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May 25, 2004

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VIA HAND DELIVERY

Board of Zoning Adjustment
for the District of Columbia
441 4th Street, N.W., Suite 210S
Washington, D.C. 20001

Re: BZA Appeal No. 17109
1819 Belmont Rd., N.W.

Dear Members of the Board:

Enclosed please find for your consideration the proposed order of Intervenor Montrose LLC in the above-referenced appeal case. Should your staff have any questions, I may be reached at (202) 862-5990.

Very truly yours,

Carolyn Brown

Carolyn Brown

Enclosure

cc: Ann Hughes Hargrove, KCA
Andrea C. Ferster, counsel for KCA
Brian Weaver, ANC 1C
Alan Roth, ANC 1C
Laurie Gisolfi Gilbert, counsel for DCRA

BZA
Case No. 17109
Exhibit No. 80

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF INTERVENOR MONTROSE LLC
Submitted May 25, 2004

APPEAL NO. 17109 of Kalorama Citizens Association, pursuant to 11 DCMR § 3100 and 3101, 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.

HEARING DATES: February 17, March 9 and 16, April 6 and 20, 2004

DECISION DATE: June 8, 2004

I. INTRODUCTION

The Kalorama Citizens Association ("KCA" or "Appellant") filed this appeal with the Board of Zoning Adjustment ("BZA" or "Board") challenging the decision of the Director of the Department of Consumer and Regulatory Affairs ("DCRA") to issue Building Permit Nos. B455571 and B455876, dated October 6 and 16, 2003, respectively, to Montrose, LLC ("Montrose"). The permits authorized Montrose to adjust the building height to 70 feet and to revise penthouse roof structure plans for a five-story apartment building in the R-5-D District at 1819 Belmont Road, N.W., Washington, D.C. The Appellant alleges that DCRA erred in issuing the permits because the construction authorized under the permits violates the Height of Building Act ("1910 Height Act"), the permissible floor area ratio ("FAR") limitations in the R-5-D District under section 402.4 of the Zoning Regulations, and the minimum roof structure setback requirements under section 411. DCRA and Intervenor Montrose LLC deny the alleged violations.

Based on the record taken as a whole, including all relevant testimony and evidence of record, and specifically the views of the ANC, the Board concludes that DCRA did not error in issuing the permits. Accordingly, the Board denies the appeal.

II. FINDINGS OF FACT

The Parties

1. The parties to the proceeding were the KCA, the Appellant; Advisory Neighborhood Commission ("ANC") 1C, an automatic party pursuant to 11 DCMR § 3199.1; and Intervenor Montrose LLC, the property owner, and also an automatic party pursuant to 11 DCMR § 3199.1.

2. The Board denied individual party status in support of the appeal to Mr. and Mrs. Hargrove, James and Mary McAndrew, Gordon Schwartz, Kevin Duffy, Roy Paine and Ms. Gubush, Mr. Orloff, Mr. Wilton and Mr. Brooks, whose interests were all adequately represented by KCA and/or the ANC.

The Subject Property and the Building Permits

3. The property that is the subject of this appeal is located at 1819 Belmont Road, N.W., Washington, D.C., in the R-5-D District. The R-5-D District permits a variety of medium-high density residential buildings, including multi-family dwellings.

4. On December 12, 2002, the owner of the property, Montrose LLC ("Montrose" or "Intervenor"), filed an application for a building permit to alter and repair the existing three-story building at the subject site, and construct an addition at the rear of the building and add two floors and an attic (the "Project"). The height of the Project as measured from the curb opposite the middle of the building would increase the existing building height to 71 feet, 3 inches. The penthouse would be constructed on top of the attic story at a height of 10 feet, 4 inches. The penthouse would be set back from the front and rear building walls a distance greater than 10 feet, 4 inches. The penthouse would be set back six feet on the west wall and flush with the interior wall along the east property line. The overall density of the Project was listed as 3.49 FAR.

5. Montrose retained the services of a third-party inspector to review the project for compliance with the Zoning Regulations. As part of the application, Montrose submitted drawings and an estimate of the construction costs totaling $705,000.00.

6. On March 11, 2003, the D.C. Department of Consumer and Regulatory Affairs ("DCRA") issued Building Permit No. B449218 authorizing construction of the Project (the "Original Permit"). Montrose displayed the permit on the building in accordance with the requirements of the D.C. Construction Codes. The permit was originally affixed to a second-story window because the street level did not have any glass. The permit was later moved to the ground level and protected by a tarp which could be lifted to view the permit. The ANC and KCA disputed whether the permits were properly posted.

7. Just prior to the issuance of the Original Permit, Montrose also applied for a public space permit requesting a curb cut and driveway across the sidewalk area to create a garage at the lower level of the building. A berm that was once located in front of the subject property had been removed by a previous owner, which would allow access to the proposed garage.

