# KALORAMA CITIZENS ASSOCIATION

April 26, 2004

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Honorable Geoffrey Griffis, Chairperson
Board of Zoning Adjustment
441 4th Street, N.W.
Washington, D.C. 20001

Ref: BZA Appeal No. 17109

Dear Chairman Griffis:

At the April 20, 2004 hearings appeal, Counsel for Montrose LLC asked leave to submit additional evidence notwithstanding the fact that Montrose's case had been presented at an earlier hearing. KCA declined to object to this request, on the understanding that we would be able to submit a response to this evidence as well as responding in the course of our closing statement, and the Chairman indicated that we could do so. Accordingly I have attached for the Board's consideration a Memorandum on Additional Material Submitted by Montrose LLC Concerning Calculation of Basement/Cellar FAR.

At the April 20 hearing we also expressed the intention of making a further written submission on the question of BZA jurisdiction respecting the Height Act, and agreed at that time, in response to a question by counsel for Montrose, that this submission would be limited to the issues raised in the memorandum on the jurisdictional issue earlier submitted by Montrose. We understand that this submission, as well as submissions by DCRA and Montrose on the James Fahey statement submitted by KCA, are due by May 11, and that proposed findings of fact and conclusions of law are due by May 25. If these dates are not correct, we would appreciate a call from the staff providing the correct dates.

Sincerely,

Ann Hughes Hargrove

Ann Hughes Hargrove

Cc: Andrea Ferster, Esq.
Carolyn Brown, Esq.
Laurie Gisolfi Gilbert, Esq.
Alan Roth

BZA
Case No. 17109
Exhibit No. 75

Matt Forman □ President
Denis James □ Executive Vice President and Chair, ABC Licensing Committee
Larry Karr □ Treasurer
Ann Hughes Hargrove □ Chairman, Zoning Committee

Founded 1
P.O. Box 21
Washington, DC 20

1. First measure the total perimeter of the floor in question.
2. Then, measure that portion of the perimeter of the floor, the ceiling of which is four feet or more above the adjacent finished grade, and what percentage this is of the total perimeter of the floor in question.
3. The answer to the above will be the percentage of the floor area chargeable to gross floor area."

The Zoning Administrator's application of this rule was upheld in the BZA Order No. 12325 of July 14, 1977 (Exhibit 3).[1] KCA believes that the rule is accepted by all parties in the present case.

**(2) The building abuts other buildings on either side, making it impossible to observe and measure the actual grade along the side walls. In such cases some other rational method of arriving at the required apportionment between "basement" and "cellar" must be employed in order to determine "gross floor area".**

We believe this rule is also accepted by all parties in the present case, with the disagreement arising only as to which of two competing methods is acceptable.

**"Grade plane method".** As is shown in testimony by Don Hawkins and the affidavit by the former Zoning Administrator James Fahey submitted by KCA (Exhibit 4), there is a rational method of making this apportionment in the case of row houses or other attached buildings -- a method employed by past DC Zoning Administrators after initially convening experts to ascertain the best measurement method. It involves establishing a grade plane line drawn from the grade level at the front of the building to the grade level at the back of the building. This diagonal line serves as an approximation of the actual grade. A horizontal line bisecting this line depicts the average grade plane, and that portion (if any) of the floor in which the horizontal and diagonal lines are both four or more feet below the ceiling is regarded as "basement", and the rest, if any, as "cellar" (see Exhibit 5, also attached to Don Hawkins Supplemental Report). This apportionment will vary, as it logically should, according to the actual steepness of the grade, as well as the length (and thus the actual floor area) of the ground floor.

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[1] The order stated: "Since parts of those buildings are below grade, the Zoning Administrator computed the amount of gross floor area in the following manner. He measured the total perimeter of the buildings, which was 2,105.22 feet. He then measured that portion of the perimeter which was four feet or more out of grade, which was 979.48 feet. The percentage of the perimeter which was four feet or more out of grade is 46.526. The Zoning Administrator then applied that percentage to the [area of the total floor]. The area of the total floor is 109,676.39 square feet, and the area charged against F.A.R. is 51,028.04 square feet. . . . The method used by the Zoning Administrator has been in constant use since the Zoning Regulations were adopted in 1958."

