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BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

Appeal of Kalorama Citizens Association from The Decision of DCRA Issuing Building Permits B455571 & B455876 Notwithstanding Non-Compliance of Plans with FAR, Height, ,and Setback Requirements with respect to 5-story Apartment in R-5-D Zone at 1819 Belmont Road (Square 251, Lot 45).	) BZA No. 17109

Joint Opposition of Appellant Kalorama Citizens Association And Advisory Neighborhood Commission 1C to Montrose LLC's Motion to Dismiss

Introduction

On February 17, 2004, Montrose LLC ("Montrose") filed a Motion to Dismiss ("*Motion*"), arguing that the above-captioned appeal of the Kalorama Citizens Association ("KCA") failed to comply with the 60-day deadline for filing appeals established by 11 DCMR § 3112.2(a), and is barred by the doctrines of laches and estoppel. Specifically, while Montrose concedes that KCA's appeal is timely as to the claim that the building exceeds the allowable FAR, Montrose asserts that KCA's November 10 appeal was not timely with respect to the claimed violation to the roof deck and balustrade and the roof structure, which KCA challenges under the Height of Buildings Act, D.C. Code § 6-601.05(b). Montrose argues that KCA had constructive and actual notice of the Height of Buildings Act violations that are the subject of its November 10, 2003 appeal. Montrose also claims that the appeal should be disallowed as to all issues on grounds of laches and estoppel. As we now discuss, each of these defenses is without merit.

Summary of Appellant's Reply

The decisions of this Board makes clear that KCA was not chargeable with constructive notice or knowledge of the Height of Buildings Act violations, for purposes of starting the 60-day clock for filing appeals in 11 DCMR § 3112.2, by the issuance of the March 11, 2003 building permit or the published or circulated notice of that permit. Nor were the zoning violations alleged in this appeal discernable on the face of the permit, but could only be identified through a review of the building plans and drawings that were the basis for the permit.

Moreover, the regulatory history of 11 DCMR § 3112.2 makes clear that the time period for filing an appeal does not begin to run where an appellant has been denied access to these building plans and drawings. That is what occurred here. Once the on-the-ground construction made clear that the building was being constructed in excess of applicable height and set back requirements, KCA promptly filed a notice of its intent to appeal, and immediately undertook diligent and sustained efforts to secure information about the project by seeking copies of the plans on file with D.C. Department of Consumer and Regulatory Affairs ("DCRA") – efforts that were obstructed both by the actions of Montrose and by the actions of the DCRA. Despite this lack of information, KCA successfully sought and secured administrative relief – a stop work order – resulting ultimately in Montrose's revisions of its plans pertaining to the building height and roof structures. Following issuance of the revised October 6 building permit, KCA finally obtained the plans submitted by Montrose on October 17, 2003, and its appeal of the revised permit, filed on November 10, 2003, is therefore timely.

In any event, the November 10 appeal was effective as to all grounds raised, and not just the FAR ground. Contrary to Montrose's representation, the plans on which DCRA's October decisions were based, attached as Exhibit C and D to Montrose's motion, displayed all the non-complying features of the project -- roof deck and railing, attic, basement and (modified) roof structure -- that KCA challenges, including those related to the Height of Buildings Act. KCA's focus on the final, revised October permits rather than the superceded March 11 permit was entirely appropriate, in order to reflect the current state of DCRA's authorization, in light of Montrose's piecemeal, incremental approach to permitting the project. KCA's failure to explicitly identify the March 11 permit in its appeal is at most no more than a technicality that effects no material change in the substantive content of KCA's appeal, which could easily be rectified by permitting KCA to amend its November 10 appeal to make explicit reference to the March 11 permit.

Finally, Montrose has not shown the existence of conditions necessary to prove laches or estoppel. Montrose cannot show that it incurred any "cost overruns" or "delays" during the 23-day period between October 16, when KCA was first chargeable with notice of Montrose's zoning violations, and the filing of its appeal on November 10. Rather, any delays are likely attributable to the issuance of a "stop work order" by DCRA, based on Montrose's own actions in undertaking demolition not authorized by its permit, which Montrose failed to appeal, and Montrose's voluntary decision to revise its building permit application in October 2003 to address the zoning violations identified at that time by DCRA. Further, Montrose's own lack of clean hands in this matter bar it from invoking the doctrines of laches and estoppel, which, because of the public interest

in the enforcement of zoning laws, are available in zoning cases only in extremely limited circumstances and where the equities weigh heavily in favor of the party seeking their protection. Therefore Montrose's Motion to Dismiss should be denied.

Argument

I. KCA's Appeal Was Filed Within 60 Days of When KCA Had Notice and Knowledge of All of the Zoning Violations That Are the Subject of This Appeal.

A. The Mere Issuance of a Building Permit Is Not Sufficient To Charge Appellants With Constructive Notice or Knowledge of Any Zoning Violations Contained Therein.

The Zoning Regulations provide that an appeal of a building permit or other administrative decision must be filed "within 60 days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier." 11 DCMR § 3112.2(a). Montrose suggests that KCA had "constructive knowledge" of the Height of Buildings Act violations that are the subject of this appeal because notice of the building permit was published in the DC Register and contained within a list distributed to the ANC[1], and posted on the building.[2] Motion to Dismiss, at 9. This argument is without merit.

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[1] Montrose's assertion that notice of the March 11 building permit was published in the D.C. Register is incorrect. *See* Exhibit 1, Declaration of Alan J. Roth, ¶¶ 4-5.

[2] Montrose also asserts, without any evidentiary support, that it displayed the March 11 permit on the building. Motion to Dismiss, at 2. However, as noted in the *Intowner* article attached as Exhibit 4 to KCA's Prehearing Statement, this building permit was not posted on the building until September of 2003; prior to that, only a December 26, 2002 permit authoring "Interior Demolition/Excavation only" was displayed, and only inside the building. The absence of posted building permits was specifically called to DCRA's attention by KCA on September 10, 2003, and an array of permits appeared on the front of the building only after a stop work order had been issued on September 12, 2003. See Declaration of Ann Hughes Hargrove and John Lawrence Hargrove, ¶¶ 5 and 11.

There is no support for the notion that the bare bones issuance of a building permit or any list of permits circulated by DCRA is sufficient to constitute the requisite notice under §3112.2(a).[3] Nothing in the issuance of the permit or the description of the action authorized on the face of the permit give the public notice or knowledge of zoning errors that may be made in the issuance of these permits. The building permits themselves do not normally describe the building dimensions in any detail that would enable the viewer to determine that the building meets the area requirements of zoning. The generic lists of building permits erratically circulated by DCRA are even less informative. Rather, as the D.C. Court of Appeals has held, it is the plans on file with DCRA that provides this notice. *See Biens v. DCBZA*, 572 A.2d 122, 126 (D.C. App. 1990) (holding that "the Board could not properly rely on the three-month period between the issuance of the building permit and the start of construction" since "[n]othing in the record suggest that the [appellants] had notice, or reasonably should have had notice, of the plans for construction until the work actually began")

Here, even if the March 11 permit had been properly displayed, on its face this permit would not have provided notice to the public that the permit authorized a building in excess of the Height Act. The March 11 permit simply states that it is for "Alteration and repair of exist. Bldg. Addition in rear, add 2 floors plus attic; retaining wall & stair at rear," with the additional notation "5 stories plus basement." *See* Appeal, Attachment 2. It is possible to have a five-story building with basement and attic that conforms to the height and set back requirements of the Height of Buildings Act. Therefore, even had it been posted and visible, nothing on the face of this permit was sufficient to place KCA on notice that in fact, the building would include a roof, roof deck and railing that exceed

the building height limit imposed by the Height of Buildings Act, or that the roof structure would not comport with the set-back requirements established by that Act. *See* D.C. Code § 6-601.05(b).

The 60-day filing deadline established by the zoning regulations was not intended to charge citizens with the obligation to appeal building permits that, on their face, do not provide sufficient information to place the public on notice of zoning violations discernable only from review of technical construction plans and drawings that are not readily available to the public. Rather, rulings by this Board dealing with the timeliness of appeals indicates that the intent of the 60-day filing requirement is to bar only those appeals that occur more than 60 days after citizens had actual information sufficient to disclose the nature of the zoning violations.

For example, in *Appeal of Darrel J. Grinstead*, BZA Appeal No. 16764 (May 22, 2002), this Board held that an appeal of a building permit on the grounds that the permit authorized building heights and set-backs in excess of those permitted matter-of-right was timely, even though the appeal was filed more than seven months after the issuance of the permit, since it was filed within 60 days of the Appellant's receipt of a letter from DCRA specifically discussing the zoning issues that were the subject of the appeal. As this Board noted in *Appeal of Robert Lehrman*, BZA Appeal No.16848, at p. 7 (May 8, 2003), the *Grinstead* decision stands for the proposition that a "bare bones permit" does not start the clock running for purposes of an appeal's timeliness, as distinct from a letter from DCRA that "fully addressed the issues raised."

The *Grinstead* case is directly on point to this case. In both *Grinstead* and the present case, the height and set back violations were not discernable from the face of the

building permits, and therefore the "bare bones" issuance of these permits was not sufficient to charge Appellants with notice or knowledge of these violations. Accordingly, there is no support for Montrose's argument that mere issuance of the building permit, and published notice thereof (which never actually occurred), gave KCA notice or knowledge of the zoning violations sufficient to start the 60-day clock running under 11 DCMR §3112.2(a).

B. KCA Did Not Have Actual Notice of the Zoning Violations By Virtue of Either the Alleged Posting of the Permits or Meetings With the ANC Because Only Review of the Plans On Which The Permits Were Based Provides The Requisite Notice or Knowledge.

Montrose also argues that KCA had actual knowledge of the Height of Buildings Act violations because elevation drawings were displayed during the course of a presentation made by Montrose to ANC 1C on March 19, 2003. Motion to Dismiss, at 3, 8. However, this assertion is not correct. On March 19, 2003, the developers came to the ANC, at a meeting of its Zoning, Planning and Transportation Committee, with a request for support for a curb-cut to permit removal of a tree in public space and access to a proposed inside parking space through the front bay.

In fact, while Montrose's representatives displayed limited drawings in connection with their request depicting the proposed curb-cut, driveway and parking space, these drawings did not address the height of the building or its scale relative to surrounding structures. The height of the proposed building was not presented or discussed at that meeting at all, except that, in response to a specific question, Montrose indicated that they proposed to add one story to the building. *See* Declaration of Ann Hughes Hargrove and John Lawrence Hargrove ("Hargrove Declaration"), ¶ 6; Exhibit 2, Declaration of Bryan Weaver, ¶¶ 4-5.

In general, Montrose's presentation at the March 19 meeting conveyed the impression of a much more modest project, involving substantial renovation of an existing building, than the project that was in fact underway -- which eventually entailed total demolition of the existing building except for a portion of the façade, and erection of a new building in its place. In fact, one week earlier, Montrose was issued the March 11 permit for the addition of "2 stories" – a fact not mentioned by Montrose at the March 19 meeting and of which KCA was unaware at that time due to Montrose's failure to properly post the permit – raising questions as to the candor of the developers' response to the question posed about how high the building would go.

Moreover, at that point, building construction was not sufficiently underway to alert KCA to the possibility that there were Height Act violations. By April, 2003 the developers had removed the front stoop of approximately 5 feet in height extending into public space to the sidewalk; removed the front berm of approximately 1 foot in height along with a tree; removed the low concrete retaining wall abutting the sidewalk; and enlarged a ground-level window opening, apparently to accommodate a planned driveway and garage. This prompted concerns by KCA and others about the effect of the project on the historic significance of the building and the neighborhood, which is not yet designated as a historic district but for which the first formal steps toward such designation have already been taken by KCA. As a result, the focus of community concerns at that time was on historic preservation since the construction of the building had not reached a point at which the Height Act violations were identifiable.

For that reason, discussion of the 1819 Belmont Road construction at KCA's May, 2003, meeting focused exclusively on the demolition of the stoop and partial

demolition of the façade to enlarge the ground level opening—*but not height or scale of the building*— and the need for historic district designation for the area (see photo circulated at that meeting, Exhibit 3). Montrose's claim (*Motion*, p. 9) that the *Intowner* Article states that the height of the building was complained of at that meeting is false. To the contrary, the article, which was attached to KCA's pre-hearing statement and on which Montrose relies in its Motion, makes clear that the focus of discussion at that meeting was on the need for a historic district "to protect our neighborhood against projects such as the façade demolition now under way by outside developers in the 1800 block of Belmont." KCA Pre-hearing Statement, Exhibit 5. The article reports no complaints about the height of the building at the May meeting, and there were no such complaints, precisely because KCA had no notice or knowledge of the excessive height planned for the structure at that time. Accordingly, contrary to Montrose's unsubstantiated assertions, at no time did Montrose provide KCA with information concerning the building height and roof structure set back that would constitute actual notice of the violations complained of herein.

KCA was not alerted even to the possibility of Height of Buildings Act violations until at the earliest September 1, 2003, which, as Montrose concedes, was when the framing for the top levels was under construction. Motion to Dismiss, at 9. Not until early September, as framing for the upper levels was erected, did the construction evolve into the narrow towering structure strikingly out of scale with its neighbors and visible from distant points in Adams Morgan that is depicted in *Prehearing Statement*, Exhibit 4 and in Attachment 1 to this Declaration. At that point, KCA realized that the height of the building and the set backs of the roof structure did not appear to comport with the

Height Act's height and set-back restrictions, and promptly filed a notice of intent to appeal on the basis of zoning and Height Act violations (*See* Exhibit B of *Motion to Dismiss,*). As will be discussed in more detail in Section I.C., below, KCA then immediately sought to review the drawings and plans that were the basis for the permit in order to determine whether these concerns were well-founded.

Montrose also suggests that knowledge of an observed feature of the project that arouses suspicions of a violation of the Zoning Regulations – in this case, when the full height of the roof structure framing became apparent on or about September 1, 2003 -- should be sufficient notice of the zoning violations to start the 60-day clock running for filing an appeal. Motion to Dismiss, at 9. However, while it may be that there are some circumstances where mere observation of an obvious feature of the project may be sufficient notice of a violation to allow an appellant to properly frame an appeal,[4] that is not the case with respect to the zoning violations raised in this appeal. In this case, *mere observation of the apparently excessive height of the building was not sufficient to give KCA the information it needed to determine that the building height and setbacks violated the Height Act or that there were FAR violations. For this, access to the plans was essential.* For without the plans:

- KCA could not have known even where the "attic" was—or guessed that it was anything other than the narrow space between the roof rafters and ceiling beams, let alone knowing whether it was included in FAR;

[4] For example, observations of the project under construction might be sufficient to identify violations of allowable lot occupancy requirements, since a citizen could measure a foundation that seems to exceed allowable lot occupancy, or violations of a tree and slope overlay zone, where observation can easily identify that specially protected earth has been removed or protected trees have been felled (as we understand was the case in *Appeal of Henry Sailer et al.*, BZA Appeal No. 17054, currently on the Board's docket, in which certain decisions on untimeliness of an appeal have been made)..

•KCA had no way of knowing what the function of the top level of the building was, or its height, floor area, or position in relation to the perimeter of the building;

•As is evident from its correspondence with DCRA, without review of the plans, KCA could only have guessed the height of the roof parapet;

•KCA could have known virtually none of the relevant facts about the basement, including, notably, its size, the means of calculating its gross floor area, and the results of that calculation;

• KCA could not have known of even of the existence of the roof deck and balustrade, which had not yet been constructed, much less its height.

Accordingly, neither the permits themselves, nor KCA's observation of the building, were sufficient to charge KCA with notice or knowledge of the Height of Buildings Act and other zoning violations that are the subject of this appeal.

