

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Order No. 17109-D of Appeal No. 17109 of Kalorama Citizens Association, pursuant to 11 DCMR § 3100¹ 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., Washington, D.C. (Square 2551, Lot 45), 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, December 6, 2005, July 20, 2010, April 5, 2011, and October 28, 2014

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 Board 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, approved June 1, 1910, (36 Stat. 452: D.C. Official Code §§ 6-601.01 – 6-601.09), 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

¹ This and all other references in this Order to provisions contained in Title 11 DCMR, except those references made in the final all-capitalized paragraph, are to provisions that were in effect on the dates that the Board deliberated on this appeal (“the 1958 Regulations”), but which were repealed as of September 6, 2016 and replaced by new text. Also all zone districts described in this order were renamed as of that date. The repeal and replacement of the 1958 Regulations and the renaming of the zone districts has no effect on the validity of the Board’s decision reflected in this order.

**BZA ORDER NO. 17109-D – ORDER AFTER REMAND
PAGE NO. 2**

area ratio (“FAR”) calculations. The permitted FAR for an apartment house in the R-5-D zone was 3.5. The Zoning Administrator calculated the proposed building’s FAR at 3.49. The Board concluded that the Zoning Administrator had properly excluded a portion of the building’s lower level from FAR based upon the use of the perimeter wall method and properly excluded the building’s sixth level from the FAR computation because the space provided structural headroom of less than six feet, six inches, which would be a relevant finding if the space was an attic.

KCA appealed to the District of Columbia Court of Appeals (“Court”) that part of Order No. 17109 pertaining to FAR. The Court of Appeals affirmed in part and remanded. *Kalorama Citizens Ass’n v. D.C. Bd. of Zoning Adjustment*, 934 A.2d 393 (D.C. 2007). The Court affirmed the Board’s decision as to the FAR calculations for the lower level and found that the potential habitability of the sixth level irrelevant to determining whether that space was an attic. *Kalorama Citizens Ass’n*, 934 A.2d at 406. However, the Court found that the Board had inadequately explained its implicit conclusion that the sixth level of the building is an “attic.” 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 affected Advisory Neighborhood Commission (“ANC”) had specifically asserted that the sixth level did not fall within the definition of “attic,” the Court found that the Board’s failure to analyze that definition meant that the Board had not given great weight to the ANC.

The Board did not hold a further hearing on the issue, but requested legal memoranda from the parties. At a Special Public Meeting held July 20, 2010, the Board deliberated on the remanded issue and concluded that the space denoted as “attic space” on the original plans contained in the record met the third sub-definition of “attic.” 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. Board Order No. 17109-C formally stated the Board’s decision (“Order C”).

KCA petitioned the Court of Appeals to review Order C. After KCA briefed the issues, the Board requested that the Court remand the case back to it so it could reconsider its decision and to conduct further proceedings as may be appropriate. By Order dated May 10, 2012, the Court granted that request. The Board deliberated at a public meeting on October 28, 2014, and again reaffirmed its conclusion that the attic space was properly excluded from the FAR computation.

The Board members participating in this remand did not personally hear the evidence in this case. Therefore, the Board sent this Proposed Order to the parties to afford them an opportunity to present written exceptions, pursuant to D.C. Official Code § 2-509(d) (2012 Repl.). Exceptions were received from the Appellant KCA jointly with ANC 1C and are discussed in the conclusions of law.

