

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18257 of Walter Parrs, et. al., pursuant to 11 DCMR §§ 3100 and 3101, from an April 8, 2011 decision of the Department of Consumer and Regulatory Affairs (DCRA) in the issuance of Building Permit No. B1104635 on April 26, 2011 and Elevator Permit No. EN1101667 on May 9, 2011 regarding the construction of an elevator or “material lift” structure at 3307 M Street, N.W., in the C-2-A District (Square 1205, Lot 79).

HEARING DATE: November 1, 2011
DECISION DATES: November 8, 2011 and December 6, 2011

DECISION AND ORDER

This appeal was filed on June 5, 2011 with the Board of Zoning Adjustment (the “Board”) by Walter Parrs, Dorina G. Kanopka, and Zdenek D. Nikodem (“Appellants”). The appeal challenged the April 8, 2011 written determination of the Zoning Administrator (“ZA”) concerning Building Permit Application No. B1104635, DCRA’s subsequent issuance of that permit on April 26, 2011, and DCRA’s subsequent issuance of Elevator Permit No. EN1101667 on May 9, 2011. Together, the two permits allowed for the installation of an elevator and construction of an elevator canopy at the rear of the subject property. As to the April 8th written determination, the Appellants claim the ZA erred in concluding that: (1) The structure is a rooftop elevator penthouse; and (2) that the elevator penthouse is not subject to the setback requirement under 11 DCMR § 770.6 because it does not abut an exterior wall. The Appellants appealed the building permit “for the same reasons¹.” (Exhibit 2.) As to the elevator permit, the Appellants argued that it should not have been issued because the elevator was to be used in conjunction with allegedly unlawful loading and delivery spaces. In a Post-Hearing submission the Appellants for the first time argued that because the building itself allegedly does not comply with rear yard requirements, DCRA was precluded from issuing a permit under § 3202.1 of the Zoning Regulations. Following a public hearing and extensive briefings by the parties, the Board voted to deny the appeal on each of the three grounds originally stated and not consider the fourth claim that was raised after the hearing was concluded. A full discussion of the facts and law supporting this conclusion follows.

¹ For the reasons explained in the Conclusions of Law, the building permit was not a proper subject of this appeal.

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BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18257
EXHIBIT NO. 371

Board of Zoning Adjustment
District of Columbia
CASE NO.18257
EXHIBIT NO.37

PRELIMINARY MATTERS

Notice of Public Hearing

The Office of Zoning scheduled a hearing on November 1, 2011. In accordance with 11 DCMR §§ 3112.13 and 3112.14, the Office of Zoning mailed notice of the hearing to the Appellants, the Advisory Neighborhood Commission (“ANC”) 2E (the ANC for the area concerning the subject property), the property owner, and to DCRA.

Parties

The Appellants in this case are Walter Parrs, Dorina Kanopka, and Zdenek Nikodem (“Appellants”), three nearby property owners whose residences each abut the subject property.² Appellants were represented by the law firm of Sullivan, Styles & Barros, LLP, Ruthanne G. Miller, Esq.

The Appellee, DCRA, was represented by its Office of the General Counsel, Jay Surabian, Esq.

As the lessee of the subject property, Euromarket Designs, Inc., d/b/a CB2, is automatically a party under 11 DCMR § 3199.1. Although it was unnecessary, the Board also granted Intervenor³ status to CB2, who will hereafter be referred to as “CB2” or “Intervenor.” The Intervenor was represented by the law firm of Holland & Knight, Leila M. Jackson Batties, Esq. and Paul Kiernan, Esq.

Motion to Postpone

The Intervenor filed a Motion to Postpone the public hearing scheduled for November 1, 2011, claiming the Appellants had not properly and timely filed their Prehearing Statement in accordance with §§ 3111 and 3112 of the Zoning Regulations. Since the Intervenor also stated it was ready to go forward with the hearing, the Board found that the Intervenor would not be prejudiced by the hearing taking place as scheduled. Thus, the motion was denied.

