

**BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA**

APPEAL OF:

WALTER PARRS, ET AL

**From the Zoning Administrator's
Decision of April 8, 2011 and Issuance
of Building Permit No. B1104635 and
Elevator Permit No. EN1101667
regarding the construction of a
"material lift" structure
at 3307 M Street, N.W., in the C-2-A
District (Square 1205, Lot 79)**

**BZA Appeal No. 18257
ANC 2E**

Hearing Date: November 1, 2011

APPELLANTS' POST-HEARING SUBMISSION

On November 8, 2011, the Board engaged in deliberations on this appeal alleging that the Zoning Administrator erred in approving the building and elevator permits for the new structure at issue in this case. Specifically, Appellants allege that the new structure was not set back in accordance with either the set back requirements governing accessory structures or roof structures. The Board reached the preliminary conclusion that the structure at issue is a roof structure. This determination was based on logical reasons, including the integral nature of the elevator and its direct connection to the structure below. However, the Board noted in its discussion that determining that the structure was a roof structure meant that all the open area above the underground parking structure, previously identified on the plat and other documents as courtyard, and a 15- foot wide driveway, meeting the rear yard requirement, are therefore a roof over an underground building that occupies the entire lot and has no rear yard. The Board asked the parties to determine whether 11 DCMR 2001.3, governing additions to non-conforming structures, applies to this case, and if so, how it should be applied.

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO.

18257

EXHIBIT NO.

34

2011 NOV 28 AM 10:30
OFFICE OF THE CLERK
Board of Zoning Adjustment
District of Columbia
CASE NO. 18257
EXHIBIT NO. 34

I. The Building is not a nonconforming structure governed by the regulations set forth at 11 DCMR 2001.3.

A nonconforming structure, in essence, refers to buildings that are lawful at the time of the enactment of the Zoning Regulations or amendments thereto, but do not conform to the new provisions. Nonconforming structure is specifically defined in the Zoning Regulations as follows:

Nonconforming structure - a structure, lawfully existing at the time this title or any amendment to this title became effective, that does not conform to all provisions of this title or such amendment, other than use, parking, loading, and roof structure requirements. Regulatory standards that create nonconformity of structures include, but are not limited to, height of building, lot area, width of lot, floor area ratio, lot occupancy, yard, court, and residential recreation space requirements. (30 DCR 3922).

The building on this property was built in 1989. A copy of the Building Permit is attached as Exhibit 1 for the Board's reference. This building was built many years after the enactment of the Zoning Regulations (May 12, 1958). No regulations have been enacted after 1989 that made this building nonconforming, specifically with respect to the rear yard requirements. Accordingly, the answer to the Board's question as to whether the building is nonconforming pursuant to 2001.3 is that it is not, and therefore, the regulations under 2001.3 are inapplicable to this case.

II. In light of the Board's determination that the open space above the underground structure is a roof, the building is noncompliant with Section 774.1 of the Zoning Regulations.

While the building is not a nonconforming structure, as set forth above, it is, as the Board noted, not in compliance with Section 774.1 of the Zoning Regulation when the open area is considered a roof and not a yard. Section 774.1 of the Zoning Regulations requires a 15-foot rear yard for all structures in the C-

2-A District, in which this property is located. This rear yard requirement protects the light and air of properties behind a commercial building.

It may be reasonably inferred from the issuance of the permit that in 1989 the Zoning Administrator determined that the building met the Zoning Regulations, including the rear yard set back and therefore treated the open space as a yard and not a roof. For 22 years therefore this building has been treated in compliance with the Zoning Regulations.

If the building is now not in compliance with the Zoning Regulations, then, pursuant to 11 DCMR 3202.1, the Zoning Administrator erred in issuing the building permits at issue in this case. 11 DCMR Section 3202.1 states as follows:

Except as provided in §§ 3202.5, 3202.7, or 3202.8, a building permit shall not be issued for the proposed erection, construction, conversion, or alteration of any structure unless that structure complies with the provisions of this title.

The building permit on appeal in this case identifies the type of work permitted as “addition alteration repair.” (Pre-hearing Statement In Support of Appeal, Exhibit B). Accordingly, in determining that the structure at issue in this case was a roof structure, the Zoning Administrator erred in issuing the building and elevator permits because the roof structure was an alteration to a building that was not in compliance with 11 DCMR 774.1.

III. The Zoning Regulations Should be Interpreted in a Manner that is Consistent with Precedent, in Harmony with Other Zoning Regulations, and in Furtherance of the Intent and Purpose of the Zoning Regulations.

The Board has several choices in this case in arriving at a decision as to whether the Zoning Administrator erred in issuing permits that allowed the construction of a large structure to be built closer to residential properties than allowed by either the Zoning Regulations governing set back requirements for roof structures or rear yard requirements for all structures in the C-2-A District.

Specifically, one choice affects whether the Board will follow precedent or change it.

