

**BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

APPEAL OF:

**Kalorama Citizens Association from the)
Administrative Decision of David Clarke,)
Director, Department of Consumer and)
Regulatory Affairs, from the issuance of)
Building Permit Nos. B455571 and B455876,)
dated October 6 and 16, 2003, respectively,)
to Montrose, LLC, to adjust the building height)
to 70 feet and to revise penthouse roof structure)
plans to construct a five-story apartment)
building in the R-5-D District at 1819 Belmont)
Road, N.W., Washington, D.C.)**

BZA Appeal No. 17109

**Next Hearing Date:
April 20, 2004**

12-11-03 10:42:11

**RESPONSE OF INTERVENOR MONTROSE LLC
TO QUESTION OF BZA'S JURISDICTION OVER 1910 HEIGHT ACT**

**I.
INTRODUCTION**

At its hearing on March 9, 2004, in the above-referenced appeal, the Board of Zoning Adjustment ("Board" or "BZA") questioned whether it had the authority to enforce the Height of Buildings Act, commonly referred to as the 1910 Height Act. The representative from the Office of Corporation Counsel advising the Board opined that the Board does not have jurisdiction over the 1910 Height Act. The Board invited the parties to brief this issue.

As discussed in greater detail below, the Board does not have jurisdiction to enforce the 1910 Height Act. Rather, that authority is reserved to the Office of Corporation Counsel. Consequently, the Board should refrain from addressing the appellant's challenge to Building Permit Nos. B455571 and B455876 based on non-compliance with the 1910 Height Act.

BZA

Case No. 17109

Exhibit No. 65

II. ARGUMENT

A. The Zoning Act Limits BZA Jurisdiction to Zoning Regulations Adopted Under the Zoning Act and Does not Include the 1910 Height Act.

The District of Columbia Zoning Act sets forth the powers and duties of the BZA. In addition to reviewing requests for special exception and variance relief, the Board is also vested with the authority to hear appeals brought by any person or officer of the District or federal government aggrieved or affected by a decision of the Building and Land Regulation Administration "based in whole or in part upon any zoning regulation or map *adopted under this subchapter and subchapter V of this chapter.*" D.C. Code Ann. § 6-641.07(f) (2001 ed.) (emphasis added). If an appeal does not challenge a map or regulations adopted pursuant to these two subchapters, the Board will not have jurisdiction over that matter.

To understand the scope of the Board's jurisdiction on appeals, it is necessary to understand the structure of the D.C. Code and the specific subchapters therein. The phrase "this subchapter and subchapter V of this chapter" refers to Subchapter IV of Chapter 6 entitled "Zoning Regulations; Board of Zoning Adjustment" and Subchapter V of Chapter 6 entitled "Chanceries." See copy of index to D.C. Code, Chapter 6, attached hereto as Exhibit A.

BZA's grant of authority does *not* extend to Subchapter I of Chapter 6, entitled "General" and "Regulation of Heights and Exterior Designs of Buildings," respectively, which sets forth the provisions of the 1910 Height Act. While the Zoning Regulations incorporate the 1910 Height Act and require permit applicants to comply with those provisions, the Board was not granted enforcement authority over these provisions. Its jurisdiction is specifically limited to the two enumerated subchapters and the Board is powerless to hear challenges to the 1910 Height Act under Subchapter I.

This is similar to other provisions of the Zoning Regulations that require compliance with other District laws and regulations, yet which the Board does not have the power to enforce. For example, under section 2506.1 of the Zoning Regulations, all signs must comply with the sign regulations in the D.C. Construction Codes. Nevertheless, enforcement action of the sign regulations under the D.C. Construction Codes is vested in the Department of Consumer and Regulatory Affairs. *See* 12 DCMR 301.1 (2004) ("[t]he Director of the Department of Consumer and Regulatory Affairs shall enforce the provisions of the D.C. Construction Codes..."). Similarly, the Zoning Regulations require a permit applicant to comply with the requirements of the Shipstead-Luce Act. 11 DCMR § 2513.1. Yet, only the U.S. Commission of Fine Arts has jurisdiction over Shipstead-Luce applications and the Board does not have enforcement power over any recommended approvals made by CFA.

