

**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
Decision Dates: November 8, 2011,
December 6, 2011**

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APPELLANTS' MOTION FOR RECONSIDERATION

Appellants Walter Parrs, Dorina G. Kanopka and Zdenek D. Nikodem ("Appellants") hereby move for reconsideration of the Board's Order in this case issued July 17, 2012. Appellants respectfully assert that the Board erred in upholding the April 26, 2011, building permit as follows:

1. The Board erred in upholding the Zoning Administrator's zoning determination that allowed the same property to be characterized one way for the original building permit (yard), then a different and conflicting way for the second permit (roof).¹
2. The Board erred in upholding the Zoning Administrator's determination that the northern and eastern walls on the lot lines of the property are not exterior

¹ Appellants did not agree with the Board's analysis at the hearing that the original permit authorizing construction of the building was in error by approving a building that did not meet lot occupancy or rear yard requirements. Appellants maintained and continue to maintain that the original permit was legally issued in conformance with the Zoning Regulations when the surface area was characterized as a yard. Appellants argued in the post-hearing brief that based on the Board's deliberations, the building would not be in compliance with the Zoning Regulations and therefore an addition to the building should not be allowed pursuant to 11 DCMR § 3202.1.

walls based on *BZA Order No. 17109, Appeal of Kalorama Citizens Association (2005)*.

For these reasons, as set forth more fully below, Appellants move pursuant to 11 DCMR 3126 that this Board reconsider and reverse its order, and rule that the Zoning Administrator's Decision of April 8, 2011, authorizing Building Permit B1104635 (hereinafter "Building Permit") was in error.

PERTINENT FACTS

3307 M Street, N.W, the property at issue in this case, (hereinafter "the Property") fronts on M Street, N.W to the south and is bound by Bank Street to the west, 33rd Street to the east, and Prospect Street to the north. Appellants live and/or own homes on 33rd and Prospect Streets and the rear yards of these homes abut the Property. The site slopes up from M Street to the north, with the first floor of the building out of grade at the M Street entrance and in grade at the north or rear of the Property. Intervenor CB2 is a recent tenant of the first floor of the building

The original building permit, authorizing construction of the building, attached to Appellants' Post-Hearing Submission, indicates that the building was built in 1989. The plat for the Property, dated March 3, 2011, identifies the above-ground structure as the "EXISTING BUILDING" with a rear yard to the north of the building and an "EXIST'G COURTYARD" on the north and east sides of the above- ground buildings walls (See, Exhibit D to Appellants' Pre-hearing Statement.) .

On April 8, 2011, the Zoning Administrator issued a decision authorizing the addition of an elevator or material lift structure at the rear of 3307 M Street, N.W., in the northeast corner of the property. The addition of the elevator structure was made at the request of the Intervenor in order to move furniture and other items in and out of the CB2 store.

The elevator structure is approximately 17.5 feet high from the surface designated as a yard on the plat. It is set back approximately nine (9) feet from the property line that abuts the rear yards of the Prospect Street homes and is flush against the property line of

rear yards of the 33rd Street homes. The elevator structure overshadows the Appellants' rear yards on the eastern or 33d Street side because the grade of the Property is above those rear yards, and diminishes the light and air to those properties. The properties fronting on Prospect Street are a grade higher than the Property and therefore the massing of the elevator structure blocks light, air and views from their rear yard patios, particularly that of Appellant Parrs whose rear yard directly faces the upper part of the structure.

On June 5, 2011, the Appellants filed a timely appeal of the Zoning Administrator's Decision that is the subject of this Appeal.

ARGUMENT

A. The Board erred in upholding the Zoning Administrator's zoning determination that allowed the same property to be characterized one way for the original building permit (yard), then a different and conflicting way for the second permit (roof).²

In its Order at 6, fn. 7, the Board highlighted, in part, D.C. Code § 6-641.09. This provision is set forth more fully below to show that it applies not just to alterations, but also to original construction. The provision indicates that a building permit may not be issued unless the plans conform to the provisions of this subchapter and the regulations.