C. KCA Was Not Chargeable With Notice or Knowledge of the Height Act Violations Until KCA Finally Obtained the Plans Disclosing the Height Act Violations on or about October 17, 2003

As noted above, KCA was not alerted even to the possibility of Height of Buildings Act violations until September, 2003, when the on-the-ground construction proceeded to the point sufficient to raise concerns that the height of the building and the set backs of the roof structure likely did not comport with the Height of Buildings Act. Once the one feature of the building that was obvious enough to raise alarm just by being visible -- its height-- emerged into view, KCA immediately filed a notice of intent to appeal, and embarked on a long and frustrating effort to review the building plans, a task that was made all the more difficult at the outset due to the absence of displayed permits (see note 2, above). *See Prehearing Statement*, Exhibit 5. KCA began with a request in

person at DCRA, only to be repeatedly refused on various grounds (including alleged disarray in the filing system and inability to locate the file). *See* Hargrove Declaration, ¶ 10, and Exhibit 1, Declaration of Alan Roth). On September 10, 2003, and again on September 15, KCA wrote DCRA complaining of DCRA's denial of the plans and again asking for the plans, noting possible building height violations, raising questions about the possible exclusion of the basement from FAR calculations, and urging that a stop work order be issued. *See* Exhibit 4, and Hargrove Declaration, ¶ 11.

Still lacking access to or copies of the plans, and thus the ability to determine in what respects, if any, the project did not comply with the Zoning Regulations, or whether there were grounds for an appeal, KCA filed a Notice of Intent to Appeal with the Office of Zoning on September 16, 2003. *See* Montrose Motion to Dismiss, Exhibit B. Still lacking the plans on September 22, KCA filed a Freedom of Information Act Request for the plans with DCRA. *See* Exhibit 5. At the meeting of the ANC on October 1 (attended by representatives of Montrose) the KCA Zoning Chair asked the developers for a copy of the plans; the request was refused. *See* Hargrove Declaration, ¶ 18. Ward 1 Councilmember Jim Graham also urged DCRA to make the plans available to KCA. *See* Hargrove Declaration ¶ 21; Exhibit 1, Declaration of Alan Roth, ¶ 17.

During this time, work on the project remained halted due to the issuance of the stop work order. However, on October 6 and then 16, DCRA issued two permits, which authorized work on the building to resume. The October permits corrected three of the unlawful features of the original permit – the roof height, roof structure floor area, and roof structure rear setbacks – features that had been drawn to DCRA's attention by KCA's efforts. However, unbeknownst to KCA (because KCA had yet to secure access

to the plans), the revised permits remained noncompliant with the Height of Buildings Act requirements or with FAR requirements.

KCA finally received some of the plans on October 17. *Id,* ¶ 22. Thereafter KCA received a reply from DCRA, dated October 23, 2003, to the September 22 FOIA request, indicating that the documents had been located and copies could be picked up. KCA's review of the plans identified that the building height and setback, as well as the FAR, did not conform to the allowable maximums. Accordingly, KCA filed its appeal on November 10, 2003, less than 60 days after receiving access to these plans

The regulatory history of 11 DCMR § 3112.2 makes clear that the Zoning Commission recognized that there were situations in which "the denial of access to permit files and plans might affect a person's ability to file a timely appeal." *Zoning Commission Order No.* No. 02-01, at p. 2 (attached hereto as Exhibit 6). The Zoning Commission's order adopting §3112.2 goes on to state: "The Commission agrees that the denial of access to public information might result in delay; however, the rule addresses such delays by providing that the appeal period begins to run from the time a person had actual or constructive knowledge of the administrative decision complained of and by providing that the Board may extend the appeal period in exceptional circumstances." *Id.* As the foregoing discussion makes clear, this is plainly such a situation, since DCRA failed to make even a portion of these plans available to KCA until October 17, 2003, more than five weeks after KCA urgently sought to review these plans

Thus, this case is distinguishable from the *Appeal of Robert Lehrman*, BZA Appeal No.16848 (May 8, 2003), in which this Board found that an appeal was untimely where the appellant, having sought and obtained a determination by DCRA, which found

no violation, chose not to appeal at that point, but to continue over a period of months to press DCRA for reconsideration of its initial decision, and then appealed from the denial of reconsideration. In *Lehrman,* DCRA's initial decision provided the appellant with all the information he needed to appeal. In the present case, by contrast, as discussed above, KCA lacked sufficient information to formulate a timely appeal of the March 11 permit until it was provided access to the building plans.

Further, KCA's initial efforts in persuading DCRA that the March 11 permit was issued in error was successful, and resulted in the issuance of a stop work order and a revised building permit. As in *Appeal of Grinstead, supra,* KCA appealed promptly on the basis of the changed set of authorizations that were in place as a result of the revised permits issued in October. By contrast, Lehrman's efforts did not succeed in persuading DCRA to revise its initial permit, and Lehrman's appeal was therefore of a *refusal* to issue a new permit. Thus, the concern expressed in *Lehrman* of allowing "disgruntled individuals to endlessly extend the appeal period through repeated requests for DCRA to reevaluate its last stated position" is not present here.

Moreover, in this case, KCA was prevented from acquiring knowledge and information necessary to identify the zoning violations, and thus file an earlier appeal, by a series of acts and omissions on the part of Montrose. These included: the misleading December 26, 2002 interior demolition permit, which was displayed only inside the building at some time prior to September 2003, and which was subsequently found by DCRA to have been inconsistent with the project actually undertaken; their misleading statement about height to the ANC Committee on March 19, 2003; their unlawful failure to display the March 11 permit until after the building had been constructed to a point

where its shocking height had become obvious and a stop work order had been issued; and their refusal on October 1 to make the plans available to KCA. Accordingly, KCA did not have knowledge or information sufficient to start the clock running for purposes of filing an appeal until it finally received these plans in October 2003.

In the alternative, these actions by Montrose and DCRA constituted exceptional circumstances outside of KCA's control and not reasonably foreseeable, substantially impairing its ability to file an appeal, as envisaged in 11 DCMR § 3112.2(d), entitling it, on this additional and independent ground, to an extension of the 60-day deadline, as contemplated by *Zoning Commission Order No.* No. 02-01.

II. KCA's Appeal Encompasses All Work Authorized by the Three Building Permits.

A. KCA's Appeal was Effective as to All Grounds Raised Because the Plans on the Basis of which DCRA's October Decisions were Made Displayed all the Non-complying Features of the Project

As Montrose concedes, KCA's November 10 appeal was certainly timely as to DCRA's October 2003 permits, issued "to adjust the height of the building to 70'-0" [and] clarify FAR calculations, as per attached drawings," and to "revise penthouse roof structure per DC request." *See* Appeal, Attachment 2. However, Montrose incorrectly claims that the October 6 revised permit made changes relevant only to the FAR calculations, based on the assertion that the accompanying drawings "do not depict in any way the roof deck and railing, nor do they address the setback of the roof structure. Those details are provided only in the Original Permit." Motion to Dismiss, at 5. Based on this characterization of the plans, Montrose argues that KCA's appeal is not timely as to KCA's claims concerning the unlawful building height and setback.

Contrary to Montrose's representation, the plans accompanying the revised October permits plainly displayed all the non-complying features of the project-- roof deck and railing, attic, basement and (modified) roof structure including floor area and setback -- that KCA challenges, including those related to the Height Act. *See* Motion to Dismiss, Exhibits C and D. The display of these features on the plans reasonably leads to the conclusion that these noncompliant features were encompassed by that permit.

Moreover, KCA's written appeal specifically stated that the errors that KCA was appealing were the failure of the plans accompanying the permits to meet the height and setback requirement of the Height of Buildings Act. In addressing its appeal explicitly to the October permits, KCA was merely ensuring that its appeal comported with the current state of DCRA's authorizations to Montrose as of the time of the appeal.

Assuming, for purposes of argument, that KCA's timely appeal of the roof height and setback issue relates in part to the subject matter of the original, March 11 permit, as Montrose implicitly acknowledges, this is a technicality in the wording of this appeal that does not effect any material change in the substantive content of the appeal. This technicality can be rectified simply by permitting KCA to amend its appeal to include explicit reference to the March 11 permit. *See Sisson v. DCBZA*, 805 A.2d 964 (D.C. 2002) (noting that BZA permitted an appellant, on the day of the hearing, to amend her appeal to include all five of the permits issued with respect to the property, and not just the three permits specifically mentioned in the appeal). To the extent a motion is necessary to effectuate this technical amendment, KCA so moves.

B. DCRA's Cumulative, Piecemeal Approach to Permitting Deprived KCA Of Any Ability to Understand the Full Scope of the Work Authorized by the Permits Until the Final Permits Were Issued.

Allowing KCA's appeal either to proceed on the basis of the October permits and plans, as just discussed, or to include and relate back to the March 11 permit is necessary in order to avoid prejudicing KCA as a result of the piecemeal, incremental manner in which the project was permitted, all of which was beyond KCA's control. As noted above, Montrose's project was the subject of no less than four formal building permits, each of which, individually failed to reflect accurately the entire scope of the project. First, on December 26, 2002, Montrose obtained a demolition permit for "Alteration and Repair – Interior Demolition/Excavation only" and then a building permit was issued to permit the construction of additional two additional stories. However, it soon became clear that Montrose had demolished the building virtually in its entirety, and that the new building would exceed the 70 foot maximum allowable height, ~~and~~ an observation that was corroborated by DCRA inspection and review of the building plans. See DCRA "Fact Sheet 1819 Belmont Street, NW" (September 15, 2003), ¶ 4 (Exhibit 7). Accordingly, in response to KCA's urgent pleas for immediate corrective action, DCRA issued a stop work order on September 12, 2003.

On September 29, 2003, Montrose submitted a revised permit application, ostensibly to address DCRA's determination that the roof height exceeded the 70 feet limit established by the Height Act. On October 6, 2003, Montrose received a new permit on the basis of plans reflecting certain revisions in the project so as to reduce the maximum height of the roof to 70 feet covering a stairway opening and revised FAR calculations. On October 17, another revised permit, relating again to the building height was issued, for work to revise penthouse roof structure per DC request." However, as KCA eventually determined when it finally was able to review these plans

after October 17, even as revised, the building violated height, set back, and FAR requirements, and thus, KCA filed the instant appeal.

As the foregoing makes clear, this case is remarkably similar to *Sisson v. DCBZA*, 805 A.2d 964 (D.C. 2002), in which the Court held that an appeal filed more than two months after the first of a total of five building permits was issued for a renovation project was timely, since the owner's piecemeal approach to permitting deprived appellant of knowledge of the whole project until the last permit had been issued. As in this case, the work in *Sisson* was authorized by a total of five permits for different aspects of the project, and each of the individual permits failed to reflect the entire scope of the renovations. *Id.* at 970. In *Sisson,* as in the present case, the owner demolished an existing structure on his property "without authorization." *Id.* Likewise, DCRA expressly determined that Montrose's "demolition exceeded the scope of the permit," which authorized only interior demolition. *See* Exhibit 7, DCRA "Fact Sheet 1819 Belmont Street, NW" (September 15, 2003), ¶ 4.[5]

Nor is this case at all similar to *Woodley Park Community Ass'n v. D.C Board of Zoning Adjustment*, 490 A.2d 628 (D.C. 1985), on which Montrose relies. As the Court noted in *Sisson, Woodley Park* is distinguishable because the issue here pertains to renovations on private residential property, whereas *Woodley Park* involved the construction of a hotel. *Sisson,* 805 A.2d at 970. Moreover, as the Court in *Sisson* explained, in *Woodley Park*, the property owner and the community group engaged in extensive negotiations that provided "BZA appellants with ample opportunity to become

[5] In addition, on January 31, 2003, Montrose applied to the Public Space Committee for a curb cut authorization so that it could put a driveway and garage in the front of the "basement" level (at grade). Without waiting to receive either ANC or Public Space Committee approval, the developer then demolished almost the entire grade-level facade to create an opening to accommodate the planned garage.

thoroughly informed about and to raise objections relating to height, setback and accessory use." *Sisson,* 805 A.2d at 971. In the present case, as in *Sisson*, no such discussions took place.

To the contrary, in this case, Montrose actively misrepresented the height of the renovated building. For example, at the ANC meeting held on March 19, 2003, representatives of Montrose represented that they planned to build only "one story" above the existing three story plus basement structure. *See* Hargrove Declaration, ¶ 6 ; Weaver Declaration, ¶¶ 4-5. This representation was directly belied by the permit, obtained by Montrose only eight days earlier (but not posted), which permitted the construction of five stories (plus "basement" and "attic"). Moreover, Montrose actively withheld information that would have permitted an earlier appeal by refusing KCA's request for a copy of the building plans, and by failing to post the building permit. All told, the effect Montrose's conduct deprived KCA of information it needed to file a timely appeal until the revised permits were issued, and DCRA made the plans available to KCA on October 17, and thereafter. KCA's appeal, filed less than one month later, was clearly timely.

II. Montrose Has Not Satisfied The Heavy Burden Required to Invoke the Equitable Defenses of Laches or Estoppel, and Is Barred From Doing So By Its Own Unclean Hands and Its Voluntary Decision To Revise its March 11 Permit.

As the D.C. Court of Appeals has repeatedly noted, "the defenses of estoppel and laches are judicially disfavored in the zoning context because of the public interest in enforcement of the zoning laws. *Biens v. DCBZA*, 572 A.2d 122, 126 (D.C. App. 1990); *Sisson v. DCBZA*, 805 A.2d 964, 971 (D.C. 2002). In this case, Montrose has failed to satisfy its heavy burden of proof on either of these equitable defenses.

A. The Defense of Laches is Not Available to Montrose.

"Laches 'is rarely applied [in the zoning context] 'except in the clearest and most compelling circumstances.'" *Sisson v. DCBZA*, 805 A.2d at 971 (citing *Biens v. DCBZA*, 572 A.2d at 128). Laches will not provide a valid defense unless two tests are met: the party asserting the defense "has been prejudiced by the delay and that delay was unreasonable. " *Id.* at 972. "[T]he party asserting the defense has the burden of establishing *both* elements." *Id.* (citations omitted, emphasis in original). Laches must be determined "based on the entire course of events." *Id.*

As noted above KCA did not have notice or knowledge of the zoning violations sufficient to formulate an appeal until it was able to review the building plans upon which the permits were based. As is also explained above, KCA acted in diligently and with great urgency in attempting to secure information about the project from both DCRA and Montrose, and was prevented from doing so by Montrose itself, which failed to properly display the building permit, misrepresented the increase in height at a public ANC Committee meeting attended by KCA representatives, and refused KCA's request for a copy of its plans. Thus, KCA did not have notice or knowledge of the zoning violations sufficient to take an appeal until the plans were made available on or about October 16 or 17. KCA's failure to file an appeal prior to October 17, was therefore not unreasonable.

Nor was KCA's delay of approximately 23 days after finally receiving partial plans on October 17 before filing its appeal on November 10 unreasonable. KCA was not simply sleeping on its rights during this time period. Rather, during this time period, KCA was engaged in active efforts to secure additional information relevant to its appeal: it reviewed the building plans, had numerous meetings and conversations with permitting

officials, presented the matter to both the ANC and the KCA monthly meeting, and attempted to secure from DCRA copies of the initial FAR worksheets on the project, certification of height of the revised roof, and other materials. *See* Hargrove Declaration, ¶¶ 22, 23, 25, and Exhibit 8,letter to Denzil Noble, DCRA from Ann Hargrove (Jan. 22, 2004), attached to KCA's motion requesting copies of documents from DCRA. On the basis of similar efforts, the Court in *Beins* held that a delay of 32 days between when an Appellant had notice of the zoning violation and when he took an appeal was not unreasonable, stating

> we think it understandable that [Appellant] would spend several weeks seeking advice about the merits of his complaint before initiating the appeal process. Indeed, a delay of that length and for that purpose is essentially what a statutory appeal period contemplates.