8. On March 19, 2003, Montrose presented its plans for a curb cut and driveway to the Transportation Committee of Advisory Neighborhood Commission ("ANC") 1C. KCA was in attendance at the meeting. Montrose showed elevation drawings of the proposed garage depicting the full height of the building, including the addition of the fourth, fifth and attic levels, and the penthouse. Because the issue before the ANC concerned only

the curb cut and driveway, neither the ANC nor KCA focused on the additional floors and height of the building. The community strongly opposed the curb cut and driveway, and as a result, Montrose withdrew its public space application.

9. From March through September 12, 2003, Montrose proceeded with construction of the Project. By September 1, 2003, Montrose had completed the framing for the additional floors, attic and penthouse in conformance with the approved plans.

10. On September 10, 2003, KCA wrote to Mr. Denzil Noble, Administrator of the Building and Land Regulation Administration of DCRA, complaining that the Project appeared to exceed the allowable height of 70 feet under the 1910 Height Act and the density limitation of the R-5-D District, which permits a maximum floor area ratio ("FAR") of 3.5. The letter did not complain of any roof structure setback issues.

11. Based on the KCA letter, DCRA issued a stop work order for the Project on September 12, 2003. DCRA determined that the third party inspector for zoning only analyzed the Project's compliance with building height under the R-5-D provisions, which permit a height of 90 feet, while the 1910 Height Act limits the Project's height to 70 feet. Montrose agreed with this finding and accordingly reduced the height of the Project's parapet from 71 feet, 3 inches, to 69 feet, 9 and 3/8ths inches. Montrose also provided additional documentation to demonstrate compliance with FAR limitations and setback requirements.

12. On September 16, 2003 KCA filed with the BZA a Notice of Intent to Appeal the Original Permit on the grounds of 1910 Height Act violations. KCA further stated to BZA that it was researching the applicable facts and law prior to proceeding with such an appeal.

13. On October 6, 2003, DCRA issued Building Permit No. B455571 (the "First Revision Permit") to Montrose to revise the Original Permit "to adjust the height of the building to 70'-0" [and] clarify FAR calculations, as per attached drawings." The drawings depicted (i) a section drawing through the east elevation showing the original height at the roof of the building; (ii) a section drawing through the east elevation showing the revised height at the roof of the building; (iii) a drawing showing the area of each level included in the FAR calculations; and (iv) the FAR calculations. The drawings did not depict the roof deck and railing, nor the setback of the roof structure. Those details were provided only in the Original Permit.

14. Pursuant to continuing discussions between DCRA and Montrose, Montrose requested a second modification to the Original Permit to ensure that the rear portion of the penthouse could not be misconstrued as usable storage space. On October 16, 2003, DCRA issued Building Permit No. 445873 (the "Second Revision Permit") to "revise penthouse roof structure per DC request and per attached drawings." The drawing submitted with the Second Revision Permit showed the rear half of the roof structure gable removed. No other changes were made to the penthouse, and the penthouse setbacks along the interior lot lines remained as shown in the Original Permit.

15. On October 17, 2003, after numerous requests to DCRA, KCA received copies of the Original Permit and associated drawings.

16. On November 10, 2003, KCA filed its appeal with the Board challenging the issuance of the First and Second Revision Permits dated October 6 and 16, 2003, respectively. KCA did not appeal the Original Permit showing the location of the east and west penthouse walls and the roof deck and railing.

17. With respect to building height, KCA argued that the Project violated the 1910 Height Act because the roof deck and railing were constructed in excess of 70 feet, even though the building as measured to the roof line fell within the 70-foot maximum height limit.

18. With respect to roof structure, KCA argued that the Project violated section 400.7(b) and the 1910 Height Act because it was not set back from all exterior walls a distance at least equal to its height, which is 10 feet, 4-1/2 inches. While the north and south walls of the roof structure were properly set back, according to KCA, the west wall was only set back 6 feet from the exterior wall, and the east penthouse wall not set back at all.

19. With respect to FAR, KCA argued that the Project violated the maximum permitted density of 3.5 FAR because Montrose erroneously labeled the top floor of the building as an "attic," and thus DCRA impermissibly excluded it from the FAR calculations. Similarly, KCA argued that DCRA erred in using the "perimeter wall method" for calculating the density of the lowest level. Instead, KCA urged that the "grade plane method" should have been used, which would result in the entire lower level counting toward the overall density of the Project. According to KCA, if the lower level and attic were included in the density calculation, the overall FAR would be 4.13, or 18% higher than the permissible 3.5 FAR.

