

RECEIVED
D.C. OFFICE OF ZONING
2011 OCT 27 PM 3:04

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**
441 4th Street, N.W.
Washington D.C. 20001

Appeal of Walter Parrs, Dorina Kanopka, and
Zdenek Nikodem

Appeal No. 18257

DISTRICT OF COLUMBIA'S PRE-HEARING STATEMENT

The Appellee, the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"), by and through undersigned counsel, respectfully submits its Pre-Hearing Statement in opposition to the appeal filed by Walter Parrs, Dorina Kanopka, and Zdenek Nikodem ("Appellants") on June 6, 2011.

This appeal concerns the construction of an elevator penthouse on the rear portion of the roof of 3307 M St., NW (the "Property"). The Appellants are abutting neighbors of the Property who object to the elevator penthouse. Appellants seek to appeal the decision of DCRA's Zoning Administrator ("ZA") contained in an email sent on April 8, 2011 that the elevator penthouse is allowed as a matter of right and Building Permit no. B1104635 issued on April 26, 2011 (the "Building Permit") permitting the construction of the elevator penthouse. *See* Appellants' Pre-Hearing Statement In Support of Appeal dated October 18, 2011 ("Appellants' 10/18") at Exhibits ("Ex.") A and B. The Board must deny the appeal because the Zoning Administrator correctly determined the elevator penthouse to be a rooftop structure in compliance with the Zoning Regulations.

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 18257
EXHIBIT NO. 25

Board of Zoning Adjustment
District of Columbia
CASE NO.18257
EXHIBIT NO.25

BACKGROUND

The Property is located in a C-2-A zone district and improved with a mixed-use building with retail on the 1st floor and office space on the 2nd and 3rd floors. The first floor is occupied by a retail home goods and furniture store known as “CB2” that fronts on M Street. The Property is also bounded by Bank Street to the west, 33rd Street to the east, and Prospect Street to the north.

The roof of the Property has three levels. The elevator penthouse at issue in this case is located on top of the lowest level of the roof. This level of the roof is a full story higher in elevation than the grade on M Street. *See* Statement of Intervenor filed on October 25, 2011 (“Intervenor 10/25”) at Ex. B. It covers a portion of the CB2 sales floor, the CB2 stockroom, and a portion of the parking garage. *Id.* It also forms a rooftop courtyard, which is accessible by a driveway that leads to Bank Street. *See* Intervenor 10/25 at Ex. A. This level of the roof also houses elements that are typically found on a roof such as ventilation shafts and a mechanical penthouse. *Id.*

The building on the Property extends all the way to the east and north property lines, which abut Appellants’ properties. Accordingly, the Property does not have a side or rear yard. The elevator penthouse is flush against the building wall on the east property line and is set back approximately 9 feet from the building wall on the north property line. *See* Intervenor 10/25 at Ex. B. The elevator penthouse is approximately 17.5 feet tall, which is below the maximum height allowed of 18.5 feet. *See* 11 DCMR § 770.6(d). The existing ventilation shaft abutting the penthouse and the wall enclosing the mechanical penthouse are both over 10 feet in height. The penthouse, ventilation shaft, and penthouse are depicted in the photos attached hereto as Exhibit A.

ARGUMENT

Appellants argue that the elevator penthouse is not a rooftop structure, but is a non-compliant accessory structure. In the alternative, they argue that if the penthouse is a rooftop structure it does not comply with the required setback. Further, Appellants' reference to loading requirements is misplaced and not relevant to this appeal. The Board must reject all of these arguments.

1) The Elevator Penthouse Is A Rooftop Structure

First, Appellants argue that the area of the building where the elevator penthouse is located is not the roof and thus the penthouse is not a rooftop structure. Consequently, the Appellants allege that the elevator penthouse is an accessory structure and thus violates provisions of the Zoning Regulations applicable to accessory structures. Specifically, Appellants cite 11 DCMR §§ 774.1, 2500.4, and 2500.9, which govern the height and siting of accessory structures.

As "roof" is not a defined term, the Zoning Regulations look to the definition of that term in *Webster's Unabridged Dictionary*. See 11 DCMR § 199.2(g). In relevant part, *Webster's* defines "roof" as:

1a: the outside cover of a building or structure including the roofing and all the materials and construction necessary to maintain the cover upon its walls or other support.

Here, the lower level of the roof clearly qualifies as a roof. It is located outside and it serves as the cover of the CB2 store and the parking garage. Further, it is a full story above the grade on M Street. The fact that the rooftop courtyard is accessible by a driveway makes it no less a roof. Rooftop courtyards are not uncommon and its accessibility is simply a reflection of the owner's efforts to maximize its use of space on the lot. The fact that the penthouse is on the

lowest level of the roof is also irrelevant. In fact, the regulations specifically permit elevator penthouses on a lower level of a roof. *See* 11 DCMR §§ 411.2, 411.4. The rooftop courtyard's designation as a roof is further bolstered by the presence of existing rooftop structures in that space, such as the mechanical penthouse and the ventilation shafts.

As the elevator penthouse is located on the roof of the Property, the Zoning Administrator correctly identified it was a rooftop structure and found the regulations concerning accessory structures inapplicable. *See* 11 DCMR §§ 770.6, 411.1.

