

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

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Appeal of Kalorama Citizens Association, pursuant to)
11 DCMR § 3100, from the administrative decision of)
David Clark, Director, Department of Consumer and)
Regulatory Affairs issuing Building Permits Nos. B455571)
and B455876 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.

BZA No. 17109-C

MOTION TO RECONSIDER ORAL DECISION OF OCTOBER 28, 2014

Appellant Kalorama Citizens Association (KCA) respectfully moves that the Board reconsider its oral decision on the issue remanded to it by the District of Columbia Court of Appeals (the Court), reached at the meeting of October 28, 2014, and decide instead that the sixth level of the subject property is not an “attic” under the Zoning Regulations of the District of Columbia. No written Order incorporating that decision having yet been issued as required by 11 DCMR 3125 and DC Official Code 2-509(e) (2001), this motion does not fall within the terms of 11 DCMR 3126, “Reconsideration or Rehearing”. The purpose of the motion is to urge the Board to act expeditiously to correct an erroneous decision, having reasonable regard for avoiding waste of time and effort on the part of the Board, supporting personnel in the District government, the citizens whose interests this appeal seeks to protect, and the Court. The Board may wish

to bear in mind that this Appeal is now in its twelfth year, and that as of now more than five of those years have been consumed in waiting for the Board to act on remands from the Court on the “attic” issue.

Background

This case is before the Board for the second time on remand from the Court on that issue. The full background of this Appeal up to the time of the initiation by KCA of the second case before the Court in 2011 (no. 11-AA-0851) can be found at pp. 1-3 of the Board’s Decision and Order After Remand dated June 15, 2011, which appears at page 1 of the Appendix to the Brief submitted by KCA to the Court in that case (attached hereto as Exhibit 3). As indicated there, the Court first remanded the “attic” issue because the Board had not adequately addressed it in its previous order, no. 17109 of November 8, 2005, and thus had also failed to address an issue that had been raised by ANC 1C. The Court had rendered this decision after having received briefs from KCA and ANC 1C as Petitioners and the Board as Respondent, and having heard full oral argument.

By contrast, the Court’s second remand of this issue, now before the Board, was done in response to a motion for remand by the Board itself, through the Attorney General as its counsel, made solely on the basis of the record and the brief filed by KCA. The sole issue before the Court was whether the findings of

fact on the basis of which the Board decided that the sixth level of the building is an “attic” – findings that the Board would necessarily have to reaffirm in order to reach the same decision now -- are supported by substantial evidence in the record. The Board’s counsel apparently concluded and communicated to the Board that the record would not support the Board’s order, 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. Counsel filed no brief on behalf of the Board, and there was no oral argument or decision on the merits by the Court. The motion, the text of which is attached hereto as Exhibit 1, went on to state that “the BZA wishes to reconsider its decision and to conduct further proceedings as may be appropriate.”

KCA has learned that the Board met on October 28, 2014, considered the remanded issue, and decided to reaffirm its previous decision that the sixth level of the subject property is an “attic”. KCA had received no notice of the meeting despite being a party both to the BZA appeal and to the Court case from which the remand emanated, nor did the Board invite the parties to submit legal memoranda on the remanded issue, as it had done with the first remand. KCA thus must rely on the video available on the Office of Zoning website for information as to what went on during the Board’s deliberations. From that

source it appears that the Board, perhaps as a result of the lapse of time and the turnover in the Board's composition, was not accurately informed as to certain facts in the record that are material to the "attic" issue, and that it may have been unaware that its Order was based in material part on project plans that were later replaced and that the issue had been remanded on the Board's own motion.

However that may be, by its action on October 28, 2014 the Board in our view has set in train a process by which the Court of Appeals may eventually be presented with the same Board decision on the "attic" issue that the Court had previously remanded at the Board's request, and which will remain – since the record within the meaning of 11 DCMR 3127 and DC Official Code 2-509(b) and (c) (2001) remains unchanged -- just as lacking in support in that record as it was in 2011. To demonstrate to the Board why this is true, we have appended KCA's brief In Court of Appeals case no. 11-AA-0851 and the Appendix to that brief (Exhibits 2 and 3). This seems appropriate in view of the fact that the Board's motion seeking remand of the case, and the Board's intention stated therein to reconsider its decision, were apparently based solely on that brief and the BZA case record presented in the Appendix. Following is a summary of the argument presented in those documents (a more extended summary is found at pp. 8-10 of KCA's brief):

Definition of “attic”.

The Board and KCA agree that the applicable definition of “attic” is:

“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.”

As to whether the sixth level is “immediately below the roof”:

The Board and KCA also agree that positioned 6' 5 ¼" above the sixth level's floor there are 2x10's labeled in the plans as “collar ties” spaced a maximum of four feet apart running front to back and interspersed among the ceiling rafters. The Board and KCA agree that a ceiling installed on those members would divide the vertical space between the sixth level's floor and the building roof into two separate spaces, only the uppermost of which would be “immediately below the roof of the building”. The Board's Order 17109-C found that there was no such ceiling, and that there was an open space between the collar ties and ceiling rafters and the roof and that therefore all of the sixth level was “immediately below the roof”. This finding is unsupported by any evidence in the record, but rather is contradicted by substantial evidence, for the following reasons:

- (a) the plans explicitly label the sixth level as having a ceiling, and
- (b) the project architect testified that the sixth level has a finished wallboard ceiling.

Therefore the sixth level is not “immediately below the roof”. Moreover,

(c) a portion of the building’s roof is installed on the building’s roof structure (penthouse), which provides access to the roof deck and of course has a floor.

So even if there were no ceiling installed on the collar ties, the sixth level would not be “immediately below” that portion of the roof.

As to whether the sixth level is “wholly or partly within the roof framing”:

The Board found that the “collar ties” are part of the roof framing because, the Order asserted, they form the base of a triangle of which the other two sides are the peaked portion of the roof that was originally depicted in the plans as covering the roof structure. This or any other finding that the “collar ties” are part of roof framing, is unsupported by any evidence in the record, but rather is contradicted by substantial evidence, for the following reasons:

(a) the final plans did away with the peaked roof, replacing it with a single sloping panel facing the front, so the presumed “triangle” has only two sides;

(b) even if the peaked roof had been retained, the sides of the “triangle” would not meet its base, since there is no evidence that the “collar ties” are connected in any way to any of the building’s roof rafters –

either those supporting the flat portion of the roof or those supporting the portion of the roof covering the penthouse;

(c) the project architect's testimony ascribed a wholly different structural function to the "collar ties" – namely, stiffening the building against racking in a front to-back direction;¹ he did not testify that they played any role in supporting or securing the roof. In fact he distinguished their function from the characteristic function of collar ties properly so called that run between the rafters of the two sides of a peaked roof and act in tension to keep the roof from spreading, and stated that the "collar ties" in this building do not act in tension.

So even if there were no wallboard ceiling, the sixth level would not be an "attic" because it is not "wholly or partly within the roof framing".

Conclusion

We therefore respectfully urge the Board to reconsider its oral decision of October 28, 2014, and hold instead that the sixth level of the subject building does not qualify as "attic". Otherwise the Board will in effect be sending back to

¹ The Board found that the "collar ties" performed this structural function. The issue of whether the "collar ties" were structural was initially relevant because 11 DCMR §199.1 (definition of "gross floor area") requires that the "structural headroom" of an attic be less than 6 feet 6 inches in order for the attic to be excluded from gross floor area.

the Court a decision based on findings of fact that are both unsupported by evidence in the record and contradicted by substantial evidence, which the Board itself had asked the Court to remand so that the Board could reconsider it.

Respectfully submitted



John Lawrence Hargrove
Counsel for Petitioner Kalorama Citizens Association
D.C. Bar No. 35413

CERTIFICATE OF SERVICE²

A copy of this instrument was sent by United States mail on this sixth day of January, 2015 to:

Ellen M. McCarthy, Acting Director
Office of Planning
1100 4th Street, S.W., Suite E650
Washington, D.C. 20024

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



John Lawrence Hargrove

² KCA is informed that Montrose, LLC, which had been an intervenor in BZA case 17109 but was not a party to Court of Appeals case 11-AA-0851 from which this remand emanated, no longer exists. KCA stands ready to serve this instrument on any successor in interest that may be brought to its attention.

No. 11-AA-851

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

KALORAMA CITIZENS ASSOCIATION,
PETITIONER,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT,
RESPONDENT.

ON PETITION FOR REVIEW FROM AN ORDER OF THE
DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

**CONSENT MOTION OF THE DISTRICT OF COLUMBIA BOARD OF ZONING
ADJUSTMENT TO REMAND**

Respondent, the District of Columbia Board of Zoning Adjustment ("BZA"), moves this Court to remand this case for it to reconsider its decision, which is the subject of this petition for review. In light of its reference to plans without accounting for those plans' subsequent revision, the BZA wishes to reconsider its decision and to conduct further proceedings as may be appropriate. Petitioner consents to this request.

Respectfully submitted,

IRVIN B. NATHAN
Attorney General for the District of Columbia

TODD S. KIM
Solicitor General

DONNA M. MURASKY
Deputy Solicitor General

No. 11 AA-0851

**DISTRICT OF COLUMBIA
COURT OF APPEALS**

KALORAMA CITIZENS ASSOCIATION,	)
Petitioner	)
v.	)
	)
D.C. BOARD OF ZONING ADJUSTMENT,	)
Respondent	)

**Petition for Review of Board of Zoning Adjustment
Order No. 17109C**

PETITIONER'S BRIEF

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Parties, Intervenors, and Counsel:

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Kalorama Citizens Association, Appellant
John Lawrence Hargrove, Esq., Counsel

Department of Consumer and Regulatory Affairs, Appellee
Jay Surabian, Esq., Assistant Attorney General, DCRA, Counsel

Montrose LLC, Intervenor
Mary Carolyn Brown, Esq., Counsel

B. In Appeal No. 11-AA-0851:

Kalorama Citizens Association, Petitioner
John Lawrence Hargrove, Esq., Counsel

D.C. Board of Zoning Adjustment, Respondent
Richard Love, Esq., Office of the Attorney General, Counsel

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A. The drawing on which the Board relies explicitly states that the sixth level has a ceiling. 11

B. Aside from explicitly labeling the sixth level as having a ceiling, the drawing on which the Board relies is of no evidentiary relevance as to the enclosure of ceiling or wall framing or lack thereof. 12

C. The project architect testified that the sixth level has a ceiling, composed of gypsum wallboard, and there is other affirmative evidence to that effect. 13

D. There is no open area between the sixth level ceiling rafters and collar ties and the supposedly peaked portions of the roof of the building; consequently it is not the case that all of the sixth level is “immediately below the roof.” 14

2. The Board’s finding that the collar ties are a part of the roof framing, and that therefore the sixth level is within the roof framing. 16

A. There is no evidence that the collar ties function as part of the roof framing. 16

B. Regardless of the function of the collar ties, the sixth level is not “within the roof framing” because it is separated from the roof framing by a wallboard ceiling. 17

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ISSUES PRESENTED FOR REVIEW

Were the findings of fact upon which the Board determined that the sixth level of the subject building qualified as an “attic” supported by substantial evidence in the record as a whole?

STATEMENT OF THE CASE

Kalorama Citizens Association (“KCA”) seeks review of Order 17109C of the Board of Zoning Adjustment (“BZA”, or “Board”), which was issued after remand to the Board by this Court of one issue raised in *Kalorama Citizens Association v. D.C. Bd. Of Zoning Adjustment*, 934 A.2d 393 (D.C. 2007), namely, whether the sixth level of the subject building of that case qualified as an “attic”. In 2003 KCA had appealed to the BZA the issuance of permits to Montrose LLC by the Department of Consumer and Regulatory Affairs for a construction project at 1819 Belmont Road, N.W.. ANC 1C joined as a party. 1819 Belmont was originally a 3-story plus basement row house. Project plans depicted redeveloping it into an apartment building of six interior levels plus basement, a roof structure housing a stairway that connected the sixth level to the roof, and a roof deck. KCA's Appeal complained of, among other things, excessive height and density of the building, which extended up above neighboring row houses by several stories. The height and density were made possible by the exclusion from DCRA’s calculation of “gross floor area” of the floor area of certain parts of the building, including the sixth level, which was labeled “attic” by the developer. The Board granted the appeal in part and denied it in part. KCA and ANC 1C sought review of the Order by this Court, in respect of, among other things, the Board’s determination that the level was an attic with structural headroom of less than 6’ 6” and that consequently its floor area did not need to be included in the calculation of gross

floor area. (Under the terms of 11 DCMR §§ 199.1, the "horizontal space of the several floors" of a building are included in "gross floor area". "Attic space" is included, but only if it has "structural headroom" of 6 feet 6 inches or more.)

The Board had found that the collar ties that form part of the sixth level ceiling framing were less than 6 feet 6 inches in height above the floor. The Board had also found that the collar ties worked to brace the building against racking in a north-south (i.e. lengthwise) direction and concluded that they were therefore structural in character. As the Court recognized, it does not follow from these findings that the seventh level is an "attic" by the applicable definition. Consequently the Board's further conclusion that the sixth level space was properly excluded from FAR calculations was unsupported by the requisite finding of fact, and the Court remanded the definitional issue.

If, as KCA and the ANC 1C argued, the sixth level did not qualify as an "attic", then its floor area would have been required to be included in gross floor area regardless of the structural character of the ceiling, since it would be merely one of the "several floors" of the building that are required to be included. *11 DCMR §199.1, definition of "gross floor area".*

STATEMENT OF FACTS

1. The plans depicted conversion of a three-story row house into a six level plus basement apartment building. They depicted a top apartment consisting of the fifth and sixth levels, with a ceiling 6 feet 5 1/4 inches above the floor of the sixth level; a roof structure housing a staircase connecting level 6 to the roof structure and providing access to the roof and roof deck; and a roof deck. *Record Exhibit ("RE") 31, App. pp. 14 and 16, section drawings from project plans.*

2. The sixth level of the building, which the plans label as “attic”, does not extend all the way to the front, but is set back by approximately 1/5 the length of the building at that level. As a result the fifth level has a very high ceiling at the front of the building, which toward the rear of the building becomes the ceiling of the sixth level.