Beins, 572 A.2d at 127. Therefore, KCA's delay of 23 days in filing its appeal was not unreasonable.

As the Court noted in *Sisson,* both elements of unreasonable delay and prejudice must be proven in order to make a claim of laches. *Sisson*, 805 A.2d at 972. Here, as was the case in *Sisson,* since the element of unreasonable delay is not present, it is not necessary to determine whether Montrose has been prejudiced. *Id.* at 972. n. 8. In any event, however, there is no evidence that the expenditures claimed by Montrose were made after October 17, and thus, prior to when KCA first was chargeable with knowledge of the zoning violations alleged in the appeal.

Montrose claims only that it incurred "cost overruns and legal fees" that were "directly attributable to the delays caused by the appeal," but fails to indicate in either the motion or the attached affidavit that these "cost overruns and legal fees" were incurred during the period between October 16 and the date KCA's appeal was filed, or indeed,

that Montrose encountered any delays at all during this 23-day period. *See* Motion to Dismiss, Exhibit G, ¶13.[6] In fact, it is likely that these alleged "cost overruns" and "delays" occurred well before October 16, and are the result of the issuance of the "stop work" order by DCRA, which was based on DCRA's determination that Montrose's "demolition exceeded the scope of the permit," which authorized only interior demolition. *See* Exhibit 7, DCRA "Fact Sheet 1819 Belmont Street, NW" (September 15, 2003), ¶ 4. Likewise, any additional costs incurred by Montrose are in all likelihood attributable to the fact that Montrose elected to revise its permit application to address DCRA's determination that the building plans, as authorized by the March 11 permit, did not comport with the zoning restrictions on building height.

Therefore, there is no evidence that these alleged delays and "cost overruns" are attributable to KCA's 23-day delay in filing its appeal. As one court noted, "this case demonstrates the acute difficulty . . . in assigning blame for prejudice, when the delay has been as short as it was here." *See Beins,* 572 A.2d at 128 (finding no prejudice where the property owner acknowledged that the prejudice to them would have been substantial even if the [Appellants] had noted their appeal immediately after" being placed on notice of the zoning violation.)

More importantly, Montrose has waived its ability to complain of these delays and "cost overruns." Montrose failed to appeal the "stop work order" despite its right to do so under the construction code (*See* 12 DCMR § 122.1), and Montrose voluntarily

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[6] Moreover, it is debatable whether "legal fees" allegedly incurred by Montrose can be the basis for a claim of prejudicial delay in filing an appeal, since there were no legal proceedings requiring the assistance of counsel in which legal costs could have reasonably been incurred prior to the filing of this appeal. Again, to the extent that Montrose saw fit to consult legal counsel following the issuance of the "stop work order," these legal fees are not attributable to KCA's appeal but to its own actions in conducting unauthorized demolition and exceeding the zoning height restrictions .

acquiesced in DCRA's determination that the March 11 permit did not comport with zoning when it submitted revised permit applications. Montrose's voluntary decision to make changes in its project plans cannot, therefore, constitute prejudice sufficient to overcome the strong public policy disfavoring application of the doctrine of laches in the context of zoning appeals.

B. Montrose Has Failed To Prove The Elements of Estoppel.

The D.C. Court of Appeals has repeatedly stated that it is doubtful that the affirmative defense of estoppel can be asserted against a private party, such as KCA, as opposed to the District. *See Rafferty v. DC Zoning Comm'n*, 583 A.2d 169, 176 (D.C. 1990); *Saah v. BZA*, 433 A.2d 1114 (D.C 1981);and *Goto v. BZA*, 423 A.2d 917, 915 n.15 (1980). Assuming, solely for purposes of argument, that estoppel can lie against KCA, Montrose bears a heavy burden of showing the following elements: that 1) acting in good faith 2) on affirmative acts of the District 3) Montrose made expensive and permanent improvements in reliance thereon, and 4) the equities strongly favor it. *Sisson*, 805 A.2d at 972; Wiek, 383 A.2d at 11. Montrose has not proven the elements of estoppel.

First, Montrose cannot avail itself of the defense of estoppel because it did not act in good faith. To the contrary, Montrose's actions evidence bad faith from the very outset: Montrose unlawfully demolished virtually the entire existing building, failed to post its permits, removed a berm and stair, and excavated, on public space without a public space and other required permits, misrepresented the height of its building at community meetings, misrepresented to the District the portion of its project attributable

to renovation as opposed to new construction, and intentionally withheld information about the project from KCA.

Nor can Montrose show that it made expensive improvements in reliance on the District. Rather, the expenditures made by Montrose largely were made prior to the issuance of the revised permits in October 2003. Moreover, since the roof deck and railing have not yet been built, Montrose cannot prove this element of estoppel for these items. To the contrary, Montrose removed the rear half of the roof structure in September, belying Montrose's assertions the roof structure improvements were permanent. Moreover, after the issuance of the stop work order and after Appellant's notice of appeal in September, Montrose was on notice that it might not be able to justifiably rely on the March permits. Montrose has also failed to show whether the alleged expensive and permanent improvements (for the roof structure or "attic" space) were made before or after the stop work order and notice of appeal. (*See Interdonato v. BZA*, 429 A.2d 1000 (1981) in which the court ruled that petitioners could not have justifiably relied upon a Board order which they were fully aware was under appeal.)

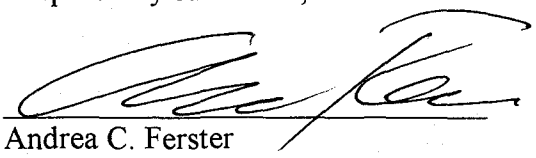
Finally, to the extent Montrose believes that it justifiably relied on the March 11 permit in incurring expenses to the property, Montrose has waived this argument. Unlike the situation in *Saah* and *District of Columbia v. Cahill*, 54 F.2d 453 (D.C. Cir. 1931), DCRA never revoked any permit on which Montrose relied in making improvements to its property. To the contrary, Montrose failed to appeal DCRA's issuance of a "stop work order," and instead voluntarily submitted applications for a revised permit to address DCRA's concerns. By these actions, Montrose has waived any claim that that the March 11 permit did not validly authorize Montrose to proceed with the project, and

waived any claim of estoppel with respect to the matters within the scope of the revised permit. As noted above, the permit drawings depict all features of the project that are subject to this appeal, including the roof deck and railing, and the setback of the roof structure. Hence, any expenses or improvements made prior to October 2003 cannot form the basis of its estoppel argument.

Conclusion

KCA's appeal raises an issue of first impression -- namely, the creation of a new loophole that would allow developers to circumvent the carefully crafted limitations on building height and setback imposed by the Height of Building Act, D.C. Code § 6-601.05(b). BZA review of building permit appeals was intended to provide a broader public scrutiny of a permitting process that largely operates behind closed doors through bilateral negotiations between developers and the District -- a process that breeds the sort of mistakes that occurred here. Allowing Montrose's timeliness and other objections to bar this appeal would further close off the public from this process, and frustrate and circumvent the access of citizens to this important check on the permitting process. Accordingly, Montrose's Motion to Dismiss should be denied.

Respectfully submitted,



Andrea C. Ferster
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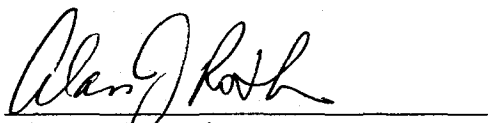
For: Kalorama Citizens Association



Alan Roth, Chairperson
Advisory Neighborhood Commission 1C
1845 Vernon Street, N.W.
Washington, D.C. 20009
(202) 667-7812

For: Advisory Neighborhood Commission 1C

March 2, 2004

CERTIFICATE OF SERVICE

I hereby certify that, on March 2, 2004, a copy of the Opposition of KCA and ANC 1C to Motion to Dismiss, Exhibits, and Hargrove Declaration was served by mail on:

Whayne Quinn
Carolyn Brown
Holland and Knight, LLP
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Washington, D.C. 20006

Denzil Noble
DCRA, BLRA
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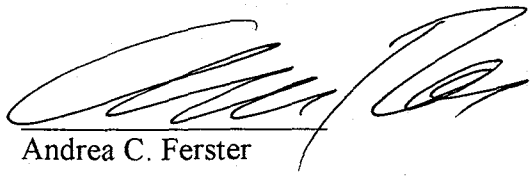
Washington, D.C. 20002



Andrea C. Ferster

DECLARATION

I, ALAN J. ROTH, being of the age of majority and otherwise competent to make this Declaration do state:

1. I reside at 1845 Vernon Street, NW in the Adams Morgan neighborhood of Washington, DC.

2. I am an elected Advisory Neighborhood Commissioner representing Single Member District (SMD) 1C01 since January 2001, and have been Chairperson of the Adams Morgan Advisory Neighborhood Commission (ANC 1C) since January 2003. In that capacity, I am aware of and have been authorized by ANC 1C to represent the ANC in the instant *Appeal of Kalorama Citizens Association,* BZA Appeal No. 17109, concerning permits issued at 1819 Belmont Road, NW, Washington, DC 20009.

3. In my capacity as ANC Chairperson, I regularly review the weekly DC Register after it arrives at our ANC's post office box, as well as all other mail addressed to me or to ANC 1C as a whole and pertaining to matters within our ANC's jurisdiction and responsibilities.

4. It is simply false and inaccurate for Montrose LLC (Montrose) to assert at page 8 of its Motion to Dismiss that notice of all building permits issued by the Department of Consumer and Regulatory Affairs (DCRA) is published in the DC Register. DCRA publishes in the DC Register only two categories of building permit applications: (1) applications for permission to demolish, alter, subdivide or erect new structures within Historic Districts, pursuant to the Historic Landmark and District Protection Act of 1978, D.C. Law 2-144, effective March 3, 1979; and (2) raze permit applications. Neither the application for nor granting of the December 26, 2002 permit for "Alteration and Repair – Interior

Demolition/Excavation Only" at 1819 Belmont Road, NW* of the March 11, 2003 permit for "alteration and repair" or any other work at said premises, fits in either of those two categories, and accordingly neither would have been published by DCRA in the DC Register.

5. Nonetheless, out of an abundance of caution in making this Declaration, I have personally reviewed each and every issue of the DC Register from December 27, 2002 through April 25, 2003, and have found no mention in any of those issues of any permit granted by DCRA to these premises.

6. Montrose has also asserted in its Motion to Dismiss that "a listing of all building permits issued by DCRA, including the proposed construction, was mailed to the ANC." Regardless of whether this statement is true or not – and as discussed below, it is not categorically true – Montrose's point is irrelevant here. Any such mailing to the ANC, even if it contained notice of a building permit issued at this location, does not mean that a private civic association such as the KCA, which is the actual Appellant in this case, had notice or knowledge of the permit. In fact, however, DCRA's practices in this regard have been so erratic, inconsistent, and unhelpful to ANCs in determining what permits or premises require attention that it is difficult to respond with precision here to Montrose's assertion even as to the ANC's own notice or knowledge. By way of explanation:

(a) Section 13(c)(3) of the Advisory Neighborhood Commissions Act of 1975, D.C. Code § 1-309.10(c)(3) provides, "The [DCRA] shall ensure that each Advisory Neighborhood Commission is provided at least twice a month by first-class mail with a current list of applications for construction and demolition permits within the boundaries of that [ANC]." Notwithstanding this clear statutory mandate, I can think of

* According to the Office of Tax and Revenue and D.C. Recorder of Deeds, Montrose did not actually purchase this property until January 15, 2003. Curiously, Montrose appears to have been granted by DCRA an interior demolition and excavation permit for a property it did not even own at that point.

no time since I have been Chairperson that DCRA – the Appellee in this case – has complied with this requirement. Instead, DCRA purports to comply with it by periodically sending the ANCs a paper copy of the very same notices published in the DC Register and described in paragraph 5 above, i.e., raze permit applications and applications for construction in Historic Districts. Even those are not provided on a consistent bi-weekly basis as required by the ANC statute.

(b) With respect to all other building permits – which constitute the overwhelming majority of permits applied for and issued – DCRA has followed an erratic course during the last several years that provides little if any assistance to ANCs. For some period of time beginning in approximately 2001 and continuing through the first few months of 2003, Mr. Lennox Douglas of DCRA would periodically send by first-class mail (and by e-mail to requesting parties, including ANCs or ANC Commissioners) two Excel spreadsheets, as follows: (1) building permits already granted; and (2) building permit applications that required further review. These lists were not sent on a regular schedule either by first-class mail or e-mail. On some occasions they would contain a few days' worth of permit applications and permits issued. On other occasions they contained several weeks' worth. In many instances these spreadsheets included scores and occasionally even hundreds of properties for which permits were granted. The spreadsheets were not organized in any usable fashion, i.e., they were not categorized by ANC, by Ward, or even alphabetically/numerically by street name/number. Rather, they were organized chronologically, in the order of the day on which the permit applications were granted. Thus, in order to ascertain what permits or applications on these lists pertained to premises within one's own ANC or SMD, a Commissioner would have to

pore through each and every line on the spreadsheet for each and every day contained therein. Considering that the overwhelming majority of these permits had already been granted in any event (and had been characterized to me in a telephone conversation during the summer and fall of 2002 by DCRA Deputy Director Theresa Lewis, former Zoning Administrator Bob Kelly, and Building and Land Regulation Administration (BLRA) head Denzil Noble – about an unrelated matter – as involving mostly insubstantial or clearly compliant permit applications that were granted over the counter), this was a very time-consuming task for very little benefit or purpose.

(c) Since April 2003, I have not received a single e-mail transmission of these spreadsheets from Mr. Douglas, and I can recall only one instance in the last several weeks in which the ANC has received a listing of these permits and applications by mail.

(d) I have no specific recollection of having seen any permit or application for 1819 Belmont Road, NW on any such spreadsheet during the period from December 2002 through April 2003. However, even if I did see or could recall it, Appellant KCA would have had no notice or knowledge of it – actual or constructive – unless it had been actually told by the ANC or a Commissioner of having seen the item on one of these spreadsheets. I certainly did not provide the KCA with any such notification in this instance, and I am not aware of any other Commissioner who did so.

7. Until September 2003, the *only* concerns I heard discussed in the community about the project at 1819 Belmont Road, NW – as ANC Chairperson, as an individual Commissioner, or as an alert neighborhood resident – pertained to Montrose's public space application for permission to construct a curb cut leading to a proposed driveway and garage on the ground floor level of the building (and its need to rip out a mature tree in front of the property

to accomplish same); Montrose's demolition of the facade on the ground floor level without first having obtained the requested curb cut permit in obvious anticipation of constructing the proposed garage; and the damage thus done to the historic beauty of this Edwardian facade at precisely the same time as the community had begun to consider whether to seek Historic District status for this particular area, which was known historically as Washington Heights. The KCA had begun planning to seek Historic District status for Washington Heights in late 2002, and because this area fell within portions of two SMDs -- Commissioner Bryan Weaver's SMD 1C03 and my SMD 1C01 – Commissioner Weaver and I cosponsored a community meeting on this subject on January 23, 2003. A copy of the notice of that meeting is attached to this Declaration as Exhibit 1. Montrose had not yet as of that time applied for a curb cut or demolished the ground-floor facade at 1819 Belmont Road, NW, and there was no discussion of this premises at the January 23rd meeting. In fact, it was not until more than two months later that Montrose demolished the ground-floor facade. At no time during that period or for several months thereafter would it have been possible for a reasonable person to realize there might be a height, roof structure, or FAR issue because the interior demolition and alteration work on the building was still in progress and – by Montrose's own admission on pages 3 and 9 of its Motion – the new roof and roof structure were not framed out until at least Labor Day.

