GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 17335 of Kalorama Citizen's Association, pursuant to 11 DCMR § 3100 from the administrative decision by the Department of Consumer and Regulatory Affairs to issue Building Permit No. B46999, dated March 2, 2005, allowing the construction of a roof deck and railing on a 5 unit apartment building located at 1819 Belmont Street, N.W. in the R-5-D Zone District (Square 2551, Lot 45).

Hearing Date: October 18, 2005
Decision Date: November 15, 2005

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17335
EXHIBIT NO. 29

ORDER

INTRODUCTION

The Kalorama Citizens Association ("KCA" or "Appellant") filed this appeal with the Board of Zoning Adjustment ("Board") challenging the decision of the Director of the Department of Consumer and Regulatory Affairs ("DCRA") to issue Building Permit No. B46999, dated March 2, 2005, to Montrose, L.L.C. ("Montrose").

This appeal follows KCA's earlier appeal, BZA No. 17109, of DCRA's decision to issue Building Permit Nos. B455571 and B455876 for the same building. The Board issued its final order in BZA No. 17109 on November 8, 2005, and published the order at 52 *D.C. Reg.* 10220 (November 18, 2005) (*Kalorama I*) In its final order in BZA No. 17109, the Board ruled that DCRA erred in issuing the building permits because the building's roof deck rose to a height that exceeded the maximum height permitted by the Act to Regulate the Height of Buildings in the District of Columbia, approved June 1, 1910 (36 Stat. 452, D.C. Official Code §§ 601.01 to 601.09 (2001)) (the "Height Act").

Montrose modified the design of the roof deck so that the deck itself is below the Height Act limit, but, in order to meet the requirements of the building code, included a safety railing that rose above the maximum height permitted.

The Appellant alleged that DCRA erred in not counting the railing's height against the Height Act limitations. Appellant also contended that the roof deck was intended for human occupancy, which is not permitted for structures allowed to exceed the Height Act's limit. For the reasons stated below, the Board finds both contentions without merit and denies the appeal.

Board of Zoning Adjustment
District of Columbia
CASE NO. 17335
EXHIBIT NO. 29

PRELIMINARY AND PROCEDURAL MATTERS

Parties. The parties to the proceeding are the KCA, Advisory Neighborhood Commission 1C ("ANC"), DCRA, and Montrose. The ANC was an automatic party pursuant to 11 DCMR §3199.1. By consensus, the Board granted Montrose's request for intervenor status pursuant to 11 DCMR § 3112.15.

Notice of Hearing. The Office of Zoning provided notice of the hearing on the appeal to the parties. The Office of Zoning advertised the hearing notice in the D.C. Register at 52 *D.C. Reg.* 6959 (July 29, 2005).

FINDINGS OF FACT

1. The property that is the subject of this appeal ("Subject Property") is located at 1819 Belmont Road, N.W., Washington D.C. in the R-5-D zone district.

2. The Subject Property is improved with a multiple story townhouse.

3. Montrose owned the Subject Property at the time the building permit was issued, but has since sold all units to individual purchasers. Nevertheless it has warranty obligations to those purchasers that the building was constructed in accordance with applicable laws and regulations. The warranty obligations extend for two years after the sale of the units.

4. The width of the 1800 block of Belmont Road, N.W., measured from building line to building line, is 80 feet.

5. The maximum height permitted for the Subject Property under the Height Act is 70 feet.

6. On February 25, 2005, Montrose LLC applied for a building permit to "amend and revise permit B 44921, to revise framed deck as shown on original permit drawing to a patio surface on the surface of the existing roof."

7. On March 2, 2005, DCRA issued Building Permit 46999 to Montrose LLC.

8. Permit 46999 authorized construction of a roof deck directly on the surface of the roof of the building. The drawings show the roof deck a "min. of ½" below 70' 0" Height." The railing is shown extending approximately three feet above the 70 foot limit. The drawings do not indicate a precise height for the railing.

9. The railing was required by the Building Code of the District of Columbia, which mandates that roof decks have safety railings no less than 34 inches and no more than 38 inches high.[1]

10. Zoning Administrators have historically permitted safety railings above the height limit for rooftop pools and decks.

CONCLUSIONS OF LAW

An appeal may be taken by a person aggrieved by any decision of a District official or District agency in the administration and enforcement of the Zoning Regulations, including the issuance of a building permit. D.C. Official Code § 6-641.07(f); 11 DCMR 3112.2. Appellant alleges that DCRA erred in issuing building permit B 46999 because it authorized a structure that violated the Height Act. The Board concluded in *Kalorama I* that it has jurisdiction to hear appeals regarding alleged violations of the Height Act.

Standing of Montrose to Intervene

Montrose was a party to the previous appeal involving the Subject Property, BZA No. 17109, and requested status as an intervenor in this proceeding. Subsection 11 DCMR § 3112.15 authorizes the Board to allow persons with a specific right or interest that will be affected by the action to intervene in an appeal.

Montrose was the developer and prior owner of the building, held the permit that is the subject of the appeal, owned the building at the time the permits were issued, and has continuing obligations to the current owners of the property to warrant that the building was constructed in accordance with the permits and the applicable laws and regulations. The Board therefore concludes that Montrose has a sufficient interest that will be affected by the action, and grants Montrose intervenor status.