D.C. Code § 6-641.09. Building permits; certificates of occupancy.

(a) It shall be unlawful to erect, construct, reconstruct, convert, or alter any building or structure or part thereof within the District of Columbia without

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obtaining a building permit from the Inspector of Buildings, and said Inspector shall not issue any permit for the erection, construction, reconstruction conversion, or alteration of any building or structure, or any part thereof, unless the plans of and for the proposed erection, construction, conversion, or alteration fully conform to the provisions of this subchapter and of the regulations adopted under said sections.

The evidence presented at the hearing overwhelmingly supports the conclusion that the original permit was legally approved based on treating the open surface at issue in this case as a yard. In treating this same surface as a roof for zoning purposes 22 years later, the current Zoning Administrator rendered the original permit illegal.

Treating the disputed area as a yard, the 15-foot wide service driveway fulfills the 15-foot rear yard requirement set forth in 11 DCMR § 774.1. Treating the area as a roof results in no rear yard, in violation of the Zoning Regulations. Treating the area as a roof, the property appears to reach 100 % lot occupancy, also in violation of the Zoning Regulations for this zone. Chairperson Moldenhauer's question is on point:

In saying this is definitely a roof, then are you saying that this is a non-conforming structure because it takes up 100-percent lot occupancy, and then how was this building then built as a matter of right?

Hearing Transcript at 357.

Chairperson Moldenhauer continues this line of questioning, referring to Tab C to Pre-hearing Statement of Intervenor, that sets forth the zoning calculations for the Property.

Chair Moldenhauer "...It does say then off to the left that it's providing 15-foot rear yard."

Mr. Sher: "Yep."

Chair Muldenhauer: "So then, where is the rear yard?"

Mr. Sher: "I believe that in, whatever this was, 1989, they would have counted that rear yard to be the 15-foot service drive leading in from Bank Street."

Hearing Transcript at 359. Chair Moldenhauer also notes, “I don’t see anything that says “roof structures” on here. Hearing Transcript at 360.

Finally she notes the loading berths that are designated on these plans. Hearing Transcript at 361. When Mr. Le Grant is questioned by the Chair regarding whether loading is allowed on a roof, he stated, “...it’s always been presented to me, as areas with no building underneath.” Hearing Transcript at 276. Again, the designations for the loading berths to meet the loading requirements of the Zoning Regulations would not have been in compliance with the regulations based on a zoning determination that the area is a roof with a building below.

When questioned by Board Member Sorg whether an area can be both a rear yard and a roof, Mr Sher, who was qualified as an expert in zoning, opined:

“I think there are situations where that happens, yes, and it appears to me that may be been what they did here in 1991.” Hearing Transcript at 363.

However, if “they” did treat the area as both a roof and a yard, they treated the open area as a yard for purposes of compliance with the zoning regulations. In other words, the yard characteristics took precedence over the roof characteristics for zoning purposes.

Finally, Mr. LeGrant stated that the presence of mechanical equipment and ventilation shafts also influenced his determination that the area on which they were located was a roof because “it’s common to have mechanical equipment and ventilation shafts at the roof level.” Hearing Transcript at 292. However, both of these structures are below the permitted height for accessory structures of one (1) story or 15 feet. 11DCMR 2500.4. *See* Building Section Plan attached to Intervenor’s Prehearing Statement., showing both well under the height of the proposed CB2 loading and protective canopy.

In light of the bump out at the northeast corner of the property, it appears that the existing ventilation shaft does not occupy the rear yard. *See, in particular*, Site Plan attached to Intervenor’s Pre-hearing Statement.

After this discussion during the hearing, it was determined that these plans were not the plans that were submitted for the construction of the site and were therefore irrelevant. However, they reflect the same layout of the property as the plat minus the residential portion on Bank Street and reveal helpful dimensions for the zoning

determinations. Intervenor stated that the plans were submitted to show the loading area since 1991. However, they also show that the zoning requirements for the zone in which this property is located were met and that they were met by treating the open areas as a yard and not as roof for zoning purpose.