B. Enforcement Authority Over 1910 Height Act is Vested in the Office of Corporation Counsel.

The Board's inability to enforce the 1910 Height Act does not mean there no enforcement mechanism whatsoever. Rather, the 1910 Height Act specifically grants the District of Columbia Office of Corporation Counsel ("OCC") the authority to enforce the height limitations of the federal law in D.C. Superior Court. The 1910 Height Act provides that:

Buildings erected, altered, or raised or converted in violation of any of the provisions of this subchapter, are hereby declared to be common nuisances; and the owner or the person in charge of maintaining any such buildings, upon conviction on information filed in the Superior Court of the District of Columbia by the Corporation Counsel or any of his assistance in the name of said District, and which said court is authorized to hear and determine such cases, shall be adjudged guilty of maintaining a common nuisance, and shall be punished by a fine of not less than \$10 nor more than \$100 per day for each and every day such nuisance shall be permitted to continue, and shall be required by said Court to abate such nuisance. The Corporation Counsel of the District of Columbia may maintain an action in the Superior Court of the District of Columbia in the name of the District of Columbia, to abate and perpetually enjoin such nuisance.

D.C. Code Ann. § 6-601.08 (2001 ed.) (emphasis added) (see copy attached as Exhibit B).

Courts have recognized the authority of OCC to interpret the 1910 Height Act. In *Techworld Development Corporation v. D.C. Preservation League*, 648 F.Supp. 106 (D.D.C. 1986), the U.S. District Court for the District of Columbia held that "Congress explicitly entrusted the Corporation with primary responsibility for enforcing the HBA [Height of Buildings Act]." *Id.* at 121. The court also held that an adjacent property owner may have a cause of to enforce the 1910 Height Act, but that there is no general private right of action that extends to preservation groups. *Id.* at 120. Thus, enforcement authority over the 1910 Height Act rests solely with the OCC and the BZA is precluded from entertaining challenges to the Height Act in the instant appeal.

III. CONCLUSION

Wherefore, Intervenor Montrose LLC, respectfully requests the Board to dismiss the appellant's claim under the 1910 Height Act.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: Mary Carolyn Brown
Whayne S. Quin
Mary Carolyn Brown

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Response to Question on BZA's Jurisdiction over the 1910 Height Act was served this 13th day of March, 2004, by hand-delivery, or first-class mail postage prepaid, on the following:

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

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Washington, D.C. 20009

and

Alan J. Roth
Chair, Advisory Neighborhood Commission 1C
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Washington, D.C. 20009

Laurie Gisolfi Gilbert
Office of General Counsel, DCRA
941 North Capitol St., N.E., Suite 9400
Washington, D.C. 20001



CHAPTER 6
ZONING AND HEIGHT OF BUILDINGS.

Subchapter I. General.

- Section**
6-601.01. Nonfireproof dwellings.
6-601.02. Nonfireproof business buildings.
6-601.03. Buildings exceeding 60 feet in height; hotels, apartments, and tenements of 3 or more stories; halls with seating capacity of 300 or more; churches.
6-601.04. Additions; towers, spires, and domes; theaters.
6-601.05. Street width to control building height; business streets; residence streets; specified properties; structures above top story of building.
6-601.06. Frame dwellings.
6-601.07. Measurement of building height; parapet walls.
6-601.08. Violation of subchapter.
6-601.09. Right of Congress to alter or repeal.

Subchapter II. Regulation of Heights and Exterior Designs of Buildings.

- 6-611.01. Erection or alteration of buildings fronting on certain federal property; applications submitted to Commission of Fine Arts for review.
6-611.02. Plats of restricted area.

Subchapter III. Zoning and Zoning Commission.

Part A. Zoning Commission Established.

- 6-621.01. Zoning Commission—Created; composition; appointment; term of office; compensation; Chairman; powers generally.

Part B. Office of Zoning.

- 6-623.01. Office of Zoning; established.
6-623.02. Office of Zoning—Director and staff; appointment.
6-623.03. Office of Zoning—Transfer of functions of Zoning Secretariat of Office of Planning.
6-623.04. Office of Zoning—Recommendations, reports, review and comment by Office of Planning.

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6-641.06. Permissible maximum height of buildings.
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6-641.08. Maps and regulations of Zoning Commission to be filed; regulations to be published.
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- 6-641.15. Federal public buildings excepted from this subchapter.

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- 6-651.01. Transfer or use of chancery.
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Subchapter VI. Miscellaneous.

- 6-661.01. Mayor to prescribe fees for permits, certificates, and transcripts by Inspector of Buildings; schedule of fees to be displayed.
- 6-661.02. Cancellation of building permits.