(Note: the actual language of the Order, instead of the bracketed portion above, is "area of the floor which is partially below grade"—an obvious drafting error, since the described calculation applied 46.526% to the total floor area, producing the 51,028.04 square feet includable in FAR.)

**"Perimeter method".** This method, employed by Montrose and the Zoning Administrator in the present case, measures the length of the entire perimeter of the ground level, measures the length of the front wall of that perimeter, determines what percentage of the total is comprised by the length of the front wall, and then applies that percentage to the total floor area to determine what portion of the total floor area is to be included in FAR.

*The problem with this method is that it produces figures that bear no rational relationship to either of these features of the building just mentioned -- floor area and grade -- and thus simply disregards the two variables that determine basement gross floor area under that the Zoning Regulations. It does not vary at all with variations in the steepness of the grade, and varies only modestly if the ground floor's length and floor space are doubled* (*see* Supplemental Report of Don Hawkins, pp. 3-4). No party in the present case has been able to find any basis for it in the Zoning Regulations. Its only practical function here is to award the owner a windfall in the form of an arbitrary and disproportionate exclusion from FAR contrary to the Zoning Regulations (just as it might arbitrarily *penalize* an owner with a wide-fronted but shallow basement).

**Montrose's proposed "grade plane method" calculation.** Possibly in recognition of this fact, Montrose prepared and submitted its own drawing purporting to depict the application of the "grade plane method" to 1819 Belmont (Exhibit 2). This is a section drawing of the lower levels of 1819 Belmont Road showing two alternative grade plane lines, drawn diagonally from the grade at the front of the building to the back of the *basement* (which does not extend through the whole footprint of the building). These lines terminate respectively at the basement ceiling and at the first floor floor. The two corresponding (horizontal) average grade plane lines are also shown.

Not surprisingly, the result is that no portion of the basement ceiling turns out to be four or more feet above the average grade plane. This stratagem, however, obviously ignores the very reason for resorting to the grade plane method in the first place, which is to provide a *reasonable approximation of the actual grade* of the ground on which the *building* sits: as Mr. Fahey's affidavit says, "The method . . . applied by our office involved drawing a grade plane line from the grade at the front of the *building* to the grade at the rear of the *building*." This grade of course remains the same regardless of the whether the basement extends through the entire length of the building or only a part thereof. If either of the "grade plane" lines depicted on Montrose's drawing is properly extended to the full footprint of the building, it terminates about 8 feet *above* the actual rear grade -- an absurdity. Instead, Montrose should have used the average grade plane that its own architect correctly drew on Sheet A8 of the original drawings (Exhibit 6; diagonal line not on original). As noted in Mr. Hawkins' testimony and his Supplemental Memorandum at p. 4, this line is virtually identical to that arrived at by Mr. Hawkins, and is thus necessarily based on a grade plane running from the front to the rear of the building like the Hawkins grade plane.

**Terminological note.** If we correctly understood, counsel for Montrose suggested at the April 20 hearing that the 1990 memo from Jim Fahey to Steve Sher constituted an endorsement by Mr. Fahey of the "perimeter method", in contrast to the Mr. Fahey's 2004 affidavit in support of the "grade plane" method. If so, counsel was in error. The two documents are perfectly compatible: the 1990 memo stated the general rule of apportionment that is to be applied in any case where a ground level is part basement and part cellar, and the 2004 statement described the method by which that rule is applied in the case of row houses or other attached buildings.

This misperception may have arisen from the fact that the 1977 memo repeatedly uses the term "perimeter", speaking of measurement of the *perimeter* of the ground level floor and of a part thereof. But these measurements are merely for the purpose of calculating floor area, which necessarily requires measuring the perimeter, and have nothing in common with the calculation of a ratio between the length of the whole perimeter and that of the front wall, as in the "perimeter method".

**Conclusion: Both the "perimeter method" and the alternative method proposed by Montrose produce a calculation of "gross floor area" arbitrarily favorable to the builder and inconsistent with the Zoning Regulations.**

**CERTIFICATE OF SERVICE**

I certify that the foregoing submission was served by United States Mail, postage prepaid, this 26th day of April, 2004 upon the following:

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Holland & Knight
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Washington, D.C. 20006

Laura Gisolfi Gilbert, Esq.
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E.
Washington, D.C. 20002

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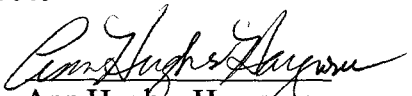
Washington, D.C. 20009



Ann Hughes Hargrove
Zoning Chairperson
Kalorama Citizens Association

# M E M O R A N D U M

TO: Steven E. Sher

FROM: Jim Fahey Jim Fahey.

