GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

January 7, 2011

To the Parties in Appeal No. 17109-C:

This letter is being sent to you on behalf of the Board of Zoning Adjustment ("Board" or "BZA") because you were a party to Appeal No. 17109 of Kalorama Citizens Association (and remain a party in the remanded portion of that appeal). The Board partially granted and partially denied the appeal on February 1, 2005. One of the portions of the appeal that was denied concerned an allegation that the sixth level of the subject building was an attic and therefore improperly excluded from the computation of its floor area ratio. The Board Order memorializing this decision was appealed to the District of Columbia Court of Appeals ("Court").

The Court concluded that "remand [was] 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." *Kalorama Citizens Ass'n. v. D.C. Bd. of Zoning Adjustment,* 934 A.2d 393, 406 (D.C. 2007). The Court further instructed the Board that it "must articulate in writing specific findings and conclusions with respect to the ANC's concern that the sixth level does not fall within the Webster's dictionary definition of 'attic' and, if the BZA disagrees with the ANC's position, must explain in writing why it does not find the ANC's position persuasive." 934 A.2d at 407.

At its special public meeting held on July 20, 2010, the Board decided that the sixth level space fell within one of the sub-definitions of "attic." Because the Board had already concluded that the space provided less than six feet, six inches of structural headroom, it found that the Zoning Administrator appropriately excluded the area from his computation of floor area ratio and once again voted to deny this portion of the appeal.

None of the Board members who participated in the July 20th deliberations had personally heard the evidence presented in the hearing on Appeal No. 17109. Section 10 of the District of Columbia Administrative Procedure Act, D.C. Official Code § 2-509(d) (2001), states that whenever the majority of those who will render a final decision in a contested case did not personally hear the evidence, "no order or decision adverse to a party to the case . . . shall be made until a proposed order or decision, including findings of fact and conclusions of law, has

441 4th Street, N.W., Suite 200/210-S, Washington, D.C. 20001
Telephone: (202) 727-6311 Facsimile: (202) 727-6072 E-Mail: dcoz@dc.gov Web Site: www.dcoz.dc.gov

been served upon the parties and an opportunity has been afforded to each party adversely affected to file exceptions and present argument."

At its public meeting held on January 4, 2011, the Board voted to send the attached proposed order to the parties and specified that written exceptions and arguments must be filed with the Office of Zoning, and served upon the other parties, no later than Friday, February 4, 2011. The Board further ruled that responses to such written statements must be filed and served no later than Tuesday, February 22, 2011.

Questions should be addressed to Mr. Clifford W. Moy, Secretary to the Board of Zoning Adjustment, at (202) 727-6311.

Regards,

JAMISON L. WEINBAUM
Director, Office of Zoning

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

BZA APPEAL NO. 17109-C

As Director of the Office of Zoning, I hereby certify and attest that on JAN 07 2011, a copy of the proposed order 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:

Kalorama Citizens Association
c/o Anne Hughes Hargrove
1827 Belmont Road, N.W.
Washington, D.C. 20009

Montrose, LLC
c/o Mary Carolyn Brown, Esq.
Holland & Knight, LLP
2099 Pennsylvania Avenue, N.W., Suite 100
Washington, D.C. 20006-6801

Andrea Ferster
1100 17th Street, N.W., 10th Floor
Washington, D.C. 20036

Chairperson
Advisory Neighborhood Commission 1C
P.O. Box 21009
Washington, D.C. 20009

Single Member District Commissioner 1C
Advisory Neighborhood Commission 1C03
P.O. Box 21009
Washington, D.C. 20009

Matthew LeGrant, Zoning Administrator
Department of Consumer and Regulatory Affairs
1100 4th Street, S.W., Room 3100
Washington, D.C. 20024

Councilmember Jim Graham
Ward 1
1350 Pennsylvania Avenue, N.W., Suite 105
Washington, D.C. 20004

Melinda Bolling, Esq.
General Counsel
Office of General Counsel
Department of Consumer and Regulatory Affairs
1100 4th Street, S.W., 5th Floor
Washington, D.C. 20024

