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

Appellant's Response to Montrose LLC's Memorandum on BZA Jurisdiction Over Height Act Issues of March 13, 2004

Background

This appeal challenges four aspects of the building permits at issue here: (1) a roof deck and railing that exceed the 70-foot height limit imposed by the Height of Buildings Act; (2) a roof structure that also exceeds that limit and is not properly setback from the exterior walls; (3) the top floor of the building, which has been improperly excluded from FAR; and (4) the basement, a portion of which has been improperly excluded from FAR.

A preliminary issue, however, arose as to the first two, namely: whether this Board has jurisdiction to hear an appeal alleging that the Zoning Administrator has made decisions inconsistent with the Height of Buildings Act.

On April 6, 2004, Appellant KCA submitted a supplemental legal memorandum on this jurisdictional issue. The position we set out is that:

(1) The Zoning Act, D.C. Code §§ 6-641.07(f), 6-641.07(g), requires the BZA to hear appeals of decisions based on the Zoning Regulations (adopted under Subchapter IV of that Act), or appeals alleging an error in the carrying out or enforcement of such regulations;

(2) Section 2510.1 is such a regulation, and it specifically requires compliance with the Height Act; and

(3) the Board therefore has jurisdiction to hear cases where, as in the present case, an appellant is arguing that the Zoning Administrator's decision issuing a

building permit is in violation of the Height Act, since any such decision necessarily constitutes an error in the carrying out of Section 2510.1 of the Zoning Regulations.

In support, we pointed to the Howard University appeal (BZA Appeal No. 15568), in which this Board explicitly decided an issue as to whether the Zoning Administrator's decision was in compliance with the Height Act. And we noted further that, in addition to the blanket requirement of Section 2510.1, the requirements of the Height Act permeate the Zoning Regulations in numerous specific instances in which they are explicitly incorporated by reference throughout the regulations. To deny the Board's jurisdiction to hear appeals under the Height Act would read exceptions into the Zoning Act's grant of BZA jurisdiction for at least seven provisions of the Zoning Regulations, where of course no such exceptions in fact exist. Finally, we established that no other agency has the authority to hear appeals raising Height Act issues.

No party appears to dispute these arguments, and the submission of counsel for DCRA appears to agree with them in all respects. Montrose, however, makes two arguments of its own, in its Response to Questions of BZA's Jurisdiction of March 13, 2004, to which we now respond.

I. The Ability of Corporation Counsel to Prosecute Height Act Violators Does Not Preclude Other Administrative Remedies.

Montrose relies on the Height Act's provision specifying the penalties for violating the Height Act (D.C. Code § 6-601.08), and apparently argues that because the Height Act explicitly grants authority to the Corporation Counsel to bring an enforcement action in Court, that must mean that Congress intended that an action brought by the Corporation Counsel would be the only proceeding in which an issue of compliance with the Height Act could be heard.

There are two things wrong with this argument:

(1) The issue here is whether this Board has jurisdiction to hear an administrative appeal raising a Height Act issue before the Board of Zoning Adjustment. The provision that Montrose cites relates to actions brought by Corporation Counsel in *court* to impose criminal penalties on property owners who unlawfully build in violation of the Height Act, and to require abatement of the nuisance comprised by the unlawful structure. Such authority on the part of the Corporation Counsel is perfectly compatible with the jurisdiction of this Board to make authoritative determinations of violations of the Height Act in an administrative proceeding. Indeed, it would appear that such a determination could provide one appropriate basis for action by the Corporation Counsel under §6-601.08 if the Corporation Counsel should ever care to take such action.

(2) There is nothing in the language, or so far as we have been able to determine the legislative history, of the Height Act that suggests that Congress intended its grant of authority to the Corporation Counsel to exclude the raising of issues under the Height Act in other appropriate proceedings, judicial or administrative. In fact, in Techworld Development Corporation v. D.C. Preservation League, ironically cited by Montrose, the Court rejected the argument made by Montrose here that only the Corporation counsel has the right to seek judicial review. Instead, the Court held that neighboring landowners can still challenge Height Act violations under the general private right of action available for enforcement of the Zoning Regulations found at what is now codified as D.C. Code 6-641.09 (formerly D.C. Code 5-426), clearly recognizing, in so doing, that a violation of the Height Act was a violation of the Zoning Regulations. The Court's decision giving effect to this private right of action comports with the cardinal principal of statutory construction that repeals by implication are strongly disfavored. *See Speyer v. Barry,* 588 A.2d 1147, 1163 (D.C. 1991).