20. On March 2, 2004, KCA requested the Board to amend its appeal to include the Original Permit.

Motion to Dismiss

21. On the first hearing date of February 17, 2004, Montrose filed a Motion to Dismiss the Appeal with the Board. Montrose argued that the BZA did not have jurisdiction over the Original Permit because KCA only appealed the First and Second Revision Permits. As a result, according to Montrose, the Board could not reach the issue of roof setbacks and building height, which were authorized under the Original Permit Neither the First Revision Permit nor the Second Revision Permit requested any change to the location of the east and west walls. Similarly, only the Original Permit authorized the construction of the roof deck and railing, and the revision permits did not seek any change to this element of the project. Consequently, because the First and Second Revision Permits did not reach these issues, Montrose claimed that KCA was barred from challenging compliance with the height and setback requirements in the instant appeal. The only elements that could be challenged in KCA's appeal of the First and Second Revision Permits were aspects of the Project changed by those revised permits, *i.e.*, the height of

the *roof*, the setback of the *rear (north) wall* of the penthouse, and the FAR calculations. Thus, Montrose claimed that the only relevant aspect of the KCA appeal is the question of FAR.

22. In support of their motion to dismiss, Montrose cited the Board's decision in BZA Appeal No. 16934. There, the Board dismissed the appeal of Advisory Neighborhood Commission 6A challenging the lack of a side yard for a residence at 922 Constitution Avenue, N.E., under a foundation permit instead of the building permit. The Board held that a foundation did not trigger the side yard requirements and that the side yard issue could only be reached under the building permit. Attempts by one Board member and the ANC to amend the appeal to include the foundation permit were denied for lack of timeliness. In the end, the Board dismissed the challenge because the ANC appealed the wrong permit. *See Appeal of Advisory Neighborhood Commission 6A*, BZA Appeal No. 16934 (2003).

23. Montrose also urged that KCA should be precluded from amending its appeal to include the Original Permit as untimely. In support of this argument, Montrose stated that the Appellant was required to raise any arguments pertaining to the deck and railing height or roof structure setback sixty days from March 11, 2003, the date the permit was issued, or by May 10, 2003, pursuant to section 3112.2 of the Zoning Regulations. Montrose further argued that even if KCA had been unaware of the March 11th permit, there were several other subsequent events at which time KCA knew or should have known of the Project height and purported deficiencies. First, KCA knew or should have known on March 19th, the date of the ANC's Planning and Zoning Committee meeting, when the elevation drawing was shown to the community and which KCA attended. Second, Montrose claimed that knowledge of the building's height and FAR could be imputed to KCA through a May 2003 *Intowner* newspaper article in which KCA discussed the inappropriateness of the Project. Third, Montrose urged that KCA had constructive notice on or about September 1, 2003, when the roof and penthouse structure were framed and evident to the public at large. Fourth, Montrose argued that KCA demonstrated actual knowledge of the Original Permit on September 10, 2003, when it filed a complaint with DCRA and again on September 16, 2003, when KCA filed its Notice of Intent to File an Appeal with the Board. Finally, both Montrose and KCA agreed that KCA had actual effective notice on October 16, 2003, when it received official copies of the Original Permit and drawings from DCRA.

24. According to Montrose, even if the Board viewed October 16 as the first date by which KCA knew or should have known of the alleged errors, section 3112.2 of the Zoning Regulations required KCA to appeal the Original Permit no later than 60 days thereafter, or by December 15, 2003. Instead, KCA did not file its appeal until over 120 days later on March 2, 2004, well past the 60-day requirement.

25. KCA and the ANC jointly opposed the Motion to Dismiss. KCA argued that exceptional circumstances outside its control, and that could not have been reasonably anticipated, substantially impaired its ability to file the appeal with the Board within 60 days, pursuant to section 3112.2(d). KCA claimed that the unavailability of drawings for

approximately six months constituted exceptional circumstances warranting an extension of time. KCA further argued that no party would be prejudiced by the delay. Montrose, however, argued that it would be greatly prejudiced by the delay because the Project had been completed in substantial part and because the amendment would allow the Board to address issues it would not otherwise be entitled to consider. Montrose asserted that the Revised Permits do not allow KCA or the Board to reach back in time to the Original Permit unless the Original Permit was appealed within an appropriate timeframe.

26. DCRA supported the Motion to Dismiss, suggesting that KCA either neglected to appeal the March permit as part of its November 10th appeal, or decided itself that such an appeal would be untimely, as evidenced by the ANC resolutions requesting a waiver of section 3112.2.

27. The Board finds that the date triggering the 60-day filing requirement is October 17, 2004, and that the Revised Permits were timely appealed on November 10, 2003. (BZA Transcript, March 9, 2004, at 220, 227). Moreover, the Board finds that KCA intended to include the Original Permit in the appeal of the Revised Permits and that, in this instance, it is appropriate to amend the appeal to include the Original Permit. The Board notes that the Revised Permits do not raise new issues, but simply modify issues that are directly related to the Original Permit. (Mar 9 Tr., 220-224). At the same time, the Board recognizes that there may be a mistaken belief that the Revised Permits encompassed all of the issues raised in the Original Permit, which they may not, and finds that such a mistaken belief is understandable. (Mar 9 Tr., 224). Thus, the Board finds that the untimeliness argument in the Motion to Dismiss is without merit.