ATTESTED BY: Jamison L. Weinbaum

JAMISON L. WEINBAUM
Director, Office of Zoning

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 17109-C 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 Permits Nos. B455571 and B455876, dated October 6 and 13, 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, March 9 and 16, April 6 and 20, 2004
DECISION DATES:	June 22, 2004, December 7, 2004, and February 1, 2005
DATE OF DECISION ON MOTION FOR RECONSIDERATION AND PARTIAL REHEARING:	December 6, 2005
DATE OF D.C. COURT OF APPEALS DECISION REMANDING CASE TO BOARD:	October 25, 2007
DATE OF DECISION AFTER REMAND:	July 20, 2010

PROPOSED DECISION AND ORDER AFTER REMAND

On November 10, 2003, the Kalorama Citizens Association ("KCA") filed this appeal with the Office of Zoning ("OZ") alleging that Building Permits Nos. B455571, B455876, and B449218, all pertaining to construction at 1819 Belmont Road, N.W. ("subject property"), were issued erroneously by the Department of Consumer and Regulatory Affairs ("DCRA"). The Board of Zoning Adjustment ("BZA" or "Board") held a properly noticed hearing on the appeal, as well as

several decision meetings, and at the final decision meeting on February 1, 2005, decided to partially grant and partially deny the appeal.
The Board's decision was memorialized in Order No. 17109, dated November 8, 2005, which granted the appeal on the grounds that the height of the building with the roof deck exceeded the height limitations of the Height Act of 1910 ("Height Act") (36 Stat. 452, D.C. Official Code §§ 6-601.01 – 6-601.09 (2001)), but denied the appeal with respect to the penthouse setback requirements under both the Height Act and the Zoning Regulations, and 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, including whether a sixth level area denoted as "attic" space on the plans would be more properly characterized as a "mezzanine" or "balcony," thus requiring its inclusion in FAR calculations.

KCA appealed to the District of Columbia Court of Appeals ("Court") that part of Order No. 17109 which denied its BZA appeal with respect to the FAR calculations. On appeal to the Court, KCA's arguments as to the FAR issue went to two areas of the FAR calculations. As to the first – whether the basement was properly measured for the purposes of these calculations – the Court upheld the Board's order. The second issue before the Court was whether the Board had adequately explained its apparent conclusion that the sixth level of the building is an "attic," making the space potentially not countable towards FAR. The Court found that the Board had not, and remanded the case for the Board to resolve the issue. Because the Zoning Regulations do not contain a definition for the term "attic," the Court concluded that, pursuant to 11 DCMR § 199.2(g), the Board must determine whether the space falls within one of the three sub-definitions of "attic" set forth in *Webster's Unabridged Dictionary* ("*Webster's Dictionary*").

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 Advisory Neighborhood Commission ("ANC") 1C, the ANC within which the subject property is located, the great weight to which it is entitled, pursuant to D.C. Official Code § 1-309.10(d) (2001). 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 definition of "attic" and to explain why the Board does or does not agree with the ANC.

On June 14, 2010, the Board issued a Procedural Order to the parties permitting them to file legal memoranda, based on the record as it existed on the date Order No. 17109 was issued, analyzing the applicability of each of the three sub-definitions of "attic" to the space at issue, and drawing conclusions as to the effect on FAR calculations. The Procedural Order also stated that the Board would not revisit the Board holding that the space provided structural headroom of less than six feet, six inches, which is the second element that must be satisfied for attic space to be excluded from FAR. Finally, the Order indicated that the Board would deliberate on the attic issue at a Special Public Meeting on July 20, 2010.

At the Special Public Meeting on July 20, 2010, the Board deliberated on the attic issue and decided that the space denoted as "attic space" on the original plans submitted with the

application is indeed attic space because it falls within the third sub-definition. Since the Board had already concluded that the space provided structural headroom of less than six feet, six inches, the Board reaffirmed its conclusion that the space was properly excluded from the FAR computation and therefore again denied that portion of the appeal.