Hearing and Closing of the Record

The public hearing took place on November 1, 2011, during which time each of the parties (except for the ANC⁴) presented its case. The Board closed the record and scheduled a decision meeting on November 8, 2011.

² Mr. Parrs resides at 3308 Prospect Street, N.W.; Ms. Kanopka resides at 1216 33rd Street, N.W.; and Mr. Nikodem resides at 1218 33rd Street, N.W.

³ Subsection 3112.15 of the Regulations allows the Board to grant Intervenor status during an appeal.

⁴ The ANC did not participate in the hearing or take a position regarding the appeal.

Deliberations

On November 8, 2011, the Board made a preliminary finding that the elevator penthouse was a rooftop structure and not an accessory building. However, the Board continued its deliberations to December 6, 2011 to allow post-hearing memorandums from the parties regarding an additional issue raised by the Chair; i.e., whether the main building was a non-conforming structure that was subject to the limitations on enlargements imposed by § 2001.3 of the Zoning Regulations. Post-hearing documents were submitted by the Appellants, DCRA, and CB2. (Exhibits 32, 33, 34, and 35.) The Board considered these filings on December 6, 2011, and voted to deny the appeal.

FINDINGS OF FACT

The Property

1. The subject property is located at 3307 M Street, N.W., in Square 1205, Lot 79 in the C-2-A Zone District.
2. The property is bounded by M Street to the south, Bank Street to the west, 33rd Street to the east, and Prospect Street to the north.
3. The property is improved with a mixed-use building (the “building”) that was built in 1989. The building has retail on the first floor and office space on the second and third floors.
4. The building fronts on M Street.
5. The site slopes up from M Street to the north. Because of the change in grade, the first floor of the building is entirely out of grade at M Street, but is in the grade at the north end of the site.
6. The first floor of the building is currently occupied by a furniture store that is operated by Euromarket Designs, Inc., d/b/a CB2 (“CB2”).

Events Leading to the Filing of the Appeal

7. Sometime in early 2011 CB2 applied for a building permit and an elevator permit to allow it to install an elevator and erect an external canopy to enclose it at the rear of the subject property.
8. On March 31, 2011, the ZA met with several persons, including one or more of the Appellants, to discuss their concerns over the proposed elevator structure and canopy on the subject property.

9. By an email dated April 8, 2011 to Mr. Parrs, the ZA indicated that he had concluded that the “structure complies with all applicable zoning regulations” and that he had approved the building permit for his office. (Exhibit 22, Tab C.) The ZA specifically concluded that the structure would be on a roof and complied with the zoning regulation that governed such structures.
10. DCRA issued Building Permit No. B1104635 on April 26, 2011 and Elevator Permit No. EN1101667 on May 9, 2011. The building permit authorized exterior work to include a wall enclosure to extend a shaft and a canopy in the rear of the building (Exhibit 22, Tab B) and the elevator permit authorized the installation of a new elevator. (Exhibit 22, Tab C.) The elevator permit described the elevator type as “lift (haul material out).”
11. An appeal was filed on June 5, 2011 challenging the ZA’s email of April 8, 2011 and permit approvals. The appeal alleged that the proposed structure was not a roof, but was a noncompliant accessory building. Alternatively, if it were a roof structure the Appellants claimed that it was subject to and noncompliant with a 1:1 setback requirement and that it was serving unlawful loading facilities.

Whether the Elevator Canopy Is Located on a Roof⁵

12. The area of the building where the proposed elevator enclosure was to be located⁶ has the following characteristics:
 - a) It has a pavement surface that is used by vehicles that service the loading facilities at CB2.
 - b) It is a full story higher in elevation than the grade on M Street and houses a mechanical equipment enclosure, a stairway and a garage ventilation shaft, all of which have been in existence for at least 20 years.
 - c) It covers a portion of the CB2 sales floor, the CB2 stockroom, and a portion of the parking garage, which are a continuation of the main floor of the building. As such, the structural elements, the waterproofing membrane, and the top part of this area, which helps to hold the walls in, provide covering and support to the building.
 - d) The area is located on a level that is below two levels of the building’s roof.
13. The elevator structure is to be connected to the floor of the building below it, and would therefore be part of the building.