DATE: September 11, 1990

RE: Outline of What Is and Is Not Included in Gross Floor Area

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As requested, the following is an outline of what is and is not included in gross floor area, for purposes of determining the maximum floor area ratio allowed under the D.C. Zoning Regulations.

Gross floor area is the sum of the gross horizontal areas of the several floors of all buildings on a lot, measured from the exterior faces of exterior walls and from the center line of party walls separating two buildings. This is achieved by simply multiplying the length by the width of each floor excluding those areas listed on pages 2 and 3 and adding up the totals. Keep in mind to include all exterior walls and to the center line of party walls when taking measurements.

In the case of a building that has a difference in grade, resulting in floors that are by definition part basement and cellar; you use the following method for obtaining the floor area charged to gross floor area:

1. First measure the total perimeter of the floor in question.

2. Then, measure that portion of the perimeter of the floor, the ceiling of which is four feet or more above the adjacent finished grade, and what percentage this is of the total perimeter of the floor in question.

3. The answer to the above will be the percentage of the floor area chargeable to gross floor area.

The term gross floor area includes:

1. All floors of the building above grade.

2. Basements; by definition a basement is that portion of a story partly below grade, the ceiling of which is four feet or more above the adjacent finished grade.

3. Elevator shafts and stairwells at each story; however, this does not include elevator shafts or stairwells that are located in the cellar area of a building.

4. Mechanical equipment rooms with a structural headroom of six feet six inches or more.

5. Interior balconies.

6. Mezzanines

7. Attic space (whether or not a floor has actually been laid), providing structural headroom of six feet six inches or more.

8. Overhangs, including covered entrances, canopies, marquises, etc.

9. Open arcades in the "C-5", Downtown SHOP and proposed Downtown Development Overlay Districts.

10. Atriums; ground floor only.

11. Vent shafts and pipe chaser shafts; ground floor only.

12. That portion of an outside balcony projecting more than six feet beyond the exterior wall of a building.

13. All floors of accessory buildings, the ceiling of which is four feet or more above the adjacent finished grade.

Other areas of the building that are included in gross floor area but are given an increase in allowable floor area ratio solely for the following uses:

1. Under sub-section 411.7, penthouses housing mechanical equipment and elevator penthouses are allowed an increase of .37.

2. Except in the "C-5", Downtown SHOP and proposed Downtown Development Overlay Districts, an open arcade complying with Section 2515 is allowed a floor area credit not to exceed 25% of the gross floor area of the floor adjacent to the arcade.

The following are exclusions from gross floor area:

1. Cellars; by definition is that portion of a story, the ceiling of which is less than four feet above the adjacent finished grade.