8. In this regard, on page 9 of its Motion, Montrose completely mischaracterizes an *Intowner* newspaper article regarding this property published in mid-October 2003. Montrose asserts that "as reported in the *Intowner* newspaper article . . . , KCA complained of the Project and its height at its May meeting." That is *not* what the article says. The relevant paragraph of the article reads:

> At the May KCA meeting [held five months before publication of the article itself], with construction (or demolition, depending on one's

> skills with English deconstruction) having just begun, the project was offered as the answer to the question posed by Ann Hughes Hargrove, prominent KCA and citizen activist who resides just four doors down from the project site, "Why a historic district? One good reason: to protect our neighborhood against projects such as the facade demolition now under way by outside developers in the 1800 block of Belmont Road."

Although I was not personally present at the KCA's monthly meeting in May 2003, I did receive thereafter a copy of a photographic handout of the ground-floor facade demolition that was used at the meeting as an example of why Historic District status was so urgently needed for Washington Heights, together with other written materials described in the article. In none of these materials was any issue other than the facade demolition brought to the meeting's attention.

9. According to District Department of Transportation (DDOT) records, Montrose filed the curb cut application described above on or about January 31, 2003. Notice of it was provided to ANC 1C by the Public Space Permits and Records Branch on or about March 5, 2003. A copy of this notice and the accompanying application are attached to this Declaration as Exhibit 2. ANC 1C's Committee on Planning, Zoning and Transportation (PZT) met on Wednesday, March 19, 2003, to hear from Montrose and the community on the application and to consider what action to recommend to the full ANC. Due to DDOT's requirement that ANCs respond to these applications within 30 days of receipt, the curb cut matter was a belated addition to the PZT Committee's agenda for its March 19th meeting. A copy of SMD 1C06 Commissioner and Committee Chair Andrea Broaddus's notice of this item's addition to the meeting agenda is attached as Exhibit 3 to this Declaration. Pursuant to the PZT Committee's adverse recommendation, ANC 1C by a unanimous roll call of 8-0 voted at its April 2, 2003 business meeting to recommend denial of the curb cut application. At no time from receipt of the curb cut application through its disposition by the ANC in early April did I hear from any

Commissioner or member of the public any awareness of a building height, roof structure, or FAR concern with regard to the Montrose project. Nor was there any awareness expressed to me by any member of the ANC or the community about those issues until September 2003. During that entire period, the only concerns of which the ANC or the community were aware were the proposed curb cut, the proposed removal of a mature tree, and the damage done by Montrose to the facade of a beautiful old building in an area being considered for a Historic District study and application. Subsequent to the PZT Committee meeting on March 19, 2003, I was told separately by both Commissioner Weaver and by Mr. Larry Hargrove, a Belmont Road resident and neighbor of the project, that Mr. Hargrove had specifically asked the developers how much higher they planned to build above the pre-existing structure and was simply told "one story."

10. As it turns out, that March 19th meeting occurred just eight days after Montrose had been issued its March 11, 2003 building permit by DCRA, which had approved Montrose's plans for "[a]lteration and repair of exist. Bldg. Addition in rear, *add 2 floors plus attic*; retaining wall & stair at rear," with the additional notation of "*5 stories plus basement*" (emphasis added). Putting aside for the moment the question of whether the basement in this case should count as a story, and whether the "attic" is really an "attic," it is evident that a statement by Montrose's representative to Mr. Hargrove and the others present at the March 19th PZT meeting that the new structure would go up only "one story" from its pre-existing height would constitute knowing misrepresentation of the facts and of Montrose's true intentions, as evidenced by the permit it had been issued barely a week earlier and the application it presumably submitted even earlier than that.

11. Moreover, this permit was not displayed on the property at any time in a manner that would enable the public to know what was being planned and permitted until after

controversy over this project erupted in September 2003. Indeed, the October 2003 *Intowner* article discussed above describes the reporter's own efforts in or about May 2003, following the May KCA meeting, to see or find the applicable permits himself. His article states:

> Following this presentation [at the May KCA meeting at which Montrose's facade demolition was discussed], *The Intowner* stopped by the construction site and observed no posted permits for the demolition (or any other work) occurring that day. Stepping through a front, ground floor hole-in-the-wall doorway, this reporter spotted two permits which were attached to the east side party wall, one for interior demolition "only" in a multi-family apartment zoned R-5-B; with the second being for "foundation and ground work excavation only." As this reporter was copying down the permit information, having already identified himself to nearby workers, he was summarily ordered out of the premises and back through the ground floor doorway by a Taurus Construction manager who refused to identify himself, and when asked when these construction permits would be posted on the outside of the remaining facade where they would be publicly visible, as required by city regulation, the manager replied, whenever he "felt like it."

12. Assuming the reporter's description of his own personal permit observation is accurate – and I note that Montrose itself has placed into evidence and relied upon that *Intowner* article on page 9 of its own Motion to Dismiss – Montrose did not even keep the March 11th permit posted on the premises *at all,* much less in public view. In my capacity as an ANC Commissioner for more than three years and ANC 1C's Chairperson for the last 14 months, I have found an occasional construction site that fails to display its permits in public view. However, I have never been denied the ability to see the permits on the premises on request. The DC BOCA Code Supplement requires that "[a] photocopy of the permit or the original shall be kept on the site of operations, *open to public inspection* during the entire time of progression of the work and until it is completed." 12A DCMR 105.7 (emphasis added). I do not personally know whether DCRA interprets this to require posting of permits in plain view or simply making them available to a member of the public on request However, in this case, it appears not only

that Montrose and its contractors were actively attempting to deny public access to and inspection of its permits, but that neither a photocopy nor the original of the March 11, 2003 permit itself may even have been physically present on the premises. At the very least, assuming the *Intowner* report is correct (and again, Montrose itself has cited that article as evidence in support of its own Motion to Dismiss), the March 11th permit was not posted together with the other permits observed by the *Intowner*'s reporter. In effect, whether the unavailability of the March 11th permit on the premises was merely an unconscious oversight or an intentional effort by Montrose to conceal the truth, no member of the public would have had any reasonable way of learning from inspecting the job site, where permits are required to be displayed or made available, that the permit itself called for a building of "5 stories plus basement," including the addition of "2 floors plus attic."

13. I returned to Washington from vacation last summer two days after Labor Day, on Wednesday, September 3, 2003. ANC 1C's regular monthly business meeting was held that evening. At no time during that meeting did any Commissioner or member of the public express an awareness of or concern over any issues of height, roof structure, or FAR pertaining to the Montrose project. Notwithstanding Montrose's claim that its roof and penthouse had been framed out by September 1st, it seems apparent that no Commissioner or member of the public attending the September 3rd ANC meeting had yet taken notice of it.

14. The first time I became aware of the height issue was after the September 3, 2003 ANC meeting, when neighborhood residents began to realize that Montrose had continued erecting additional stories on the proposed building beyond the "one story" the developer had promised at the March 2003 PZT Committee meeting. According to a message published by Councilmember Jim Graham on the Adams Morgan Yahoo Group list-serv, this discovery had

produced constituent calls to his office on the afternoon of Monday, September 8, 2003 regarding the "remarkable height" of the structure, and Councilmember Graham himself personally went out to observe the site that evening. A copy of the message posted by Councilmember Graham and his staff to the list-serv, dated September 12, 2003, is attached as Exhibit 4 to this Declaration, and a further message posted by Councilmember Graham following his office's investigation and demand to DCRA for issuance of a stop-work order is attached as Exhibit 5.

15. Immediately following the realization in the community that this structure had grown to such a "remarkable height," members of ANC 1C and neighboring residents, including Ann and Larry Hargrove and other members of the KCA, began diligently to pursue both DCRA action to obtain issuance of a stop-work order, investigation by DCRA of whether the construction already undertaken violated zoning or other legal requirements, and independent research into whether the structure violated the Height Act and/or other zoning laws and regulations. DCRA actively stymied and slowed these efforts by initially refusing to turn over copies of the plans on which the March 11, 2003 building permits had been issued, or any plans or applications submitted by the developer to DCRA subsequent to the issuance of the stop-work order. On Tuesday, September 16, 2003, Ann Hargrove and I conferred in person with Mr. Toye Bello of the Office of Zoning about the situation, and about the difficulty of filing in good faith an appeal of a permit issued on March 11, 2003 without having any access to the plans so that any assertions of error in the issuance of the permit would be supportable. Mr. Bello advised Mrs. Hargrove that she could file a Notice of Intent to Appeal on a BZA form provided for that purpose. On behalf of the KCA, Mrs. Hargrove filed the Notice of Intent to Appeal that day.

16. At its next regular business meeting on Wednesday, October 1, 2003, after hearing from Gail Montplaisir of Montrose and other members of the community, ANC 1C by unanimous 8-0 roll call, voted to approve a resolution supporting KCA's Notice of Intent to Appeal. The resolution asserted that "the alleged unlawfulness of any permits issued for 1819 Belmont Road, NW, or the failure of BLRA to enforce the requirements of such permits, could not have been discovered or anticipated by any reasonable person until after actual construction made the alleged violations evident to passers-by from the street in early September 2003," and that representatives of KCA in the meantime had been repeatedly denied full access to and the right to copy Montrose's plans and drawings by BLRA. ANC 1C's resolution accordingly called upon the BZA to view any such appeal "as timely pursuant to the zoning regulations or to provide KCA with a reasonable extension of time as permitted by the regulations," and called upon DCRA to take various enforcement actions against Montrose. I sent copies of this resolution and accompanying cover letters to both the BZA and BLRA on October 3 and 7, 2003. A copy of the relevant pages of the ANC's minutes of October 1, 2003 is attached as Exhibit 6 to this Declaration. The ANC's transmittal letters to the BZA and BLRA are already a part of the case file.

17. DCRA's continued failure or refusal through early October 2003 to make plans and documentation available to the KCA resulted in a meeting in Councilmember Graham's office on the afternoon of October 16, 2003, which both Commissioner Weaver and I attended, together with Ann Hargrove and other neighbors. During that meeting, Councilmember Graham got both DCRA Deputy Director Theresa Lewis and Interim Zoning Administrator Denzil Noble on speaker-phone, and demanded that they turn over the requested plans and related documentation to his office and/or the KCA. During that telephone call, Ms. Lewis and Mr. Noble indicated

that Montrose had been revising and submitting new plans for the project, and that DCRA had approved them and was in the process of typing up new permits. Mr. Graham stated, "We want you to stop typing," and again demanded that he and the community be given prompt access to and copies of any new plans that had been submitted. Ms. Lewis asserted that DCRA had no legal basis on which to "stop typing", and rather than committing to produce the requested documentation by a specific time, she instead promised to continue the discussion on a conference call with Councilmember Graham's office early the following morning at which Mrs. Hargrove and Commissioner Weaver could be present. Although I was not present the following morning, I was later informed by both Mrs. Hargrove and Commissioner Weaver that Deputy Director Lewis cancelled the telephone call and did not have the further discussion she had promised.

18. After additional prodding from Councilmember Graham's office and Mrs. Hargrove to make the plans and related documentation available, DCRA complied – but only partially – in time for a meeting on October 20, 2003 between, on one hand, Jeff Jennings of Councilmember Graham's staff, Ann Hargrove of the KCA, and myself representing ANC 1C, and on the other hand, DCRA Deputy Director Lewis, Interim Zoning Administrator Noble, and a third gentleman whose name I can no longer recall but who identified himself as the new general counsel of BLRA. Although I was required to leave approximately halfway through the meeting, I found the meeting highly unproductive and unsatisfactory. During the portion of the meeting for which I was present:

(a) The DCRA representatives offered a variety of excuses for their erroneous issuance of the earlier permit and for their reissuance of new permits without satisfactorily addressing the Height Act, roof structure, or FAR issues being raised by

Mrs. Hargrove. They refused to explain why they felt legally compelled to issue new permits with such remarkable dispatch in the face of a track record by this developer of repeated misrepresentations and violations, including those that led to the issuance of the March 11th permit; the demolition of the facade without, it seems, any proper permit at all; and the improper demolition of virtually the entire building except for what remained of the facade under color of the December 26th interior demolition permit. I recall commenting that I wished I could get as quick a response out of Mr. Noble to my telephone calls as these scofflaws seem to have gotten from him.

(b) In the case of the "attic" issue specifically, the DCRA representatives had no direct response to Mrs. Hargrove's discussion of the definition of an "attic" under the Zoning Regulations (which in turn incorporate reliance on Webster's Unabridged Dictionary), and indeed they appeared to be completely unfamiliar with that definition. Mr. Noble in particular was fumbling during this discussion through what appeared to me from a distance to be a binder of zoning and building code documents and was reading a different definition of an attic from those documents rather than addressing Mrs. Hargrove's Webster's discussion. Finally, the DCRA representatives argued that if Montrose weren't permitted to call the space an "attic," they could simply label it something else to evade its being counted as part of the FAR.

(c) In the case of the roof deck and railing, Mr. Noble simply shrugged his shoulders and threw up his hands, belittling Mrs. Hargrove's complaint by saying, "Oh, it's just a roof deck" – giving me the impression that he meant, "It's not big deal. Does it really matter?"

(d) I was not present for the discussion of the roof structure setback issue, or any other issues that may have been discussed.

19. According to DCRA records, new building permits were issued to Montrose on October 6 and 16, 2003. It is evident from the record above that neither the KCA, the ANC, nor any reasonable person in the community could or would have had reason even to suspect any of the zoning violations alleged in the KCA's appeal prior to early September, and would not have been able to actually determine whether there in fact were such violations until the plans on which the October 6 and 16 permits were issued had been made available to the KCA – which did not occur until well after those permits were already issued.

20. At its monthly business meeting next following the KCA's filing of its appeal, on December 3, 2003, ANC 1C again voted by a unanimous roll call of 7-0 (one SMD seat being vacant at that point) "to support the Kalorama Citizens Association (KCA) recently filed appeal to the BZA in regards to 1819 Belmont Road, NW." A copy of the relevant pages of that meeting's minutes are attached as Exhibit 7 to this Declaration, and my letter to the BZA on behalf of ANC 1C transmitting that resolution is contained in the BZA's case file.

21. In addition to the conduct on Montrose's part described in the preceding paragraphs and in any other evidence that may be presented in this Appeal, I also attach as Exhibit 8 to this Declaration a letter dated February 17, 2004, from Ms. Denise Wiktor, Public Space Manager, Office of Public Space Management Administration, District Department of Transportation. In that letter, Ms. Wiktor states that the public space in front of 1819 Belmont Road, NW extends 25 feet in from the curb, and that there have been no legally required Public Space Permits issued to Montrose for "[a]ny removal of the berm, landscaping or excavation in this area." (She also notes that such activities would have required an additional permit from the

Department of Health's Watershed Protection Division.) From my personal recollection of the appearance of the property prior to Montrose's demolition and construction activities, it appears to me that Montrose may have removed a low berm and several steps to the previous front door, and excavated several inches beneath the surface in the front yard, without the necessary public space permit. Ms. Wiktor's letter also indicates that as of February 17, 2004, the dumpster that has occupied the curb lane since the inception of Montrose's construction had not been in compliance with the law since its last public space permit renewal expired on December 11, 2003.