⁵ Appellants argue that the area in question is not a “roof”. The Owner and DCRA assert that this area is the lowest level of a three-level roof, or the “lower roof”.

⁶ The Board is aware that construction of the canopy began prior to the application for the building permit, but from the ZA’s perspective, and therefore the Board’s, the structure is proposed until it is approved. It is the decisions that led to that approval that are before the Board.

14. The elevator is to be used for moving furniture and other items into and out of the CB2 store. Therefore, its use would not be incidental to the building.

Whether the Canopy Is Subject to a Setback Requirement

15. The elevator was to be constructed near the northeast corner of the lower roof, approximately nine feet from its north edge and flush to the property line along its east edge.
16. The walls and lower roof of the building extend to the northern and eastern property lines and abut the rear property lines of properties along Prospect Street and 33rd Street. The east wall of the building abuts an adjacent building that has frontage on 33rd and M Streets.
17. The eastern and northern walls do not abut a street or alley, and since they are built on lot lines, do not abut a court or yard on the subject property.

The Use of the Roof as a Loading Area

18. The proposed structure would be adjacent to a loading area that has been used for that purpose for 20 years or more.
19. Trucks and other vehicles will access the elevator from a loading driveway that extends from Bank Street to a loading area.
20. The loading driveway and loading area are shown on an attachment to the Intervenor's Prehearing Statement. (Exhibit 33, Tab A, revised November 1, 2011.)
21. The construction authorized and undertaken pursuant to the building permit that is the subject of this appeal did not include the establishment of new loading spaces.

CONCLUSIONS OF LAW

The Board is authorized by § 8 of the Zoning Act of 1938, D.C. Official Code § 6-641.07(g)(21) (2008 Repl.), to hear and decide appeals where it is alleged that there is error in any decision made by any administrative officer in the administration of the Zoning Regulations. There are two decisions involved in this appeal. The first was the ZA's decision to clear the building permit for zoning purposes. That decision was noted and explained in the email from the ZA described in Finding of Fact No. 9. The second decision was DCRA's issuance of the elevator permit. The issuance of the building permit did not represent a separate decision from the ZA's email determination, and was therefore not a proper subject of this appeal. *See Basken v. District of Columbia Bd. of Zoning Adjustment*, 946 A.2d 356 (D.C. 2008); *Appeal No. 18300 of Lawrence and Kathleen Ausubel* (2011).

As to the ZA's email, the alleged zoning errors were his determinations that: (1) the elevator structure is a rooftop elevator penthouse; and (2) the elevator structure is not subject to a 1:1

setback from the east or north walls of the main building. The Appellants contend that the area upon which the structure was to be located is not a roof, which makes the canopy an accessory structure that, among other things, would be illegally located in a required rear yard. Alternatively, if the area were a roof, Appellants contend that the structure was subject to a 1:1 setback because the northern and eastern walls are adjacent to required rear yards on neighboring properties. As to the elevator permit, the Appellants' claim that if the area to be served by the elevator is a roof, the existing loading spaces are not permitted to be located there. They therefore argue that it was error to permit the installation of an elevator intended to serve such illegal loading facilities.

Prior to turning to the merits of the appeal, the Board will address an issue it raised during its deliberations of November 8, 2011 and an issue raised by the Appellants in response thereto.