3. This sixth level ceiling consists of gypsum wallboard mounted on the underside of ceiling beams running front to back, and also on the underside of structural members (either wooden or engineered lumber 2x10s) that serve as collar ties. The collar ties also run front to back and are interspersed among the ceiling beams and set 48 inches apart. *RE 31, App. pp 14 and 17, Section drawings from project plans; Transcript 04/06/04, Testimony of Norman Smith, Architect for Montrose LLC, pp. 134, 138-39, 146-48, App. pp. 33-48..*

4. The collar ties also serve structurally to brace the building from racking in a north-south (i.e. lengthwise) direction. *Order No. 17109-C (“Order”), p. 4, App. p. 4.*

5. Above the ceiling beams and collar ties are 2x10 roof rafters gently sloping from front to back. *T. 4/06/04, Testimony of Norman Smith, App .p. 148.*

6. The original plans depicted a two-sided gabled or peaked roof over the roof structure, with the front roof panel interrupted by an enclosed walkway with vertical walls and a flat roof, to provide access to the roof deck. Modified plans reduced the footprint of the roof structure by eliminating the rear panel of the peaked roof and enclosing the rear of the roof structure with a vertical wall. *RE 31, App. pp 14 and 17, Section drawings from original and revised project plans.*

ARGUMENT

STANDARD OF REVIEW

The Board's conclusions of law will be upheld if, but only if, it has made findings of fact on each material contested issue of fact, *flowing rationally from substantial evidence in the record as a whole*, from which its conclusions are rationally drawn. [emphasis added] See D.C. Code §2-510(a) (2001). *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1094 (D.C. App. 1994); *Myrick v. District of Columbia Board of Zoning Development*, 577 A.2d 757 (D.C.1990); *Levy v. District of Columbia Board of Zoning Adjustment*, *supra*, at 746, 753; *Communication Workers of America v. District of Columbia Commission on Human Rights*, 367 A.2d. 149, 152 (D.C. App. 1976); *Dietrich v. Board of Zoning Adjustment*, *supra*; *Palmer v. Board of Zoning Adjustment*, D.C. App., 287 A.2d 535 (1972); *A.L.W., Inc. v. Board of Zoning Adjustment*, 338 A.2d 428, 430 (D.C. App.1975).

SUMMARY OF ARGUMENT

1. In Findings of Fact 6 and 9, the Board found (a) that the sixth level of the building has no ceiling, (b) that there is thus an open area between the sixth level ceiling rafters and collar ties and both the flat and supposedly peaked portions of the roof, and (c) that therefore all of the sixth level is immediately below either the flat or peaked roof. None of these findings flows rationally from substantial evidence in the record as a whole.

As to the finding that there is no ceiling, the Board identifies no evidence affirmatively showing that there is no ceiling, but rather rests its finding on the proposition that the evidence does *not* show that there *is* a ceiling. The sole evidence on which the Board

relies for this purpose – a section drawing from the plans depicting the structural skeleton of the building – itself specifically labels the sixth level as having a ceiling, but otherwise has no evidentiary bearing on the question of whether or how the framing of any ceilings or walls is to be enclosed. Moreover, there is evidence in addition to the section drawing, including the explicit testimony of the project architect, affirmatively establishing that the sixth level has a ceiling, comprised of gypsum wallboard mounted on the ceiling rafters and collar ties.

As to the finding of an open space between all of the sixth level and the roof, the space between the sixth level and the supposedly peaked roof is not open but is obstructed by the floor of the “roof structure” that the roof covers, and thus the portions of the sixth level below the roof structure are not “immediately below the roof” and would not be regardless of whether there is a sixth level ceiling.

Since the definition of “attic” requires that an attic be immediately below the roof, for this reason alone the Board erred in concluding that the sixth level was an attic.

2. The Board’s Finding of Fact 7 that the collar ties are a part of the roof framing, from which it concludes that the sixth level is “within the roof framing” (*Order, p. 6, App. p. 6*) is unsupported by substantial evidence in the record as a whole. To support this finding the Board relies solely on the proposition that the two sides of the supposedly peaked portion of the building’s roof form the sides of a triangle of which the collar ties form the base. However, there is no peaked roof in the final project plans, it having been replaced by a single sloped panel facing to the front (interrupted by a covered walkway to the front roof deck), and a vertical wall facing to the rear. Consequently the Board’s putative triangle has only two sides. Even if there were a peaked roof, the collar ties could

not serve to prevent its rafters from spreading because they are unconnected to and physically distant from those rafters. There is no evidence that the collar ties have any connection to any roof rafters, and the project architect took pains to ascribe a wholly different structural function to them: stiffening the building against racking in a front-to-back direction.

Since the definition of “attic” requires that an attic be wholly or partly within the roof framing, for this reason alone the Board erred in concluding that the sixth level was an attic.

DISCUSSION

1. THE FINDINGS THAT THE SIXTH LEVEL HAS NO CEILING AND THAT THERE IS AN OPEN AREA BETWEEN ALL OF THE SIXTH LEVEL CEILING RAFTERS AND COLLAR TIES AND THE BUILDING’S ROOF.

The Board is correct in its determination that, of the three alternative definitions of “attic” provided by *Webster’s*, the applicable dictionary definition is the third:

“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.”

Moreover, the Board correctly proceeds from the premise, which seems beyond dispute, that a ceiling installed on the collar ties and ceiling beams that are positioned 6’ 5 ¼” above the sixth level’s floor would divide the vertical space between that floor and the roof into two separate spaces, only the uppermost of which would be “immediately below the roof of the building” -- just as drywall walls divide horizontal space into separate rooms. Where the Order is erroneous is not in this premise, but in its finding of fact that there is no such ceiling and that all the vertical space between the sixth level floor and the roof rafters is open.

The Board’s position on the ceiling issue may be summarized as follows: The Board having asserted the negative proposition that there is no ceiling, it was incumbent on it to

identify evidence affirmatively showing that there is no ceiling. Rather than discharge that burden, however, the Board apparently rests its finding on the proposition that the record contains *no* evidence that there *is* a ceiling. Both that proposition, and the Board's assumption as to what evidence must be identified in order to sustain these findings, are erroneous.

The Board's findings of fact on this issue are the following:

"6. The plans show 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.

"9. Because there is no finished ceiling to the sixth level, all of that level is immediately below the roof of the building. . . ."

These findings, which the Board bases solely on a section drawing from the original project plans, *RE 31, App. p.14*, do not flow rationally from, and in fact are contrary to, substantial evidence in the record, for the following four reasons.

A. The drawing on which the Board relies explicitly states that the sixth level has a ceiling. The architect's drawing just mentioned indicates a plane located 6'5 1/4 inches above the floor of the sixth level and extending all the way to the front of the building, and plainly labels it "ceiling", a notation that perhaps the Board overlooked. The same is true for the revised plans. *RE 31, App. p.17*. The Zoning Regulations do not define "ceiling", so, under 11 DCMR §199.2(g), the governing definition is the applicable definition provided by *Webster's Unabridged Dictionary*: "The overhead inside lining of a room." The Board's findings speak of the absence of a "finished" ceiling or a "full ceiling", and the Board further hedges by stating that "this 'ceiling' is *essentially* unfinished". Order p. 5, Appendix p. 5 (emphasis added). What the Board means by, for example, "essentially unfinished" is not entirely clear, but it is clear that the drawing on which the Board relies labels the sixth level as having a ceiling without any

such qualifications or reservations, and that a room that has a ceiling has an overhead lining such as is commonly provided by gypsum wallboard.

B. Aside from explicitly labeling the sixth level as having a ceiling, the drawing on which the Board relies is of no evidentiary relevance as to the enclosure of ceiling or wall framing or lack thereof. Assuming for the sake of argument that the architect had not labeled the sixth level ceiling as such in this elevation drawing, the absence of such a notation would not support a finding that there was to be no ceiling at that level, any more than its failure to show the location of plumbing fixtures would support a finding that the building was to be without indoor plumbing. That is because the obvious purpose and function of this section drawing is to depict the structural skeleton of the building as viewed from the side—the sole exceptions being the sixth level “ceiling” notation just mentioned and the depiction of the roof deck and interior staircase to the roof. That being the case, if the architect had omitted the sixth level ceiling notation, this drawing would provide no evidence at all as to whether any particular set of wall studs or ceiling rafters was to be enclosed, or if so by what material, or about myriad other features that the project will include once completed. What it does do, as a part of approved project plans, is to create a presumption that all of those features, even if nowhere explicitly depicted in the plans, will comply with the applicable codes, and if they do not, that the completed project will not receive approval. The Board, however, goes so far as to say (again overlooking the “ceiling” notation) that, because “the plans show no finished ceiling”, for the builder to enclose that ceiling would amount to “unlawful construction” (Order p. 7, Appendix p. 7). If that is true, then it would be likewise unlawful for the builder to mount gypsum wallboard or some similarly code-compliant material on *any* of the wall studs or ceiling

rafters in shown in this drawing, for which the drawing provides no indication that wallboard is to be applied -- a patent absurdity.¹

C. The project architect testified that the sixth level has a ceiling, composed of gypsum wallboard, and there is other affirmative evidence to that effect. In addition to the fact that the section drawings from the plan consistently label the sixth level as having a ceiling, the Board's finding of the absence of a ceiling is directly contravened by the testimony of the project architect, Norman Smith. In a colloquy about the project plans with Board Member Parsons and Board Chairman Griffis, Mr. Smith was asked specifically whether the "attic" had a finished ceiling and explicitly and repeatedly stated that the "attic" was to have a finished ceiling, thus removing any doubt on the issue, and went on to discuss how the gypsum wallboard would be installed. *Transcript 04 06 04*, pp. 138-39, *Appendix pp.37-38*.

On March 16, 2004, three weeks earlier, DCRA's representative, Faye Ogunneye, testified about the "attic" that "the finished ceiling isn't in place yet." [*emphasis added*] She recounted how a DCRA inspector had visited the site to confirm that the sixth level headroom would be less than 6' 6" by measuring from the floor to the "underside of the collar ties", not the "finished ceiling" -- clearly indicating an expectation on her part that the ceiling would be installed in the course of completion of the project as planned. *Transcript 03 16 04*, p. 246, *App.31*.

In other ways the record as a whole indicates such an understanding and expectation: The members designated as *ceiling* beams or rafters (noted by the Board in Finding of Fact 6 and 9), which were interspersed among the collar ties at the same level above the floor, served no purpose in the building other than to provide the necessary support for a ceiling. This is because, on the one hand, the spans between the collar ties were as much as 4 feet on center ² and thus

¹ So far as we can determine from project plans included in the record, the plans contained no reference to wall or ceiling covering, except that the list of abbreviations included in the plans by the Architect contains an abbreviation for gypsum wallboard. *Re. 29, Appendix p.13*. It is evident that neither the builder's architect nor the permitting officials in the Department of Consumer and Regulatory Affairs regarded such references as necessary for approval of the plans.

² *Testimony of Norman Smith, Transcript 04 06 04*, p. 134, *Appendix p.33*.

were too wide for the collar ties alone to provide adequate support for a ceiling, and on the other hand only the collar ties were found to be structural members.

It bears noting that the Board's order disparages the testimony of the project architect on this issue, stating that what is controlling are the plans. *Order p. 7, Appendix p. 7*. It is certainly the case as a general matter that the plans control as to any feature of the project depicted by the plans or otherwise disclosed by the written plans, which are after all the basis for the issuance of the building permits. The problem with the Board's position on the ceiling issue in this case, however, is that it opted to ignore the testimony of the architect who created the plan that explicitly addressed the question of the sixth level ceiling, in favor of a part of the written plans that (as incompletely read by the Board) was silent on that issue and thus without probative value on it. As already seen, there may well be many details of a planned project on which the written plans are silent, and in such cases the most authoritative source of information is the testimony of the project architect, followed by the permitting authorities. The Board itself recognized this in the present case by repeatedly eliciting from the architect information about the project that could not be gleaned from the written plans.

D. There is no open area between the sixth level ceiling rafters and collar ties and the supposedly peaked portions of the roof of the building; consequently it is not the case that all of the sixth level is "immediately below the roof."

Specifically, the Board found that "[b]ecause the plans show no finished ceiling to the sixth level, all of that level would be immediately below the roof of the building. Part of the roof is flat and the sixth level is just below it. Part of the roof of the building is peaked, and there would be an open area between the sixth-level ceiling rafters/collar ties and the peaked roof."

There are two things wrong with this finding:

First: there is no "peaked roof", as a more diligent attention to the record would have disclosed. The original plans called for a roof structure, as envisaged in 11 DCMR §400.7, which was to be covered by a two-sided peaked or gabled roof, as shown in *RE 31, App. p. 14*.

Very early in the project, however, the plans were changed to call for a smaller roof structure with a single, sloped roof facing the front of the building and a vertical wall facing the rear. The building was so constructed during the course of the proceedings before the Board on the original appeal. *See revised permit, RE 3, Appendix p.11; RE 31, revised section drawing, App. p. 17; photographs of the project nearing completion, RE 44, App. pp.18-19.* KCA called the Board's attention to the fact that there was no peaked roof in its comments on the Board's draft order, but the Board apparently overlooked this information as well as the relevant portions of the record, in drafting its order.

Secondly, while the fact that the roof structure does not have a peaked or gabled roof is not material to the issue of whether the sixth level is "immediately below the roof," the fact that what the roof covers is a "roof structure" is highly material. That structure is permitted under the 11 DCMR §411.7 of the Zoning Regulations because it is reached by an interior staircase and provides access from the staircase to the roof and roof deck. It therefore has a floor. (*See sheets from project plans showing amount of gross floor areas attributed to the roof structure, RE 31, App. pp.15-16.*) Thus, contrary to the Board's finding, there is no "open area" between the portion of the building's roof that covers the roof structure and the sixth level ceiling beams and collar ties.

Since the definition of "attic" requires that an attic be immediately below the roof, and since the Board's findings to this effect are unsupported by, and in fact contrary to, substantial evidence in the record, for this reason alone the Board erred in concluding that the sixth level was an attic.

2. THE BOARD'S FINDING THAT THE COLLAR TIES ARE A PART OF THE ROOF FRAMING, AND THAT THEREFORE THE SIXTH LEVEL IS WITHIN THE ROOF FRAMING.

Among the Board's findings of fact was the following:

"7. The collar ties depicted in the plans are part of the roof framing. They secure the roof rafters and work to brace the building against racking in a north-south direction."

A. There is no evidence that the collar ties function as part of the roof framing. To justify this finding the Board argues that since it has previously found the collar ties to be structural in character, they "must be part of the structure of some aspect of the building," and concludes that that aspect is to serve as part of the roof framing. *Order p. 7, App. p. 7*. This strange logic ignores the fact that the function of the collar ties which the Board found to justify characterizing them as "structural" in character was that of bracing the whole building against racking or twisting in a north-south – i.e. front to back – direction, which is altogether different from preventing the roof rafters from spreading.