2. Mechanical equipment rooms with a structural headroom of less than six feet six inches.

3. Outside balconies that do not exceed a projection of six feet beyond the exterior wall of the building.

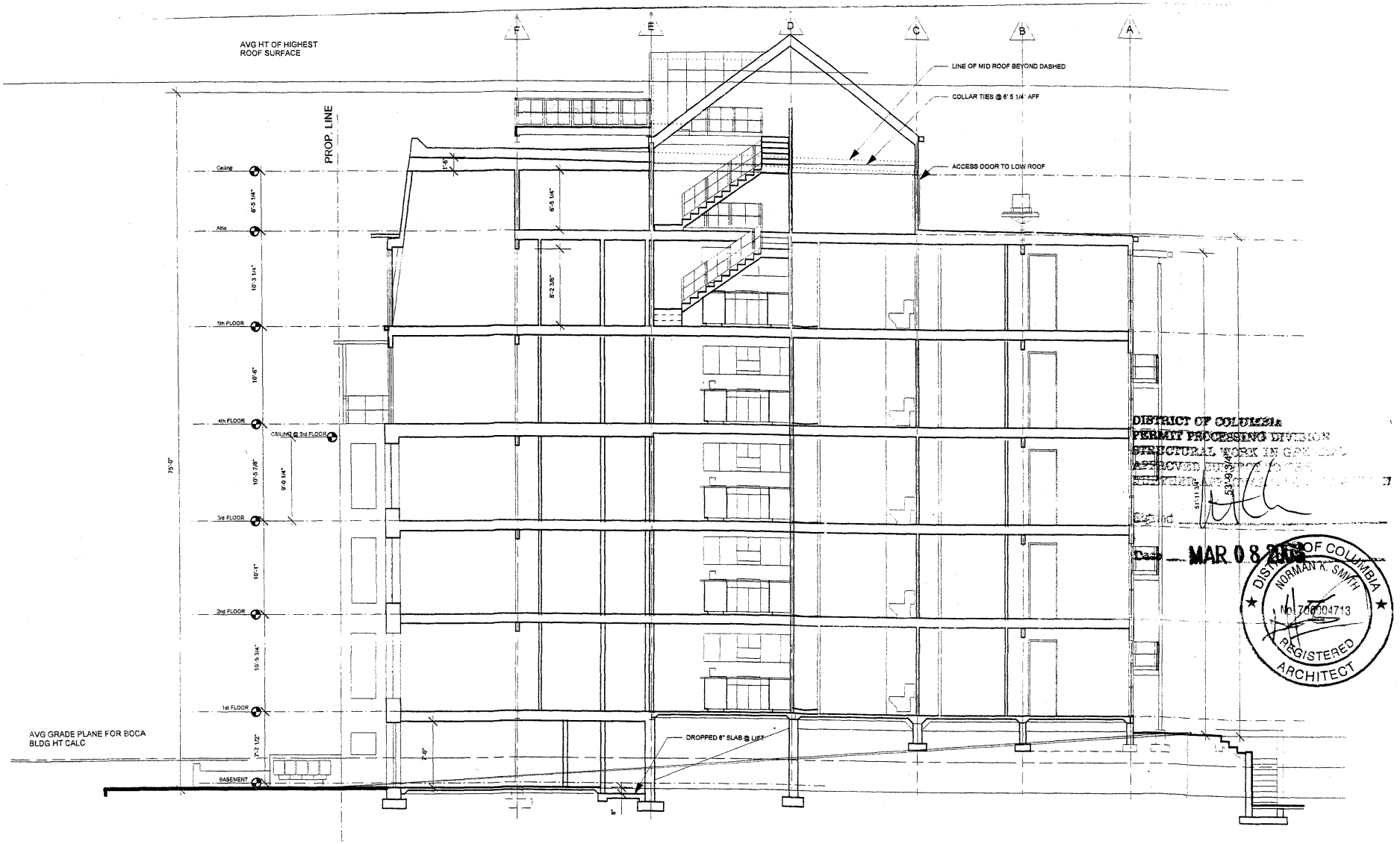
4. All projections beyond the lot line that may be allowed by other Municipal Codes.

5. In Residential Districts, the first floor or basement areas designed and used for parking space or for recreation space, provided that not more than 50% of the perimeter of the space may be comprised of columns, piers, walls, or windows, or similarly enclosed.