This Order, No. 17109-D, 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

**BZA ORDER NO. 17109-D – ORDER AFTER REMAND
PAGE NO. 3**

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. As part of Exhibit 29, the Appellant submitted a portion of the revised plans approved by DCRA, which the Appellant referred to as “Exhibit 6” of that exhibit and which hereinafter will be referred to as “the Plans.” The Plans 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 29, sheet labeled “1819 BELMONT RD., NW 10-14-03 NORMAN SMITH ARCHITECTURE 202.462.5886 SCHEMATIC BUILDING SECTION” “SCHEMATIC BUILDING SECTION SHOWING REVISED PARAPET AND BUILDING,” stamped “Complies with Zoning Regulations,” and signed by “Faye O”, hereinafter the “Revised Building Section Drawing”). The Revised Building Section Drawing is appended to and made a part of this order.
2. The Revised Building Section Drawing denotes 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. The Revised Building Section Drawing shows the undersides of the “collar ties” forming a flat plane that is 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. The project architect testified, and the Board finds, that the collar ties are part of a structural system comprised of the roof rafters, bearing walls, and collar ties, and that the function of the collar ties in that system was to prevent north-south racking of the building. (Transcript (“Tr.”) of April 6, 2004 at 141-142.)
7. Between the collar ties are openings where there is nothing between the floor of the sixth level and the underside of the roof. (Tr. of April 6, 2004 at 138-139, 146.) The Board is aware that the Revised Building Section Drawing labels the underside of the collar ties as a “ceiling.” However, the testimony of the project architect explained that this was intended to refer to a “ceiling plane,” by which he meant that the collar ties are spaced at 48 inches and are surrounded by drywall that “goes across and down and back up.” (Tr. of April 6, 2004 at 139.) The Board interprets this testimony to mean that the spaces between the collar ties were open to the floor below, and the drywall “went down and back up” to enclose the collar ties themselves, leaving open spaces in between.

BZA ORDER NO. 17109-D – ORDER AFTER REMAND
PAGE NO. 4

8. Because of the openings between the collar ties on the sixth level, the sixth level is immediately below the roof of the building.
9. The collar ties depicted in the Revised Building Section Drawing are part of the roof framing. The collar ties are located at the top of the building and brace the building against racking in a north-south direction. (*See*, Finding of Fact No. 32 in Order No. 17109.)
10. Because of the openings between the collar ties, the sixth level of the building is at least partially within the roof framing of the building.

CONCLUSIONS OF LAW

The remaining issue in this appeal is whether the Zoning Administrator erred in excluding the building's sixth level from the building's gross floor area for the purpose of calculating its floor area ratio. If the area had been included, the building would have exceeded the permissible FAR.

The Zoning Regulations in place at the time that the building permits were issued defined floor area ratio as "a figure that expresses the total gross floor area as a multiple of the area of the lot." (11 DCMR § 199.1.) 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 specifically find 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.

Subsection 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.

**BZA ORDER NO. 17109-D – ORDER AFTER REMAND
PAGE NO. 5**

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.” There are open spaces between the collar ties. In these open spaces, there is no obstruction from the floor of the sixth level to the underside of the roof. The sixth level is therefore immediately below the roof, satisfying the first part of sub-definition (c).

The Board is aware that the project architect first testified that the collar ties were covered by a “finished ceiling.” He later clarified that he was talking about a “plane, because the collar ties are spaced at 48 inches on center, and so the drywall, the wall board, goes across and down, and back up.” (Tr. of April 6, 2004 at 139.)

Second, an attic is also “wholly or partly within the roof framing.” The building’s collar ties were not proposed for ornamental purposes, but are structural members of the building’s skeleton.² The Board is persuaded by the project architect’s testimony that the collar ties are part of a structural system comprised of the roof rafters, the bearing walls, and the collar ties, with the collar ties functioning in that system to prevent north–south racking of the building. Since the collar ties are located at the very top of the building and perform this structural function, the Board considers them part of the roof framing. Between the collar ties are openings. In these openings there is nothing between the floor of the sixth level and the underside of the roof. The portion of these openings that is between the underside of the roof and the collar ties is within the roof framing. Thus, the sixth level is at least partly “within the roof framing,” thereby 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.

The Board is required under § 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)) to give “great weight” to the issues and concerns raised in the written report of the affected ANC. ANC 1C filed a submission with the Board on December 2, 2003 supporting the appeal on both the height and FAR grounds asserted. (Exhibit 20.) As to the issue of FAR, the ANC advised the Board that:

² 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.”

BZA ORDER NO. 17109-D – ORDER AFTER REMAND
PAGE NO. 6

Regardless of how the plans label it, the portion of the upper story that the developers describe as an "attic" is not an attic under the legally controlling definition of the term, nor is it an "attic" under any other conventional or commonly accepted sense of the term. Rather, all signs seem to point toward a future resident's ability to use this space as a habitable room, and the room should therefore be subject to the FAR limitations of 11 DCMR § 402.4.

The Board agrees with the ANC that the labelling of the space as an attic does not make it one, but for the reasons stated above, disagrees that the area is not an attic under the applicable definition. As noted, the Court of Appeals agreed with the Board that the potential habitability of the six-level space is not a relevant consideration as to whether that space is an attic. Therefore, the Board need not respond to the ANC's assertion to the contrary.