The Board, however, decides to add a second structural function -- "securing the roof rafters" -- to bracing against north-south racking to the list of structural jobs performed by the collar ties. *Finding of Fact 7, Order p. 4, App. p. 4*. For support of this finding, it relies solely on the proposition that "[t]he collar ties form the base of the triangle the other two sides of which are the sloping sides of the peaked roof. The Board considers the whole triangle, including its base, to be part of the roof framing." *Order pp. 5-6, App. pp. 5-6. See also Order p. 7, App. p. 7*.

The problem with this reasoning is two-fold: First, as already noted there is no peaked roof covering the roof structure, only a one-sided sloped roof facing the front of the building, interrupted by an enclosed passageway to the roof deck, so the presumed triangle has only two sides. Secondly, even if there were a peaked roof, the "base" of the presumed triangle – the collar

ties – would be separated from the “sides” by several feet – a geometric absurdity – and, being unconnected to the roof rafters that they are said to prevent from spreading, wholly incapable of performing that function.³

More broadly, the developer, Montrose LLC, made no claim that the collar ties “secured the roof rafters” or were connected to any roof rafters in any way or played any role in framing or otherwise supporting the roof, and introduced no evidence to that effect. On the contrary, Montrose’s architect, Norman Smith, was at pains to describe their function as bracing the building against north-south racking, noting that they were affixed to the bearing walls (not the roof rafters), in his ultimately successful effort to convince the Board that the collar ties were necessary structural members. *See Transcript 04 06 04, p. 134, App. p.33*. In fact he was specifically distinguished the function of these collar ties from the characteristic function of collar ties that are, as he said, “sort of banged into the side” of a pair of rafters on opposite sides of a gabled roof and thus prevent them from spreading apart. This is a function that the collar ties could not have performed even for the original gabled roof of the roof structure, being unconnected to and physically separated from them, and certainly do not perform for the revised roof, which has only one set of sloped rafters. *See Transcript 04 06 04 pp.147-48, App. pp. 46-47*.

B. Regardless of the function of the collar ties, the sixth level is not “within the roof framing”, because it is separated from the roof framing by a wallboard ceiling. Even if the collar ties were a part of the roof framing, they would be separated from the sixth level by a gypsum wallboard ceiling and thus the sixth level could not be “wholly or partly within the roof framing”, as required by the definition of “attic”.

³ See Order, Finding of Fact. No. 5: “Collar tie” is defined by *Webster’s Dictionary* as “a board used to prevent the roof framing from spreading or sagging.”

Since the definition of “attic” requires that an attic be wholly or partly within the roof framing, and since the Board’s finding that the collar ties are part of the roof framing is not supported by, and is in fact contrary to, substantial evidence in the record, for this reason alone the Board erred in concluding that the sixth level was an attic.

* * * * *

CONCLUSION

For the foregoing reasons Petitioner respectfully urges the Court to reverse the decision of the Board determining that the sixth level of the subject building is an attic.

Respectfully submitted,

_____/s/_____

John Lawrence Hargrove
Counsel for Petitioner
D.C. Bar No. 35413

ADDENDUM: RELEVANT TEXTS OF STATUTES AND REGULATIONS CITED

D.C. Official Code §2-510(a)(3)(A)

§ 2-510. Judicial review

(a) Any person suffering a legal wrong, or adversely affected or aggrieved, by an order or decision of the Mayor or an agency in a contested case, is entitled to a judicial review thereof in accordance with this subchapter upon filing in the District of Columbia Court of Appeals a written petition for review. . . . The review of all administrative orders and decisions by the Court shall be limited to such issues of law or fact as are subject to review on appeal under applicable statutory law, other than this subchapter. In all other cases the review by the Court of administrative orders and decisions shall be in accordance with the rules of law which define the scope and limitations of review of administrative proceedings. Such rules shall include, but not

be limited to, the power of the Court:

(1) So far as necessary to decision and where presented, to decide all relevant questions of law, to interpret constitutional and statutory provisions, and to determine the meaning or applicability of the terms of any action;

(2) To compel agency action unlawfully withheld or unreasonably delayed; and

(3) To hold unlawful and set aside any action or findings and conclusions found to be:

(A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) Contrary to constitutional right, power, privilege, or immunity;

(C) In excess of statutory jurisdiction, authority, or limitations or short of statutory jurisdiction, authority, or limitations or short of statutory rights;

(D) Without observance of procedure required by law, including any applicable procedure provided by this subchapter; or

(E) Unsupported by substantial evidence in the record of the proceedings before the Court.

11 DCMR §199.1

...
Gross floor area – the sum of the gross horizontal areas of the several floors of all buildings on the lot, measured from the exterior faces of exterior walls and from the center line of wall separating two (2) buildings. The term “gross floor area” shall not include . . . 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

11 DCMR §199.2(g)

...
(g) Words not defined in this section shall have the meanings given in Webster’s Unabridged Dictionary.

11 DCMR §400.7

...
400.2 Except as provided in §2510, the height of buildings or structures specified in §400.1 may be exceeded as provided in §§ 400.3 through 400.13.

...
400.7 If housing for mechanical equipment or a stairway or elevator penthouse is provided on the roof of a building or structure, it shall be erected or enlarged as follows:

(a) It shall meet the requirements of § 411;

- (b) It shall be set back from all exterior walls a distance at least equal to its height above the roof upon which it is located; and
- (c) It shall not exceed eighteen feet six inches (18 ft., 6 in.) in height above the roof upon which it is located. . . .
- . . .

CERTIFICATE OF SERVICE

On this __29th__ day of December, 2011 a copy of the foregoing instrument was sent by United States mail, first class postage prepaid, to:

Richard Love, Esquire
Office of the Attorney General
441 4th Street, N.W., Suite 600 S.
Washington, DC 20001

_____/s/_____
John Lawrence Hargrove

**DISTRICT OF COLUMBIA
COURT OF APPEALS**

KALORAMA CITIZENS ASSOCIATION,	)	
Petitioner	)	
v.	)	
	)	
D.C. BOARD OF ZONING ADJUSTMENT,	)	No.11-AA-0851
Respondent	)	
	)	
	)	

Appendix to the Briefs

KALORAMA CITIZENS ASSOCIATION,)
Petitioner)
v.)
D.C. BOARD OF ZONING ADJUSTMENT,) **No.11-AA-0851**
Respondent)
))
))

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John Lawrence Hargrove
D.C. Bar #354134
Counsel for Petitioner

CERTIFICATE OF SERVICE

A copy of the foregoing instrument on this 5th day of December, 2011 was sent by United States mail, first class postage prepaid, to:

Todd S. Kim, Esquire
Solicitor General
441 4th Street, NW
Suite 600S
Washington, DC 20001

John Lawrence Hargrove

1

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

★ ★ ★
[REDACTED]
[REDACTED]

Order No. 17109-C of Appeal No. 17109 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., Washington, D.C., 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, and April 5, 2011

DECISION AND ORDER AFTER REMAND

Background

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 (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

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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 20th, 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. When that is the case, D.C. Official Code § 2-509(d) (2001) provides that no order adverse

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to a party may be issued until a proposed order has been served upon the parties, who then must given an opportunity to present written exceptions. Therefore, at its public meeting on January 4, 2011, the Board voted to send a proposed order to the parties and established a deadline for any exceptions and responses to be filed. The Appellant timely filed exceptions with the Board on February 4, 2011. (Exhibit 110.) DCRA filed a Response to those exceptions (Exhibit 112), and the Appellant filed a Reply to DCRA's Response (Exhibit 113). Based on its exceptions, the Appellant asked the Board to revise this Order to conclude that the sixth level of the building is not an "attic," but a floor of the building whose square footage must be included in the FAR calculations.

At its public meeting on April 5, 2011, the Board discussed the Appellant's exceptions and voted, 4-0-1, to issue the order as proposed, except for an inclusion of its explanation why it found the exceptions to be unpersuasive. That discussion appears at the end of this Order's Conclusions of Law. The order has also been revised to clarify that its Findings of Facts and Conclusions of Law are based exclusively upon what was in the plans before the Zoning Administrator at the time he cleared the building permit application for zoning review.

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 107, 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. The plans show "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."

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6. The plans show 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 depicted in the plans 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. As depicted on the plans, the sixth level of the building is at least partially within the roof framing of the building.
9. Because the plans show no finished ceiling to the sixth level, all of that level would be 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 would be 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 (6ft., 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.

Section 199.2 of the Zoning Regulations (“Regulations”) directs the Board to *Webster’s Unabridged 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 the most current version of *Webster’s Unabridged 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.

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(*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. (See, Exhibit 107, Attachment 3 (relevant page of plans).)

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 inches¹ to 16 feet, five and one-quarter inches² below the roof of the building. There is nothing on the relevant page of the plans that indicates a finished ceiling between the floor of the sixth level and the peaked roof of the building. (Exhibit 107, Attachment 3.) Therefore, the sixth level is not less "immediately below the roof" in the peaked-roof area than in the flat-roofed area, making the whole open area between the sixth level floor and the roof "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 as shown on the plans includes the collar ties which help stabilize the building. They were not proposed for ornamental purposes, but are structural members of the building's skeleton.³ 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 form the base of the triangle the other two sides of which

¹This 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.

³Board 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."

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are the sloping sides of the peaked roof. The Board considers the whole triangle, including its base, to be part of the roof framing. 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 would be 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 as depicted on the plans is not an attic. The Board instead finds that the proposed 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.⁴

Discussion of Exceptions

The Appellant took exception to several of the Findings of Fact and Conclusions of Law set forth in the then Proposed (now Final) Order. (Exhibit 110.) The Appellant claimed that Finding of Fact No. 6 and the first sentence of Finding No. 9 were not based on substantial evidence in the record. Taken together, Finding No. 6 and the first sentence of No. 9 discuss the absence of a finished ceiling to the sixth level, and find that, due to the lack of such a finished ceiling, all of the sixth level is “immediately below the roof of the building.” The Appellant’s exception states that the Board, in the final analysis, failed to rely on what was shown on the plans, and instead, based its decision on whether the sixth level had a finished ceiling either during construction, or, alternatively, after construction of the building was complete. The Appellant states that “[i]t is axiomatic that what controls in such a dispute are the plans for the completed project as permitted, not the physical configuration of the project at various stages of completion.” (Exhibit 110, at 3.)

⁴*Kalorama Citizens Association v D C Bd of Zoning Adjustment*, 934 A 2d at 407 (D C 2007)

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The Board agrees with the Appellant in principal, but disagrees in substance. The Board agreed that its principal focus should be on the plans before the Zoning Administrator at the time the building permit was being reviewed for zoning compliance. In fact the plans do not authorize a finished ceiling between the floor of the sixth level and the building's roof.

Looking at the relevant sheet of the originally-submitted plans, attached to Exhibit 107, there is no indication that a finished ceiling was to be installed above the sixth level of the building. Since a building may only be constructed in accordance with the plans approved by DCRA, this Board can only conclude that the building permit did not authorize the construction of a finished ceiling at this level. The Appellant cites the testimony of the developer's representative as to whether there exists a finished ceiling to the sixth level, but, as conceded by the Appellant, this testimony is not controlling as to the issue. (Exhibit 110, at 2.) What is controlling are the plans, and the Board does not read the plans to show a finished ceiling. All that a constructed ceiling would prove is unlawful construction, which is an enforcement issue not before the Board.

The Appellant's next exception alleges that Findings of Fact Nos. 7 and 8 are not supported by substantial evidence, claiming that there is no support for the findings that either the collar ties or the sixth level are at least partially within the roof framing. The Board has already found that the collar ties are structural members of the building and this finding was not at issue in the remand. The collar ties, as part of the structure of the building, and not merely ornamental, must be part of the structure of some aspect of the building, and, in fact, they are part of the roof framing. They are not found distributed throughout the building, but only at the top of the sixth level, under the flat roof and forming the base of the triangle made by the peaked roof. The whole triangle, including its base, are part of the roof framing; therefore, the Board maintains its finding that the collar ties and the sixth level are at least partially within the roof framing.

The Appellant last takes exception with the Board's conclusion that the sixth level is a "garret." This exception relies on the Appellant's three earlier conclusions that the sixth level is not immediately under the roof, but under its own ceiling, that it is not within the roof framing, and that its ceiling is finished. But the Board disagrees with all of these conclusions. *Webster's Dictionary* definition of "attic" uses the word "garret" as an example of what is defined, essentially as a synonym for "attic." The definition of "garret" itself is "an unfinished part of a house immediately under or within the roof." (See, definitions set forth below.) The Board reiterates that the sixth level is an unfinished part of the building immediately under the roof, and so qualifies as a garret. But, in any event, it is not necessary that the sixth level actually be a garret, as long as it falls within one of the three sub-definitions of "attic."

Lastly, contrary to the Appellant's implication (Exhibit 110, at 5-6), any evidence of habitability is not relevant to the Board's determination that the sixth level is an attic. *Kalorama Citizens Association v. D.C. Bd. of Zoning Adjustment*, 934 A.2d 393, 407 (D.C. 2007).

BZA APPEAL NO. 17109-C
PAGE NO. 8

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. 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 TO AFFIRM REMANDED PORTION OF APPEAL:

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

VOTE TO ISSUE AN ORDER ADVERSE TO A PARTY:

4-0-1 (Meridith H. Moldenhauer, Nicole C. Sorg, Jeffrey L. Hinkle, and Konrad W.
Schlater to issue; No other Board member (vacant) participating)

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

A majority of Board members approved the issuance of this Order.