The building at the subject property does not have a rear yard even though § 774.1 of the Zoning Regulations requires a 15-foot rear yard for all structures in the zone. During the November 8th deliberations, the then Chairperson wondered whether this meant that the structure was non-confirming and, if so, whether the elevator canopy was an "enlargement" or an "addition" governed by § 2001.3. After asking the parties to brief the issue and reviewing their submissions, the Board concluded that the rear yard requirement existed at the time the building was constructed in 1989. Since the rear yard requirement was not added after construction vested, the absence of such a yard did not render the structure non-conforming. *See, definition of "Nonconforming structure" at 11 DCMR § 199.1.*

The Appellants agreed with this analysis, but took it one step further. In their Post-Hearing submission on the issue, the Appellants for the first time argued that since a rear yard was required when the building was first constructed, its absence made the structure illegal and therefore precluded the issuance of the instant building permit. The argument was based upon § 3202.1, which provides that "a building permit shall not be issued for the proposed ... alteration of any structure unless that structure complies with the provisions of this title." The Appellants did not request permission to amend the appeal to add this ground. Therefore the Board interpreted the argument as an invitation to the Board to take up the issue on its own. The Board decided not to do so. While the Board's rules do not specify deadlines for adding new issues, it would be fundamentally unfair to consider it at this juncture after the hearing has been completed.⁷

The Board will now turn to the merits of the appeal.

⁷ The Board takes no position on whether § 3202.1 actually precludes additions to structures that were constructed pursuant to and in accordance with a lawfully issued building permit. Subsection 3202.1 is an abbreviated version of § 10 of the Zoning Act of 1938, which only requires that the plans for the alteration, and not the structure being altered, comply with the regulations. The relevant portion of § 10, as codified at D.C. Official Code § 6-641.09, provides that the District "shall not issue any permit for the ... alteration of any building ..., unless the plans of and for the proposed ...alteration fully conform to the provisions of ...the regulations."

The Elevator Canopy Will Be Constructed on a Roof

Appellants allege that the elevator structure will not be situated on the “roof” of the building, but will be a separate accessory building that fails to comply with applicable height and siting requirements. However, the Board agrees with the ZA’s conclusion and finds that the elevator structure will be situated on a roof, and is therefore a rooftop structure.

The term “roof” is not defined in the Zoning Regulations. When that is the case the Zoning Regulations look to the definition of the term as contained in *Webster’s Unabridged Dictionary*. (See 11 DCMR § 199.2(g).) The parties all agree that the definition of “roof”, in relevant part, is “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.” (Emphasis supplied.) The inclusion of the term “building” within this definition makes for a somewhat circular analysis because one of the prerequisites for a “structure” to be considered a “building” under the Zoning Regulations is that it have a roof.

Building “a structure *having a roof* supported by columns or walls for the shelter, support, or enclosure of persons, animals, or chattel...”.

(11 DCMR § 199 (emphasis added).)

In any event, the Appellants do not deny that there is a building on the subject property. However, the Appellants argue that as the structure extends toward the north, and eventually falls below grade when viewed from the rear, it becomes an underground structure that no longer has a roof. The Appellant’s also contend that the use of the area for loading is inconsistent with it being characterized as a roof.

The Appellants first argument relies upon the Board’s decision in *Appeal No. 17538 of Advisory Neighborhood Commission 3C and Woodley Park Community Association* (2007). That order concerned a parking garage that would be located entirely below grade except for life-safety features, including two exit/egress stairways and four air intakes. The question was whether the garage was an accessory building illegally located in a front yard. The order concluded that because the garage will be constructed below grade it “will lack a roof and therefore does not meet the definition of ‘building’ in the Zoning Regulations.”

The Board finds *Appeal No. 17538* inapplicable. In contrast to the garage involved in that case, the building on the subject property is entirely above grade at all points when measured from M Street, including the portion upon which the elevator canopy will be constructed. It is M Street, which serves as the building’s front, and not the area abutting the rear of the building that is relevant, because zoning height may only be “measured from the level of the curb opposite the middle of the front of the building” (Definition of “Height, Building”, 11 DCMR § 199.1 (emphasis added).)