The Parties' Exceptions

Because a majority of the Board members participating in this remand did not personally hear the evidence in this case, a Proposed Decision and Order on Remand ("Proposed Order") was provided to the parties on July 27, 2017 to afford them an opportunity to present written exceptions, pursuant to D.C. Official Code § 2-509(d) (2016 Supp.).

Exceptions were submitted by KCA and ANC 1C on September 18, 2017. (Exhibit 124.) The exceptions fell into two categories. Their first set of exceptions related to the Board's description of the procedural history of the case. The second set related to the Board's conclusion that the sixth level is an attic. They were that: (1) there are no open spaces between the collar ties where the underside of the roof is open to the floor of the sixth level; and (2) that the collar ties are not part of the roof framing.

Procedural Exceptions

KCA and ANC 1C had two exceptions to a sentence in the Board's summary of the procedural history of the case in the Proposed Order. The sentence read: "*After the parties briefed the issues, the Board requested that the Court remand the case back to it for additional deliberations on the issues and so it could better articulate its reasoning.*"

First, they pointed out that the sentence contains a misstatement regarding the procedural history of the case that should be corrected. They correctly asserted that only KCA filed a brief before the Court of Appeals, not the other parties, and that the Board's motion requesting the remand asked that the Court "remand this case for it to reconsider its decision, which is the subject of the petition for review."

The Board has revised the sentence accordingly.

Second, the KCA and ANC 1C asserted that, "the Assistant Attorney General apparently concluded that the record would not support the Board's Order [Order C], and acted accordingly

BZA ORDER NO. 17109-D – ORDER AFTER REMAND
PAGE NO. 7

(citing in the motion just one of the deficiencies that KCA had noted in its brief, namely, that the order was based on plans that had later been revised).” The Board concludes that this is purely speculation on the part of KCA and ANC 1C, is unrelated to the accuracy of the statement in the draft order, and goes to the final decision that is the Board’s to make in this case.

KCA and ANC 1C exceptions to the conclusion that the sixth level space is an attic

KCA and ANC 1C made two exceptions to the Board’s conclusion in the Proposed Order that the sixth level is an attic. First, they contend there are no open spaces between the collar ties where the underside of the roof is open to the floor of the sixth level. Second, they contend the collar ties are not part of the roof framing. The Board does not agree with either contention, for the reasons discussed below.

Openings between the collar ties

Whether the sixth level of the building is an attic turns on a determination of whether there are open spaces between the collar ties where the underside of the roof is open to the floor below, as the Board concluded in the Proposed Order. KCA and ANC 1C claim instead that the ceiling of the sixth level is completely enclosed by ceiling panels.

The Board concludes that they are partially open, based on the Revised Building Section Drawing and the testimony of the project architect at the April 6, 2004 hearing, as stated in Findings of Fact 7-8 of the Proposed Order:

7. The Revised Section Drawing labels the underside of the collar ties as a “ceiling.” However, between the collar ties are openings where there is nothing between the floor of the sixth level and the underside of the roof. (Tr. of April 6, 2004 at 138-139, 146.)
8. Because of the openings between the collar ties on the sixth level, the sixth level is immediately below the roof of the building.

KCA and ANC 1C believe the record shows the collar ties were covered by a flat ceiling, based on the same drawing and testimony cited by the Board in its Proposed Order, and the fact that the architect testified at one point that there is a “ceiling panel” at the line shown as the “ceiling” in the drawing. (Tr. of April 6, 2004 at 138.) However, the project architect then went on to qualify this earlier statement by further explaining at the April 6, 2004 hearing that the “finished ceiling” is actually a “ceiling plane,” that he further explains by stating:

Well, I use the word “plane,” because the collar ties are spaced at 48 inches on center, and so the drywall, the wall board goes around and down and back up. But to answer your question, there is a finished – yes, there is a finished ceiling surface.
(Tr. of April 6, 2004 at 139.)

**BZA ORDER NO. 17109-D – ORDER AFTER REMAND
PAGE NO. 8**

The Board understands this to mean that the spaces in between the collar ties were open to the floor below, and the wall board went “down and up” to enclose the collar ties themselves, leaving open spaces in between.