The Board members participating in this remand did not personally hear the evidence in this case. Therefore, at its public meeting on January 4, 2011, the Board voted to send this Proposed Order to the parties to afford them an opportunity to present written exceptions, pursuant to D.C. Official Code § 2-509(d) (2001). [INSERT DESCRIPTION OF ANY EXCEPTIONS RECEIVED AND DISCUSSION OF THEIR SUBSTANCE.]

This Order, No. 17109-C, reflects the Board's Findings of Fact and Conclusions of Law only on the two issues remanded by the Court – the attic issue and ANC great weight – and incorporates by reference Order No. 17109. This Order, therefore, will not restate all facts concerning the subject property, but only those relevant to the remand issues, and if a relevant factual finding also appeared in Order No. 17109, it is so noted herein.

FINDINGS OF FACT

1. The plans submitted with the application depict a five-story building plus basement, with each story approximately 10 feet high. The plans also depict a sixth level of the building that is six feet, five and one-quarter inches high to the ceiling. (Exhibit 100, Attached Plans.)
2. The plans denote the sixth level as an "attic."
3. The sixth level of the subject building provides less than six feet, six inches of structural headroom. (*See*, Finding of Fact No. 31 in Order No. 17109.)
4. There are "collar ties" forming part of the unfinished "ceiling" of the building's sixth level, which are part of the building's structural members and are placed six feet, five and one-quarter inches above that level's floor.
5. "Collar tie" is defined by *Webster's Dictionary* as "a board used to prevent the roof framing from spreading or sagging."
6. There is no finished ceiling to the sixth level because interspersed among the collar ties and ceiling rafters of the sixth level is open space; therefore, there is no full ceiling or floor between the floor of the sixth level and the roof of the building.
7. The collar ties in the subject building are part of the roof framing. They secure the roof rafters and work to brace the building against racking in a north-south direction. (*See*, Finding of Fact No. 32 in Order No. 17109.)
8. The sixth level of the building is at least partially within the roof framing of the building.
9. Because there is no finished ceiling to the sixth level, all of that level is immediately below the roof of the building. Part of the roof of the building is flat and the sixth level is

just below it. Part of the roof of the building is peaked, and there is an open area between the sixth-level ceiling rafters/collar ties and the peaked roof.

CONCLUSIONS OF LAW

The calculation of "gross floor area" of a building includes only attic space that provides "structural headroom of six feet, six inches (6 ft., 6 in.) or more." (11 DCMR § 199.1, definition of "Gross floor area.") In Order No. 17109, the Board stated its determination that the sixth level does not provide structural headroom of at least six feet, six inches. (Order No. 17109, at 14.) In that Order, however, the Board failed to find specifically whether the sixth level was an attic. This omission prompted a remand from the Court of Appeals with instructions that the Board determine whether the sixth level fell within one of the three sub-definitions of "attic" in *Webster's Dictionary.* The Board now holds that the sixth level is an attic, and specifically falls within the third sub-definition.

Section 199.2 of the Zoning Regulations directs the Board to *Webster's Dictionary* for words not defined by the Regulations themselves. (11 DCMR § 199.2.) "Attic" is not defined by the Regulations, so the Board turns to the tripartite definition of "attic" in *Webster's Dictionary* set out below:

a. 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;
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.

(Webster's Unabridged Third New International Dictionary.) Sub-definition (b) does not provide any illumination of the question before the Board and is somewhat difficult to interpret as it uses the word being defined in the definition.

Sub-definition (a) is more helpful, and may or may not apply to the sixth level of the subject building. There is some question as to its precise meaning, and as to the nature of a "façade in the classical styles."

Sub-definition (c), however, provides the Board with an understandable, workable definition of "attic" within which the sixth level of the subject building clearly falls. Sub-definition (c) has two parts to it, both of which apply to the sixth level here. First, an attic is "the part of the building immediately below the roof." The sixth level is immediately below the roof. This is evident under the flat-roofed part of the building, where the roof is at the top of the sixth level. It is less clear under the peaked-roof part of the building because immediately above the ceiling rafter/collar ties at the top of the sixth level is an open space that varies in height due to the peak of the roof.