6. Vent shafts and pipe chaser shafts above the ground floor.

7. Atriums above the ground floor.

8. Ramps on the ground floor leading to a parking garage on a lower level.




BUILDING SECTION B-B

A8

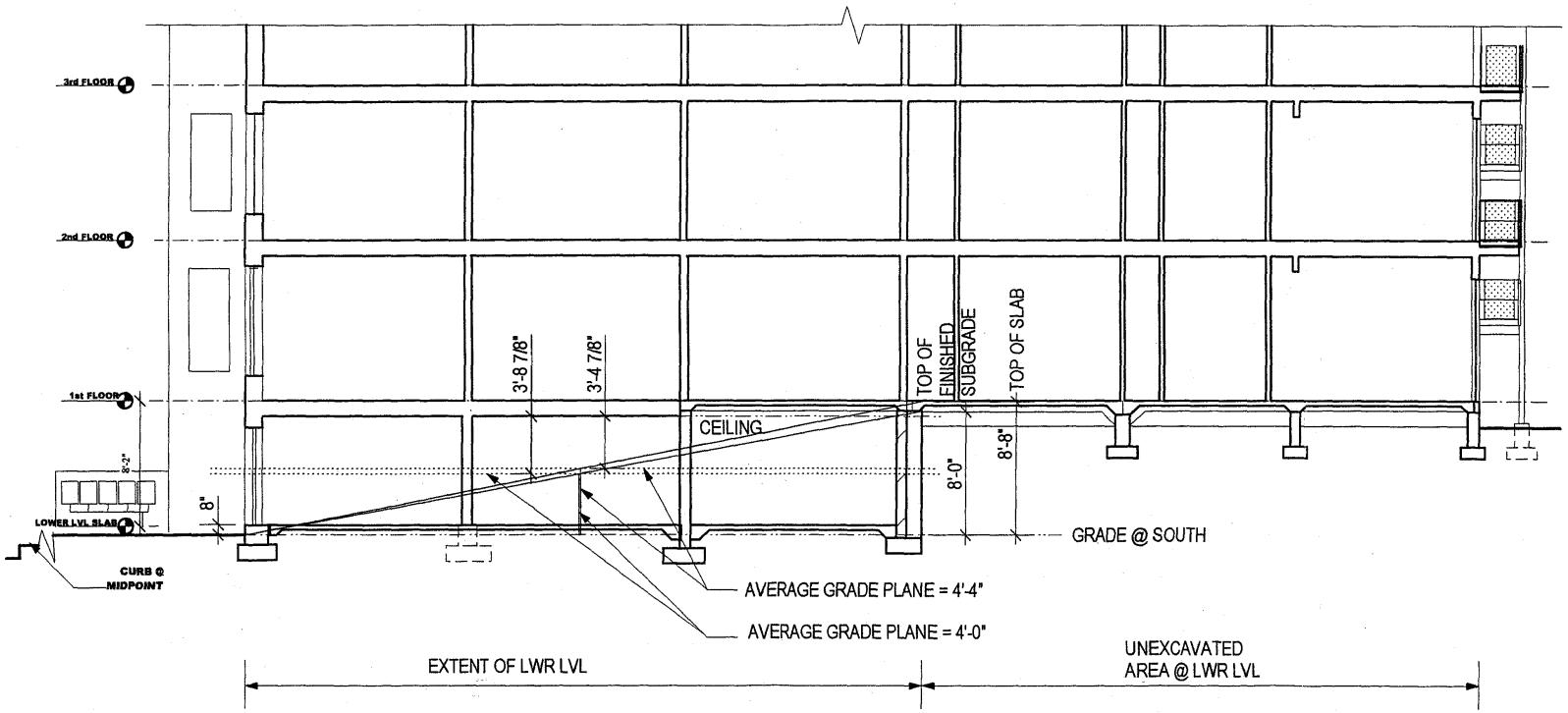
NORMAN SMITH
Architecture · Interiors · Art
2311 15th St.
Email

PERMIT 12.19.02

Design © NORMAN SMITH ARCHITECTS

A 8

1819 Belmont RD. NW
Washington, DC 20009




**GRADE PLANE GRAPHIC**
**1819 BELMONT RD., NW 04.19.04**
**NORMAN SMITH ARCHITECTURE**
**202.462.5886**

**PARTIAL SECTION**
**Scale: 1/8" = 1'-0"**

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 12325, the Appeal of Advisory Neighborhood Commission - 3E, pursuant to Sections 8102 and 8206 of the Zoning Regulations, of the method used by the Zoning Administrator in computing the allowable floor area ratio (FAR) under Section 1202 (definition of gross floor area), Subsection 5301.1 (C-2-A F.A.R.) and Section 5306 (roof structure) for property located at 4807 Massachusetts Avenue, N.W. (Square 1499, Lot 9).

Application No. 12348, the Appeal of the American University Park Citizens Association and the Spring Valley-Wesley Heights Citizens Association, pursuant to Sections 8102 and 8206 of the Zoning Regulations, of the method used by the Zoning Administrator in computing the allowable floor area ratio citing several Sections of the Zoning Regulations, for property located at 4807 Massachusetts Avenue, N.W. (Square 1499, Lot 9).

HEARING DATE: March 19, 1977
DECISION DATE: June 7, 1977

FINDINGS OF FACT:

1. The Chairman ruled that both cases would be heard concurrently and would be consolidated for the purposes of hearing and decision by the Board.

2. On a motion made by Dr. Walter B. Lewis, seconded by William F. McIntosh and granted unanimously by the Board, the Board allowed the owner of the property, Mr. Fred Burka and David Burka, trustees, represented by the law firm of Wilkes and Artis, to intervene as parties in the appeals in accordance with Sections 1.151 and 2.4 of the Supplemental Rules of Practice and Procedure before the Board of Zoning Adjustment.