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

FINAL DATE OF ORDER: JUN 15 2011

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.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment**



BZA ORDER NO. 17109-C / APPEAL NO. 17109

As Director of the Office of Zoning, I hereby certify and attest that on JUN 15 2011, 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:

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

441 4th Street, N W , Suite 200/210-S, Washington, D C 20001

Telephone (202) 727-6311

Facsimile (202) 727-6072

E-Mail dcz@dc.gov

Web Site www.dcoz.dc.gov

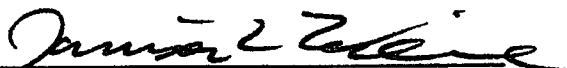
BZA ORDER NO. 17109-C / APPEAL NO. 17109
PAGE NO. 2

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

Harriet Tregoning, Director
Office of Planning
1100 4th Street, S.W., Suite E650
Washington, D.C. 20024

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

ATTESTED BY:


JAMISON L. WEINBAUM
Director, Office of Zoning

**Attachment 2 to Appeal of Kalorama Citizens Association
to the Board of Zoning Adjustment regarding 1819 Belmont Road, N.W.**

Permits B455571 and B455873

GOVERNMENT
DISTRICT OF COLUMBIA
Form BLRA-15
(Rev. 9/30/91)

**DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION**

BUILDING PERMIT

PERMIT NO. B455571

Date **10/6/03** (Type) **MISC.**
Address of work **1819 BELMONT RD NW**
Permission is hereby granted to

ADVERSE I.L.C. to perform the work described herein at the address shown above in strict accordance with the conditions stated on BOTH sides of this permit.
Authorized work and conditions of performance thereof:

NEW REVISIONS TO PERMIT B449213 TO ADJUST BUILDING HEIGHT TO 70'-0" CLASSIFICATION CALCULATIONS AS PER ATTACHED DRAWINGS.

Builder—
Width of Bldgs. Length Height
Zone **R5D**
Height of terrace above grade
Address of owner **2311 15TH ST NW**
Deposit No. Amount \$
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

D CLARK 32301
DIRECTOR

Lot **0045** Square **2551**

TOTAL PERMIT FEE \$
FILING FEE \$

DATE

FEE PAYABLE \$ **33.00**

FOR INSPECTIONS CALL **202-696-1215**

Value \$ No. of Bldgs.

No. of Stories **5 + B**

To be occupied as
Projections:

APARTMENT HOUSE

Chief, Permit Issuance Branch

By *[Signature]* Permit Clerk

0001 D.C. GOVERNMENT
10/06/03 at 12:15 PM CLK# 11
Amount \$33.00
BUILDING STRUCTURE & EQUI

GOVERNMENT
DISTRICT OF COLUMBIA
Form BLRA-15
(Rev. 9/30/91)

**DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION**

BUILDING PERMIT

PERMIT NO. B455873

Date **10/16/03** (Type) **MISC.**
Address of work **1819 BELMONT RD NW**
Permission is hereby granted to

ADVERSE I.L.C. to perform the work described herein at the address shown above in strict accordance with the conditions stated on BOTH sides of this permit.
Authorized work and conditions of performance thereof:

NEW REVISIONS TO PERMIT B455571 TO REVISE PENTHOUSE ROOF STRUCTURE PER REQUEST & PER ATTACHED DRAWINGS.

Builder—
Width of Bldgs. Length Height
Zone **R-5-D**
Height of terrace above grade
Address of owner **2311 15TH ST NW**
Deposit No. Amount \$
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

D CLARK 32301
DIRECTOR

Lot **0045** Square **2551**

TOTAL PERMIT FEE \$
FILING FEE \$

DATE

FEE PAYABLE \$ **60.00**

FOR INSPECTIONS CALL **202-696-1215**

Value \$ No. of Bldgs.

No. of Stories **5 + B**

To be occupied as
Projections:

APARTMENT HOUSE

Chief, Permit Issuance Branch

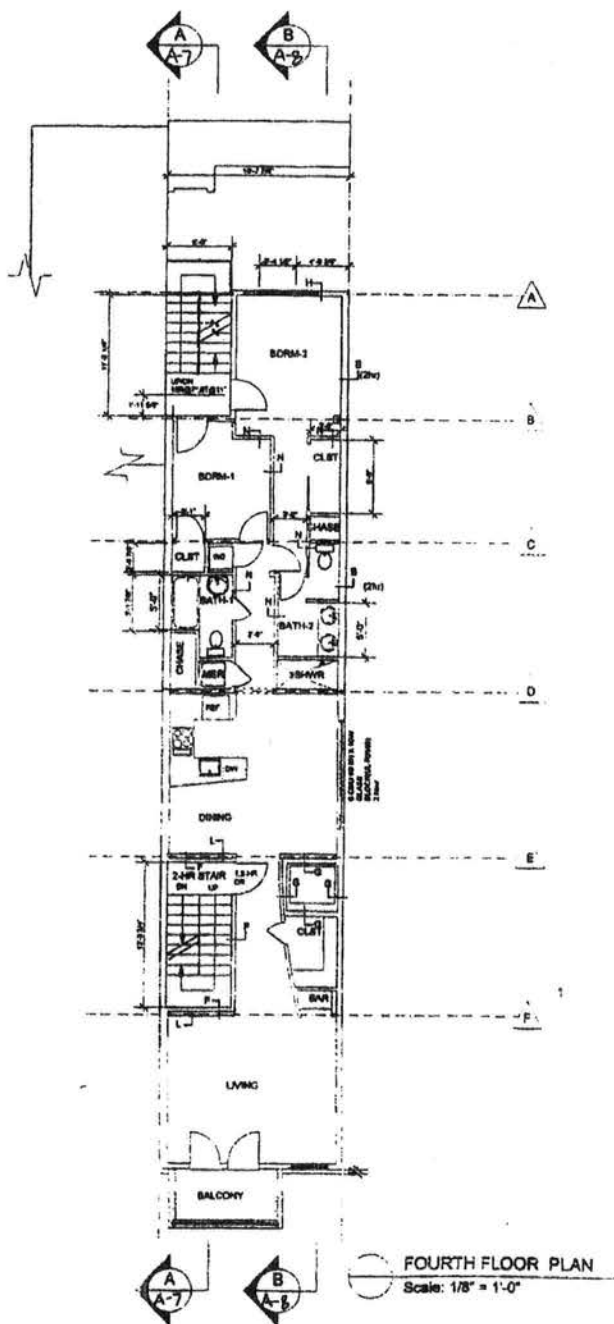
By *[Signature]* Permit Clerk

0001 D.C. GOVERNMENT
10/16/03 at 12:29 PM CLK# 11
Amount \$60.00
BUILDING STRUCTURE & EQUI

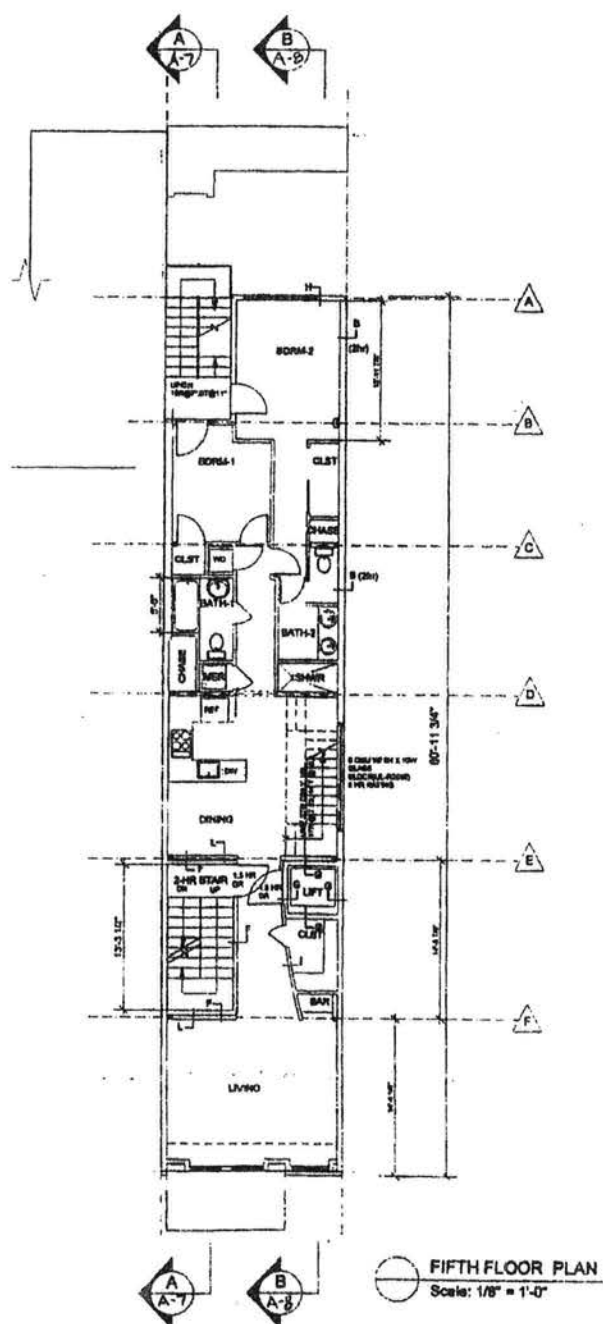
17109
14

8.

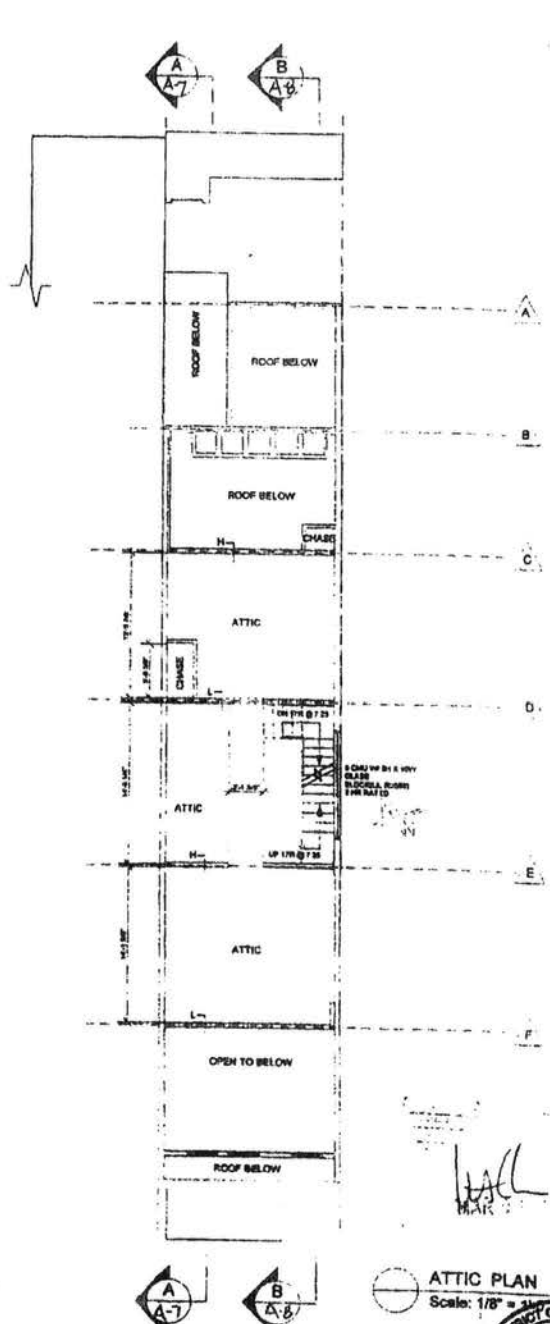
11a



FOURTH FLOOR PLAN
Scale: 1/8" = 1'-0"



FIFTH FLOOR PLAN
Scale: 1/8" = 1'-0"



ATTIC PLAN
Scale: 1/8" = 1'-0"

WALL
MARK



DATE: 02/05/03

TO: ROBERT CHEN @ STRUCTURAL, RAVI SHANKAR @ MECK/PLUMB, FIRE REVIEWER
(NO NAME PROVIDED)

FROM: NORMAN SMITH ARCHITECTURE

RE: RESPONSES TO YOUR PLAN CORRECTION LIST DATED 02/03/03 FOR JOB
FILE # 314-B, 1819 BELMONT ST , N W

RESPONSES TO STRUCTURAL. LISTED BY YOUR NUMBERS-

- 1 DC SURVEYOR'S PLAT(S) WERE PROVIDED WITH ORIGINAL APPLICATION, REPLACEMENT COPIES WERE PROVIDED ON 02/03/03.
- 2 CLARIFY SPRINKLER YOUR COMMENT IS UNCLEAR. THE SPRINKLER RISER IS NOTED ON PAGE SP/FP-1 ALL LEVELS OF THE BUILDING (INCLUDING BASEMENT, FIRST, SECOND, THIRD FOURTH, FIFTH, ATTIC AND STAIR AREA TO PRIVATE ROOF DECK ARE SERVED BY SPRINKLER RISER (SP ON THE DRAWINGS); INDIVIDUAL HEAD LOCATIONS AND SPRINKLER PIPE DRAWINGS WILL BE PROVIDED, AS USUAL, WITH THE FIRE PROTECTION/SPRINKLER SUBCONTRACTOR'S SHOP DRAWING SUBMITTAL TO DC
- 3 CLARIFY NO. OF STORIES THE BUILDING IS FIVE STORIES WITH ATTIC SPACE, THE BASEMENT IS NOT A STORY ABOVE GRADE UNDER BOCA DEFINITION FOR STORY ABOVE GRADE, 502.1 (DEFINITION OF STORY ABOVE GRADE, ITEM #2), THE ATTIC IS THE SPACE BETWEEN THE CEILING BEAMS AND THE RAFTERS PER BOCA DEFINITION FOR ATTIC, 1202.1 (DEFINITION OF ATTIC) ALTHOUGH THE BASEMENT IS NOT A STORY BY DEFINITION, BOCA SECTION 504.6 ALLOWS 6 STORIES (1 MORE THAN SHOWN) WHEN THE BASEMENT IS SEPARATED BY THE 3-HOUR ASSEMBLY NOTED IN THE DRAWINGS AND IN THE BUILDING CODE NOTES ON PAGE A-1
- 4 NO OPENING W/IN 3 FT; THE GLASS BLOCK ASSEMBLY NOTED IS NOT AN OPENING IN THE WALL BUT IS A U.L. RATED 2-HOUR ASSEMBLY WHICH IS INOPERABLE AND IS A WALL ASSEMBLY AND MAINTAINS THE 2-HOUR WALL RATING HOWEVER, FOR COST REASONS, THAT ASSEMBLY WILL BE DELETED FROM THE DRAWINGS WHICH WILL RESOLVE THIS ISSUE
- 5 PROVIDE STL CERTIFCN, THE STRUCTURAL ENGINEER, AHMET OZUSTA, WILL PROVIDE THE REQUESTED LETTER.