Under the peaked-roof area, the floor of the sixth level is further from the roof of the building than it is under the flat-roofed area. Under the peak, the sixth level floor is anywhere from

approximately eight feet, five and one-quarter inches[1] to 16 feet, five and one-quarter inches[2] below the roof of the building. But it is not less "immediately below the roof" than in the flat-roofed area because there is nothing intervening between the floor of the sixth level and the peaked roof except the open-work sixth level ceiling rafters/collar ties.[3] The whole open area between the sixth level floor and the peaked roof is "immediately below the roof," thus satisfying the first part of sub-definition (c).

The second part of sub-definition (c) states that an attic is "wholly or partly within the roof framing." The sixth level of the subject building includes the collar ties which help stabilize the building. They are not put in place for ornamental purposes, but are structural members of the building's skeleton.[4] The collar ties are interspersed with the ceiling rafters of the sixth level, but this "ceiling" is, essentially, unfinished, with open spaces among the rafters and collar ties. The collar ties are, therefore, structural members which are part of the roof framing, making the sixth level "within the roof framing," thus satisfying the second part of sub-definition (c).

The third part of sub-definition (c) comes at the end, after a colon, and essentially provides two examples of what the first two parts of the definition try to define. It is not necessary that the sixth level actually fit either category, but in this case it does. The examples given are of "a garret or storage space under the roof." The sixth level of the subject building is exactly that – a garret or storage space under the roof. A "garret" is defined by *Webster's Dictionary* as "(1) an unfinished part of a house immediately under or within the roof: loft – compare ATTIC, (2) a room on the top floor of a house." The sixth level is an unfinished part of the building just under the roof and within the roof framing, and thus falls within "garret" definition number one.

ANC 1C filed a submission with the Board on December 2, 2003 (Exhibit 20) supporting the appeal and stating that the sixth level is not an attic under the dictionary definition or any commonly accepted sense of the term. The ANC claimed that the labeling of the sixth level as an attic was a "subterfuge" to avoid counting in FAR calculations space that it claims is intended to be used for human habitation. (Exhibit 20, at 3.) For all of the reasons set forth above, the Board disagrees with the ANC's position that the sixth level is not an attic. The Board instead

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[1]This number is derived by adding the height of the sixth level -- six foot, five and one-quarter inches -- plus the two feet between the ceiling rafters/collar ties and the low point of the peaked roof.

[2] This number is derived by adding the height of the sixth level -- six feet, five and one-quarter inches -- plus the 10 feet or so to the top of the peak.

[3]The situation was clearly verbally depicted by Chairperson Moldenhauer: "[I]f I were 6'8", I could look up and put my head between one of the four or five wooden joists and see the remainder of the space and look up to the roof; thus, I would be immediately below the roof. There is nothing for me to believe that there is any sort of drywall or ceiling structure that would impede my ability to put my head up and through those rafters, or however you want to term them, but those roof structural aspects to see the remainder of the area that I consider to be directly or immediately below the roof structure." (Decision Meeting Transcript of July 20, 2010, p. 43, lines 1-13.)

[4]Board Order No. 17109, at 14, states that "structural" is defined by *Webster's Dictionary* as "of or relating to the load bearing members or scheme of a building, as opposed to the screening or ornamental elements."

finds that the sixth level falls within the third sub-definition of "attic" enunciated in *Webster's Dictionary*. And, as noted by the Court, the issue of habitability is not relevant to whether a space is or is not an attic.[5]

On remand, the Board concludes that the sixth level of the subject building is an attic. Having already concluded that the space has less than six feet, six inches of structural headroom, the area was properly excluded by the Zoning Administrator from the calculation of the gross floor area of the building. Therefore, the building does not exceed the maximum floor area ratio permitted in this R-5-D Zone District. Accordingly, the Board affirms its denial of Appeal No. 17109 with respect to the FAR calculations.

VOTE: **3-0-2** (Meridith H. Moldenhauer, Konrad W. Schlater, and Shane L. Dettman to Affirm. No other Board members (vacant) participating)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this Order.

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

FINAL DATE OF ORDER:_____

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

[5] *Kalorama Citizens Association v. D.C. Bd. of Zoning Adjustment,* 934 A.2d 393, 407 (D.C. 2007).