II. Unlike Other Regulatory Provisions Referenced in the Zoning Regulations, the Zoning Administrator Is the Official Responsible for Enforcement of the Height Act.

Montrose argues that this Board does not have jurisdiction to hear appeals relating to violations of statutes or regulations that are incorporated by reference in the Zoning Regulations. Montrose attempts to analogize the Height Act to other statutory or regulatory provisions referred to in the Zoning Regulations. Again, there are two things wrong with this argument.

First, it is far from clear that—as Montrose asserts, without citation of authority—that a BZA appeal alleging a violation of a zoning regulation incorporating by reference some other District law or regulation would be subject to dismissal for lack of jurisdiction. Indeed, we noted in our supplemental memorandum on the Height Act one recent example in which this Board ruled that "[t]he definition of 'community-based residential facility' in the Zoning Regulations includes and incorporates by reference 'facilities covered by D.C. Law 2035, relating to the 'Community Residence Facilities Licensure Act of 1977.'" *See Appeal of Southeast Citizens for Smart Development, Inc. and ANC 6B*, BZA Appeal No. 1679 at 19 (June 21, 2002). No jurisdictional concerns arising from the fact that this definition was not specifically reiterated in the Zoning Regulations but instead was simply incorporated by reference deterred this Board from applying this definition.

In any event, questions of the extent of the Board's jurisdiction to determine issues raised under those other provisions are not at issue here. Those questions await future determination, on a case-by-case basis. What *is* at issue here is the Height Act, and in matters relating to this Board's jurisdiction, the Height Act is fundamentally different from, for example, the sign regulations or the Shipstead-Luce Act (cited by Montrose) or any number of other provisions of law

incorporated by reference in the Zoning Regulations. As counsel for DCRA has also noted (see Appellee's Submission Regarding Jurisdiction dated of April 20, 2004, at pp. 4-5), unlike the Height Act, the Zoning Administrator lacks authority to apply sign regulations or undertake an architectural review. Rather, as Montrose correctly points out at p. 3 of its March 13 Response, such authority lies, respectively, with DCMR and the Fine Arts Commission. By contrast, there is no question that the Zoning Administrator is responsible for ensuring compliance with the Height Act, which responsibility is not within the purview of any entity other that the Zoning Administrator.

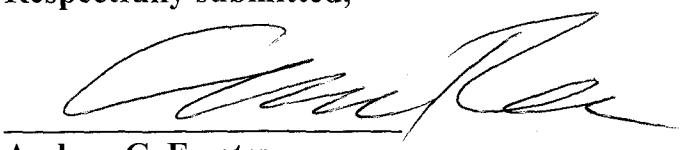
III. Preclusion of Administrative Remedies For Height Act Issues Would Undermine The Public Policy Objective Of Affording Permittees and the Public Timely Administrative Appeals.

Finally, the Board should consider the chaotic effects, on the administration of the law governing height of buildings and more broadly on the regulation of any projects involving Height Act issues, of adopting Montrose's position that "enforcement authority over the 1910 Height Act rests solely with the OCC" (Intervenor's Reply on Jurisdiction, at p. 4). Bear in mind that Montrose's position is not that this administrative appeal as to Height Act issues is being heard in the wrong forum: it is that there is no administrative appeal on such issues, or indeed any remedy at all until a building project is at or near completion—because the Height Act gives the Corporation Counsel no authority to act until a building has been "erected, altered, or raised or converted" in violation of the Act (D.C. Code §6-601.08). That means, as Counsel for DCRA correctly suggests (Appellee's Submission Regarding Jurisdiction, at pp. 3-4), no administrative appeal can be made either by a third party alleging a too permissive interpretation of the Height Act, or by a builder alleging a too restrictive interpretation before the building has been erected.

Avoiding such situations is the very purpose of the administrative remedies afforded by District's permitting process— providing an orderly process for resolving in advance any disagreements about whether the project as proposed will comply with the relevant building and zoning requirements. A forum for securing an administrative determination should be available before property owners expend substantial funds in erecting or altering a building that they may be required to tear down if its height is excessive, or which they would have been entitled to erect to a greater height. It would be counterproductive to exclude so fundamental a feature as the height of a proposed building from this administrative process.

We conclude, therefore, that this Board has jurisdiction to determine those parts of this administrative appeal that involve issues under the Height of Buildings Act, and that this jurisdiction is not affected by the fact that the Corporation counsel is authorized to pursue penalties against Height Act violators.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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