Even if this portion were considered to be at grade, it would still be considered a roof because it clearly acts as an “outside cover of a building or structure ... necessary to maintain the cover upon its walls or other support.” The area covers a portion of the CB2 sales floor, the CB2 stockroom, and a portion of the parking garage. Moreover, in contrast to the limited life and safety features that extended from the underground garage in *Appeal No. 17538*, the area to be occupied by the elevator structure presently contains structures normally found on a roof. The area at issue houses a mechanical equipment enclosure, a stairway, and a garage ventilation shaft that have been there for at least 20 years. All of the structures at this level are connected to form a single enclosure.

As to the Appellants’ second argument regarding loading on the roof, the Board concludes that the use of this area for loading is not inconsistent with it being also considered a roof. The definition of “roof” quoted above does not suggest that an area that otherwise would be considered a roof loses that characteristic because it serves other purposes. The Board will later address the Appellants’ alternative argument that loading spaces may not be located on a roof.

Since the elevator canopy is part of this building’s roof, it cannot also be an “accessory building”, as that term is defined in the Zoning Regulations. To consider roof structures as accessory buildings would impose two conflicting sets of regulations upon the same structure. In addition, this roof structure meets no portion of the definition of an accessory building, which in relevant part reads:

Accessory building “a subordinate building located on the same lot as the main building, the use of which is incidental to the use of the main building.”

(11 DCMR § 199.)

First the definition contemplates an entirely separate “building” from a principal building. However, there is nothing about this penthouse that would cause it to be considered a separate building. The elevator structure is connected to the floor below and is therefore part of the building. In addition, its function, moving furniture in and out of the store, is directly connected to the use of the building and therefore would not be “incidental to the use of the main building.”

For all of these reasons, the Board concludes that the structure that is the subject of this appeal is an elevator penthouse that will occupy a portion of the building’s roof and not an accessory building.

The Elevator Penthouse Is Not Subject to a Setback Requirement

Having determined that the elevator enclosure is an elevator penthouse, the question becomes whether the ZA erred in determining that it was not subject to the setback requirement contained in § 770.6. The provision states in relevant part:

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:

...

- (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 ... (emphasis supplied)

The ZA's email to the Appellants used the term "roof edge" instead of exterior wall and found that "no setback from the roof edge of the eastern property line is required." Citing pages 11 and 12 of *BZA Order No. 17109, Appeal of Kalorama Citizens Assoc.*, (2005), the ZA indicated that "the 1:1 set back from a roof edge only applies to roof edges adjacent to public space." The ZA noted that neither the eastern and northern walls abutted public space.

As noted by the Appellants, the portion of the *Kalorama* order relied upon by the ZA was discussing the exterior wall setback requirement of § 5 of An Act To regulate the height of buildings in the District of Columbia, approved June 1, 1910 (36 Stat. 453, D.C. Official Code § 6-601.05 (h) (2008 Repl.) (the "Height Act"). As *Kalorama* later pointed out, the term "exterior wall" as used in the Zoning Regulations has been interpreted more broadly "to include a wall set back from the property line that abuts a yard or court." *Kalorama* at 13. While the ZA's written determination cites *Kalorama* and not the Zoning Regulations, the Board is persuaded that the ZA also analyzed whether the northern and eastern walls were "exterior walls" under the Zoning Regulations. During the November 1st hearing, the ZA indicated that he did consider whether the eastern and northern walls were set back to form a yard and concluded that both walls extended to the lot lines. (Transcript, Hearing of November 1, 2011, p. 259.) This conclusion is consistent with the evidence in the record. Therefore, in addition to not facing any street or alley, the northern and eastern walls are not set back from any court or yard on the subject property. As such the eastern and northern walls are not exterior walls from which a setback is required.