22. In sum, taking all of the evidence above together, it is my personal opinion that Montrose has engaged in a concerted pattern of deceit, deception, misrepresentation, concealment, and/or unlawful or un-permitted construction and demolition activities for virtually all of the past year. Under these circumstances, in the opinion of ANC 1C, as indicated in its October 1, 2003 resolution, Montrose's conduct constitutes exceptional circumstances outside of the KCA's or the community's control, not reasonably foreseeable – entitling KCA to a determination by the BZA that it acted expeditiously, responsibly, and within 60 days of obtaining actual or constructive notice of a problem, or in any event to an extension of the 60-day deadline. Montrose's conduct also disables it from claiming any prejudice from such an extension. Moreover, whereas Montrose's equitable claims of laches and estoppel require Montrose itself to have "clean hands," the facts above conclusively demonstrate that Montrose's hands, far from being "clean," are indeed quite sullied. The injustice, inequity, and prejudice in this case from dismissing the KCA's Appeal would, in my view as Chairperson of ANC 1C, fall much more heavily upon the KCA and the Adams Morgan community than upon Montrose, which is the author of its own problems here.

23. While DCRA has disclaimed any reliance on the theories of laches and estoppel, it has stated its support for Montrose's Motion to Dismiss with respect to the issue of timeliness under the regulations. However, as demonstrated above, DCRA is itself largely responsible for KCA's and the community's *lack* of notice or knowledge of the violations in this case through, among other things:

- its failure to provide ANCs with reliable and usable information concerning applications for and issuance of permits within each ANC area, in violation of the ANC statute;

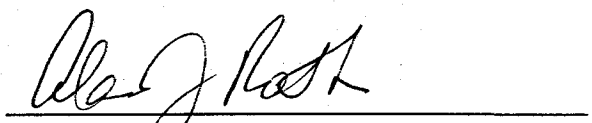
- its issuance of a permit to Montrose that by its own subsequent admission should never have been issued, and its failure to police or enforce repeated violations by Montrose of both permit and other regulatory requirements;

- its stonewalling tactics in refusing to make available to the KCA the plans needed to assess the validity of any of the permits issued here, and then its stalling tactics in delaying the KCA's access to a complete set of those plans, FAR worksheets, and related documentation.

The BZA is the citizen's last line of defense against the kind of arbitrary, capricious, and unfair conduct exhibited by DCRA toward the KCA, Councilmember Graham, and the community in this case. Whether because the KCA could not have had actual or constructive knowledge of the alleged violations until after it had received a set of plans adequate to evaluate the permits issued in October, or because the KCA is entitled to an extension of that deadline as the result of exceptional circumstances outside its own control and not reasonably foreseeable, the BZA should not countenance and reward this sort of conduct on DCRA's part by allowing it to claim the benefit of the 60-day appeal deadline in this case.

24. By contrast, Ann and Larry Hargrove are personally known to me as diligent and attentive stewards of the zoning, public space, and historic preservation laws as those laws apply to buildings and architecture in Adams Morgan. The Hargroves are also known to me and to all active members of the zoning, public space, and historic preservation communities in

Washington, D.C. as persons of deep knowledge and complete integrity on these issues. Knowing the Hargroves as well as I do, it is absolutely inconceivable to me that living only four doors away from the project at issue, they would have ignored or even unconsciously overlooked the kinds of violations being alleged in this Appeal had they even the slightest inkling that something was amiss – much less having actual or constructive notice or knowledge.

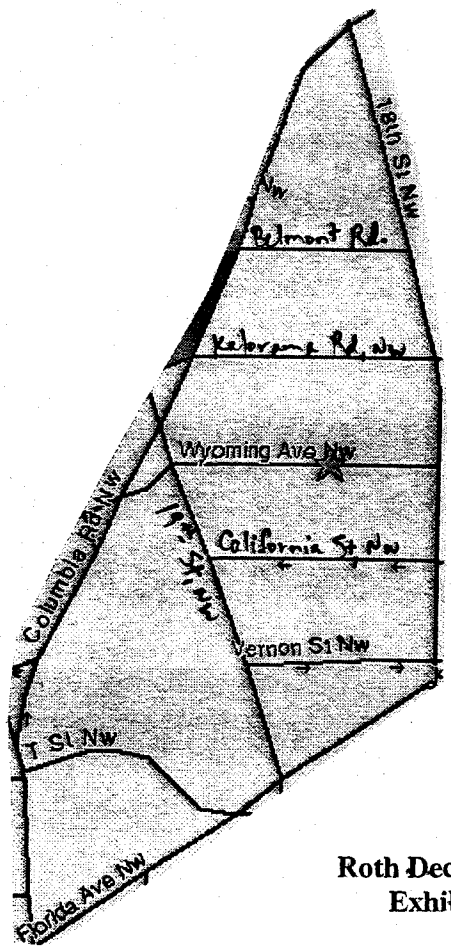


Alan J. Roth
Chairperson, ANC 1C

Dated: February 29, 2004

COMMUNITY MEETING: Should Our Neighborhood Become A Historic District?

If you own or rent within the area shown on this map, come out and learn about the pros and cons of Historic District status.



Roth Declaration
Exhibit 1

Thursday, Jan. 23rd
7:30 p.m.
Goodwill Baptist Church
1862 Kalorama Road, NW

Sponsored by ANC Commissioners
Alan Roth (SMD 1C01) and Bryan Weaver (SMD 1C03)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF TRANSPORTATION

Roth Declaration Exhibit 2

Office of Public Space
Management Administration

Date: 3-5-03

Chairperson, ANC-1C
P.O. Box 21652
Washington, DC 20009
Phone: (202) 332-2630

Pursuant to the District of Columbia Self Government and Governmental Reorganization Act, Section 738 (d), this is to notify you of an application to occupy public space for the propose of constructing one new Driveway at premise 1819 Belmont ~~Street~~ Road, NW.

Enclosed is a drawing showing the proposed Driveway. It is requested that you indicate your comments on this memorandum and return it to this office within thirty (30) business days from the date you receive this notice and whether or not you offer any objections to such use.

If a response is not received within (30) business days, we will assume that you have no objections to the applicants request and we will proceed with its approval process.

If you have any questions, please feel free to contact Lou Williams at (202) 442-4624 or (202) 442-4670 (FAX: 202-442-4867).

Sincerely,

Lou Williams, Engineering Tech.
Public Space Permits and Records Branch
941 North Capitol Street, NE
Washington, D.C. 20002

ENDORSEMENT

Date: APRIL 4, 2003

To: Mr. LOU WILLIAMS

No Objection ( )
Objection (✓)

Signature: Alan J. Roth - CHAIRPERSON
Signature: _____

Please State Objection:

SEE ATTACHED LETTER AND ANC RESOLUTION.

Advisory Neighborhood Commission 1C
PO Box 21652, NW, Washington, DC 20009
202-332-2630 • http://www.anc1c.org

April 4, 2003

Mr. Lou Williams, Engineering Tech.
Public Space Permits and Records Branch
District Department of Transportation
941 North Capitol St., NE
Washington, DC 20002

BY FAX TO (202) 442-4867
AND BY FIRST CLASS MAIL

Re: Public Space Application – Driveway
1819 Belmont Street, NW

Dear Mr. Williams:

I am writing to inform you that Advisory Neighborhood Commission 1C, at its monthly business meeting on April 2, 2003, by a roll call vote of 8-0 (a quorum being present), voted to *oppose* the above-referenced application for a public space permit to construct a driveway. A copy of our resolution, as adopted, is enclosed together with your form notice dated 3-5-03, signed and dated by me. The ANC's reasons for opposing this application are as follows:

* The proposed curb cut, driveway, and parking space on private property would eliminate at least two public parking spaces on Belmont Street, in the heart of Adams Morgan, where public parking is already in short supply.

* The proposed curb cut and driveway would require the removal of a mature oak tree at a time when the District is working to improve its tree canopy.

We respectfully request that the Public Space Committee give great weight to the ANC's recommendation by rejecting this application.

Sincerely,

Alan J. Roth
Chairperson

Enclosure

ANC 1C RESOLUTION REGARDING
TREE REMOVAL & CURB-CUT AT 1819 BELMONT RD

WHEREAS, Taurus Enterprise Group and/or Montrose LLC has applied for a removal of a tree and the creation of a curb-cut to install a new driveway at their property at 1819 Belmont Rd; and

WHEREAS, the residents of Belmont Rd have expressed great concern about the removal of the tree and the creation of a curb-cut and parking space/garage at 1819 Belmont Rd NW; and

WHEREAS, said home falls in the jurisdiction of the Adams Morgan ANC (1C); and

WHEREAS, a curb-cut at 1819 Belmont Rd is of significant interest to the community because it will remove two on street parking spaces; and

WHEREAS, the removal of the tree at 1819 Belmont Rd would damage the historical and environmental character of Belmont Rd;

NOW, THEREFORE, BE IT RESOLVED, that ANC 1C strongly opposes the removal of the tree at said address; and be it

FURTHER RESOLVED, that ANC1C opposes a curb-cut at said address for the creation of a driveway/garage; and be it

FURTHER RESOLVED, that this resolution is to be forwarded via fax to Lou Williams at DDOT, and that a copy of this resolution is to be forwarded via mail to Lou Williams at DDOT, as soon as possible.

Offered by:	**Commissioner Apostolides**
Seconded by:	**Commissioner Weaver**
Vote:	**Approved by roll call vote, 8-0**
	AYE Apostolides, Roth, Weaver, Moretti, Levy, Broaddus, Gibson, Coudriet
Date:	**April 2, 2003**

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION; PERMIT PROCESSING DIVISION (727-7039)

★ ★ ★ GOVERNMENT OF THE DISTRICT OF COLUMBIA

DLRA-35
(Rev. 5/85)

APPLICATION FOR PUBLIC SPACE PERMITS

(PRINT IN INK OR TYPE; DO NOT WRITE IN SHADED AREAS)

(A) ALL APPLICANTS MUST COMPLETE ITEMS 1 THRU 18

1. Date of Application: 01/31/03

2. Address of Premise for which Public Space Work is Proposed: 1819 BELMONT ST, NW

3. Lot: 45

4. Square: 2551

5. Type of Application: ☑ New ☐ Renewal

6. Previous Permit Number if Renewal:

7. Owner of the Premise: MONTROSE L.L.C.

8. Owner's Address: 2311 15th ST, NW #1 20009

9. Phone: 462-4904

10. Authorized Agent (if applicable): N/A (John)

11. Firm's Name: N/A

12. Address: 2311 15th ST. NW #1 20009

13. Phone: 462-5886

Cell: 202-423-6842

14. Check all proposed work; indicate the specific street of work and the names of boundary streets; and specify the length and width of the work area.

Check	Proposed Work	Located on the following Street (or Alley)	Between (Street Name)	And (Street Name)	Length of Work (ft)	Width of Work (ft)
	A. Temporary Use for: 1. Crane					
	2. Truck: ☐ Dump ☐ Concrete ☐ Construction Equipment					
	3. Dumpster					
	4. Hoists/Scaffolds					
	5. Use of Sidewalk for: ( )					
	6. Use of Roadway for: ( )					
	B. Excavation for: ( )					
	C. Sheeting and Shoring					
✓	D. Driveway Construction	BELMONT	COLUMBIA RD	18th ST	26.4+/-	8.0+/-
	E. Sidewalk Construction					
	F. Curb and Gutter Construction					
	G. Alley Construction					
	H. Grading ☐ Street ☐ Alley					
	I. ☐ Trees ☐ Planter Boxes ☐ Hedges					
	J. ☐ Fence ☐ Wall					
✓	K. Other (specify):					

15. Description of Proposed Work: CONSTRUCT PRIVATE DRIVEWAY,

16. Start Date: 02/07/03

17. End Date: 02/31/03

18. APPLICANT'S SIGNATURE: I have read and I understand the conditions set forth on this application. I further understand that penalties are provided for furnishing false information.

AGENT'S SIGNATURE: ..... DATE: 01/31/03

OWNER'S SIGNATURE: ..... DATE: .....

COMPLETE Page 4 If Trees, Rental of Public Space, Fuel Oil Tanks, & Parking Lot.

1611 Vermont St. NW

(DO NOT WRITE IN SHADED AREAS)

H.P.A. No.:	O.G. No.:	S.L. No.:

(B) TREES (COMPLETE ITEMS 19 THRU 22)

19. Type of Work:	20. Number of Trees:	21. Type of Trees:	22. Name of Trees:
☐ New Building ☑ Removal ☑ Driveway ☐ Planting ☐ Trimming	1	☑ Curb ☐ Parking	oak

(C) RENTAL OF PUBLIC SPACE, SIDEWALK CAFE, PARKING LOT, FUEL OIL TANK (COMPLETE ITEMS 23 THRU 29)

23. Insurance Company's Name:	24. Policy or Certificate Number:	25. Expiration Date:

26. Type of Sidewalk Cafe:	27. Length of Rental Period:	28. Hours of Weekday Use:	29. Hours of Weekend Use:
☐ Enclosed ☐ Unenclosed		from _____ to _____	from _____ to _____

(D) APPROVALS (OFFICIAL USE ONLY)

☐ PERMIT CONTROL

☐ 1. Fine Arts by: _____ Date: _____
☐ 2. Land Mark by: _____ Date: _____
☐ 3. PADC by: _____ Date: _____
☐ 4. WMATA by: _____ Date: _____
☐ 5. Control by: _____ Date: _____

DPW - PUBLIC SPACE WIDTHS/RESTRICTIONS

Street Name: _____
Street Width: _____
Road Width: _____
Sidewalk Width: _____
Parking: _____
Restrictions: _____

☐ DPW - WATER/SEWER		☐ ZONING			☐ STREETSCAPE	
Approved by:	Date:	District:	By:	Date:	Approved by:	Date:

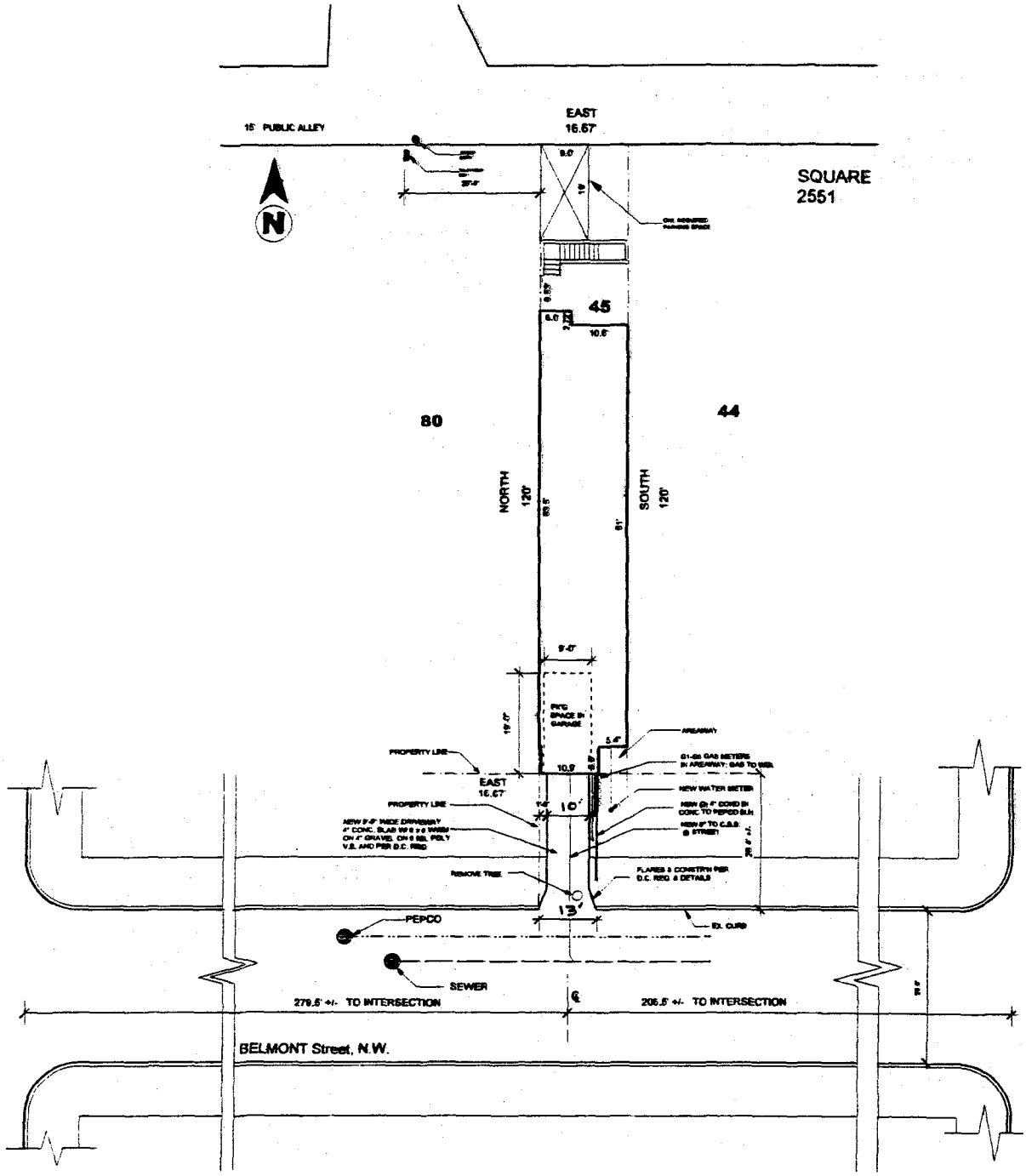
Restrictions of Permit:

PUBLIC SPACE APPROVAL STAMP

Deposit Number:

(E) FINAL APPROVAL FOR PERMIT ISSUANCE (OFFICIAL USE ONLY)

Permit Type	Approved by:	Approval Date	Deposit Amount ($)	FEE ($)	Permit Number	Expiration Date
1. Temporary Occupancy						
2. Excavation, Sheeting and Shoring						
3. Construct Sidewalks, Curb/Gutter, Alley						
4. Walls, Fences, Copings, Leads/Steps, Plant Hedges, Paved Parking						
5. Trees						
6. Driveway Construction						
7. Sidewalk Cafe						
8. Other						



PRIVATE DRIVEWAY

Scale: 1" = 20 ft

From: Andrea Broaddus <abroaddus@t...>
Date: Mon Mar 17, 2003 12:28 pm
Subject: PZT Committee Agenda for Wed 3-19-03

**Please note one additional agenda item regarding an application for a new curb cut at 1819 Belmont Rd to install a driveway.

Adams Morgan ANC
Planning, Zoning and
Transportation Committee

Next Meeting: Wednesday, March 19
Location: 3rd District Police Station, Snyder Room (corner of 17th & V)
Time: 7:30-8:30pm

Agenda:
-Presentation by Castle Mgmt on proposal for redevelopment of Jemal building at 2412 17th St
-Presentation by Off The Wall Advertising on projected-light billboard proposal
-Presentation by Taurus Enterprise Group on application for curb cut to install new driveway at 1819 Belmont Rd
-Other business

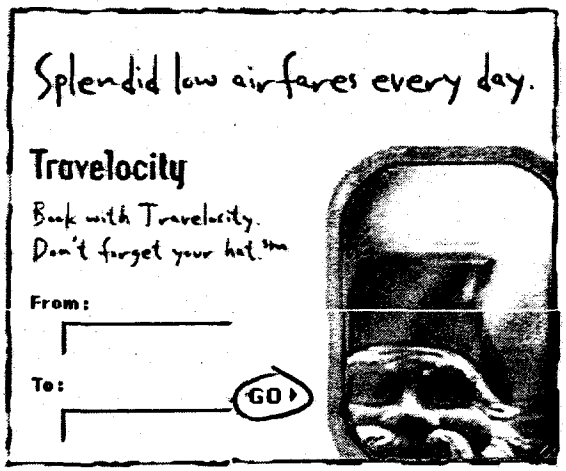
The PZT Committee deals with Housing, Parking, Planning, Public Space (other than ABC-related), Signage (other than HP-related), Zoning, and Transportation and Traffic. Members: Commissioner Broaddus (Chairperson), Commissioner Coudriet, and Commissioner Gibson.

To be added to the email announcement list for PZT meetings, contact Andrea Broaddus at andrea@walkdc.org or 202-462-5618.

Roth Declaration
Exhibit 3

From: "Rivero, Fernando (COUNCIL)" <FRivero@d...>
Date: Fri Sep 12, 2003 5:45 pm
Subject: FW:

Roth Declaration Exhibit 4



-----Original Message-----
From: Jennings, Jeffrey (COUNCIL)
Sent: Friday, September 12, 2003 5:30 PM
To: Rivero, Fernando (COUNCIL)
Subject:

Dear Friends:

Earlier this week my office was alerted to the remarkable height of the building construction at 1819 Belmont St. I observed the height of this structure, myself, on Monday evening and was surprised to see how the streetscape was dramatically transformed because of the height of this one address. Additionally, my staff became aware of the issue Monday afternoon, September 8, 2003, and began to investigate for proper building permits as well.

As a result of our requested building inspection on Tuesday, and the due diligence of neighbors on Belmont St., a stop work order will be placed on the 1819 Belmont St. property. During the period of this stop work order, we will further investigate the various permits necessary along with DCRA provisions for Housing and

Building Regulations. There are some legal complexities to this issue. However, I will continue to work for a speedy resolution.

Bests,

Councilmember Jim Graham

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Reply | Forward | View Source | Unwrap Lines

From: "Jim Graham" <jim@g...>
Date: Mon Sep 15, 2003 10:00 am
Subject: *Stop Work Order: The Tower on Belmont*

Roth Declaration Exhibit 5

Dear Friends: We have a real problem here. As the message below (sent Friday) indicates, we intervened along with neighbors to demand that DCRA to stop work on this project. The stop work order was posted.

But I am not sure they stopped over the weekend. I had dinner on Sunday night at Rumba Cafe, and this structure towered over 18th Street. It is well on its way to becoming a major and unwelcome landmark in Adams Morgan.

In addition to our calls to Denzil Noble, I have now spoken with the DCRA Director, David Clark. He has promised another inspection today and action, if they worked after receiving the stop work order. It is imperative that DCRA compel a reduction in size of this structure. If this is permitted, it could have serious consequences for the streetscape of Adams Morgan. This developer, and others like him, must understand that there are serious consequences to this type of action. We had a similar situation a while back in U Street, and that developer had to dismantle his "addition".

Bests Councilmember Jim Graham

Prior message:

Dear Friends:

Earlier this week my office was alerted to the remarkable height of the building construction at 1819 Belmont St. I observed the height of this structure, myself, on Monday evening and was surprised to see how the streetscape was dramatically transformed because of the height of this one address. Additionally, my staff became aware of the issue Monday afternoon, September 8, 2003, and began to investigate for proper building permits as well.

As a result of our requested building inspection on Tuesday, and the due diligence of neighbors on Belmont St., a stop work order will be placed on the 1819 Belmont St. property. During the period of this stop work order, we will further investigate the various permits necessary along with DCRA provisions for Housing and Building Regulations. There are some legal complexities to this issue. However, I will continue to work for a speedy resolution.

Bests,

Councilmember Jim Graham

I typically answer emails before 9 AM on weekdays. If you email me after that, it is likely that you will hear from me the next weekday. If there is a need to communicate prior to that, you may wish to call me.

Jim Graham, Councilmember, Ward One, 1350 Pa. Ave., NW, #406, Washington, DC 20004. 202-724-8181; 202-724-8109 (fax).

Message 4314 of 5281 | Previous | Next [Up Thread] Message Index Msg # Go

Reply | Forward | View Source | Unwrap Lines

ADVISORY NEIGHBORHOOD COMMISSION 1C
Adams Morgan

Minutes of October 1, 2003

A scheduled meeting of Advisory Neighborhood Commission 1C was held on Wednesday October 1, 2003 at the Third District Police Headquarters. ANC1C Chairman Alan Roth called the meeting to order at 7:05 p.m. Approximately 25 members of the public attended.

Attending were Commissioner Alan Roth (1C01), Nik Apostolides (1C02) Bryan Weaver (1C03) Mindy Moretti (1C04), Ken Levy (1C05), Andrea Broaddus (1C06), Josh Gibson (1C07) and Jeff Coudriet (1C08).

SECRETARY'S REPORT

Commissioner Moretti, secretary, distributed copies of the Minutes from the September 3 meeting and moved their approval. The motion was seconded and approved by voice vote.

TREASURER'S REPORT

Commissioner Levy, treasurer, reported a bank balance of $66,398 as of October 1, 2003. He noted that the balance reflected the quarterly allotment from the District government, as well as $1184 in expenditures.

PUBLIC COMMENTS

Commissioner Roth opened the floor to members of the community. Lisa Duperier, with Adams Morgan Main Street, provided an update on the groups efforts.

COMMITTEE REPORTS

ABC and Public Safety

Commissioner Weaver gave an update on the status of Timerhi International. He noted that the next status hear will be November 5. Commissioner Weaver noted that if there were no move to compromise between the ANC and Timerhi, then the next step would be an actual protest hearing.

Commissioner Roth moved that he be authorized on behalf of the Commission to write a letter to the ABC Board expressing our dismay at the Board's handling of the Timerhi case, drawing the Board's attention to the fact that the licensee has in effect extended the duration of his own

license for several months simply by not showing up for status hearings; the MPD calls for service associated with this establishment, including incidents of violence, have occurred at an alarming rate; and that the ANC is distressed that the Board, by compelling the Commission to engage in mediation with an establishment whose license ought to have been revoked already, has in effect granted this licensee yet another reprieve of more than a month.

The motion was seconded, discussed and approved by role call vote:

YEA: Roth, Apostolides, Weaver, Moretti, Levy, Broaddus, Gibson, Coudriet
NAY: None

Commissioner Weaver moved to move the matter of Asylum's substantial change request to the committee portion of the agenda. The motion was seconded and approved by voice vote.

Commissioner Weaver then moved to protest Asylum's request for a substantial change.

Resolution to Protest Substantial Change of the ABC Liquor License of ASYLUM

WHEREAS, the establishment JJA Incorporated trading as Asylum located at 2471 18th Street, NW, Washington, DC 20009, has filed an application with the ABC Board for a substantial change of its license;

WHEREAS, said establishment falls in the jurisdiction of the Adams Morgan ANC (1C);

THEREFORE, BE IT RESOLVED, THAT ANC 1C will protest the substantial change of this license on the grounds of the adverse effect on peace, order, and quiet in the neighborhood.

The resolution was seconded, discussed and approved by voice vote.

Officers Ragavonitz and Salas from the Third District gave an update on the current crime statistics for the neighborhood.

Planning Zoning and Transportation

Commissioner Broaddus announced a meeting of XXXXX to be held on October 15th to discuss planning and transportation plans, including parking, for the District.

Commissioner Broaddus offered a resolution in support of the Kalorama Citizen's Association investigation into the construction at 1819 Belmont Road, NW.

Resolution in Support of the Kalorama Citizens Association's Appeal of Permits for 1819 Belmont Road, NW

WHEREAS, Montrose LLC is currently redeveloping 1819 Belmont Road, NW (Square 2551, Lot 45) in a manner inconsistent with the character of the block and the surrounding area, and

WHEREAS, certain construction permits issued by the Department of Consumer and Regulatory Affairs, Building and Land Regulation Administration (BLRA), may have been issued contrary to

(over)

laws and regulations governing the height of buildings and/or zoning, and the construction itself may have been conducted beyond the scope of demolition and construction permits issued by BLRA, and

WHEREAS, the Kalorama Citizens Association (KCA) on September 16, 2003 filed with the Board of Zoning Adjustment (BZA) a Notice of Intent to File an Appeal of certain permits issued to Montrose LLC for construction at these premises on the grounds that the Height of Buildings Act or zoning regulations may have been violated, and the KCA is currently researching the applicable facts and law prior to proceeding with such an appeal, and

WHEREAS, section 3112.2(a) of the Zoning Regulations, Title 11 DCMR, requires that an appeal be filed "within 60 days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier," and

WHEREAS, the alleged unlawfulness of any permits issued for 1819 Belmont Road, NW, or the failure of BLRA to enforce the requirements of such permits, could not have been discovered or anticipated by any reasonable person until after actual construction made the alleged violations evident to passers-by from the street in early September 2003, and

WHEREAS, representatives of the KCA were denied full access to and copying of Montrose LLC's plans and drawings by BLRA upon their first request, and as of September 26, 2003 had not received or seen all the documentation to which they are entitled under their Freedom of Information Act request,

NOW, THEREFORE, BE IT RESOLVED, that Advisory Neighborhood Commission 1C urges the BZA to treat the Appeal filed by the KCA under its September 16, 2003 Notice of Intent as timely pursuant to the zoning regulations or to provide KCA with a reasonable extension of time as permitted by the regulations.

FURTHER RESOLVED, that ANC 1C requests the Department of Consumer and Regulatory Affairs to revoke as issued in error any construction and related permits that are not fully compliant with Construction Codes, Zoning Regulations or Height Act requirements, to cause any construction thus far undertaken that is not so fully compliant to be brought into compliance by whatever means necessary, including the removal of structures exceeding the lawful height, and to ensure that any new or revised building plans and related construction permits be made fully compliant with said laws and regulations.

The resolution was seconded, discussed and approved by role call vote:

YEA: Roth, Apostolides, Weaver, Moretti, Levy, Broaddus, Gibson, Coudriet
NAY: None

Public Services

Commissioner Apostolides offered a resolution regarding the ongoing construction/renovation at 1953 Biltmore Street, NW.

Resolution Opposing the Application for Conceptual Design Review by the Owner of 1953 Biltmore Street, NW to the DC Historic Preservation Review Board

WHEREAS, the DC Historic Preservation Review Board (HPRB) has informed ANC 1C of its intention to consider an application for conceptual design review on behalf of the owner of 1953 Biltmore Street NW at the HPRB's October 2003 meeting, and

ADVISORY NEIGHBORHOOD COMMISSION 1C

Adams Morgan

Minutes of December 3, 2003

A scheduled meeting of Advisory Neighborhood Commission 1C was held on Wednesday, December 2, 2003 at the Third District Police Headquarters. ANC1C Chairman Alan Roth called the meeting to order at 7:06 p.m. Approximately 40 members of the public attended.

Attending were Commissioners Alan Roth (1C01), Nik Apostolides (1C02), Bryan Weaver (1C03), Mindy Moretti (1C04), Andrea Broaddus (1C06), Josh Gibson (1C07) and Jeff Coudriet (1C08).

Commissioner Roth advised the public that the seat for Single Member District 1C05 had become vacant as a result of Commissioner Levy's recent resignation and that a new petition period had begun as of the previous day (Dec. 2) because no one had filed petitions by the previous deadline of Dec. 1.

VICE CHAIR'S REPORT

Josh Gibson, vice chair gave an update on the status of the Dec. 15 quarterly forum. The Mayor is still confirmed. Commissioner Gibson made a motion to move the meeting to the Marie Reed Learning Center and that any necessary expenses be covered. The motion was approved by unanimous consent.

TREASURER'S REPORT

Commissioner Coudriet, treasurer provided the Commission copies of the FY04 budget as it currently stands. Commissioner Coudriet moved the approval of the FY04 budget. The motion was seconded and approved by voice vote. (See attached budget as approved).