By vote taken March 9, 2003, on motion to deny the motion to dismiss based on untimeliness.

VOTE: 5-0-0 (Geoffrey Griffis, Ruth Ann Miller, Curtis Etherly, David Zaidain and John Parsons to approve.)

28. The Board further finds that it has jurisdiction over the Original Permit because the Board's regulations allow it to amend cases if it so chooses. (Mar 9 Tr., 235). Thus, the Board finds that the Motion to Dismiss on jurisdiction grounds is likewise without merit.

By vote taken March 9, 2003, on motion to deny the motion to dismiss based on jurisdictional grounds.

VOTE: 5-0-0 (Geoffrey Griffis, Ruth Ann Miller, Curtis Etherly, David Zaidain and John Parsons to approve.)

29. The Board also finds that it is appropriate in this instance to allow the Appellant to amend its appeal to include the Original Permit because the Revised Permits do not raise any new issues and because the Board has a past practice of allowing appeals to be amended. (Mar 9 Tr., 234, 236). Additionally, the Board finds that it was difficult for the Appellants to understand the scope of the Project. Finally, in order to understand the Revised Permits, the Board must look at the Original Permit. Thus, the Board finds merit to granting the Appellant's Motion to Amend the Appeal to include the Original Permit.

By vote taken March 9, 2003, on motion to deny the motion to dismiss based on untimeliness.

VOTE: 5-0-0 (Geoffrey Griffis, Ruth Ann Miller, Curtis Etherly, and John Parsons to approve; David Zaidain to deny.)

30. Montrose also moved for dismissal of the appeal on the equitable grounds of estoppel and laches. In order to meet its burden of proof, Montrose had to demonstrate that: (i) that it acted in good faith; (ii) on affirmative acts of the District; (iii) made expensive and permanent improvements and reliance thereon; (iv) the equities are strongly in the claimant's favor. *Smith v. District of Columbia Board of Zoning Adjustment*, 342 A.2d 356 (D.C. 1975); *Lyke v. D.C. Board of Zoning Adjustment*, 383 A.2d 7 (D.C. 1978); *Goto v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 917, (D.C. 1980); s*ee also District of Columbia v. Cahill*, 60 App. DC 342 (1931).

31. In support of its argument, Montrose claimed it acted in good faith by exercising due diligence in acquiring the property for redevelopment and investigated the zoning classification, the D.C. Comprehensive Plan and Historic Status of the property. Similarly, Montrose hired a licensed architect to design the building, and also hired zoning consultants and code consultants to review all of the issues surrounding the project. Montrose also continued to meet with its adjacent neighbors to discuss issues and concerns that might arise during the construction process, and showed its plans and elevations to all parties. Relying on the permit issued by DCRA, Montrose began construction and proceeded apace until September 12, 2003, when DCRA issued a Stop Work Order. Immediately thereafter, Montrose began working diligently with Mr. Noble and his staff to address the issues raised in connection with the Stop Work Order. This process continued for three weeks, and culminated with the issuance of two new permits that allowed the construction to continue.

32. Montrose stated that since construction began in Spring 2003 until the first hearing in this appeal case, it invested a significant amount of time and approximately $700,000 in construction costs. Additionally, Montrose alleged losses in excess of $160,000 due to costs overruns and legal fees directly attributable to the delays caused by the appeal. Montrose argued that it proceeded with construction in good faith on the affirmative actions of the District in approving not only the Original Permit but the First and Second Revisions Permits. Finally, Montrose claimed that the equities favor it because the public interest is best served by consistent and timely interpretations of the Zoning Regulations. Montrose argued that if the appeal were allowed to proceed, all construction projects would be at risk of untimely challenges, uncertainty over the validity of building permits, cost overruns and the inability to obtain financing. Montrose concluded that it had met its burden of proof and that the appeal should be dismissed on the grounds of estoppel and laches.

33. KCA and the ANC opposed the motion to dismiss on grounds of estoppel and laches based on the disfavor courts treat such requests in the zoning context. *See Biens v. D.C. Board of Zoning Adjustment*, 572 A.2d 122, 126 (D.C. 1990); *Sisson v. D.C. Board of Zoning Adjustment*, 805 A.2d 964, 971 (D.C. 2002). KCA and the ANC argued that any delay in bringing the appeal was attributable to the unavailability of the drawings at

DCRA and Montrose was not prejudiced by the delay because it was able to continue with construction with only a short interruption of three weeks during the time of the Stop Work Order. KCA and the ANC further alleged that Montrose had acted in bad faith.

34. DCRA also opposed the motion to dismiss on grounds of estoppel and laches. It disputed the claim of bad faith raised by KCA and the ANC. Instead, DCRA argued that Montrose had simply not met its burden of proof.