In this case, the Zoning Administrator has stated that as a roof structure, the structure is not required to be set back from the north and east building walls because the walls are on property lines. This interpretation is contrary to a long line of precedent requiring special exception relief for a roof structure not set back from all lot lines a distance equal to its height. The only exception to this rule is for party walls as explained in the *Kalorama* case at 13.

The retaining walls that border the north and east sides of the property are not party walls because they do not abut a side wall from the adjacent properties. Instead, they abut required open rear yards. As Intervenor's zoning expert stated at the hearing, the *Kalorama* case did not change the law. If the Board upholds the Zoning Administrator's decision on these grounds, then the Board will be changing the law to eliminate the protection currently afforded by the roof top structure set back provisions to required open yards where there happens to be a wall on the property line. In this case, the wall on the property line is a retaining wall. If the Zoning Administrator's interpretation is upheld, then any property owner could circumvent the regulations intended to protect open yards by constructing a wall on a property line.¹

With respect to the other decisions in determining whether the Zoning Administrator erred, the Board should interpret the Zoning Regulations so that the property is considered compliant, and in a manner that the purpose of the regulations to protect the light and air of neighboring properties is protected and not diminished.

Accordingly, regardless of whether the new structure is considered an accessory building or a roof structure, the Zoning Administrator erred in issuing the permits for the structure because:

¹ See also transcript of deliberations of the *Kalorama* case on February 1, 2005 <http://dcoz.dc.gov/trans/050201b1.pdf>

1. As a roof structure, the structure was not allowed at all because the main building was not in compliance with the regulations (3202.1);
2. As a roof structure it was not set back from all exterior walls a distance at least equal to its height above the roof upon which it is located; (770.6)
3. As an accessory structure it does not have the required 15 feet rear yard. (774.1)

In light of the above, Appellants respectfully request that the appeal be granted and the permits revoked.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Ruthanne G. Miller", is written over a horizontal line.

Ruthanne G. Miller, Esq.

Sullivan & Barros, LLP

1990 M Street, N.W., Suite 200

Washington, D.C. 20036

(202) 503-1705

*** GOVERNMENT
OF THE DISTRICT
OF COLUMBIA
Form BLRA-15
(Rev. 12/10/86)

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION

BUILDING PERMIT

PERMIT NO. **B 342959**

Date **8/25/89** (Type) **NEW CONST**

Address of work **3307 "M" STREET, N.W.**

Permission is hereby granted to
3307 "M" STREET, PARTNERS.

who is authorized to perform the work described herein at the
address shown above in strict accordance with the conditions
stated on BOTH sides of this permit.

Authorized work and conditions of performance thereof:

CONSTRUCT A MIXED-USE (PARKING, RETAIL, RESIDENTIAL, OFFICE) THREE TO FOUR STORY (ABOVE GRADE) BUILDING WITH TWO LEVELS BELOW GRADE. IT IS FLAT SLAB CONCRETE CONSTRUCTION WITH A BRICK AND CMU BACKUP EXTERIOR WALL. NO WORK TO BE DONE UNTIL PUBLIC SPACE SHEETING & SHORING PERMIT.

Builder— **HARVEY CONSTRUCTION COMPANY**

Width of Bldgs.

Length

Height

Zone

C-2-A

Height of terrace above grade

To be occupied as

Projections:

Address of owner **1625 "K" STREET, N.W.**

Deposit No.

D5612

Amount \$

16,000.00 PAID

Value \$ **5,000,000.00**

No. of Bldgs. **2**

No. of Stories **3-4 ABOVE & 2BELOW**

PARKING, RETAIL, RESIDENTIAL & OFFICE

Chief, Permit Issuance Branch

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

By **C. GREENIDGE**
Permit Clerk

Donald B. Munn
DIRECTOR

AS PER PLANS.

P
E
R
M
I
T

EXHIBIT

1

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellants' Post-Hearing Response to Board Questions was served this 25th day of November, 2011, by e-mail on the following:

Matthew Le Grant
Zoning Administrator
Department of Consumer and Regulatory Affairs
Government of the District of Columbia
matthew.legrant@dc.gov

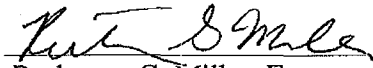
Melinda Bolling, Esq.
General Counsel
Department of Consumer and Regulatory Affairs
Government of the District of Columbia
Melinda.bolling@dc.gov

Jay Surabian, Esq.
Assistant Attorney General
Office of the Attorney General
Jay.surabian@dc.gov

Leila M. Jackson Batties
Holland & Knight
Leila.batties@hklaw.com

Ron Lewis, Chair
Advisory Neighborhood Commission 2E
Anc2e@dc.gov
ronlewis@anc.gov

Commissioner Bill Starrels,
SMD ANC 2E05
Bill.starrels@anc.dc.gov


Ruthanne G. Miller, Esq.