CONSENT AGENDA

The following resolution was approved by unanimous consent:

Resolution of Commendation and Thanks to Former ANC1C Treasurer Ken Levy

WHEREAS, Ken Levy served ANC 1C as a Commissioner and as Treasurer from January 2003 through October 2003, and

WHEREAS, Commissioner Levy served in these volunteer positions with distinction, integrity, and the best interests of the community in mind, particularly by keeping the books and financial affairs of the Commission in good order, and

WHEREAS, he resigned at the end of October 2003 as required by law because of a move outside the boundaries of ANC 1C, and

WHEREAS, his hard work and service to the Adams Morgan community has nonetheless been deeply appreciated,

NOW, THEREFORE, BE IT RESOLVED, THAT Advisory Neighborhood Commission 1C commends Commissioner Levy for his devotion and dedication to the Adams Morgan community, thanks him for his service to ANC 1C, and wishes him every success in his future endeavors.

PUBLIC COMMENTS

Commissioner Roth opened the floor to members of the community. Wilson Reynolds noted that the Adams Morgan Community Association will hold its 3rd Annual Officer Appreciation Night at Adams Mill Bar & Grill on Dec. 9. Lisa Duperier gave an update on Adams Morgan Main Street and AmeriCorps.

COMMITTEE REPORTS

ABC & Public Safety

Officer Gonzales provided a statistical crime update for the neighborhood and addressed questions from the Commission and the community on several ongoing crime problems in the neighborhood.

Commissioner Weaver gave an update on the status of the protest of Timerhi International. Commissioner Weaver made a motion that he be authorized to look into hiring legal counsel to support the ANC's protest and to use up to $5000 in discretionary funds to do so. The motion was seconded and approved by voice vote.

The next meeting of the committee (combined with the PSA 301/304 meeting) will be Dec. 10 at 7:30 p.m. at the Kalorama Park Rec. Center

Planning Zoning and Transportation

Commissioner Broaddus announced that the next PZT meeting will be Dec. 11 at 8 p.m. in the Third District Police Headquarters. On the agenda for the Dec. 11 meeting will be presentations from the developers of the Dorchester House and from Harris Teeter.

Commissioner Broaddus moved that ANC1C support the Kalorama Citizens Association (KCA) recently filed appeal to the BZA in regards to 1819 Belmont Rd., NW. The motion was seconded, discussed and approved by roll call vote:

YEA: Roth, Apostolides, Weaver, Moretti, Broaddus, Gibson, Coudriet
NAY: None

Commissioner Broaddus moved that ANC1C support the application of Habana Village for (1)an area variance from the FAR limitation to permit the use of its third floor for commercial purposes, and (2) for a parking variance for the establishment to obtain a public hall license. The motion was seconded and discussed.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DISTRICT DEPARTMENT OF TRANSPORTATION

Roth Declaration Exhibit 8

Office of Public Space
Management Administration

February 17, 2004

Alan Roth
Chairperson ANC 1C
PO 21652
Washington, DC 20009

By facsimile to 347-3133

RE: 1819 Belmont Road N.W.

Dear Commissioner Roth:

Thank you for your inquiry into the status of Public Space Permits for 1819 Belmont Road N.W. This address has 25 feet of Public Space in front of it as you measure from the curb, (10 feet of sidewalk and 15 feet of public parking). I have enclosed the distribution card for confirmation. I also have reviewed The GIS map of the area with the orthophoto and real property overlay and it appears that the building on this street are built to the property line on the front.

Any removal of the berm, landscaping or excavation in this area would have required a permit, which we do not have on file. In addition it would have required a permit from the Watershed Protection Division of the Department of Health. Even if the berm removal were shown on the building plans (and they got a Watershed permit then) they still would have required a separate Public Space permit.

I have also looked at the permits our office has issued to this address since 2001.I There were none issued in 2001. The following permits have been issued and have been attached.

P608852 11/12/02for a dumpster renewed with p609509 12/12/02 and had six more renewals, the last of which was P616807 Which expired 12/11/03

P616806 for a crane with several renewals the most recent isP620207 issued 2/204 for a crane expires 4/2/04 and two other crane permits.

P612634 renewed through P617086 Which expired 10/29/03 and was for Plumbing-domestic service, Fire Service, sanitary sewer and water connections.

P619253 for use of part of the alley. Expired 2/12/04.

Copies of all the permits are attached. If you have any questions you may reach me at 535-2699 or my Nextel 437-6388.

Sincerely,

Denise Wiktor
Public Space Manager

STREET WIDTHS

10 A

Street Belmont Road, Northwest

Kal. Cir. to Conn. Ave:
See E0204432
See Map 1299
ED-143364-17

PLEASE DO NOT CREASE OR FOLD.

LOCATION	REMARKS	STREET	ROADWAY	SIDEWALK		PARKING	
18th to Columbia Rd.		80	30	10	10	15	15
Conn. Ave., to Kal Cir. (see Above)		B-1299/1					
West of 20th St.		100	30	12	12	23	23
Mass. Ave to Kalorama Circle (Map 52)		60	30	10	10	5	5
19th to 20th North side 10' BRL		60	30	10	10	5	5

P-4186

DECLARATION

I, BRYAN WEAVER, being of the age of majority and otherwise competent to make this Declaration do state:

1. I reside at 1812 Calvert Street, NW, Unit #D, in the Adams Morgan neighborhood of Washington, DC.

2. Since January 2003, I have been a member of Advisory Neighborhood Commission 1C (ANC 1C), having been elected a Commissioner for Single Member District (SMD) 1C03 in November 2002. The property at issue in the *Appeal of Kalorama Citizens Association,* BZA Appeal No. 17109 – 1819 Belmont Road, NW, Washington, DC 20009 – is located within my SMD. In my capacity as the SMD Commissioner representing the neighbors of that property, I am personally familiar with and have participated in many of the events relevant to this Appeal.

3. During the winter of 2003, shortly after my taking office, Montrose LLC, the owner of the property in question, filed a public space application for permission to construct a curb cut and driveway in front of the premises, which would lead in turn to a proposed garage on the ground-floor level of the building. The public space application also disclosed that construction of the curb cut would require the removal of an oak tree.

4. On Wednesday, March 19, 2003, I attended a public meeting of ANC 1C's Committee on Planning, Zoning and Transportation (PZT) to discuss the curb cut application. Two representatives of Montrose, Ms. Gail Montplaisir and Mr. Norman Smith, also attended that meeting to discuss the curb cut/driveway request and to respond to the committee's and community's questions about it. As part of their presentation, the Montrose representatives

described the overall project in general terms as a major renovation with an addition. However, the overwhelming focus of the meeting was on the curb cut application. There was no full description given of the project's magnitude, nor were any drawings other than those pertaining to the proposed curb cut, driveway, and garage distributed to those in attendance. I was not given, nor do I have any recollection of having seen at the meeting, any elevation drawings showing the full height of the proposed structure. There was certainly no distribution or discussion of any such elevation drawings. In fact, the only discussion of the building's planned height came in response to a question from Mr. Larry Hargrove, who asked whether the developers intended to build on top of the existing structure and if so, how high up. Mr. Smith responded that they intended to add one story. The PZT Committee later voted to recommend that the full ANC 1C oppose the curb cut application, which the ANC did at its April 2, 2003 business meeting by a vote of 8-0.

5. I have since learned that while Mr. Smith told Mr. Hargrove and the other meeting attendees on March 19th that Montrose intended to add only one story, Montrose on March 11th had already been issued a building permit that called for the addition of "2 floors plus attic," for a total of "5 stories plus basement." I am compelled to wonder from this sequence of events whether Montrose intentionally downplayed the project's size and scope at the PZT meeting, and whether Mr. Smith specifically misrepresented their plans to Mr. Hargrove in response to his question about building height.

5. Until early September 2003, no constituent, and no other member of the ANC or Adams Morgan community, expressed to me any awareness of concerns regarding the height of the roof, parapet, or so-called penthouse, none of which were built up or visible until that time. Rather, any attention focused on the project between the time of the PZT meeting and early

September related mostly to the neighbors' and community's dismay over Montrose's destruction of the ground-floor facade – and on the consequent loss of a valuable architectural element in the so-called "Washington Heights" section, for which the Kalorama Citizens Association (KCA) had begun the process of seeking Historic District status. The height and roof structure issues did not become evident to me or to the community until the first week of September.

6. At no time until after controversy erupted over this project in September 2003 and a stop-work order was issued by the Department of Consumer and Regulatory Affairs (DCRA) did I ever observe any building permits posted on the property.

7. I attended a meeting in the office of Councilmember Graham at 2:00 pm on October 16, 2003, at which the primary subject was DCRA's refusal to turn over the architectural plans, drawings, and other materials on which its March 11, October 6, and October 16 permits were based. That meeting culminated in a telephone call placed by Councilmember Graham to DCRA's Denzil Noble and Theresa Lewis, whom he put on speaker-phone so that the others attending the meeting in his office could hear and participate. In addition to myself, these attendees included Ann Hargrove, ANC 1C Chairperson Alan Roth, and two other Belmont Road constituents and neighbors of the project, Donald Brooks and Jonathan Orloff. Without making a firm commitment as to how much of the requested material would be turned over, or when, Mr. Noble and Ms. Lewis insisted that they had to terminate the call because of another meeting and agreed to resume the call early the next morning. Councilmember Graham called me throughout the following morning to let me know that Ms. Lewis kept postponing the conference call, which in the final analysis never actually happened at all.

8. Based on the foregoing, it is clear to me that no reasonable person in the community prior to early September did have or could have had notice or knowledge of any of the zoning violations now being claimed by the KCA in its appeal. Even then, by withholding full access to and copying of the plans, drawings, and related materials until the KCA was compelled to file a motion in this appeal, DCRA itself made it difficult or impossible for KCA or any citizen to ascertain whether our suspicions about such violations were well-founded and could justify the time and expense that a BZA appeal would entail.

9. In addition to being constituents of mine, Ann and Larry Hargrove are well-known to all persons active in and around the Adams Morgan community as perhaps the most knowledgeable residents of our neighborhood in zoning, planning, and historic preservation matters. Given that they live just a few doors away from the project at issue here, it is very difficult for me to imagine that they would not have questioned or challenged the March 11th permit immediately upon suspecting any of the violations being alleged by the KCA here.

Bryan Weaver
ANC Commissioner – ANC 1C
Single Member District 1C03

Dated: February 29, 2004

A historic survey is a preliminary step toward a possible historic district.

Why a historic district?

One good reason:
to protect our neighborhood against projects such as the façade demolition now underway by outside developers in the 1800 block of Belmont Road:

Ann Hughes Hargrove 1827 Belmont Road, N.W. Washington, D.C. 20009-5164
Voice: 202-332-6320 Fax: 202-328-1522 E-mail: ahhjlhdc@worldnet.att.net

September 10, 2003

Denzil Noble, Administrator
Building and Land Administration
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E.
Washington, D.C. 20002 **FAX: 442-4863**

Re: 1819 Belmont Road, N.W.
Lot 45, Square 2551

Dear Mr. Noble,

We are sorry to be writing you on an urgent matter once again, but a problem has emerged that requires your immediate attention.

In a relatively short period of time, a so-called alteration and repair/new addition project that has been underway for some months at the above address has shot up to a height that may well violate the Height of Buildings law (D.C. Code Section 6.l601.05). Even if it should turn out that no violation of the Height of Buildings law is involved, there are nonetheless sufficient other problems to justify your immediate action with a stop work order, and further investigation. (The community was caught off guard because the applicant asserted to community and ANC persons some months ago, that there would be an addition of one story to an existing rowhouse, and the permits have not been consistently displayed on the building, if at all.)

The residentially zoned portions of this block facing onto Belmont Road consist of handsome, turn-of-the century restored rowhouses, condo stacked rowhouses, and two small apartment buildings not exceeding five stories. This modified rowhouse edifice under construction (the likes of which we have never seen) towers over its neighbors and is visible from virtually all directions, impeding light and air and destroying the historic character of the block. The effect is grotesque, and is quite a shock.

Before listing these problems, we wish to lodge a major complaint: We have been unable to view a copy of the submitted "drawings" accompanying the application for the granted permit, much less to obtain copies, although neighbors have tried to do so on several occasions. This makes it exceedingly difficult for the public to know what is taking place at a given location, especially if discussions with the applicant have resulted in a misunderstanding of what would be constructed. Had we been able to look at the plans earlier, which neighbors had requested at the counter, we could have alerted you to these problems more quickly. We request that this policy be changed immediately. Even if given information regarding interpretation of such plans, it is important for the public to have the right of independent review.

Issues:

1. Height. Section 6-601.05(c) of the D.C. Code provision cited above provides, in relevant part:

> On a residence street, . . . no building shall be erected, altered or raised in any manner so as to be over 90 feet in height . . . , *nor shall the highest part of the roof or parapet exceed in height the width of the street, . . . diminished by 10 feet . . .* ." (emphasis added)

Section 6-601.05(e) provides:

> On streets less than 90 feet wide where building lines have been established and recorded in the Office of the Surveyor of the District, . . . the width of the street, insofar as it controls the height of buildings under this subchapter, shall be held to be the distance between said building lines.

First, the greatest permissible height under Section 6-601.05(c) would be70 feet. We were informed yesterday by a very helpful DCRA official that the distance between the building lines in this block of Belmont Road, N.W., is 80 feet (shown on the map as 30 feet of street width, abutted on either side by two strips of 15 feet and 10 feet respectively, for a total of 80 feet). The actual distance between the existing building lines as measured on the ground is also 80 feet.

Secondly, the building plans apparently contemplate a height of 75 feet. The permit lists no permitted height of the structure in the place provided on the permit. We were informed yesterday by the DCRA official that the plans or accompanying materials, which we were not permitted to inspect, indicate a maximum height to the highest roof point of 75 feet, which, on the basis of Section 6-601.05(c), would be 5 feet in excess of the lawful height.

Third, it appears from a rough and necessarily unreliable visual estimate that the structure already in place may exceed 75 feet.

It is therefore urgent that the question of the lawfulness of the proposed or actual height of the structure, measured from the curb level at the middle of the front of the building, be addressed immediately, and that if either the permit or the actual construction exceeds the lawful height, corrective measures be promptly ordered in accordance with the law, including requiring removal of the excess height.

2. Discrepancies between permit and project. The building permit (#B449218) is for the following:

> "ALTERATION AND REPAIR OF EXIST.BLDG. ADDITION IN REAR, ADD 2 FLOORS PLUS ATTIC; RETAINING WALL & STAIR AT REAR. SEPARATE ELECTRICAL, PLUMBING AND MECHANICAL INSTALLATION PERMITS ARE REQUIRED".

The permit further indicates that it is to be a 5-story building plus basement to be occupied for 5 units.

The permit application and permit characterize the project as comprising substantial alteration and repair of an existing building. The application attributes approximately 61% of the project cost to new construction, and 39% to alteration and repair, for which corresponding permit fees according to their varied rate appear to have been paid to the District of Columbia. In fact, however, it appears that the building has been completely demolished except for portions of the front façade, and that all or virtually all of the interior and exterior components of the building are *new* construction except for those portions of the front façade that were not demolished. We are confident that inspection of the construction by a building engineer would confirm these facts, and, if so, that the DCRA will conclude that the project underway is not the project for which permits were applied for and granted, and take the necessary corrective action.

3. FAR. Because we are denied access to the plans, we cannot independently do the FAR calculations to assure that the R-5-D requirement of 3.5 FAR has not been exceeded. Of particular importance is whether the level characterized as a basement has been included in the FAR calculations, as it should be, inasmuch as it is at grade level that has been changed with the complete removal of the berm in front of the building. (For that matter, it would be surprising if there were a public space permit allowing complete removal of the berm.)