35. The Board finds that estoppel and laches are inapplicable in this case. The doctrine of estoppel is usually invoked against the government and not a private party, and thus the Board finds the argument without merit. Similarly, the doctrine of laches is usually invoked when there has been unreasonable delay. Here, the Board finds that there is no evidence that the Appellant's sat on their rights and delayed appealing the building permits. The Board further notes for the record that there is no evidence to support the contention that Montrose proceeded in this matter with unclean hands. Nevertheless, the Board finds that Montrose has failed to meet its burden of proof under the doctrines of estoppel and laches.

By vote taken March 9, 2003, on motion to deny the motion to dismiss based on laches and estoppel.

VOTE: 5-0-0 (Geoffrey Griffis, Ruth Ann Miller, Curtis Etherly, David Zaidain and John Parsons to approve.)

Jurisdiction over the 1910 Height Act

36. During the course of the hearing, the Board raised the question of whether it had the requisite jurisdiction to hear appeals based on violations of the 1910 Height Act, a federal law, when the Zoning Law limits BZA jurisdiction to enforcement of the local zoning regulations and variance and special exception cases. Mar 9 Tr., 265. Counsel to the Board advised it that the 1910 Height Act could only be enforced by the Office of Corporation Counsel. The Board requested the parties to brief the issue.

37. KCA argued that the 1910 Height Act had been incorporated by reference into the Zoning Regulations, thereby authorizing the Board to enforce its provisions. KCA cited numerous provisions requiring compliance with the 1910 Height Act, including sections 400, 411 and 2510.1, in support of its position.

38. In contrast, Montrose argued that the Board lacks jurisdiction to enforce the 1910 Height Act. Montrose stated that the Board's authority is limited by the grant of power under the District of Columbia Zoning Act. That law, according to Montrose, only vests the Board with jurisdiction over 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, Montrose asserted, the Board will not have jurisdiction over that matter.

39. Montrose further argued that the 1910 Height Act only authorizes the Office of Corporation Counsel to enforce violations of the Act by bringing action in the D.C. Superior Court. Codified at D.C. Code Ann. § 6-601.08 (2001 ed.), 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 assistants 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.*

(Emphasis added).

40. The Board finds Montrose's interpretation of the law persuasive. The phrase "this subchapter and subchapter V of this chapter" of the Zoning Act refers to Subchapter IV of Chapter 6 entitled "Zoning Regulations; Board of Zoning Adjustment" and Subchapter V of Chapter 6 entitled "Chanceries." *See* index to D.C. Code, Chapter 6. BZA's grant of authority does *not* extend to Subchapter I of Chapter 6, entitled "General", 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, that 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.

41. The Board notes that the Zoning Regulations require similar compliance with other District laws and regulations that 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, not the Board. *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. However, 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.

42. The Board further finds that enforcement authority over the 1910 Height Act is vested solely in the Office of Corporation Counsel pursuant to D.C. Code Ann. § 6-601.08 (2001 ed.). In making this finding, the Board relies on the holding of the U.S. District Court for the District of Columbia that "Congress explicitly entrusted the Corporation with primary responsibility for enforcing the HBA [Height of Buildings Act]." *Techworld Development Corporation v. D.C. Preservation League*, 648 F.Supp. 106, 121 (D.D.C. 1986). Any attempt by the Board to enforce the 1910 Height Act would be an ultra vires act and rendered a nullity. Thus, in deciding the instant appeal, the Board is limited to determining whether the District erred in its interpretation and application of the Zoning Regulations to the Project.

Merits of the Appeal

Setback Issue

43. KCA argued at length that the roof structure is required to be set back a distance equal to its height from all exterior walls and not just the front and rear walls of a building. In support of its position, KCA offered the testimony of its expert witness in architecture, Don Hawkins. Mr. Hawkins stated that the setback requirements were a function of the 1910 Height Act. Mar. 9 Tr., 261. Mr. Hawkins testified that, based on the drawings, the east and west walls of the Project were either a party wall or a wall on the neighbor's property. Mar. 9 Tr., 297. In either instance, according to Mr. Hawkins, the walls qualified as exterior walls and thus the roof structure must be set back from these walls, as well.

44. KCA further argued that the legislative history of the setback requirements under the Zoning Regulations demonstrated that the Zoning Commission intended for roof structures to be set back on a ratio of 1:1 from *all* four exterior walls, regardless of whether they are party walls or not. Mar. 9 Tr. At 307. Mr. George Oberlander, KCA's rebuttal witness, offered further testimony in support of Appellant's position that the term "exterior walls" under the Zoning Regulation includes all four walls of a building, and not just those fronting on a street or alley. Mr. Oberlander testified that he was the National Capital Planning Commission ("NCPC") staff person assigned to make recommendations on the proposed amendments to the Zoning Regulations on the set back requirements during the 1980s. He stated that the original 1958 Zoning Regulations required a setback of penthouses by a distance equal to their height above the roof from "all lot lines of the lot" in most zoning districts. According to Mr. Oberlander, in the 1980s, the Zoning Commission originally proposed changing these provisions to require setbacks to be measured from the perimeter of the roof. Mr. Oberlander stated that NCPC was concerned that the Zoning Regulations be consistent with the 1910 Height Act which required setbacks from "exterior walls." Ultimately, the Zoning Commission rejected measuring setbacks from the perimeter walls and instead maintained the term "exterior walls" as used in the Height Act. Apr. 20 Tr., 292-294; *see also* Zoning Commission Order No. 476.