Cross References

Civil infractions, administrative review, appeals, see § 2-1803.01.

SUBCHAPTER I. GENERAL.

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No combustible or nonfireproof building in the District of Columbia used or occupied or intended to be used or occupied as a dwelling, flat, apartment house, tenement, lodging or boarding house, hospital, dormitory, or for any similar purpose shall be erected, altered, or raised to a height of more than 4 stories, or more than 55 feet in height above the sidewalk, and no combustible or nonfireproof building shall be converted to any of the uses aforesaid if it exceeds either of said limits of height.

(June 1, 1910, 36 Stat. 452, ch. 263, § 1; May 20, 1912, 37 Stat. 114, ch. 124.)

Historical and Statutory Notes

Prior Codifications

- 1981 Ed., § 5-401.
- 1973 Ed., § 5-401.

Cross References

Building regulations, powers and duties of Council and Mayor, see § 1-303.04.

Section References

This section is referred to in §§ 6-601.04, 6-601.05, 6-601.07 to 6-601.09, and 6-641.06.

Library References

Key Numbers

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- Zoning and Planning ↻65.
- Westlaw Key Number Searches: 199k32; 414k65.

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- C.J.S. Health and Environment §§ 28 to 36, 52.
- C.J.S. Zoning and Land Planning §§ 25, 48, 51, 53.

§ 6-601.08. Violation of subchapter.

Buildings erected, altered, or raised or converted in violation of any of the provisions of this subchapter, are hereby declared to be common nuisances; and the owner or the person in charge of or maintaining any such buildings, upon conviction on information filed in the Superior Court of the District of Columbia by the Corporation Counsel or any of his assistants in the name of said District, and which said Court is hereby authorized to hear and determine such cases, shall be adjudged guilty of maintaining a common nuisance, and shall be punished by a fine of not less than \$10 nor more than \$100 per day for each and every day such nuisance shall be permitted to continue, and shall be required by said Court to abate such nuisance. The Corporation Counsel of the District of Columbia may maintain an action in the Superior Court of the District of Columbia in the name of the District of Columbia, to abate and perpetually enjoin such nuisance. The injunction shall be granted at the commencement of the action, and no bond shall be required. Any person violating the terms of any injunction granted in such proceeding shall be punished as for contempt by a fine of not less than \$100 nor more than \$500, or by imprisonment in the Washington Asylum and Jail for not less than 30 days nor more than 6 months, or by both such fine and imprisonment, in the discretion of the Court.

(June 1, 1910, 36 Stat. 454, ch. 263, § 8; June 25, 1936, 49 Stat. 1921, ch. 804; Apr. 1, 1942, 56 Stat. 190, ch. 207, § 1; June 25, 1948, 62 Stat. 991, ch. 646, § 32(b); May 24, 1949, 63 Stat. 107, ch. 139, § 127; July 8, 1963, 77 Stat. 77, Pub. L. 88-60, § 1; July 29, 1970, 84 Stat. 570, Pub. L. 91-358, title I, § 155(a), (c)(18).)

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Prior Codifications

1981 Ed., § 5-408.

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Notes of Decisions

In general 1

Actions and proceedings 3

Rights and remedies of individuals 2

1. In general

Determination of the corporation council, that the Height of Buildings Act permitted proposed international trade center in the District of Columbia to be 130 feet high, was based on

consistent, demonstrable, administrative practice and was reasonable and consistent with language of the HBA; therefore, alternative interpretations of the HBA did not provide basis to overturn corporation council's determination. D.C.Code 1981, §§ 1-361, 5-405. Techworld Development Corp. v. D.C. Preservation League, 1986, 648 F.Supp. 106. Zoning And Planning ☞ 353

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Advisory Neighborhood Commission 1C
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Washington, D.C. 20009

and

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51, 53.

ZONING & BUILDING HEIGHTS**§ 6-601.08**

Note 1

§ 6-601.08. Violation of subchapter.

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52.

C.J.S. Nuisances § 20.

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West Palm Beach

International Offices:
Caracas*
Mexico City
*Representative Office:

Rio de Janeiro
Sao Paulo
Tel Aviv*
Tokyo

FACSIMILE

TO:

Name: Board of Zoning Adjustment
Company: Washington, D.C.

Fax Number: (202) 727-~~6372~~ 6072

FROM:

Mary Carolyn Brown. 202-862-5990

NAME	TELEPHONE	TOTAL PAGES (Including Cover Sheet)
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MESSAGE:

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