

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

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D.C. OFFICE OF ZONING

Appeal of Kalorama Citizens Association

Appeal No. 17109-B

**DCRA'S MEMORANDUM IN RESPONSE TO THE BOARD'S JUNE 14, 2010
PROCEDURAL ORDER**

The Appellee, the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"), by and through undersigned counsel, respectfully submits its Memorandum in response to the Board's Procedural Order of June 14, 2010. The Procedural Order invited the parties to submit memoranda on the limited issue on remand from the District of Columbia Court of Appeals of whether the sixth story of 1819 Belmont Rd., NW ("the Property") is an attic. In this memorandum, DCRA reaffirms its position that the sixth floor qualifies as an "attic" and offers an analysis of that term.

THE ISSUE ON REMAND

Under the Zoning Regulations, the term "gross floor area" includes "attic space (whether or not a floor has actually been laid, providing structural headroom of six feet, six inches (6 ft., 6 in.), or more)." See 11 DCMR § 199.1. Conversely, attic space that provides less than 6 ft., 6 in. of structural headroom is properly excluded from gross floor area calculations. See *Appeal No. 17109 of Kalorama Citizens Association* (November 8, 2005) at p.14.

In *Kalorama Citizens Ass'n. v. D.C. Bd. of Zoning Adjustment*, 934 A.2d 393 (D.C. 2007), the Court of Appeals agreed with the Board's finding that the sixth floor of the Property

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has less than 6 ft., 6 in. of structural headroom, but remanded the case because the Board did not sufficiently explain why the sixth floor is an attic. Specifically, 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. Accordingly, the Court remanded the case back to the Board so that it could explain whether it was appropriate for the Zoning Administrator to treat the sixth level as an attic and to make specific findings with the respect to the ANC’s concern that the sixth level is not an attic. *Id.*

The significance of the issue on remand is that if the Board concludes that the sixth floor does not meet the definition of “attic” given in *Webster’s Unabridged Dictionary*, the Property would exceed the maximum allowable FAR in the R-5-D district. *Kalorama Citizens Ass’n.*, 934 A.2d at 398. The maximum permitted FAR is 3.5. Excluding the floor area of the sixth floor, DCRA’s calculation of the Property’s FAR was 3.33. *See* Transcript (“Tr.”) of March 16, 2004 at p.180.

DISCUSSION

Since “attic” is not a defined term in the Zoning Regulations, the Board must use the definition given in *Webster’s Unabridged Dictionary*. *See* 11 DCMR § 199.2(g). The Court of Appeals noted that *Webster’s Third New International Dictionary, Unabridged* sets forth the following definitions of “attic”:

- 1a: a low story or wall above the main order or orders of a façade in the classical styles;
- 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.

See Kalorama Citizens Ass’n., 934 A.2d at 406.

The Court speculated that the Board could reasonably apply these definitions to find that the sixth floor is an attic. *Id.* at 407. Specifically, the Court stated that the sixth floor could be considered a room behind “a low story” or as “a part of a building immediately below the roof” that is partly within the roof framing. *Id.*

DCRA believes the Court’s application of the definitions is correct on both counts. The sixth level is the Property’s top floor. The interior of the sixth floor has a ceiling height of only 6’ 5 ¼”, which is significantly lower than the building’s other ten-foot-plus stories. *Id.* at 406. Therefore, it is a “low story.” The room that is located on interior of the sixth floor is thus located behind this “low story.” Further, the sixth level is covered by the building’s roof, which slopes in from the street facing façade. *Id.* at 398. Thus, the sixth floor does not extend all the way to the front of the building. *Id.* The architect, who testified as an expert on behalf of Kalorama Citizens Association, described the roof as a mansard roof. *See* Tr. of March 9, 2004 at p. 278. Since the sixth story slopes in from the façade of the building, it is above the “main order” the façade. When these elements are strung together, it is clear that the interior of the sixth floor is a room located behind a low story and located above the main order of the building’s façade. This meets the definition of an “attic” under definitions 1a and b in *Webster’s Unabridged Dictionary*.

The sixth level also qualifies as an attic under definition 1c. The roof’s framing consists of rafters that are secured by a series of collar ties. *Kalorama Citizens Ass’n.*, 934 A.2d at 398. The collar ties are a series of wooden boards running the length of the sixth floor, which are approximately an inch and a half wide and spaced forty-eight inches apart. *See* Tr. of April 6, 2004 at p. 146-7. They are at a height of only 6’ 5 ¼” from the floor of the sixth level. *See* Tr. of March 16, 2004 at p. 134. The Court of Appeals stated that since the underside of the collar

ties form the “ceiling” of the attic, the Board could conclude that the sixth floor is to some extent “within” the roof framing. *Id.* at 407. The Court’s application of definition 1c is a reasonable one; however, that is not the only way that the Board can reach the conclusion that the sixth floor is located within the roof framing.

During the Board’s hearing, Appellant took the position that only the space between the collar ties and the roof rafters was the attic. *See* Tr. of March 9, 2004 at p. 273 and Tr. of April 20, 2004 at p. 339. The problem with that interpretation is that the *Webster’s* definition states that an attic can be either wholly *or partly* contained within the roof framing. For that reason, the attic need not be only the space between the collar ties and the rafters, but can consist of both the area below and above the collar ties. Although the collar ties, to some degree, limit the accessibility of the space above, that does not mean that space is not also part of the attic.

In excluding the sixth level from the FAR calculations, the Board looked to the definition of “gross floor area,” which excludes attics with structural headroom less than 6’ 6”. *See* 11 DCMR § 199.1. If an attic has very little headroom, it cannot be used as living space and therefore, it makes sense to exclude that space from FAR calculations; however, it does not logically follow that an attic necessarily ends at the limit of the structural headroom. In a case like this, where the headroom of the attic is limited by a structural element, like a series of collar ties, and there is not another story above it, neither the Zoning Regulations nor the *Webster’s* definition of “attic” preclude the Board from finding that the area above the structural headroom is also part of the attic. Therefore, in applying definition 1c, the Board can reasonably conclude that the attic consists of both the space above and below the collar ties and thus, the attic is located “immediately below the roof” and “partly within the roof framing.”

The second part of definition 1c defines attic as “a garret or storage space under the roof.” Since the sixth floor lacks sufficient headroom to be lawfully used as a habitable room, storage is the only practical use for that space. See 14 DCMR § 405.4 (“All habitable room area shall have a minimum clear head room of six feet eight inches (6 ft. 8 in.) under beams, pipes, ducts, or other construction projections from the ceiling”). Further, the intended storage use was confirmed by the developer at the hearing. See Transcript of April 6, 2004 at p. 137.


Accordingly, the Board must conclude that under the definitions found in *Webster’s Unabridged Dictionary*, the sixth level of the Property is an attic and that the Zoning Administrator properly excluded that space from the FAR calculations.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

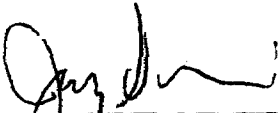
I hereby certify that a copy of the foregoing Memorandum was served by first class mail, postage prepaid, this 2nd day of July 2010, to the following:

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