RESPONSES TO FIRE

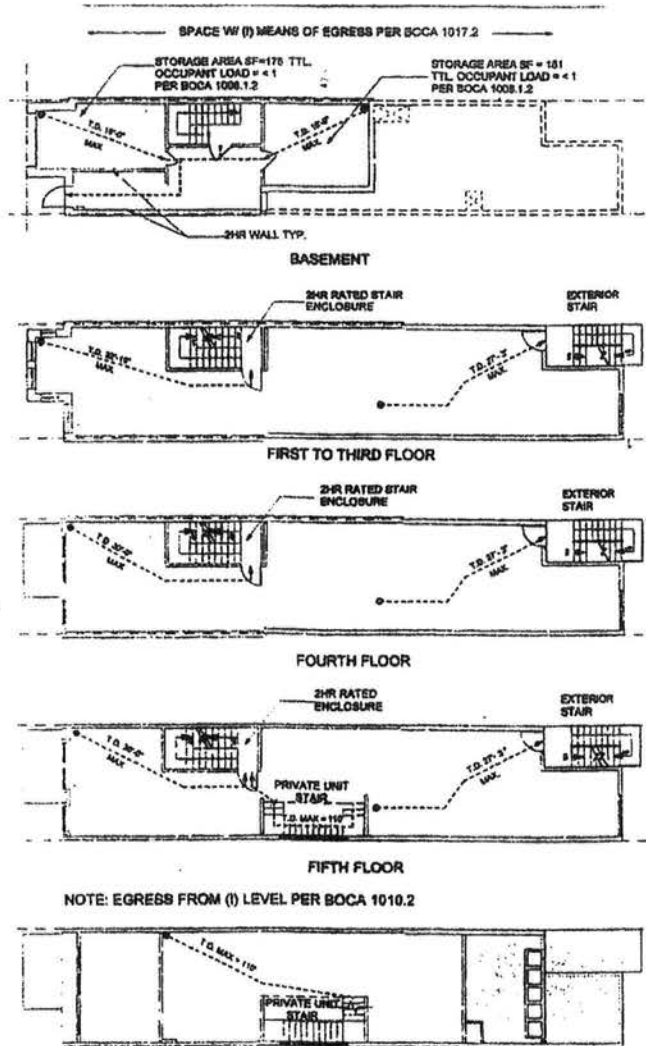
- 1 THE INCOMING WATER SUPPLY AND SIZING IS INDICATED ON THE WATER/SPRINKLER RISER ON PAGE SP/FP-1
- 2 RE THE ABBREVIATIONS, FS = FLOW SWITCH, BFP = BACK-FLOW PREVENTOR, FDC = FIRE DEPARTMENT CONNECTION THE LEGEND IS NOTED ON PAGE P-2, A COPY OF LEGEND WILL BE PROVIDED

RESPONSES TO MECH/PLUMB

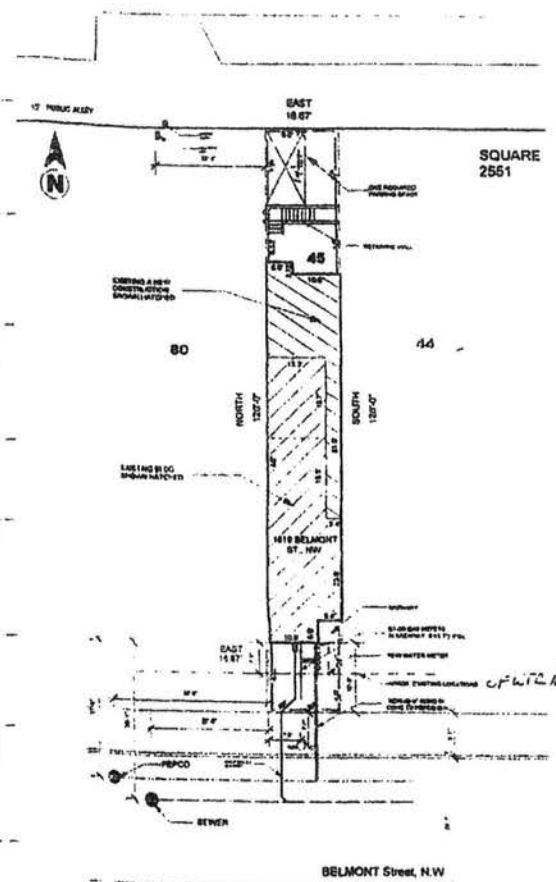
- 1 APPROVAL FROM WASA/BRYANT ST FOR WATER/SEWER AVAILABILITY WILL BE PROVIDED
- 2 ELEVATOR (PRIVATE LIFT) REVIEW HAS BEEN APPROVED ON CONTROL BATCH SHEET SO THIS ISSUE IS RESOLVED
- 3 DOH(DEPARTMENT OF HEALTH) DOES NOT HAVE JURISDICTION OVER A 5 UNIT RESIDENTIAL CONDOMINIUM SO NO APPROVAL IS REQUIRED
- 4 WATER RISER, THE WATER SUPPLY LINES ARE INDICATED IN PLAN WITH THE MAIN WATER RISER INDICATED ON THE WATER/SPRINKLER RISER ON PAGE P-2. ALTHOUGH WE HAVE NOT BEEN REQUIRED TO PROVIDE A COMPLETE WATER RISER DIAGRAM IN THE PAST FOR SIMILAR SIZE PROJECTS, WE WILL PROVIDE THIS

ABBREVIATIONS

ABOVE FINISHED FLOOR	AF	INTERIOR	INT
ARTIFICIAL JOINT	AJ	JOIST	ST
ANCHOR BOLT	AB	JOINT	JT
APPROXIMATE	APPR	LAG SCREW	LS
BENCHMARK	BM	LOAD BEARING	LB
BUILDING	BLDG	MASONRY	MAS
BLOCK/LOCKING	BLK/BLKO	MAXIMUM	MAX
		MINIMUM	MIN
		METAL	MR
BUILT-IN	BI	MODIFIED BITUMEN SYSTEM	MTL
BEAD	BD	MOISTURE RESISTANT	MSS
BULKHEAD	BLKHD	MEAN HOLE	MH
BOLT	BO	NON-LOAD BEARING	NLB
BOTTOM	BTM	NOT IN CONTRACT	NIC
CEILING	CLO	ORIENTED STRAND BOARD	OSB
CEMENT SLURRY BOARD	CSB		
CENTER(S)	CTR(S)/CTR(S)	OWNER FURNISHED AND OWNER	OFOW
CLEAR	CLR	INSTALLED	OFI
CONCRETE MASONRY UNIT	CMU	OWNER FURNISHED AND	OFI
COMPACTED	COMP	CONTRACTOR INSTALLED	PERF
COMBINED SANITARY SWR	CBS	PERFORATE/	
CORNER	CRN OR CRUR	PERFORATED	
COLUMN	COLM	PLATE	PL
CONTROL JOINT	CJ	PLYWOOD	PLY
CONCRETE	CONC	PAINT/PAINTE	PT
COURSES(S)	CBS	PRESSURE-TREATED	PT
COLLAR TIE	CT	POLYETHYLENE	POLY
DRAINAGE/WASTE/VENT	DWV	PATCH TO MATCH	PTM
DEFT/PUBLIC WORKS	DWV	RAIN WATER LEADER	RWL
DIMENSION	DM	SCHEDULE	SCH
DISCHARGE	DSCH	SERVICE ENTRANCE	SE
DOUBLE	DBL	SOLDERED FLAT SEAM	SFS
DOOR(S)	DR(S)	SPRINKLER	SP
DOWNPOUT	DS	STEEL	STL
DRAIN TILE	DT	STORM	ST
EACH WAY	EW	SUBFLOOR	SUBFLR
EQUAL	EQ	SHELF/SHELVES	SH
ELECTRICAL PANEL	EP	SHOWER	SHWR
EXPANSION	EXP	STANDARD SEAM	STND SM
EXISTING	EXIST	STRUCTURAL	STR/STRUTL
EXTERIOR	EXT/EXT	SURFACED 4 SIDES	S4S
EXTRA STRONG	ES	TO BE DECIDED	TBD
FINISH FLOOR	FF	TONGUE AND GROOVE	T&G
FINISH	FN	TO BE SELECTED	TBS
FACE OF FRAMING	FOF	TUBE STEEL	TS
FOUNDATION	FOF (ND)	TYPICAL	TYP
FIBERGLASS	FG	TELEPHONE	TEL
FLOOR	FLR	UNLESS OTHERWISE NOTED	UDN
FACE OF MASONRY	FOM	VAPOR BARRIER	VB
FOUR SIDES	FS	VERIFY IN FIELD	WV
(1) SYSTEM DRYWALL	GPDW	W-ELDED WIRE MESH/FABRIC	WWM/WWT
HEADER	HDR	WOOD	WD
HEADSILL/JAMB	HSJ	WATER	WTR
HEAD	HD	WATER PROOF/PROTECTED	WP/WPD
HEIGHT	HT		
INSULATE/INSULATION	INSUL		



EGRESS PLAN
NON SCALE



SITE PLAN
Scale: 1" = 20 ft

DISTRICT OF COLUMBIA
PERMITTING DIVISION
STRUCTURAL WORK IN GENERAL
APPLICANT TO THE
OFFICE OF THE DISTRICT OF COLUMBIA

Plan #
Date

MAR 08 2003

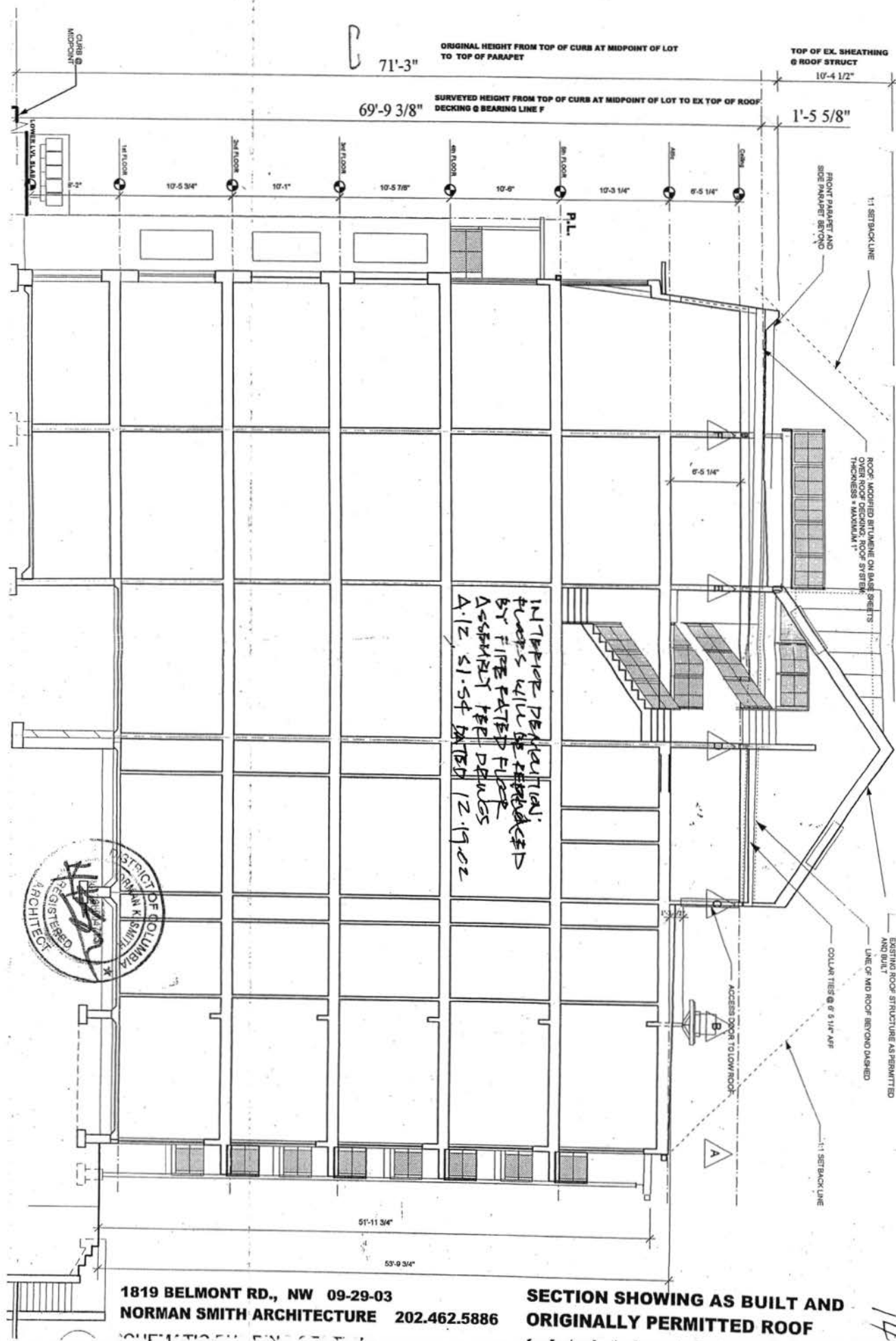
NORMAN SMITH ARCHITECTURE
Architectural Firm
2111 14th St., N.W., Washington, DC 20009
Tel: 202-462-1111 Fax: 202-462-1112

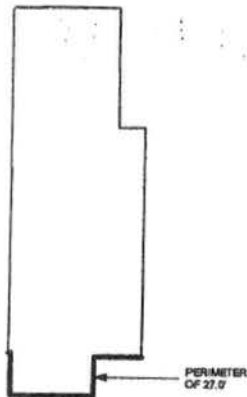
PERMIT 12-19-02

Design: NIRMAL SMITH ARCHITECTS PC

1819 Belmont RD. NW
Washington, DC 20009

A2

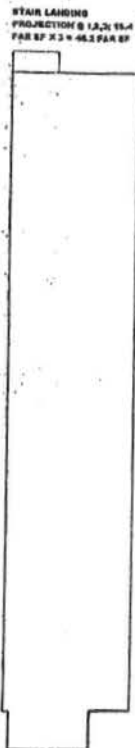




LOWER LEVEL FAR CALCULATION:
TOTAL AREA = 736.6 SF TOTAL
PERIMETER = 131.4 LF

PERIMETER WITH CEILING WHICH IS >4' ABOVE ADJACENT FINISHED GRADE = 27.0 LF

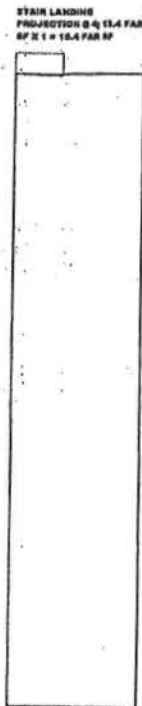
FAR = $131.4 / 27.0 \times 736.6 = 147.3$ FAR SF