45. DCRA challenged the assertions of KCA by claiming that party walls constituted interior walls that are exempt from the setback requirements. None of the parties, however, could agree on the definition of a party wall and whether the east and west walls of the Project met that purported definition or were, in fact, face-on-line walls.

46. Montrose argued that the "party wall" dispute was irrelevant to the question of "exterior walls." Montrose urged that legislative history set forth in Zoning Commission Order No. 476 provided the necessary framework to answer the setback issue. There, NCPC opined that the 1910 Height Act setback measurement from exterior walls was intended to hide or screen penthouses from street views. ZC Order No. 476 at 6. During the deliberations on clarification of the setback requirements, the Office of Planning suggested that the Zoning Commission change the phrase "exterior walls" to "perimeter wall" to include more than just street views. *Id.* at 4. According to Montrose, it is significant that the Zoning Commission had the opportunity to use, but rejected, the phrase "perimeter wall." The Board agrees.

47. The Board finds that the Zoning Commission had the opportunity to clarify the regulations to mean "perimeter walls" and distinguish the Zoning Regulations from the Height Act, which has consistently been interpreted to protect street views. Instead, the Commission left the words "exterior walls" intact. Thus, the Board finds that an exterior wall means only a street frontage wall and not perimeter walls. Accordingly, the roof structure of the Project is not subject to the setback provisions along the east and west walls because those walls are not exterior walls with public street frontage.

Height Issue

48. The parties introduced testimony and legal argument on the Project's compliance with the provisions of the 1910 Height Act. KCA and the ANC argued that the roof deck and railing exceeded the permissible building height of 70 feet by approximately five feet. The two parties noted that, while the Height Act listed several building elements that could be erected in excess of the maximum building height, roof decks and railings were not among those listed items. Thus, KCA and the ANC concluded that because the Project's height was corrected to 69 feet and 9-3/8th inches, it nevertheless exceeded the maximum permitted height by virtue of the roof deck and railing constructed above the roofline.

49. DCRA and Montrose argued that the roof deck and railing were exempt from the 1910 Height Act. In support of this position, Montrose cited several precedents where buildings had been constructed to their maximum height under both the Zoning Regulations and the 1910 Height Act. Among those buildings listed were 2099 Pennsylvania Avenue, N.W., which was constructed to a maximum height of 130 feet, with a roof deck and railing exceeding the 130-foot height limit; 1667 K Street, N.W., constructed to a maximum height of 130 feet with a roof deck and railing above that height; and 400 Massachusetts Avenue, N.W., which received BZA approval in BZA Case No. 16881 and included a roof deck and trellis above the maximum height limit. In

response, KCA argued that the examples only identified other violations of the 1910 Height Act.

50. DCRA further testified that the roof deck was a structure less than four feet in height and thus did not count toward height pursuant to section 411.17 of the Zoning Regulations. DCRA also asserted that the deck railing likewise did not count toward building height, even though it exceeded four feet in height, because it was a life-safety feature required by the D.C. Construction Codes. DCRA offered support for this position by analogy to section 2503. That section provides that "a structure not including a building, no part of which is more than four feet above grade at any point may occupy any yard required under the provisions of this title. Any railing required by the D.C. Construction Codes, 12 DCMR, shall not be calculated in the measurement of the height."

51. The Board is persuaded by the arguments of Montrose and DCRA. First, as noted above, the Board finds that it does not have jurisdiction to enforce the 1910 Height Act and can only determine compliance with the height requirements of the Zoning Regulations. Here, the Zoning Regulations permit a maximum height of 90 feet. Because all parties agree that the building, roof deck and railing are no more than approximately 75 feet in height, the Project falls within the permissible height of 90 feet under the Zoning Regulations.

52. Even if the Board were found to have enforcement authority over the 1910 Height Act, it nevertheless finds no violation of that Act. Although roof decks and railings are not among the building elements specifically exempted from the Height Act in subparagraph (h), neither are heating, ventilation, air conditioning and electrical systems, all of which have been interpreted as exempt from the height calculations and are common roof structure elements exceeding the maximum permitted height under the 1910 Height Act. The Board is persuaded by the precedent cited by Montrose and the life-safety elements of the Building Code that require the installation of these elements on rooftops. The Board notes the analogous provisions of section 411.1 of the Zoning Regulations that contemplate rooftop swimming pools, which likewise require safety enclosures, and section 2503 cited by DCRA. Consequently, the Board finds that roof decks and railings constitute roof structures that are exempt from the restrictions of the1910 Height Act.