4. No demolition, building or related construction permits are displayed on the building; we are not aware that any have ever been displayed. Workmen are now demolishing the garage in the rear as of today and continue the new construction at a rapid pace.

We understand that an inspector went out to the address yesterday, and we appreciate the service. However, we believe these outstanding problems warrant an immediate investigation of the situation and a stop work order until all are assured that the construction, its permits, and its postings are in full compliance with applicable law and regulations.

Thank you for your attention to this matter. We would appreciate a response as to whom we should contact regarding this issue before the construction continues further. We would also appreciate obtaining copies of the plans as well as the FAR calculation sheets and speaking further with your staff about interpretation of these plans.

Sincerely,

Ann Hughes Hargrove, Zoning Chairman, Kalorama Citizens Association

Cc: Council member Jim Graham
Theresa Lewis, Deputy Director For Operations
Alan Roth, Chair, ANC-1C
Matt Forman, President, Kalorama Citizens Association

Ann Hughes Hargrove *1827 Belmont Road, N.W.* *Washington, D.C. 20009-5164*
Voice: 202-332-6320 *Fax: 202-328-1522* *E-mail: ahhjlhdc@worldnet.att.net*

To: Mr. Denzil Noble, Administrator, Building and Land Administration
Department of Consumer and Regulatory Affairs **VIA FAX: 442-4863**
From: Ann Hughes Hargrove, Zoning Chairman, Kalorama Citizens Association
Date: September 15, 2003
Subject: 1819 Belmont Road, N.W.

First, thank you for posting the stop work order to conduct a review of this situation.

Secondly, two additional comments should be added to our earlier correspondence of September 10, 2003:

(1) the demolition permit was limited to the removal of interior walls.

(2) the measuring point for the height. We are concerned that it be done, as required: "the vertical distance measured from the level of the curb opposite the middle of the front of the building to the highest point of the roof or parapet" for a street of this width in accordance with the Height Act as well as the Zoning Regulations. For what it is worth, the berm in front of the house has been completely removed for a new grade level in front of a basement or first level of the house. The height measurement, taken at the appropriate point at the curb midway between the property lines, we believe, should result in removal not only of the excess five feet (70 feet is allowed for this street, not 75 feet under the Height Act), but also additional constructed height if measured from the appropriate point.

Thank you for your assistance.

Cc: Councilmember Jim Graham
Alan Roth, ANC 1-C Chairman
Matt Forman, President, Kalorama Citizens Association

Ann Hughes Hargrove 1827 Belmont Road, N.W. Washington, D.C. 20009
Voice: 202-443-6320 Fax: 328-1522 E-mail: ahhjlhdc@worldnet.att.net

September 22, 2003

Mr. Denzil Noble, Administrator
Building and Land Administration
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E.
Washington, D.C. 20002

Re: documents relating to construction activities at 1819 Belmont Road, N.W., lot 45, square 2551

Dear Mr. Noble:

Pursuant to D.C. Code Section 2-531 et seq., "Freedom of Information", I hereby request the following information: copies of all documents generated or received on or after January 1, 2002, relating to construction activities proposed for or underway at the address referred to above, *including, but not limited to:* all permit applications, all permits, notes or memoranda to or from the applicant for such permits or other documents related to the application for or granting of such permits, floor-area ratio (FAR) and lot occupancy worksheets, architect's plans and drawings including originally submitted plans and any revised plans, and any DCRA orders.

I would appreciate your immediate response, particularly in view of the fact of our previous unsuccessful efforts to obtain access to or copies of certain of the requested documents, about which I wrote you on September 10, 2003.

Sincerely,

Ann Hughes Hargrove

Ann Hughes Hargrove
Zoning Chairman, Kalorama Citizens Association

Cc: Councilmember Jim Graham
Matt Forman, President, Kalorama Citizens Association
Alan Roth, Chairman, ANC 1-C

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
and
ORDER NO. 02-01
Z.C. Case No. 02-01
(Text Amendment – 11 DCMR)
(Filing Deadline for Appeals to the Board of Zoning Adjustment)

September 9, 2002

The full text of this Zoning Commission order is published in the "Final Rulemaking" section of this edition of the *D.C. Register*.

Government of the District of Columbia

ZONING COMMISSION

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
and
ORDER NO. 02-01
Z.C. Case No. 02-01
(Text Amendment – 11 DCMR)
(Filing Deadline for Appeals to the Board of Zoning Adjustment)

September 9, 2002

The Zoning Commission for the District of Columbia, pursuant to its authority under §§ 1 and 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended; D.C. Code, 2001 Ed. §§ 6-641.01 and 6-641.07(c)); having held a public hearing as required by § 3 of the Zoning Act (D.C. Code, 2001 Ed. § 6-641.03); and having referred the proposed amendment to the National Capital Planning Commission for a 30-day period of review pursuant to 11 DCMR §§ 3025.3 and 3038.1; hereby gives notice of the adoption of the following amendments to § 3112 (Pre-Hearing Procedures for Appeals) of the Zoning Regulations, Title 11 DCMR, pertaining to appeals to the Board of Zoning Adjustment from the decisions of the Zoning Administrator and other administrative officials in the administration and enforcement of the Zoning Regulations. This rulemaking requires that all such appeals be filed within sixty (60) days of the date the person filing the appeal had notice or knew of the decision complained of, or reasonably should have had notice or known of the decision complained of, whichever is earlier. The Commission took final action to adopt the amendment at a public meeting held on September 9, 2002.

This final rulemaking is effective upon publication in the *D.C. Register*.

The Commission initiated this rulemaking to reduce uncertainty and litigation over the timeliness of Board of Zoning Adjustment appeals. Section 8 of the Zoning Act authorizes the Board to hear and decide appeals where an aggrieved person alleges that there is an error in any order, requirement, decision, determination, or refusal by the Zoning Administrator or other administrative official in carrying out or enforcing the Zoning Regulations. *See* D.C. Code, 2001 Ed. § 6-641.07(g)(1). The Zoning Act, however, does not specify a time period for the filing of an appeal and the Board's Rules of Practice and Procedure in 11 DCMR § 3112.2 simply require that an appeal be "timely." Because the timeliness of an appeal is jurisdictional, the absence of a specific time period has led over the years to extensive litigation, both before the Board and the District of Columbia Court of Appeals. In *Waste Management of Maryland, Inc. v. District of Columbia Board of Zoning Adjustment*, 775 A.2d 1117, 1122 (D.C. 2001), the Court stated that

"in the absence of exceptional circumstances substantially impairing the ability of an aggrieved party to appeal – circumstances outside of the party's control – we conceive of two months between notice of a decision and appeal therefrom as the limit of timeliness."

The amendment to 11 DCMR § 3112.2 codifies the principles established in *Waste Management* and prior Court decisions by requiring that all appeals to the Board pursuant to the Zoning Act be filed within sixty (60) days of the date the appellant had actual or constructive knowledge of the administrative decision complained of. Because an appellant may not have notice or knowledge of a decision until construction is underway, the amendment provides that no appeal may be filed later than ten (10) days after the construction is "under roof." The Board is authorized to provide an extension of the filing deadline only when there are exceptional circumstances outside of the appellant's control that substantially impaired the appellant's ability to file an appeal and the extension would not prejudice the rights of other parties to the appeal.

The Commission held a public hearing on this case on April 11, 2002. At the hearing, Dorothy Miller expressed concern that the denial of access to permit files and plans might affect a person's ability to file a timely appeal. The Commission agrees that the denial of access to public information might result in delay; however, the rule addresses such delays by providing that the appeal period begins to run from the time a person had actual or constructive knowledge of the administrative decision complained of and by providing that the Board may extend the appeal period in exceptional circumstances.

At its regularly scheduled monthly meeting on May 13, 2002, the Commission took proposed action pursuant to 11 DCMR § 3027.2 to approve the proposed amendment. A Notice of Proposed Rulemaking was published in the *D.C. Register* on May 24, 2002, at 49 DCR 4884, for a 30-day notice and comment period.

The Commission received comments in response to the Notice of Proposed Rulemaking from the law firm of Holland & Knight LLP recommending that the language in proposed § 3112.2 be amended to read that "An appeal *may* be filed no later sixty (60) days" from the date the person filing the appeal had notice or knowledge of the administrative decision complained of, to reflect that the filing of an appeal is a discretionary act. The Commission declines to make the suggested change since the introductory language in § 3112.2 already reflects the discretionary nature of the filing of an appeal (that is, an aggrieved person "may file a timely appeal"). The language in paragraph (a), however, is intended to be mandatory. That is, if an aggrieved person chooses to file an appeal, that appeal must be filed within the sixty (60) day time period allowed.

Further, Holland & Knight interprets paragraph (b) in § 3112.2 as potentially shortening the sixty- (60) day time period established in paragraph (a), and suggests revising paragraph (b) to state that an appeal must be filed no later than ten days after the date the structure is under roof or within the sixty- (60) day period established in paragraph (a), whichever comes first. The Commission, however, did not intend in paragraph (b) to shorten the sixty- (60) day appeal period. Since the sixty- (60) day appeal period is based upon actual or constructive notice or knowledge of the decision complained of rather than the actual date of the decision complained of, the Commission's intent in paragraph (b) was to establish a firm deadline beyond which no appeal could be filed. Accordingly, the Commission has revised paragraph (b) and added a new

paragraph (c) to clarify that all appellants have at least sixty (60) days from the date of the decision complained of in which to file an appeal. When an appellant seeks to file an appeal more than sixty (60) days after the date of the decision on the grounds that the appellant did not have notice or knowledge of the decision until some time after the date of the decision, the latest date an appeal can be filed is ten (10) days after the structure is under roof. The cap in paragraph (b) on the appeal period, however, does not relieve an appellant of the responsibility of filing a timely appeal, within sixty (60) days of actual or constructive notice or knowledge of the decision complained of.

Finally, Holland & Knight recommends adding a paragraph that states an appeal that is timely filed is subject to dismissal on equitable grounds, such as laches and estoppel. Because an appeal may be dismissed on any number of grounds, the Commission has declined to add the suggested language.

The proposed rulemaking was referred to the National Capital Planning Commission (NCPC) under the terms of § 492 of the District of Columbia Charter. NCPC, by report dated June 6, 2002, found that the proposed text amendment would neither adversely affect the federal interest, nor be inconsistent with the Federal Elements of the Comprehensive Plan for the National Capital.

There are no Advisory Neighborhood Commission or District of Columbia Office of Planning reports in this case. The Office of the Corporation Counsel has determined that this rulemaking meets its standards of legal sufficiency.

Apart from the clarifying amendments noted above, no substantive changes to the rulemaking as proposed have been made. The Commission therefore took final action to adopt the proposed rulemaking as the final rulemaking at its public meeting on September 9, 2002.

Based on the above, the Commission finds that the proposed amendment to the Zoning Regulations is in the best interests of the District of Columbia, consistent with the purpose of the Zoning Regulations and Zoning Act, and not inconsistent with the Comprehensive Plan for the National Capital.

In consideration of the reasons set forth herein, the Zoning Commission hereby **APPROVES** the following amendment to chapter 31, § 3112 of the Zoning Regulations, Title 11 DCMR.

Chapter 31, Board of Zoning Adjustment Rules of Practice and Procedure, § 3112.2, pertaining to pre-hearing procedures for appeals, is amended to read as follows. Added language is shown bolded and underlined:

3112.2 Any person aggrieved by an order, requirement, decision, determination, or refusal made by an administrative officer or body, including the Mayor of the District of Columbia, in the administration or enforcement of the Zoning Regulations may file a timely appeal with the Board **as follows:**

(a) An appeal shall be filed within sixty (60) days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier.

(b) If the decision complained of involves the erection, construction, reconstruction, conversion, or alteration of a structure or part thereof, the following subparagraphs shall establish the latest date on which an appeal may be filed:

(1) No appeal shall be filed later than ten (10) days after the date on which the structure or part thereof in question is under roof. For purposes of this subparagraph, the phrase "under roof" means the stage of completion of a structure or part thereof when the main roof of the structure or part thereof, and the roofs of any structures on the main roof or part thereof, are in place; and

(2) The provisions of paragraph (b) of this subsection shall not relieve an appellant of the jurisdictional requirement in paragraph (a) of this subsection of filing a timely appeal.

(c) Notwithstanding paragraphs (a) and (b) of this subsection, for purposes of establishing the timeliness of an appeal under this subsection, an appellant shall have a minimum of sixty (60) days from the date of the administrative decision complained of in which to file an appeal.

(d) The Board may extend the sixty- (60) day deadline for the filing of an appeal only if the appellant demonstrates that:

(1) There are exceptional circumstances that are outside of the appellant's control and could not have been reasonably anticipated that substantially impaired the appellant's ability to file an appeal to the Board; and

(2) The extension of time will not prejudice the parties to the appeal, as identified in § 3199.1.

Vote of the Zoning Commission taken at its public meeting on May 13, 2002, to **APPROVE** the proposed rulemaking: **4-0-1** (Carol J. Mitten, Peter G. May, Anthony J. Hood, and James H. Hannaham, to approve; John G. Parsons, not voting, not having heard the case).

This order was **ADOPTED** by the Zoning Commission at its public meeting on September 9, 2002, by a vote of **4-0-1** (Carol J. Mitten, Peter G. May, Anthony J. Hood, and James H. Hannaham to adopt; John G. Parsons not voting, not having heard the case).

In accordance with the provisions of 11 DCMR § 3028.9, this order shall become effective upon publication in the *D.C. Register*; that is, on FEB - 7 2003.

Carol J. Mitten
Carol J. Mitten
Chairman
Zoning Commission

Jerrily R. Kress
Jerrily R. Kress, FAIA
Director
Office of Zoning

FACT SHEET
1819 Belmont Street NW

Background

12/19/02 – Interior demolition/excavation permit (B425801) issued to Gail Montplaisir and Montrose LLC.

1/23/03 – Foundation and groundwork excavation permit issued (B448421). Indicated "no utility work".

3/11/03 - a building permit (B499218) was issued for alteration and repair of an existing building, an addition in the rear (2 floors and attic), and a retaining wall and stair at rear. The building is a 4-unit apartment building in an R-5-D zone (3 stories plus basement). The permit application proposed to expand to 5 units (5 stories plus basement).

Current Status

BLRA inspected the site several times in response to complaints from neighbors and Councilmember Graham re: height of new structure, port-o-johns and trash. Based on the inspections and review of the building plans, it was determined that the demolition exceeded the scope of the permit, and that the proposed building height exceeds the 70 feet maximum allowable.

Based on these facts, a Stop Work Order was issued on 9/12/03. Councilmember Graham called DCRA on 9/15/03, stating that work continued over the weekend. Denzil Noble called Mark Yeager, project superintendent, (423-6841) to indicate that there were reports of weekend work. Yeager denied that he had any workers on site on Saturday and Sunday and has submitted a letter to BLRA to that effect.

The project's architect, zoning consultant and project assistant met with BLRA at 3PM on 9/15/03. The purpose of the meeting was to review BLRA's basis for the SWO and to determine options that are available to the builder.

Next Steps

The developer will transmit a letter to BLRA asking for permission to brace the existing walls against the anticipated hurricane later the week of 9/15/03. They were instructed to specifically state the stabilizing methods that would be used so that they in no way could be construed as continued construction.

It was determined that the demolition that has taken place complies with the approved demolition plans. Regarding future construction, the owner's reps will present available options to the owner: (1) whether or not to appeal to the BZA or (2) file revised plans that conform to the 70 foot requirements.

LB 9/15/03