Accordingly, the Board concluded in the Order:

First, an attic is “the part of the building immediately below the roof.” There are open spaces between the collar ties. In these open spaces, there is no obstruction from the floor of the sixth level to the underside of the roof. The sixth level is therefore immediately below the roof, satisfying the first part of sub-definition (c). The Board is aware that project architect first testified that the collar ties were covered by a “finished ceiling.” He later clarified that he was talking about a “plane, because the collar ties are spaced at 48 inches on center, and so the drywall, the wall board, goes across and down, and back up.” (Tr. of April 6, 2004 at 139.)

The Board stands by its prior interpretation of this evidence and is not persuaded by the exceptions to change it. The Board has changed Finding of Fact 7 and its discussion in the conclusions of law in this Order to further clarify its reasoning in light of the KCA and ANC 1C exceptions.

Are the collar ties part of the roof framing?

Whether the sixth level is an attic also turns on whether the collar ties are part of the roof framing.

The Board concluded that the collar ties were part of the roof framing, based on the Revised Building Section Drawing and the testimony of the project architect at the April 6, 2004 hearing, as stated in Findings of Fact 5-6, and 9 of the proposed order:

5. “Collar tie” is defined by Webster’s Dictionary as “a board used to prevent the roof framing from spreading or sagging.”
6. The project architect testified, and the Board finds, that the collar ties are part of a structural system comprised of the roof rafters, bearing walls and collar ties, and that the function of the collar ties in that system was to prevent north-south racking of the building. (Tr. of April 6, 2004 at 141-142.)
- ...
9. The collar ties depicted in the Revised Building Section Drawing are part of the roof framing. The collar ties are located at the top of the building and brace the building against racking in a north-south direction. (*See*, Finding of Fact No. 32 in Order No. 17109.)

Accordingly, the Board concluded in the Order:

Second, an attic is also “wholly or partly within the roof framing.” The building’s collar ties were not proposed for ornamental purposes, but are structural members of

BZA ORDER NO. 17109-D – ORDER AFTER REMAND
PAGE NO. 9

the building's skeleton.³ The Board is persuaded by the project architect's testimony that the collar ties are part of a structural system comprised of the roof rafters, the bearing walls, and the collar ties, with the collar ties functioning in that system to prevent north-south racking of the building. Since, the collar ties are located at the very top of the building and perform this structural function, the Board considers them part of the roof framing. Between the collar ties are openings. In these openings there is nothing between the floor of the sixth level and the underside of the roof. The portion of these openings that is between the underside of the roof and the collar ties is within the roof framing. Thus, the sixth level is at least partly "within the roof framing," thereby satisfying the second part of sub-definition (c).

KCA and ANC 1C argued that the collar ties are not part of the roof framing because they do not directly hold up the roof, and they are not directly attached to the roof rafters. The roof rafters hold up the roof and the collar ties are located below them and their function is to prevent racking in a north-south direction. They also dispute that they are at the top of the building because they are below the roof rafters and roof.

The Board interprets the testimony of the project architect to mean that the collar ties performed a structural function at the very top of the building and that the "roof framing" includes not just the structural members that directly hold up the roof, but also includes the other components of the structural system that perform other structural functions at the top of the building, including in this case, the collar ties that prevent north-south racking. The Board therefore concludes that the collar ties are a part of the roof framing.

The Board stands by its prior interpretation of this evidence and is not persuaded by the exceptions to change it. The Board has changed its discussion in the conclusions of law in this Order to further clarify its reasoning in light of the exceptions.

CONCLUSIONS

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. The Court of Appeals has affirmed the Board's finding upholding the Zoning Administrator's FAR calculations as to the building's lower-level. 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.

³ 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."

**BZA ORDER NO. 17109-D – ORDER AFTER REMAND
PAGE NO. 10**

VOTE AFTER REMAND TO AFFIRM REMANDED PORTION OF APPEAL:

4-0-1 (Lloyd J. Jordan, Peter G. May, Marnique Y. Heath, and Jeffrey L. Hinkle to Affirm;
one Board member not participating or voting).

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. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: January 24, 2019

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

**BZA ORDER NO. 17109-D – ORDER AFTER REMAND
PAGE NO. 11**

TAB A - Revised Building Section Drawing