3. The property the appeal concerns is located in Square 1499, bounded by Massachusetts Avenue, 48th Street and Yuma Street, N.W. The property is currently referred to as Lot 9, a record lot on the records of the D.C. Surveyor. A sub-division plat contained in the record, dated September 28, 1976, indicates that Lot 9 contains 121,271.95 square feet. Lot 9 consists of former Lots 2,3,4 & 7, plus the area of an alley which was closed by action of the City Council.

8. The Zoning Administrator based the distinction of four feet or more out of grade on the definitions of gross floor area, basement and cellar contained in Section 1202. The definition of gross floor area reads in relevant part:

> "The term gross floor area shall include basements, ... shall not include cellars....."

A basement is defined as "That portion of a story partly below grade the ceiling of which is four feet or more above the adjacent finished grade". The method used by the Zoning Administrator has been in constant use since the Zoning Regulations were adopted in 1958.

9. The Zoning Administrator did not include in the computation of gross floor area nor charge against F.A.R. that portion of the existing parking structure which has no roof. The relevant portion of the definition of gross floor area is as follows:

> "The sum of the gross horizontal area of the several floors of all buildings on the lot, measured from the exterior faces of exterior walls and from the center lines of walls separating two (2) buildings..."

The Zoning Administrator determined that an area which has no roof does not constitute a building which is defined as a "structure having a roof..." and therefore would not be included in gross floor area.

10. The appeals allege that the Zoning Administrator erred in a number of ways in computing the permitted F.A.R. and gross floor area for Lot 9.

11. The appellants allege that the upper level of the parking structure should be included in the area charged against F.A.R. Sub-section 5301.1 of the Zoning Regulations reads as follows:

> "Except as specified in Paragraph 5301.2 of this Section, Section 5306 and Chapter 7, the maximum permitted F.A.R. of a building or structure in a commercial district shall be given in the following table...."

The appellants argue that the use of "building or structure" implies that in commercial districts, the area of structures would be included in the calculation of F.A.R. The appellants also argue that the use of the two levels of the parking garage is identical, and there should be no distinction in regard to the calculation of F.A.R.

12. The appellants allege that the Zoning Administrator erred in his method for calculating the portion of a building which should be charged against F.A.R. when the building is partially below grade. The appellants state that the Zoning Administrator should use the "periphery method" for calculating the F.A.R, but failed to show how the Zoning Administrator was wrong in his computation of gross floor area, as described above

13. The appellants allege that the Zoning Administrator should have charged the entire area of the Apex Hardware store and the Apex Sports store against F.A.R., since the buildings were originally built as free standing structures with all of their area above grade. The two stores are now partially below grade, since they are connected to the parking lot and the A & P food store.

14. The appellants allege that the Zoning Administrator should not have allowed for F.A.R. to be created for the area of the alley, since the alley remains in use by the public. The alley was closed by action of the City Council and became the private property of the Burkas on May 21, 1973. The Council required that a permanent pedestrian and vehicular easement be provided for the area formerly occupied by the alley, but did not restrict any further use of that area.

15. The appellants allege that the Zoning Commission was required to hold a public hearing on the Zoning to be applied to the alley, since the alley was closed on May 12, 1973 and the Zoning Commission Order eliminating the need to hold hearings on alley closing did not become effective until May 29, 1973, when it was published in the D.C. Register. The history of the text change contained in Order No. 65 clearly demonstrates that the Zoning Commission intended to require no public hearings on land which had previously been included in streets and alleys, and that the regulation was intended to apply to a large number of streets and alleys which had already been closed but which had not been considered by the Zoning Commission.

16. The appellants allege that because no hearing was held, no zoning could be applied to the area of the alley, and the Zoning Administrator could thus not allow the allocation of F.A.R. from former Lot 7 across the unzoned area. The area of the alley was not zoned from May 21, 1973 to May 29, 1973, when Order No. 65 took effect. Since May 29, 1973, the alley has been zoned C-2-A by operation of Sub-section 2301.3, and was so zoned when the Zoning Administrator made his computations in November of 1976.

17. The owner of the property appeared in support of the Zoning Administrator stating that the Zoning Administrator had correctly applied the Zoning Regulations and was applying the regulations in a manner consistent with practice used since 1958.