In conclusion, while this structure may be considered a roof structure because of the manner in which it is connected to the parking garage below, that characteristic should not prevail for how the structure is treated for zoning purposes. Only by treating it as an accessory structure will the Zoning Administrator and the Board maintain the legality of the original permit as well as protect the neighboring residential properties from the loss of light and air.

B. The Board erred in upholding the Zoning Administrator's determination that the northern and eastern walls on the lot lines of the property are not exterior walls based on BZA Order No. 17109, Appeal of Kalorama Citizens Association (2005).

As the Board noted in *BZA Order No. 17109, Appeal of Kalorama Citizens Association (2005)*, the term "exterior walls" is not defined either in the Zoning Regulations or the Act to Regulate Height of Buildings in the District of Columbia, approved June 1, 1910 (36 Stat.452, D.C. Official Code §§ 6-601.01 to 6-601.09 (2001) ("the Height Act"). Accordingly, as the Zoning Administrator stated in his April 8, 2011, administrative decision, he relied on BZA Order 17109 at pages 11 and 12 for his decision regarding the set back of the elevator structure. He expanded his reliance during the appeal to include language on page 13 of the Order upon which this Board also relies. In particular, the Board relies on the following statement from the *Kalorama* 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.." *Kalorama at 13*. The Board then states, "The Board therefore agrees that the issue is not whether it abuts a yard on a neighboring lot. It's whether it abuts a yard on the same lot."

Appellants respectfully assert that the statement upon which the Board relies is in fact *dicta*, comments of the Board which were not part of the basis for the ruling and

which do not have the full force of precedential value. The Board did not hold that building walls on lot lines that abut rear yards are not exterior walls. To the contrary, the ruling in *Kalorama* involves and is limited to party walls

At the February 1, 2005, meeting, the Secretary to the Board stated, in relevant part, the issue as follows:

At its public meeting on December 7, 2004, the Board reopened the record and requested all parties to respond to the question of whether a side wall of the building should or should not be considered an exterior wall if the adjacent property shares a party wall or may lawfully construct a shared party wall between the buildings.

February 1, 2005 Hearing transcript at 5.

Accordingly, it was error for the Zoning Administrator and the Board to rely on the *Kalorama* case for the determination that the northern and eastern walls that are on the lot lines of the property are not exterior walls because they are not set back from any court or yard on the subject property.

CONCLUSION

Based on the foregoing, Appellants request that the Board vacate and reverse its July 17, 2012 order upholding the Zoning Administrator's approval of the April 26, 201 building permit.

Respectfully submitted



Ruthanne G. Miller, Esq.
Sullivan & Barros, LLP
1990 M Street, N.W., Suite 200
Washington, D.C. 20036
(202) 503-1705

I HEREBY CERTIFY that a copy of the foregoing APPELLANTS' Motion for Reconsideration was served this 30th day of July by electronic mail to

Leila M. Jackson Batties, Esq.
Holland & Knight
2099 Pennsylvania Ave, NW
Suite 100
Washington, DC 20006

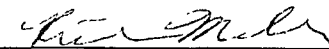
Bill Starrels, Commissioner
ANC 2E05
1045 31st Street, NW
#502
Washington, DC 20007

ANC 2E
c/o Ron Lewis, Chair
3400 Reservoir Road, NW
Washington, DC 20007

Melinda M. Bolling, Esq.,
General Counsel
Office of General Counsel
Department of Consumer and Regulatory Affairs
1100 4th Street SW, 5th Floor
Washington, DC 20024

Jay A. Surabian, Esq.
Assistant Attorney General
Office of General Counsel
Department of Consumer and Regulatory Affairs
1100 4th Street SW, 5th Floor
Washington, DC 20024

Matthew Le Grant
Zoning Administrator
Department of Consumer and Regulatory Affairs
Government of the District of Columbia
1100 4th Street SW, Room 3100
Washington, DC 20024



Ruthanne G. Miller, Esq.