FAR Calculations

53. The crux of KCA's allegation of error in the FAR calculations rests on the technical interpretation of two areas in the project: the attic and cellar. Pursuant to the definition of "gross floor area" under the Zoning Regulations, attic space with structural headroom of less than 6 feet, 6 inches, does not count toward FAR. Similarly, a cellar, which is defined as the area with a ceiling height of four feet or less out of ground, does not count toward FAR. Under KCA's interpretation, neither of these spaces meets the technical definition and must be counted toward FAR. If correct, the Project has an impermissible density of 4.18 FAR.

54. The Board received extensive, confusing and often conflicting testimony on this issue. , In essence, KCA suggested that Montrose was disguising living space as an attic, in order

to obtain more density for the project than was otherwise allowed. KCA argued that the drawings actually showed two attics, one on top of the other, which the Zoning Regulations do not permit. KCA contended that a "sliver space" at the top front portion of the building was the true attic and the space immediately below it was really intended for future expansion of habitable space.

55. In support of this position, KCA's expert witness in architecture, Don Hawkins, testified that the collar ties shown in the space labeled "attic", were not structural in nature and thus could easily be removed to increase the structural headroom from 6 feet, 5 inches to approximately 7 feet, 2 inches. Because the term "structural" is not defined in the Zoning Regulations, Mr. Hawkins turned to Webster's Unabridged Dictionary for guidance, pursuant to section 199 of the Zoning Regulations. The dictionary defines "structural" as "of or relating to the load bearing members or scheme of a building, as opposed to the screening or ornamental elements." Mr. Hawkins also relied on a definition found in *Building, Excavating and Contracting Book*, which defined "structural" as "details of a house [that] consist of floor joists, rafters, wall and partition studs supporting columns... foundations."

56. Mr. Hawkins noted that the collar ties shown in the front portion of the building did not extend to the rear. It was his professional opinion that these collar ties could be removed without compromising the structural integrity of the building. That is, according to Mr. Hawkins, the collar ties were ornamental, rather than structural in nature, and thus the space labeled attic did not have "structural headroom" of 6 feet, 6 inches or less. As a result, he concluded, the space must count toward FAR.

57. Norman Smith, the architect of record and expert witness for Montrose, painted quite a different picture. He stated unequivocally that the collar ties did, in fact, provide structural support for the building. He described the collar ties as wood structural members in the attic that are 1 and ½ inch wide, and 9 and ¼ inches tall running from north to south and spaced approximately 48 inches on center. He stated that the collar ties act in tension with, essentially as compression braces for, the rafters. He testified that the building deviated from the norm in that it was framed from front to back and did not rely on the adjacent walls of the abutting rowhouses for support. Mr. Smith stated that due to this framing system, the building would have a tendency to rack in a north-south direction. Consequently, it was his professional opinion that the collar ties were structural members necessary to help brace the building against such racking.

58. Mr. Hawkins disputed this interpretation, claiming that the integration of the north-south walls with the floor structure would be sufficient north-south bracing. He asserted that the collar ties were ineffective as bracing because the triangle created by the collar tie is too small. At the same time, Mr. Hawkins agreed that a force could be calculated that the collar ties accommodate, but he did not believe that any force would come to bear on them. He concluded that it is necessary for DCRA and, in this instance, the Board to examine in detail the structural necessity of each member of a building to determine whether, in fact, it is required to support the building or whether it should be relocated to be more effective. Apr 6 Tr., 190.

59. With respect to the "sliver" space, Mr. Hawkins asserted that this is the true attic space according to the definition of attic in Webster's Unabridged Dictionary. Attic space is defined by Webster's as "the part of a building immediately below the roof and wholly or partly within the roof framing: a garet or storage space under the roof." Mr. Hawkins concluded that, according to that definition a building can only have one attic and consequently, the second, lower "attic space" must necessarily be habitable space. Mr. Smith disputed this interpretation. He clarified that the "sliver" space is a non-accessible portion of the roof and does not function as an attic in any sense of the term. Thus, it was his professional opinion that there is no FAR square footage assignable to the attic space. Apr 6 Tr., 149.

60. The Board credits the testimony of Mr. Smith and finds that the collar ties do, in fact, perform a structural function. As the architect of record, Mr. Smith is more intimately familiar than Mr. Hawkins with the architectural, mechanical and structural design of the building and the purpose, need and function of each element. The Board is reluctant to second guess the structural interpretations of the architect of record, particularly in matters where the Board has no expertise. The Board is uncomfortable venturing into this area and finds that as long as the architect or developer provides a rational basis for the structural purpose of the framing members, the Board's inquiry ends there. In this particular instance, the Board is further comforted by the testimony of Mr. Smith who stated that it would be difficult to remove the collar ties in order to create more habitable space in the building. To do so, he noted that a resident would require approval of the condominium board, which would, hopefully, contact the architect of record who would recommend against it. He further noted that a building permit would be required from DCRA that would trigger structural integrity questions and recalculation of the building's density.