CONCLUSIONS OF LAW AND OPINION

The Board has carefully reviewed the record of these appeals and has concluded that the appellants have failed to demonstrate that the Zoning Administrator erred in his application of the Zoning Regulations to the permit application for Lot 9 in Square 1499. The Zoning Administrator applied standard procedures which have been in use since 1958 and the appellants failed to demonstrate convincing reasons why the procedures were wrong in general, or how the Zoning Administrator had incorrectly applied them in the present specific case.

The Board concludes that the definitions of gross floor area, floor area ratio and building take precedence over the wording of Sub-section 5301.1, and that those definitions clearly apply to buildings and not structures. The Board concludes that those definitions do not speak to the use of buildings, only as to whethe buildings and other specific items will be charged against F.A.R.

The Board concludes that the Zoning Administrator was correct in applying the present and proposed buildings on the lot and their circumstances in relating to distance out of grade for consideration as to the application of F.A.R. The fact that buildings may have once been free-standing and out of grade does not alter the fact that they are no longer that way nor were they that way when the Zoning Administrator made his computations.

The Board concludes that the action of the City Council and subsequent recordation by the D.C. Surveyor had the effect of closing the alley and making it the private property of the Burkas. The requirement that the alley, by way of an easement, remain open for public use in no way prevents the Zoning Administrator from assigning an F.A.R. value to the area.

The Board concludes that the operation of Zoning Commission Order No. 65 was to assign zoning to all streets and alleys, whether open or closed, except for those specifically owned by the Federal Government. The record in Case No. 73-5, as cited in these cases, clearly demonstrates that the Zoning Commission intended to remove the necessity for a public hearing. There was a short period of time when no zoning was applied to the alley, but since May 29, 1973, the alley has been zoned C-2-A, and was so zoned in November, 1976 when the Zoning Administrator made his computation.

Based on the above Findings and Conclusions, it is therefore ORDERED that the two appeals cited in this ORDER be DENIED and the decision of the Zoning Administrator be AFFIRMED.

VOTE: 3-0 (Walter Lewis, William F. McIntosh, Leonard L. McCants, to DENY; Lilla Burt Cummings, Esq., not voting, having recused herself).

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

ATTESTED BY: Steven E. Sher
STEVEN E. SHER

THAT THE ORDER OF THE BOARD IS VALID FOR A PERIOD OF SIX MONTHS ONLY UNLESS APPLICATION FOR A BUILDING AND/OR OCCUPANCY PERMIT IS FILED WITH THE DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT WITHIN A PERIOD OF SIX MONTHS AFTER THE EFFECTIVE DATE OF THIS ORDER.

FINAL DATE OF ORDER: 14 JUL 1977

**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 an R-5-D Zone at 1819 Belmont Road, N.W. (Square 251, Lot 45). | ) BZA No. 17109 |

***Statement of James J. Fahey***

I am James J. Fahey. I served in the District of Columbia government in capacities relating to zoning from 1949 to 1986, serving as Zoning Administrator from 1970 to 1986. In 1958, when the concept of "floor area ratio" was included in the Zoning Regulations, we had a special problem in distinguishing between a "basement" and a "cellar" for purposes of determining "gross floor area", in the case of a row house or other building where the grade on either side could not be observed because the building was directly abutted by other buildings on either side. In order to devise a method for determining how much of the first floor should be fairly included in "gross floor area", my predecessor as Zoning Administrator, for whom I worked at the time, consulted architects and others about the best method of measurement to employ. The method devised and subsequently applied by our office involved drawing a grade plane line, from the grade at the front of the building to the grade at the rear of the building. This grade plane was then used to determine how much of the floor area should properly be treated as "basement" and included in "gross floor area", because the ceiling was four or more feet above the average grade plane, and how much should be treated as "cellar". This method did not involve any determination of the ratio between the length of the perimeter of the basement or cellar and the length of some designated portion of that perimeter, which the Zoning Administrator would not have regarded as relevant for purposes of determining gross floor area.

