "the Plans." The Plans 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 29, sheet labeled "1819 BELMONT RD., NW 10-14-03 NORMAN SMITH ARCHITECTURE 202.462.5886 SCHEMATIC BUILDING SECTION" "SCHEMATIC BUILDING SECTION SHOWING REVISED PARAPET AND BUILDING", stamped "Complies with Zoning Regulations", and signed by "Faye O", hereinafter the "Revised Building Section Drawing"). The Revised Section Drawing is appended to and made a part of this order.
2. The Revised Section Drawing denotes 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 Revised Section Drawing shows the undersides of the "collar ties" forming a flat plane that is 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 project architect testified, and the Board finds, that the collar ties are part of a structural system comprised of the roof rafters, bearing walls, and collar ties, and that the function of the collar ties in that system was to prevent north-south racking of the building. (Hearing Transcript of April 6, 2004 "Tr." at 141-142.)
7. The Revised Section Drawing labels the underside of the collar ties as a "ceiling." However, between the collar ties are openings where there is nothing between the floor of the 6th level and the underside of the roof. (Tr. of April 6, 2004 at 138-139, 146.)
8. Because of the openings between the collar ties on the sixth level, the sixth level is immediately below the roof of the building.
9. The collar ties depicted in the Revised Section Drawing are part of the roof framing. The collar ties are located at the top of the building and brace the building against racking in a north-south direction. (*See*, Finding of Fact No. 32 in Order No. 17109.)

BZA APPEAL NO. 17109-D
PAGE NO. 4

10. Because of the openings between the collar ties, the sixth level of the building is at least partially within the roof framing of the building.

CONCLUSIONS OF LAW

The remaining issue in this appeal is whether the Zoning Administrator erred in excluding the building's sixth level from the building's gross floor area for the purposes of calculating its floor area ratio. If the area had been included, the building would have exceeded the permissible FAR.

The Zoning Regulations in place at the time the building permits were issued defined floor area ratio as "a figure that expresses the total gross floor area as a multiple of the area of the lot." (11 DCMR § 199.1.) The calculation of "gross floor area" of a building includes only attic space that provides "structural headroom of six feet, six inches (6 ft., 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.

Subsection 199.2 of the Zoning Regulations directs the Board to Webster's 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 Webster's 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.

(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."

BZA APPEAL NO. 17109-D
PAGE NO. 5

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.” There are open spaces between the collar ties. In these open spaces, there is no obstruction from the floor of the sixth level to the underside of the roof. The sixth level is therefore immediately below the roof, satisfying the first part of sub-definition (c). The Board is aware that the project architect first testified that the collar ties were covered by a “finished ceiling.” He later clarified that he was talking about a “plane, because the collar ties are spaced at 48 inches on center, and so the drywall, the wall board, goes across and down, and back up.” (Tr. of April 6, 2004 at 139.)

Second, an attic is also “wholly or partly within the roof framing.” The building’s collar ties were not proposed for ornamental purposes, but are structural members of the building’s skeleton.² The Board is persuaded by the project architect’s testimony that the collar ties are part of a structural system comprised of the roof rafters, the bearing walls, and the collar ties, with the collar ties functioning in that system to prevent north–south racking of the building. Since the collar ties are located at the very top of the building and perform this structural function, the Board considers them part of the roof framing. Between the collar ties are openings. In these openings there is nothing between the floor of the sixth level and the underside of the roof. The portion of these openings that is between the underside of the roof and the collar ties is within the roof framing. Thus, the sixth level is at least partly “within the roof framing,” thereby 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.

As noted a proposed version of this order was submitted to the parties to provide an opportunity to file written exceptions. [DISCUSSION OF ANY EXCEPTIONS RECEIVED].

The Board is required under § 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)) to give “great weight” to the issues and concerns raised in the written report of the affected ANC. ANC 1C filed a submission with the Board on December 2, 2003 (Exhibit 20) supporting the appeal on both the height and FAR grounds asserted. As to the issue of FAR, the ANC advised the Board that:

Regardless of how the plans label it, the portion of the upper story that the developers describe as an “attic” is not an attic under the legally controlling definition of the term, nor is it an “attic” under any other conventional or commonly

² Board 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.”

BZA APPEAL NO. 17109-D
PAGE NO. 6

accepted sense of the term. Rather, all signs seem to point toward a future resident's ability to use this space as a habitable room, and the room should therefore be subject to the FAR limitations of 11 DCMR § 402.4.

The Board agrees with the ANC that the labelling of the space as an attic does not make it one, but for the reasons stated above disagrees that the area is not an attic under the applicable definition. As noted, the Court of Appeals agreed with the Board that the potential habitability of the sixth-level space is not a relevant consideration as to whether that space is an attic. Therefore, the Board need not respond to the ANC's assertion to the contrary.

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. The Court of Appeals has affirmed the Board's finding upholding the Zoning Administrator FAR calculations as to the building's lower-level. 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:

VOTE: **4-0-0** (Lloyd J. Jordan, Peter G. May, Marnique Y. Heath, and Jeffrey L. Hinkle, to AFFIRM. No fifth member participating or voting.)

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

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

ATTESTED BY: _____
SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: _____