FLOORS 1,2,3 FAR CALCULATION:
1,2,3; $1394.1 \text{ FAR SF} \times 3 = 4182.3 \text{ FAR SF}$
1. CHASE SPACES INCLUDED IN FAR
2. REAR STAIRS INCLUDED IN FAR AT EACH FLOOR
3. 3.0' REAR BALCONIES DO NOT COUNT TOWARD FAR

STAIR LANDING PROJECTION @ 1,2,3; $15.4 \text{ FAR SF} \times 3 = 46.2 \text{ FAR SF}$

TOTAL FAR = 4228.5 FAR SF



FLOOR 4 FAR CALCULATION:
 $1336.6 \text{ FAR SF} \times 1 = 1336.6 \text{ FAR SF}$
1. CHASE SPACES INCLUDED IN FAR
2. REAR STAIRS INCLUDED IN FAR AT EACH FLOOR
3. 3.0' REAR BALCONIES DO NOT COUNT TOWARD FAR

STAIR LANDING PROJECTION @ 4; $15.4 \text{ FAR SF} \times 1 = 15.4 \text{ FAR SF}$

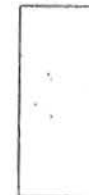
TOTAL FAR = 1352.0 FAR SF



FLOOR 5 FAR CALCULATION:
 $1270.5 \text{ FAR SF} \times 1 = 1270.5 \text{ FAR SF}$
1. CHASE SPACES INCLUDED IN FAR
2. REAR STAIRS INCLUDED IN FAR OF FLOORS BELOW;
NO FAR AT THIS LEVEL
3. 3.0' REAR BALCONIES DO NOT COUNT TOWARD FAR

TOTAL FAR = 1270.5 FAR SF

TOTAL AREA OF ROOF STRUCTURE INCLUDING STAIR AND OPEN AREAS WITHOUT LANDING OR STAIRS: 260.7 SF



AREA OF ROOF STRUCTURE WITH LANDING AND STAIR THAT COUNTS TOWARD FAR: FAR SF; 124.3 FAR SF



ROOF STRUCTURE FAR CALCULATION:
TOTAL SF OF ROOF STRUCTURE INCLUDING STAIR LANDING AND OPEN AREAS WITHOUT FLOORS = 260.7 SF

AREA OF ROOF STRUCTURE WITH LANDING AND STAIR THAT COUNTS TOWARD FAR SF = 124.3 FAR SF

TOTAL FAR = 124.3 FAR SF



1819 BELMONT RD., NW 09-29-03
NORMAN SMITH ARCHITECTURE
202.462.5886

FAR GRAPHICS

ZONING INFORMATION; REVISED 09-29-03

1 STREET ADDRESS: 1819 BELMONT STREET, N.W. WASHINGTON, DC
2 LOT: 45
3 SQUARE: 2551
4 ZONING: R5D
5 NUMBER OF DWELLING UNITS: 5
6 MINIMUM LOT SIZE: NONE PRESCRIBED
7 LOT SIZE: 2000.4 SF
8 FAR: SEE ATTACHED GRAPHIC

8.1 ALLOWABLE/REQUIRED;
8.1.1 MAIN: 3.5 MAIN: 2000.4 SF X 3.5 = 7001.4 SF
8.1.2 ROOF STRUCTURE: .37 OF FAR OF FLOOR BELOW: .37 X 1270.5 = 470.1
8.1.3 TOTAL ALLOWABLE: 7471.4 SF

8.2 ACTUAL
8.2.1 CELLAR: (20% OF GFA CEILING HEIGHT AT LESS THAN 4' ABOVE GRADE, BASED ON PERIMETER CALCULATION)
736.6 X 20 = 147.3 SF

8.2.2 1ST,
8.2.2.1 MAIN: 1394.1 SF
8.2.2.2 STAIR LANDING 15.4 SF

8.2.3 2ND,
8.2.3.1 MAIN: 1394.1 SF
8.2.3.2 STAIR LANDING 15.4 SF

8.2.4 3RD,
8.2.4.1 MAIN: 1394.1 SF
8.2.4.2 STAIR LANDING 15.4 SF

8.2.5 4TH,
8.2.5.1 MAIN: 1336.6 SF
8.2.5.2 STAIR LANDING 15.4 SF

8.2.6 5TH,
8.2.6.1 MAIN: 1270.5 SF
8.2.6.2 STAIR LANDING: NONE 0 SF

8.2.7 ATTIC; NOT APPLICABLE 0 SF
8.2.8 ROOF STRUCTURE 124.3 SF
8.2.9 TOTAL 7122.6 SF
8.2.10 NOTES:
8.2.10.1 CALCULATION BASED ON LOT LINE TO LOT LINE AND INCLUDING EXTERIOR WALLS
8.2.10.2 CHASE SPACES INCLUDED IN FAR FOR EACH FLOOR
8.2.10.3 REAR STAIRS INCLUDED AS SEPARATE LINE ITEM AT FLOORS 1-4 (I.E. STAIR RUN FROM FLOOR 1 TO FLOOR 2 IS COUNTED AS FAR ON FLOOR 1); STAIR RUN TO GRADE IS BELOW MAIN LEVEL OF 1ST FLOOR AND DOES NOT COUNT TOWARD FAR; THERE IS NO STAIR ABOVE FLOOR 5
8.2.10.4 3'-0" DEEP REAR BALCONIES DO NOT COUNT TOWARD FAR
8.2.10.5 ROOF STRUCTURE FAR IS BASED ON THE STAIR, LANDING AND HORIZONTAL SURFACES WITHIN THE ROOF STRUCTURE
8.2.10.5.1 TOTAL AREA OF ROOF STRUCTURE, INCLUDING OPEN AREAS = 260.7 SF, RESULTING IN TOTAL OF 7259 SF < 7471.4 ALLOWABLE



9 LOT COVERAGE:
9.1 ALLOWABLE/REQUIRED; 75%; 2001.4 X .75 = 1500.3 SF
9.2 ACTUAL 1409.3 SF

10 REAR YARD
10.1 ALLOWABLE/REQUIRED: 4" PER 12" VERTICAL HEIGHT(.33) AT MIDPOINT
REAR GRADE, 15'-0" MIN.; BUILDING HEIGHT AT REAR = 53'9 1/4" X .33 = 17'9 1/8"
10.2 ACTUAL AT NEW WORK: 31' 2 1/4"

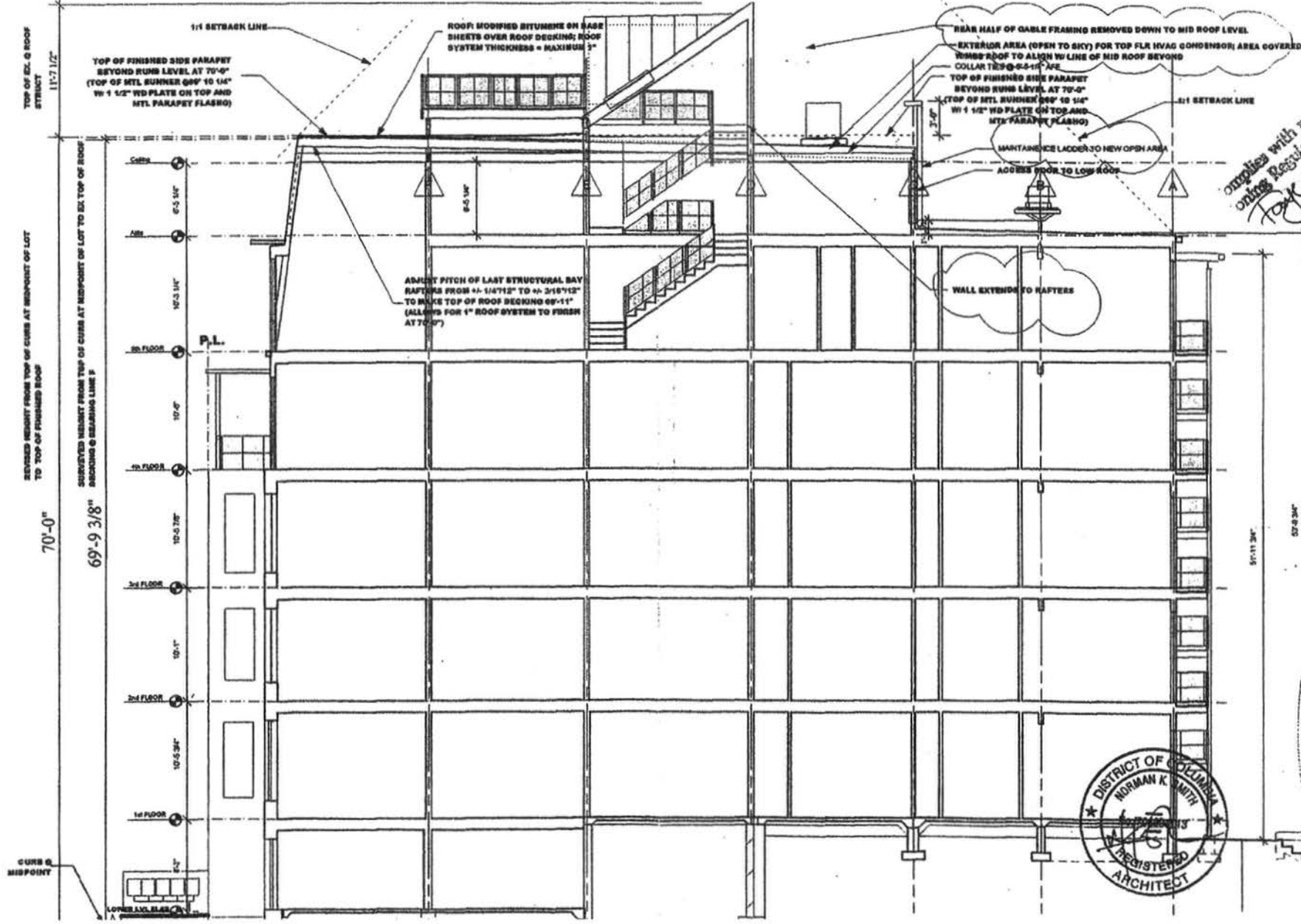
11 SIDE YARDS: NOT APPLICABLE
12 COURTS: NOT APPLICABLE
13 BUILDING HEIGHT
13.1 ALLOWABLE; 90.0' UNDER R5-D
13.1.1 UNDER 1910 HEIGHT ACT, FOR STREET WIDTH OF 80.0', BUILDING HEIGHT IS LIMITED TO 70.0'
13.2 ACTUAL AS REVISED: 70.0'

14 NUMBER OF STORIES
14.1 ALLOWABLE: NO LIMIT
14.2 ACTUAL: 5

15 USE GROUP UNDER BLDG CODE
15.1 EXISTING: R-2; 4 UNITS
15.2 NEW: R-2; 5 UNITS (20% INCREASE IN USE INTENSITY)

16 PARKING
16.1 REQUIRED: (1) REQUIRED UNDER DCMR 11, #2100.7 FOR 5 UNITS (20% INCREASE IN USE INTENSITY).
16.2 PROVIDED: 1 SPACE PROVIDED; AUXILIARY PARKING SPACES WHICH MAY BE PROVIDED; 2





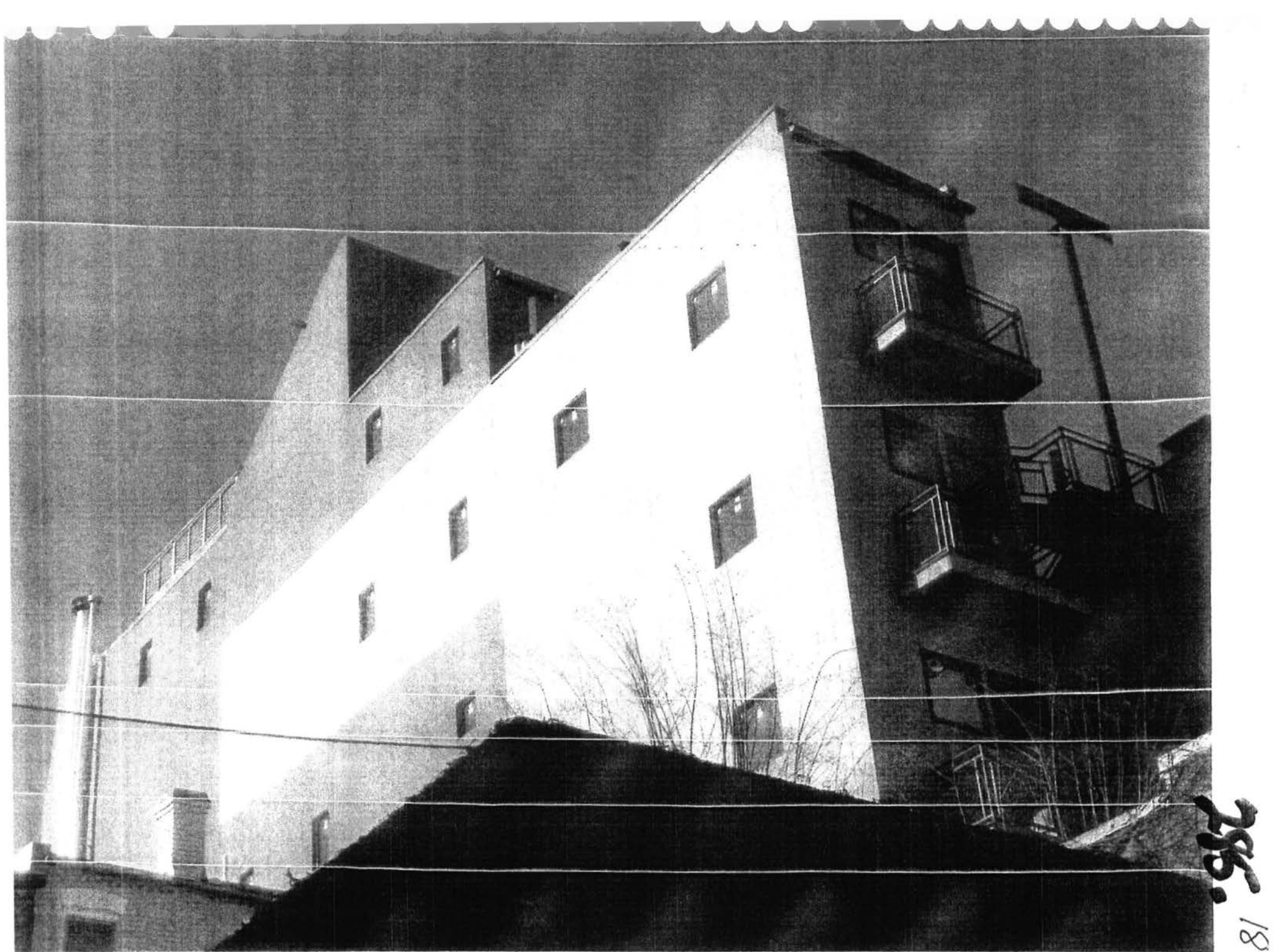
complies with requirement of
online Regulations
10-10-10