Merits of the Appeal

1. Height of the Safety Railing

The first issue is whether the safety railing attached to the roof deck violates the height limitation of the Height Act.

It is undisputed that because the 1800 block of Belmont Street is 80 feet wide, the maximum building height permitted is 70 feet. Permit 46999 approves a roof deck that is

---

[1] Section 1003.2.12 of the International Building Code (2000 edition) adopted, with some modifications, as the building code for the District by Notice of Final Rulemaking, 51 *D.C. Reg.* 292 (January 9, 2004).

½ inch below the 70 foot height limit, but with a safety railing that, if counted, would increase the building's height to approximately 73 feet in violation of the Height Act. For the reasons discussed below, the Board concludes that safety railings should not be counted against the height of a building.

The Height Act was enacted in 1910. The Height Act at D.C. Official Code §6-601.05 (h) enumerates certain structures that may be erected above the limits of the Height Act. Safety railings are not included in that list. However, resolution of the issue does not end there. Because the Height Act, enacted almost 100 years ago, did not anticipate roof decks with safety railings, it is necessary to look at the history and intent of the Act. As this Board noted in *Kalorama I,* the Height Act has been construed to include structures not specifically enumerated in §6-601.05 (h) provided that such construction is within the intent and spirit of the Act. *See Kalorama 1, n.3at 11,* in which the Board cited the 1953 Opinion of Vernon E. West, Corporation Counsel, D.C., July 27, 1953, that the phrase, "penthouses over elevator shafts" set forth in D.C. Official Code §6-601.05 (h) may be construed to include penthouses over stairways.

In this case the Board finds that §6-601.05 (h) may be construed to include safety rails because the interpretation is consistent with the spirit and intent of the Act, as well as the treatment of safety rails under other sections of the Zoning Regulations.

The Zoning Commission acknowledged that safety rails would be permitted as an exception to the height limits, in Zoning Commission Order 46, 33 D.C. Reg. 3975 (July 4, 1986), which amended the penthouse and roof structure rules. The Commission, in discussing the Office of Planning's recommendations regarding how roof areas could be improved in appearance, noted the following:

> The Office of Planning indicated that the typical roof and penthouse could be improved in appearance by allowing greater flexibility in the choice of materials and/or by encouraging the introduction of landscaping and other decorative elements on the roof. Temporary restaurants, scenic overlooks, exercise facilities or employee lunch areas would bring users to the roof. The necessary railing, *which would be permitted an exception to the height limit,* could be designed as an architectural embellishment in helping to provide a visual cap to the building." *Id.* at 2-3 (emphasis added).
>
> An interpretation exempting safety railings from the Height Act is consistent with the Act's concern about safety and its exemption of structures that may be viewed and treated as embellishments. Further, it is consistent with the Zoning Regulations which do not calculate railings in

the measurement of height.[2] Finally, it is consistent with a history of rulings by Zoning Administrators that permitted safety railing above the height limit for rooftop pools and decks.

The Zoning Regulations and the Height Act should, whenever possible, be interpreted and administered in a consistent manner. The Board concludes that DCRA has reasonably done so in this case.

2. Use of the Roof Deck for Human Occupancy

Appellant contends the roof deck violates the provision of the Height Act that governs structures granted height waivers. Specifically, the Appellant relies upon section 5 of the Height Act (D.C. Official Code § 6-601.05(h), which provides, in part, that "no floor or compartment [of a structure granted a height waiver] shall be constructed or used for human occupancy above the top story of the building upon which such structures are placed."

Appellant's argument is flawed in two respects.

First, the cited provision does not apply to this structure since, as just discussed, no countable portion of it exceeds the 70 foot limit imposed by the Height Act.

Second, even if the provision did apply, the use of an open roof deck does not constitute "human occupancy," because it is unenclosed space. Human occupancy requires more than the mere ability to access the space. Since at least 1953, the Zoning Administrator has considered only *enclosed* space to be space used for human occupancy. This interpretation is supported by a 1953 Corporation Counsel Opinion, which concluded that "the prohibition of 'human occupancy' in the last section of section 4 of the Act of June 1, 1910 was intended by the Congress to prevent the use of enclosed space above the height limit for residential, office or business purposes..."). Opinion of Vernon E. West, Corporation Counsel, *supra at* 4. The Board concurs with this interpretation and concludes that the deck was not intended for human occupancy within the meaning of the Height Act.

Based on the foregoing, the Board denies the appeal in its entirety.

---

[2] See 11 DCMR 2503.2 which states in pertinent part, "Any railing required by the D.C. Building Code, Title 12 DCMR, shall not be calculated in the measurement of this height." While, this provision is within the section entitled "Structures in Open Spaces," the record reflects that D.C. Zoning Administrators have historically applied this interpretation to railings in general.

VOTE: 4-1-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., and John A. Mann II to deny the appeal; John G. Parsons to grant the appeal).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring Board member approved the issuance of this order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: NOV 16 2006

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.