

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

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Appeal No. 17109-B of Kalorama Citizens Association, pursuant to 11 DCMR § 3100, from the administrative decision of David Clark, Director, Department of Consumer and Regulatory Affairs, from the issuance of Building Permit Nos. B455571 and B455876, dated October 6, 2003 and October 16, 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., and from the issuance of the original Building Permit No. B449218, dated March 11, 2003.

HEARING DATES: February 17, 2004, March 9, 2004, March 16, 2004, April 6, 2004, and April 20, 2004

DECISION DATES: June 22, 2004, December 7, 2004, and February 1, 2005

DATE OF BOARD ORDER: November 8, 2005

DATE OF DECISION ON MOTION FOR RECONSIDERATION AND PARTIAL REHEARING: December 6, 2005

DATE OF COURT DECISION REMANDING TO BOARD: October 25, 2007

PROCEDURAL ORDER ON REMAND

Background

This Procedural Order on Remand is issued to set forth the Board of Zoning Adjustment's ("BZA" or "Board") initial procedures for complying with the District of Columbia Court of Appeals' ("Court") remand instructions in *Kalorama Citizens Ass'n. v. D.C. Bd. of Zoning Adjustment*, 934 A.2d 393 (D.C. 2007), which appealed certain aspects of the Board's decision in

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BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17109

EXHIBIT NO. 99

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Appeal No. 17109. This Procedural Order is being sent to each of the parties to Appeal No. 17109. Appeal No. 17109 was brought by the Kalorama Citizens Association (“KCA” or “Appellant”) and joined in by Advisory Neighborhood Commission (“ANC”) 1C, and alleged that the Department of Consumer and Regulatory Affairs had erroneously issued several building permits to Montrose, LLC, for a building located at 1819 Belmont Road, N.W.

By order dated November 8, 2005, the Board partially granted and partially denied Appeal No. 17109. Order No. 17109 granted the appeal on the grounds that the height of the building with the roof deck exceeded the height limitations of the Height Act, but denied the appeal with respect to the penthouse setback requirements under both the Height Act and the Zoning Regulations, as well as with respect to the floor area ratio (“FAR”) calculations. Order No. 17109-A, dated April 4, 2006, denied KCA’s request for reconsideration of certain aspects of the Board’s decision.

KCA appealed to the Court that part of Order No. 17109 which denied its appeal with respect to the FAR calculations. On appeal to the Court, KCA’s arguments as to the FAR calculations addressed two separable issues. As to the first issue -- whether the basement was properly measured for the purposes of these calculations -- the Court upheld the Board’s order, and **this issue is not within the purview of this remand.**

The second issue appealed was whether the Board properly determined that the sixth level of the building was *excluded* from the FAR calculations. This issue was remanded to the Board for more particularized findings and conclusions.

The Appellants made two arguments for why the space should be counted toward the building’s FAR:

1. The space was not an attic, but a habitable sixth floor; and
2. Even if the space were an attic, it provided structural headroom of six feet, six inches or more.

As to the first argument, the Court found that the issue of whether the sixth floor was or was not habitable was irrelevant to the determination of whether the space was an attic. *Kalorama Citizens Ass’n*, 934 A.2d at 406.

Instead the Court found that the determination of whether a space is an attic must be based upon how the term “attic” is defined and whether the space met that definition. The Court noted that the Zoning Regulations do not define the word “attic,” but pursuant to 11 DCMR § 199.2 (g) “[w]ords not defined in this section shall have the meanings given in *Webster’s Unabridged Dictionary*.” The *Webster’s Third New International Dictionary, Unabridged*, sets out the following definitions of “attic:”

- Ia: a low story or wall above the main order or orders of a façade in the classical styles;

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- b: a room or rooms behind an attic; and
- 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.

The Court found that the Board “did not explicitly consider or apply *any* of the unabridged Webster's dictionary definitions before concluding that the sixth level is an ‘attic.’” *Id.* at 406. Because it failed to do so, the Court agreed with “KCA and the ANC that a remand is required so that the BZA may consider the attic issue in light of the definitions incorporated by reference in the Zoning Regulations, and so that it can explain why it was or was not appropriate for the Zoning Administrator to treat the sixth level as an attic.” *Id.*

Because the Court held that the Board did not address the attic issue with sufficient particularity, it also held that the Board had not accorded the ANC great weight as to this issue. Therefore, the case was also remanded for the Board to make specific findings with respect to the ANC's concern that the sixth level does not fall within the definitions of “attic” and to explain why the Board does or does not agree with the ANC.

However, the Court did not disturb the Board's rejection of the Appellants' second argument that even if the space were an attic, it provided structural headroom of six feet, six inches or more. Therefore, **the following ruling is the law of the case and will not be revisited on this remand.**

Because the building is framed from front to back, rather than relying on the adjacent walls of the abutting townhouses for support, the collar ties forming the attic ceiling were not ornamental, but served as structural members necessary to help brace the building against racking in a north-south direction. The Board therefore concludes that the collar ties created structural headroom of less than six feet, six inches

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Procedures

In order to properly effectuate the Court's remand order, the Board must explicitly consider and apply each of the definitions of “attic” stated in the unabridged *Webster's Third New International Dictionary*, and, based upon this review, determine whether any of the three definitions have been satisfied.

To that end, the Board hereby directs any party that wishes to do so, to submit to the Office of Zoning, by 3:00 p.m. on July 2, 2010, a memorandum analyzing the applicability of each of the three definitions of “attic” to the space at issue. Each memorandum must include citations to, and copies of, any parts of the record in the proceedings of Appeal No. 17109 on which the party writing relies. Only the memorandum need be served on the other parties.

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Any reply to a memorandum is due by 3:00 p.m. on July 12, 2010. No sur-reply will be accepted.

The scope of the remand is limited to the record as it existed on the date that Order No. 17109 was issued. Any material attached to the requested memoranda not already in the record will be disregarded by the Board and returned to the party who submitted it.

Following the receipt of the requested memoranda, the Board will deliberate upon the issue on July 20, 2010. Since the majority of the Board members did not personally hear the evidence in this case, the Board, pursuant to § 10 (d) of the District of Columbia Administrative Procedure Act, D.C. Official Code § 1-509(d) (2001), will send a proposed order to the parties and will afford any party adversely affected the opportunity to present written exceptions.


This Procedural Order on Remand is not a final order of the Board and is, therefore, not the proper subject of a motion for reconsideration.

Accordingly, it is **ORDERED** that the Board **APPROVES** the issuance of this Order.

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

A majority of members approved the issuance of this Order.

(Meridith H. Moldenhauer, Shane L. Dettman, Nicole C. Sorg, and Konrad W. Schlater to approve issuance)

ATTESTED BY: 
JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: JUN 14 2010

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As Director of the Office of Zoning, I hereby certify and attest that on JUN 14 2010, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party who appeared and participated in the public hearing concerning the matter and to each public agency listed below:

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