SECTION SHOWING REVISED
PARAPET AND BUILDING

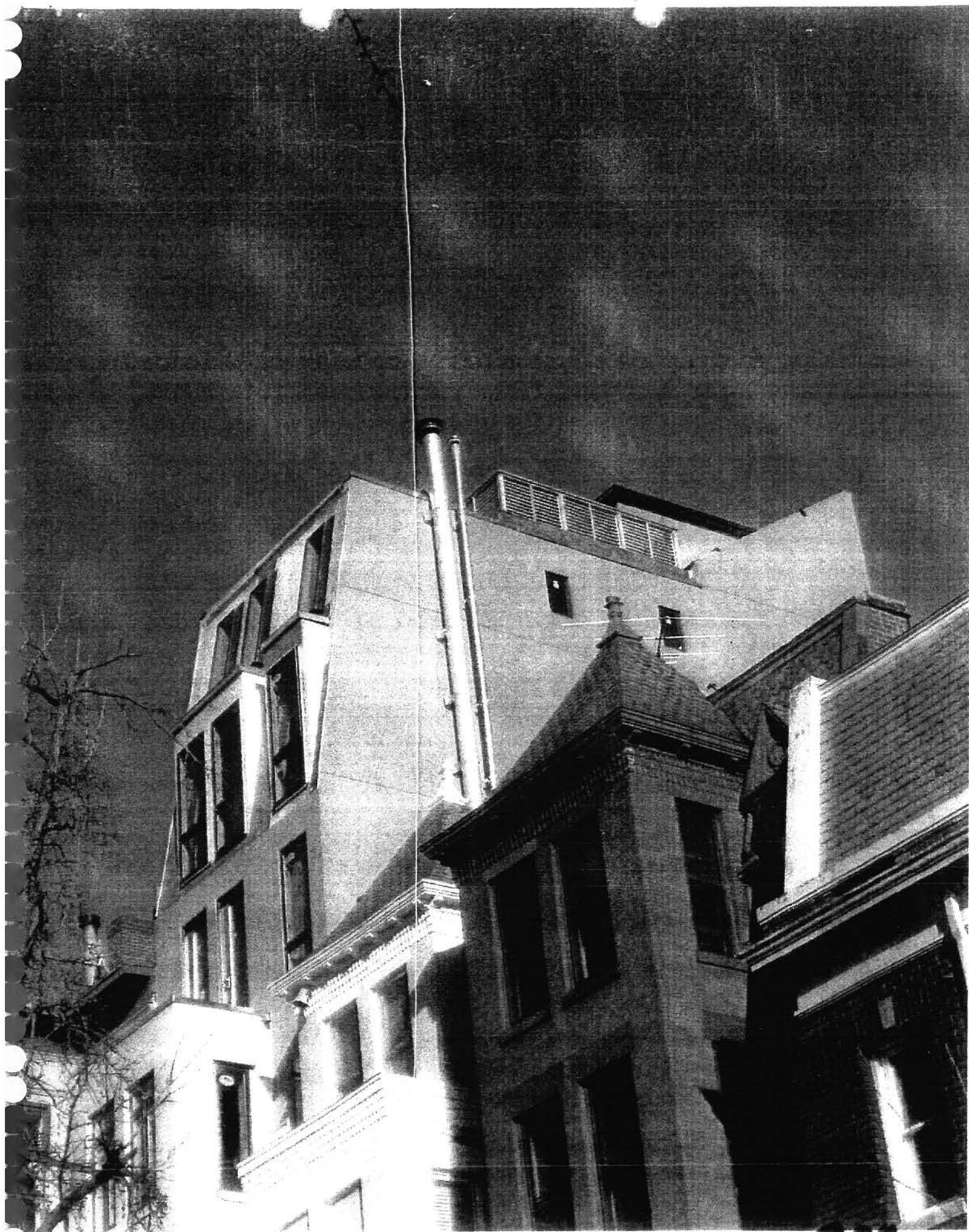
1819 BELMONT RD., NW 10-14-03
NORMAN SMITH ARCHITECTURE 202.462.5886
SCHEMATIC BUILDING SECTION



17



285.
18



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

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BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17109

EXHIBIT NO. 109

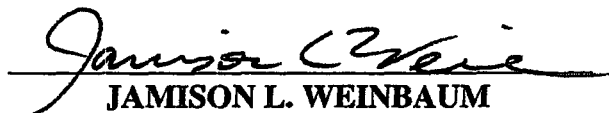
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been served upon the parties and an opportunity has been afforded to each party adversely affected to file exceptions and present argument.”

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

Single Member District Commissioner 1C
Advisory Neighborhood Commission 1C03
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Matthew LeGrant, Zoning Administrator
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Councilmember Jim Graham
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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

909.

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

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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

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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

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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

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approximately eight feet, five and one-quarter inches¹ to 16 feet, five and one-quarter inches² 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

¹This 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.

³The 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.)

⁴Board 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.”

gm.

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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).

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Transcript of March 16, 2004
pp. 245-247

1 less.

2 CHAIRPERSON GRIFFIS: Right. And we do
3 have in the record, I don't know who submitted it, but
4 we do have a definition also from Webster's on attic.

5 MR. ROTH: Yes, it was submitted and I --
6 I guess -- I guess in light of counsel's objection, I
7 just want to clarify or -- or -- or make clear or ask
8 Ms. Ogunneye to make clear is that your definition or
9 do you apply the Webster's definition?

10 MS. GILBERT: May we look at the Webster's
11 definition again? Does anybody have the Webster's
12 definition before she's asked to response to that
13 question?

14 CHAIRPERSON GRIFFIS: Is there a doctor in
15 the house? Who's got a dictionary?

16 MR. ROTH: Mr. Chairman, maybe we can
17 shorten this by -- by my simply asking Ms. Ogunneye, I
18 -- I believe that you testified near the end of your
19 direct examination that the attic is measured from the
20 floor to the underside of the structural members. Is
21 that what you said?

22 MS. OGUNNEYE: Yes, I did.

23 MR. ROTH: And is it your opinion that
24 sheetrock applied to the top of a room is a structural
25 member?

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1 MS. OGUNNEYE: Sheet rock applied to the
2 top of --

3 MR. ROTH: Applied to -- applied to the
4 ceiling.

5 CHAIRPERSON GRIFFIS: You measure from the
6 floor to the finished ceiling to establish the 6 feet
7 6?

8 MS. OGUNNEYE: No, the finished ceiling
9 isn't in place yet.

10 CHAIRPERSON GRIFFIS: Pardon me.

11 MR. ROTH: I thought you said that the --
12 that the space was built out.

13 MS. OGUNNEYE: The space was built out.
14 The measurement was taken from the floor and I'm not
15 sure that it's a finished floor yet to the underside
16 of collar tie. That was what I said. Which is a
17 structural member.

18 CHAIRPERSON GRIFFIS: Make sense?

19 MR. ROTH: It makes sense now, but it
20 sounds to me like it contradicts her earlier testimony
21 and -- and --

22 MS. OGUNNEYE: That's what I said earlier.

23 CHAIRPERSON GRIFFIS: No, in fact, I do
24 remember because that would be part of the definition
25 of the -- the height. Because she said from the floor

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1 to the structural member, the collar ties.

2 MR. ROTH: She did -- she did say that?

3 CHAIRPERSON GRIFFIS: That's correct.

4 MS. OGUNNEYE: Um-hum.

5 MR. ROTH: And -- and going back again to
6 the definition there in Webster's which hopefully
7 you've had a chance now to review which I now don't
8 have in front of me. That's okay. Would you -- would
9 you read the underlined language please?

10 MS. OGUNNEYE: Sure. "The part of a
11 building immediately below the roof and wholly or
12 partly within the roof framing."

13 MR. ROTH: And I'm not an expert in this
14 obviously, sir. You're going to have to help me here,
15 but was -- based upon what you know of what these
16 inspectors measured when you sent them out last week,
17 the measured from where to where?

18 MS. OGUNNEYE: From the floor to the
19 underside of collar ties and they had 6 foot 5 inches.

20 MR. ROTH: Okay. Thank you. Appreciate
21 your indulgence, Mr. Chairman.

22 CHAIRPERSON GRIFFIS: No problem. Ms.
23 Miller, did you want a follow-up question?

24 VICE CHAIRPERSON MILLER: I have one
25 follow-up question and I think this is where Mr. Roth

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Transcript of April 6, 2004
pp. 134-148

1 since the stair has been counted in the FAR
2 calculations of the floors below, it is not counted
3 here. So therefore, we have 1270.5 FAR square
4 footage, square feet on this floor.

5 In regard to the attic, the attic is an
6 attic under the Zoning Regulations since it has
7 structural headroom of 6 foot, 5 and 1/4 inches, which
8 is less than the structural headroom of 6 foot, 6
9 inches or 6.5 feet, which is the threshold under the
10 Zoning Regulations for the level to count toward FAR.

11 This headroom is created by the use of
12 permanently attached collar ties, which are spaced at
13 a maximum of 48 inches on center in all the structural
14 bays of the attic, that is from front to back, from
15 north to south. These collar ties are attached to the
16 steel stud load bearing walls with screw applied
17 framing anchors and like the cross or rack bracing in
18 the walls contribute to the north/south stiffness of
19 the building structure. Based on that, it is my
20 opinion that there is no FAR square footage assignable
21 to the attic space.

22 The roof structure. In the roof
23 structure, the area of the short stair, that is the
24 short stair leading up to the actual deck, the landing
25 and then the stair down to the attic is included for a

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1 total of 124.3 FAR square feet. The stair from the
2 fifth floor to the attic is included in the FAR
3 calculations for the fifth floor.

4 In terms of the variations of the other
5 calculations, which alluded to a moment ago, they are
6 done using CAD and I think there will be some variance
7 between our figures and somebody's figures who does it
8 with a planometer or any other kind of mechanical
9 devise owing to the instability of print paper and
10 other factors.

11 Also, I think there is some discrepancy,
12 because, as I mentioned earlier, the original lower
13 level area way was in-filled and cannot count towards
14 FAR since it doesn't exist, and I believe that this
15 accounts for the, approximately, 50 square foot
16 difference in our lower level calculations from the
17 other calculations that were given.

18 So in conclusion, based on all the above,
19 it's my professional opinion that the project complies
20 with the height requirements of the 1910 Height Act
21 and the Zoning Regulations, as well as the setback
22 requirements of the Zoning Regulations and the FAR
23 requirements of the Zoning Regulations for an R-5-D
24 District.

25 MS. BROWN: I would just have one quick

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1 follow-up question for the witness.

2 Mr. Smith, you heard Mr. Hawkins'
3 methodology for calculating the FAR. In your expert,
4 professional opinion, is this calculation method the
5 customary and accepted method for a partial basement
6 cellar space?

7 MR. SMITH: In my experience, it is not
8 customary, no.

9 MS. BROWN: Thank you. That concludes our
10 direct testimony and we would reserve any
11 conclusionary statement until the end.

12 CHAIRPERSON GRIFFIS: Questions from the
13 Board? Yes, Mr. Parsons?

14 COMMISSIONER PARSONS: Well, it's
15 certainly quite clear how you did something. I want
16 to go into a little bit as to why you did something.
17 Why has this building -- as I understand it, the attic
18 is really not required for any purpose other than the
19 structural purpose that you identified earlier, Mr.
20 Smith. Is that correct, or just recently, just now
21 identified?

22 Why has this building got an attic and got
23 access to the roof? I don't understand that. I mean,
24 if economics was driving you to make this building
25 work and the attic doesn't work for you, it's not

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1 rentable space, what motivated you to this height? Is
2 it simply a view from the roof? I need some help as
3 to why you did this, either of you. Is it a marketing
4 issue?

5 MS. MONTPLAISIR: From a development --

6 COMMISSIONER PARSONS: There is certainly
7 no reason to go to additional height if you don't need
8 to.

9 MS. MONTPLAISIR: From a development
10 standpoint, the attic does two things for us. One, as
11 probably most people know, anybody who lives in an
12 apartment in the city, is that storage space is always
13 at a premium. That is number one. Number two, the
14 competition out there these days is fierce and to have
15 a two story space in the front of the unit is
16 definitely called for in the market. It's definitely
17 called for.

18 If you go to loft projects, if you go to
19 selling condominium projects, you will frequently find
20 two story spaces and it is definitely a competitive
21 advantage to have that space. And then yes, of
22 course, to have a roof deck as anybody -- you know, we
23 try to give as much outdoor space as we can and we
24 would normally want that to be a roof deck if you're
25 talking about the penthouse unit, which is why we did

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1 do this.

2 COMMISSIONER PARSONS: So it's the windows
3 in the living room, if you will, and access to the
4 roof is worth all of this structural addition, if you
5 will, to the building. Is it that simple?

6 MS. MONTPLAISIR: Absolutely.

7 COMMISSIONER PARSONS: And the only one
8 that has access to the roof deck is the fifth floor
9 apartment penthouse owner?

10 MS. MONTPLAISIR: Correct.

11 COMMISSIONER PARSONS: New question. Is
12 there actually a ceiling panel at the line shown on
13 this drawing as ceiling? Certainly, you have seen
14 this drawing. I don't have an exhibit number, but
15 it's --

16 CHAIRPERSON GRIFFIS: It's attached to --

17 MR. SMITH: Yes.

18 COMMISSIONER PARSONS: So there is a
19 ceiling measurement here and then a line that goes all
20 the way to the back of the building.

21 MR. SMITH: Yes.

22 COMMISSIONER PARSONS: There is a ceiling
23 along that entire length even though there is no use
24 for it, I mean, as in ceiling in this room?

25 MR. SMITH: Well, it's --

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1 COMMISSIONER PARSONS: A finished ceiling?

2 MR. SMITH: There is a finished ceiling in
3 a two story space and there is a finished ceiling
4 plane in the attic space, yes.