The Appellants nevertheless claim that the walls are exterior because they abut yards on adjacent properties. For this proposition the Appellants point to a portion of the *Kalorama* case from which they conclude that any freestanding wall that does not face a street or alley is an exterior wall. At issue in *Kalorama* was a side wall connected to an adjacent but shorter wall, so that its upper portion was exposed. The appellant there contended that since a portion of the wall was presently exposed, it should be deemed exterior. The Board therefore noted that the threshold issue was:

[W]hether the Zoning Administrator, in applying the set back requirement for the stairway penthouse, looks to the current height of the roofs on adjacent lots to determine whether an exterior wall will result from the plans being reviewed, or to the potential height to which those rooflines may be brought as a matter of right.

The Board finds that the Zoning Administrator must look at the potential height as a matter of right.

Kalorama at 12.

In responding to the “exposed wall” argument, the Board did not alter the traditional interpretation of the term “exterior wall” as being a wall that faces a street or public alley or a “wall set back from the property line that abuts a yard or court.” *Id.* The Board made this clear in its further statement that, as to those walls that do not face a public street or alley, “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.” *Kalorama* at 13. The Board therefore agrees with DCRA that for a wall that does not face a street or public alley: “The issue is not whether it abuts a yard on a neighboring lot. It's whether it abuts a yard on the same lot.” (Transcript of November 1, 2011 Hearing at 264.)

Since the eastern and northern walls do not face a street or alley, and are not set back from a property line that abuts a yard or court, neither are exterior walls, and the ZA did not err in finding that the setback requirement of § 770.6 (b) did not apply.

The Legal Status of the Existing Loading Spaces Was Irrelevant to the Issuance of the Elevator Permit.

The Appellants note that the plans submitted for the elevator permit describe the adjacent area as a loading area and point out that § 2203.1 requires that within Commercial Districts all required loading berths and service/delivery loading spaces must be located either within the building or structure the berths or spaces are designed to serve, or on an open area of the lot. The Appellants then note that the term “lot” is defined, in relevant part, as “the *land* bounded by definite lines” (emphasis added). From this they argue that a roof has no land and therefore cannot be considered an open area of the lot eligible for the location of loading facilities. Because the rooftop loading spaces are allegedly unlawful, the Appellants’ claim that DCRA erred in authorizing the installation of an elevator to serve them.

The Board did not analyze whether the existing loading spaces are lawful because their status is irrelevant to the issuance of an elevator permit. Pursuant to the Construction Code an elevator permit is required “for installation, modernization alteration or repair of new and existing elevators, escalators or conveying systems, except for general maintenance per ASME A17.1 Section 8.6, and A17.3 (2005).” (12 DCMR § 105.1.13.) An elevator permit is not a building permit, but a type of “supplemental permit.” Such supplemental permits are required in addition to a building permit or a demolition permit. (12A DCMR § 105.1.13.) In this case the elevator permit was supplemental to the building permit that actually authorized the construction at issue in this appeal. It is only building permits that authorize the construction or alteration of a building that must conform to the Zoning Regulations. There is nothing about the issuance of

this supplemental permit that could implicate the Zoning Regulations, and therefore this portion of the appeal is denied.⁸

CONCLUSION

On the basis of the full and complete record in this matter, the Board finds that the ZA correctly applied the provisions of the Zoning Regulations in approving the permits, and that the appeal should be denied.

For reasons discussed above, it is hereby **ORDERED** that the appeal is **DENIED**.

VOTE: 4-0-1 (Nicole C. Sorg, Michael G. Turnbull, Meridith H. Moldenhauer, and Jeffrey L. Hinkle to Deny the appeal; Lloyd J. Jordan not present, not voting)

Vote taken on December 6, 2012.

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

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

ATTESTED BY:



SARA A. HARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: July 17, 2012

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

⁸ Because the Appellants did not challenge the building permit on this ground, the Board did not have to consider whether the rooftop loading facilities made the structure noncompliant with the Zoning Regulations therefore precluding the issuance of a building permit under a facial reading of 11 DCMR § 3202.1. *But see* FN 6.