James J. Fahey
James J. Fahey

ACKNOWLEDGEMENT

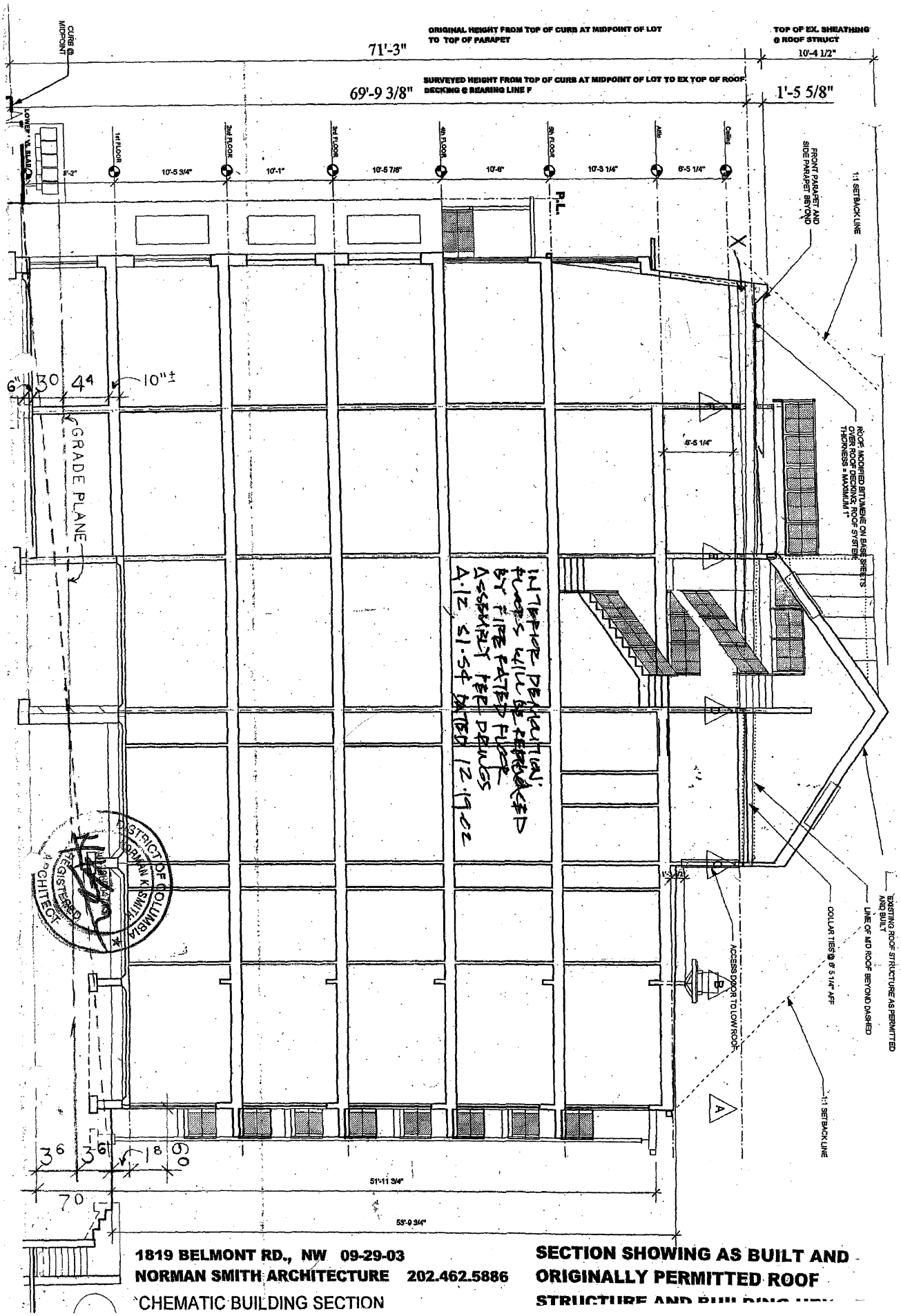
State of Maryland
County of Frederick

I, Robert H. Read II, a Notary Public of said county, do hereby certify that James J. Fahey, whose name is signed to the foregoing writing bearing the date of the 2nd day of April, 2004, has t his day acknowledged the same before my in my said County.

Given under my hand this 2nd day of April, 2004.

Notary Public

My commission expires My Comm. Exps. 4/1/07 Robert H. Read II




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

CHEMATIC BUILDING SECTION

**SECTION SHOWING AS BUILT AND ORIGINALLY PERMITTED ROOF STRUCTURE AND BUILDING HEI**