2) The Elevator Penthouse Is Not Subject To A Setback Requirement

Appellants also argue that if the Board determines the penthouse to be a rooftop structure, then the Zoning Administrator erred because it does not comply with the setback requirement of 11 DCMR § 770.6.¹ The relevant provision states as follows:

If housing for mechanical equipment or a stairway or elevator penthouse is provided on the roof of a building or structure, it shall be erected or enlarged as follows:

- (a) It shall meet the requirements of § 411;
- (b) It shall be set back from all exterior walls a distance at least equal to its height above the roof upon which it is located;

See 11 DCMR § 770.6.²

Appellants argue that the elevator penthouse must be set back from the north and east walls of the building; however, this argument fails because the setback requirement only applies

¹ The Appellants argument that the Zoning Administrator only reviewed the penthouse for compliance with the Height Act and did not review it for compliance with the Zoning Regulations is simply an attempt to confuse the issue. *See* Appellants' 10/18 at p. 7. The penthouse was reviewed for compliance with the Zoning Regulations and the Zoning Administrator affirmatively told the Appellants this in his April 8th email, "[a]fter a thorough review, I have concluded that the structure complies with all applicable zoning regulations [.]". *See* Appellants' 10/18 at Ex. A.

² The Height Act has a similar provision requiring elevator penthouses to be "set back from the exterior walls distances equal to their respective heights above the adjacent roof." *See* D.C. Official Code § 6-601.05(h).

to “exterior walls” and neither the east or north walls are considered exterior walls under the Zoning Regulations.

The Board dealt with this issue at length in the *Appeal no. 17109 of Kalorama Citizens Association* (Nov. 8, 2005). In *Kalorama*, the appellant was challenging DCRA’s issuance of a building permit that allowed for the construction of a five-story row dwelling with a rooftop penthouse 10 feet, 4 inches in height. See *Kalorama* at p. 3. The appellant argued that the penthouse violated § 400.7 because the penthouse was flush against the east wall of the building and set back only 6 feet from the west wall. *Id.*

In that case, the Board explained that in interpreting the Height Act, the term “exterior walls” has historically meant only walls that abut a street. *Id.* at p. 12. The Board went on to explain, “While the term “exterior walls” has been interpreted more broadly under the Zoning Regulations to include a wall set back from the property line that abuts a yard or court, as opposed to a street or alley, it has not been interpreted to apply to a side wall constructed to the lot line of an abutting property.” *Id.* at p. 13. Therefore, the Board concluded that the penthouse did not need to be set back from the east and west walls of the building. *Id.* The Board then went on to articulate the following rule that the Zoning Administrator applied in this case, “Accordingly, what distinguishes an exterior wall for zoning purposes is not whether it is exposed to the elements, but whether it is set back from a property line.” *Id.*

Here, the east and north building walls of the Property are not set back from the property line and do not abut a street or public space. This is confirmed by the plat submitted by Appellants. See Appellants 10/18 at Ex. D. In *Kalorama*, the Board noted that the subject property had only two exterior walls: the front wall, which abutted a street and the rear wall, which was set back from the property line. *Id.* at p. 13. A yard separated the rear building wall

and the property line and the rear property line abutted an alley. In this case, the east and north walls of the Property are built to the property line and abut the neighboring properties.

Accordingly, they are not considered exterior walls under the Zoning Regulations and the setback requirement is not applicable to those walls.³

3) The Issue of Loading Is Not Relevant To This Appeal

When the Zoning Administrator approved the Building Permit, the loading use on the lower level of the roof was an existing use. DCRA understands that this space has been used for loading for 20 years or more. *See* Intervenor 10/25 at Ex. C. Since the scope of work for the Building Permit did not expand the gross floor area of the building or change the use, it did not subject the Property to any additional loading requirements.

In this appeal, Appellants are essentially raising the question of whether the building was constructed without the required loading or whether the required loading was provided in a non-compliant location. Those issues are not properly before the Board at this time. The application of the zoning regulations governing loading in effect at the time of the building's construction (circa 1989) is not germane to this appeal and is long since time-barred.

Nevertheless, the loading requirements that may have been applicable to the Property in 1989 are not relevant to the analysis of whether an elevator penthouse can be lawfully built on the roof of the Property. Section § 2203.1 does not in any way limit the ability of the permit holder to construct an elevator penthouse.

For these reasons the appeal must be denied.

³ It should also be noted that neither the existing ventilation shaft nor the mechanical penthouse are set back from the building walls.

Respectfully Submitted,

IRVIN B. NATHAN
Attorney General for the District of Columbia

MELINDA M. BOLLING
General Counsel

October 27, 2011


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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing filing was served by email or first class mail, this 27th day of October 2011, to the following:

Ruthanne Miller, Esq.
Sullivan, Styles and Barros, LLP
1990 M St., NW, Suite 200
Washington, DC 20036
Via email rmiller@ssblawfirm.com

Advisory Neighborhood Commission 2E
c/o Commissioner Ron Lewis, Chair
400 Reservoir Road, NW
Washington, DC 20007

Leila Batties, Esq.
Holland & Knight
2099 Pennsylvania Ave., NW
Washington, DC 20006
Via email Leila.batties@hklaw.com


Jay Surabian



EX. A