5 COMMISSIONER PARSONS: Plane?

6 MR. SMITH: Well, I use the word plane,
7 because the collar ties are spaced at 48 inches on
8 center, and so the drywall, the wall board, goes
9 across and down and back up. But to answer your
10 question, there is a finished -- yes, there is a
11 finished ceiling surface.

12 COMMISSIONER PARSONS: So you have got a 4
13 inch space between that and the beams that carry the
14 roof, is that right, I don't know, a 6 inch space?

15 MR. SMITH: The collar ties are 2 x 10, so
16 they are 9 and 1/4 inches deep, so the difference --
17 I'm sorry, I'm not sure that I completely understand
18 your question.

19 COMMISSIONER PARSONS: Well, Mr. Hawkins
20 spent a lot of time talking about this and I'm trying
21 to get some rebuttal to what he is talking about.

22 MR. SMITH: Right.

23 COMMISSIONER PARSONS: As to whether there
24 is a ceiling here or it's just a measuring line for a
25 ceiling.

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1 MR. SMITH: I guess what I can say is that
2 there is a ceiling at the top of the two story space.

3 There is a ceiling in the attic as well. And in
4 terms of Mr. Hawkins' testimony, I have to confess, I
5 don't remember exactly what he said about that.

6 CHAIRPERSON GRIFFIS: Maybe this will
7 help. This section, which is frankly more schematic
8 than anything else, although it has labels on it, we
9 have what is showing and what Mr. Parsons is going to,
10 only in the elevation is there a note to it that says
11 ceiling and then it's dimensioned.

12 MR. SMITH: Yes.

13 CHAIRPERSON GRIFFIS: 6 feet, 5 and 1/4
14 inches. But it looks like it's a structural member.
15 It has depth to it. So his first question is is there
16 a finished ceiling in there and the answer is yes. I
17 think where he is going to next is what does that do
18 as there appears to be a whole line of your collar
19 ties, which really read more as the roof joist. So
20 you have created two members. You have one that's
21 parallel with the floor below it and the other, it's
22 following the pitch of the roof.

23 MR. SMITH: Yes.

24 CHAIRPERSON GRIFFIS: So in some sense, I
25 guess Mr. Parsons is trying to get to the fact of what

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1 is this one doing, if anything, and that relates to
2 why do we have the attic space so large below it and
3 then in addition to the penthouse, but that goes to
4 his first question.

5 So the first one is what are those two
6 doing in conjunction with each other?

7 MR. SMITH: Well, the collar -- let me
8 start by explaining that this building is framed from
9 front to back rather than the traditional side to side
10 method you would normally use in a structure of this
11 width and that was done specifically to not have to
12 deal with loads super-implied on the existing walls
13 and so on and so forth and all the geotechnical
14 analysis that is involved in doing that.

15 So therefore, we decided for that reason
16 amongst some other ones to frame the building front to
17 back. Because of that, that means that the building
18 has a tendency to want to rack, that is to twist a
19 little bit, excuse me, twist this way, north/south.
20 So the roof rafters, obviously, are creating a roof
21 slope.

22 The collar ties are locking into those
23 bearing walls that the roof rafters, in turn, bear
24 all, which are spaced, approximately, 13 to 14 feet
25 apart and varies slightly from north to south to form

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1 what is, essentially, a panel truss in each one of the
2 framing bays, so that those elements work together to
3 help resist north/south racking.

4 CHAIRPERSON GRIFFIS: Okay.

5 COMMISSIONER PARSONS: Thank you for the
6 help, because I was out on a limb. Let me try another
7 limb.

8 CHAIRPERSON GRIFFIS: Okay.

9 COMMISSIONER PARSONS: Why is the roof
10 deck this high off the roof, and again I'm looking at
11 this section and it's not dimensioned, but it appears
12 to be about 3 feet off the roof, as opposed to 2 feet
13 off the roof or 8 inches? What drove that decision?

14 MR. SMITH: I can address that. There are
15 two things. One was the way we had decided to frame
16 it, which is that the typical way of framing a deck
17 like this, I mean, given the fire rated requirements
18 and so on and so forth, is to bring the floor joists
19 to a beam, that is this way. We also need to deal
20 with the fact that we have to allow for leaves,
21 buildup, trash blown, blown trash and debris that gets
22 on the roofs that can conceivably get clogged
23 underneath a deck. So the deck was raised enough to
24 allow passage of water underneath, to prevent ice
25 damming and that kind of thing.

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1 That said, in reality we did drop the deck
2 some. We chose to reframe it, so that the beam that
3 the floor joists frame to was dropped, I believe,
4 about 12 inches or so and it makes a little hump at
5 the end of the deck. The final --

6 COMMISSIONER PARSONS: A hump?

7 MR. SMITH: I'm sorry, a little hump like
8 that. It's only because the beam is a deeper
9 structural dimension than the floor joists are. The
10 net result being that the top of the walking surface
11 of the deck is, approximately, 1 foot 3 to 1 foot 4
12 off of the top of the parapet.

13 COMMISSIONER PARSONS: Off of the top of
14 the what?

15 MR. SMITH: Off of the top of the parapet.

16 COMMISSIONER PARSONS: Oh, so this drawing
17 isn't really accurate, I mean?

18 MR. SMITH: It is not accurate, no.

19 COMMISSIONER PARSONS: At one time,
20 somebody could have crawled under there to get leaves
21 out and so forth?

22 MR. SMITH: That was the original
23 intention, yes.

24 COMMISSIONER PARSONS: And now you have
25 lowered it?

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1 MR. SMITH: Yes.

2 COMMISSIONER PARSONS: Okay. Thank you.

3 CHAIRPERSON GRIFFIS: Go ahead, Mr.
4 Etherly.

5 BOARD MEMBER ETHERLY: Just a quick
6 follow-up to make sure I understood that last point.
7 So the space -- perhaps both for the witness, but then
8 also for Mr. Parsons. So the space that is denoted as
9 ceiling, and I am looking at what is the same drawing,
10 but it's Exhibit 1, it's attachment 1 to Exhibit 48,
11 which was the supplemental report of Mr. Hawkins.

12 The space that's denoted as ceiling, it's
13 the witness' testimony that that space is no longer
14 there? Am I understanding that correctly?

15 COMMISSIONER PARSONS: Oh, no, I think
16 maybe we ought to go over this again with the
17 Chairman's help. But as I understand it, you have got
18 to have a finished ceiling in that two story section.

19 I mean, people pay good money for a window and
20 ceiling and loft. So there is a ceiling there and I'm
21 still confused as to what happens once you enter what
22 is attic space here where it's 6 foot high. I
23 wouldn't know a collar if I saw it.

24 BOARD MEMBER ETHERLY: Okay, okay.

25 COMMISSIONER PARSONS: So that's where I

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1 lost it.

2 BOARD MEMBER ETHERLY: Okay. Let me try
3 this attack then. There was a question that Ms. Brown
4 threw towards you at the conclusion of your statement
5 with regard to Mr. Hawkins' piece, and I think what
6 I'm trying to do is square your testimony with that of
7 Mr. Hawkins. So perhaps what might be helpful is help
8 me understand or help my colleagues and I understand
9 where Mr. Hawkins goes awry, in your opinion, with
10 regard to that interpretation of attic, because
11 perhaps what I am just struggling with is is it the
12 case then -- is there any real purpose to that ceiling
13 that is in place in what is referred to as the attic
14 or is that, essentially, just architectural subterfuge
15 for what realistically could be a taller space?

16 MR. SMITH: Are you asking whether the
17 collar ties could be removed?

18 BOARD MEMBER ETHERLY: Yes.

19 MR. SMITH: I think, and I do not mean to
20 be facetious in saying this, that you could remove a
21 piece of floor if you chose to. You could remove
22 collar ties. It would be very, very difficult. It
23 would be inadvisable and would require the consent of
24 the Condominium Owners Association who would contact,
25 hopefully, the architect of record and I would say

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1 that they cannot do that. In addition to that, it
2 would require a building permit, which would trigger
3 FAR calculations. So I think the short answer is no.

4 BOARD MEMBER ETHERLY: Okay. Okay. Let
5 me then back up real quickly and then I will pause,
6 Mr. Chair, and let other colleagues get in. But with
7 respect to, let's kind of go back downstairs, if you
8 will, and come to the basement.

9 CHAIRPERSON GRIFFIS: You know what? Let
10 me interrupt you for a second.

11 BOARD MEMBER ETHERLY: Yes, sir.

12 CHAIRPERSON GRIFFIS: Let's start with the
13 basics. What is a collar tie? If you're standing on
14 the floor of that attic space, that level, I'm looking
15 up and I look up to 6 feet, 5 and 1/4 inches, what do
16 I see?

17 MR. SMITH: You would see the bottom face
18 of a member that is, in its rough state, an inch and a
19 half wide and 9 and 1/4 inches tall that would run
20 from north to south, would be spaced 48 inches on
21 center.

22 CHAIRPERSON GRIFFIS: A member of what,
23 the Kalorama Citizens Association? Not being an
24 architectural design and review board or a structure
25 review board, what you are talking about is a piece of

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1 steel in that.

2 MR. SMITH: It's a wooden member.

3 CHAIRPERSON GRIFFIS: Oh, it's wood then?

4 You're using some wood in there, and so it's an
5 engineered piece though. Am I correct?

6 MR. SMITH: The actual floor joists of the
7 building are engineered lumber. These particular
8 members, I believe, are either engineered or are 2 x
9 10s. I think in the --

10 CHAIRPERSON GRIFFIS: All right. I'm just
11 trying to explain then. So they are 48 inches apart?

12 MR. SMITH: That is correct.

13 CHAIRPERSON GRIFFIS: Okay. So there is
14 only a few of them?

15 MR. SMITH: There are I think four or
16 five.

17 CHAIRPERSON GRIFFIS: Right.

18 MR. SMITH: Because actually, they are
19 spaced less than 48 inches in certain places. I think
20 one of the analogies or a good example is if any of
21 you live in a single-family house and you go up into
22 the attic, in a gabled attic, frequently there are
23 collar ties that are 2 x 4s or 2 x 6s that run across.
24 They are sort of banged on to the sides of the
25 rafters. Those are members that are acting in tension

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1 to keep the roof from spreading.

2 These members here, these collar ties, are
3 the same thing. However, they are not acting in
4 tension. They are acting, essentially, as compression
5 braces and collar tie came from the collar bar on
6 men's shirts that helped hold the collar together.

7 CHAIRPERSON GRIFFIS: Fascinating. And
8 then your roof framing is 2 x 12s above that. Is that
9 correct?

10 MR. SMITH: They are 9 and 1/2 inch TJI
11 350s, I believe. The roof framing of the penthouse
12 roof structure is 2 x 12s.

13 CHAIRPERSON GRIFFIS: Oh, I got you. It's
14 kind of hard to read to 8.5 x 11. Okay. Is that
15 clear? I mean, I think this is important enough,
16 because it seems like we're going to spend a lot of
17 time on this to fully understand just the basics of
18 it, so we know what we're looking at. If there are
19 further questions, I would be happy to ask them if you
20 don't want to. But it really gets to the point of,
21 you know, what the Board is getting to, what I hear
22 them struggling with is here you have this space that
23 has got 6 feet 5 and change. Then you have got this
24 other space and then you have this penthouse.

25 Well, I think there is some sort of

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Transcript of July 20, 2010
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1 July 2nd.

2 The Board is to act on these
3 submissions attended to the remand.

4 And that concludes the staff's
5 briefing, Madam Chair.

6 MADAM CHAIR MOLDENHAUER: Thank
7 you very much, Mr. Moy.

8 The Board will accept all
9 documentation in this case in order for us to
10 have a full file and review all the matters.
11 I believe the matters have been fully briefed
12 and there's no prejudice to any of the parties
13 by accepting all the documentation.

14 That being said, we now get into
15 the issue that is before us. The Court found
16 that the Board did not explicitly consider or
17 apply any of the Unabridged Webster's
18 Dictionary before concluding that the sixth
19 level is an attic.

20 And so then our obligation right
21 now is to analyze the three different
22 Webster's Unabridged Dictionary definition of

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1 the word "attic" and determine how those apply
2 to the facts of this case and how that either
3 confirms that the sixth floor is an attic or
4 confirms that it is now.

5 Then now looking at the Webster's
6 definition, we have three different
7 definitions. We have them labeled as:

8 Definition A: Which is a low story
9 or vault above the main order or orders of a
10 facade in the classical style.

11 Definition B: A room or rooms
12 behind an attic, and;

13 Definition C: Part of the
14 building immediately below the roof and wholly
15 or partly within the roof framing a garret or
16 storage space under the roof.

17 Looking at these three definition,
18 I think that Definition A while providing some
19 clarification as to what exactly an attic is,
20 is not absolutely clear.

21 Definition B, considering that
22 they're using the term that they're trying to

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1 define in the definition, provides no
2 assistance in my opinion.

3 So, then I moved to Definition C,
4 which states as I read earlier, "part of the
5 building immediately below the roof."

6 Looking then at our case file and
7 the different briefings, I turn to KCA's
8 Exhibit 100 and they have attached as an
9 exhibit, Attachment 4 portions of the
10 transcript. And I think that this was
11 provided mostly on my point as to, in my
12 opinion, how to determine whether the area was
13 immediately below the roof.

14 And this section Chairperson
15 Griffis at the time was inquiring with the
16 architect, I believe, Mr. Smith or their
17 expert Mr. Smith. And they provided in the
18 record that when you looked up, you looked up
19 directly to the wooden joist or beams.

20 And so by reading that I
21 understand the facts as they are in evidence
22 to me. And if -- I'm not, I'm 5 foot. But if

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1 I were 6'8", I could look up and put my head
2 between one of the four or five wooden joists
3 and see the remainder of the space and look up
4 to the roof, thus I would be immediately below
5 the roof.

6 There is nothing for me to believe
7 that there is any sort of drywall or ceiling
8 structure that would impede my ability to put
9 my head up and through those rafters, or
10 however you want to term them, but those roof
11 structural aspects to see the remainder of the
12 area that I consider to be directly or
13 immediately below the roof structure.

14 That being said, I would state
15 that the areas in question do fall within
16 Webster's definition 1C, which is immediately
17 below the roof.

18 That being said, I'll open up the
19 floor to additional Board deliberation as to
20 whether they have any additional perspectives
21 on that or any expansions.

22 MEMBER DETTMAN: Madam Chair, I

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