61. The Board is also unpersuaded that the "sliver" space must be deemed the one and only attic of the building, thus rendering the area below as habitable space. Without answering the question of whether a building may have two attics, the Board finds that the sliver space is an inaccessible portion of the roof structure that serves no purpose. The Board further finds that the space labeled "attic" on the drawings is a true attic space that has structural headroom of less than 6 feet, 6 inches. Accordingly, the Board finds that the square footage of that space is not assignable to FAR calculations.

FAR Calculations for the Lower Level

62. Finally, the Board turns to the question of whether the lower level of the Project is considered a basement, a cellar, or partially both, and what amount of the square footage is assignable to FAR. Under the Zoning Regulations, a story that has a ceiling four feet or less out of grade is considered a cellar and does not count toward FAR. 11 DCMR § 199. Conversely, if a lower story has a ceiling height of more than four feet out of grade, it is considered a basement and the area must be included in the density calculations for the building. *Id.* The difficulty arises when the lower level is partially above and partially below that four-foot plane, and when the adjacent grade cannot be determined. Such is the case here where the Project is bounded on either side by row dwellings and the finished grade is not apparent.

63. The Zoning Regulations provide no guidance on how to calculate the FAR of partial basements and partial cellars. As a result, the Zoning Administrator is left to interpret this provision in accordance with the discretion afforded him under the Zoning Act and Regulations. The parties have offered two, apparently conflicting, methods of calculating the FAR of partial basements/cellars. DCRA and Montrose adopted the "perimeter wall" method, whereas KCA asserted that the "grade plane" method was the appropriate means to calculate partial basements/cellars.

64. Mr. Smith stated that under the perimeter wall method, the FAR is determined by establishing a ratio between the linear footage of the portion perimeter wall with more than 4 feet out of grade and the total square footage the lower level. Mr. Smith testified that in this instance, the total linear feet of the perimeter wall more than 4 feet out of grade is 27 linear feet; that the total perimeter of the lower level is 131.4 linear feet; and that the total square footage of the lower level is 736.6 square feet. He explained that the assignable FAR is calculated by dividing the perimeter with more than 4 feet of grade by the total linear footage of the lower level; that is, 27 ft divided by 131.4 ft., which equals 0.2. He further explained that this number is then multiplied by the total square footage of the lower level, which yields the portion of the lower level assignable to FAR square footage; that is, 0.2 times 736.6, which equals 147.3 square feet of FAR square footage.

65. In contrast, KCA argued that the assignable FAR of the lower level should have been determined by using the "grade plane" method. Under that calculation, Mr. Hawkins explained that a plane is established between the grade at the front of the building and the grade at the rear of the building. According to Mr. Hawkins, the point at which this plane intersects a four feet level, any portion that exceeds that plane counts toward FAR and any portion that does not is considered a cellar. Based on his calculations, Mr. Hawkins determined that the entire lower level must be considered a basement and thus all 736.6 square feet must be included in the FAR calculation. In so doing, he argued, the building exceeded the allowable density of 3.5 FAR.

66. In support of its position, KCA submitted an affidavit from former Zoning Administrator Jim Fahey who described the grade plane method as one that was commonly used during is tenure. Montrose offered its own memorandum from Mr. Fahey dated September 11, 1990, wherein the perimeter wall method was described. Finally, DCRA introduced a statement by the Acting Zoning Administrator, Denzil Noble, who stated that the perimeter wall method is the current accepted method of his office. Montrose questioned the accuracy of Mr. Hawkins' calculations using the grade plane method and specifically disputed his determination to establish a plane to the back of the building rather than the back of the lower level, which does not extend the full depth of the building. According to calculations submitted by Mr. Smith on behalf of Montrose, the lower level is a cellar even using the grade plane method when the grade is appropriately established at the rear of the lower level.

67. The Board finds that Zoning Regulations do not provide a method for calculating the FAR for lower levels that are partially below and partially above grade. The Board further finds that the Zoning Act and the Zoning Regulations vest the Zoning Administrator with the authority to interpret the regulations. Based on the evidence of

record, the Board finds that the Zoning Administrator's office has employed at least two methods for calculating lower level FAR: the grade plane method and the perimeter wall method. Significantly, there is no official interpretation from that office establishing the preferred or appropriate method, or which puts the public on notice as to what method should be employed. While both methods appear reasonable, the Board finds that the Zoning Administrator did not abuse his discretion in establishing the perimeter wall as the current practice of his office and that it was appropriate for Montrose to use that method. Moreover, as evidenced by the 1990 memorandum from Mr. Fahey, this calculation has been in effect for many years. In applying the perimeter wall method to the instant case, the Board finds that the square footage of the lower level assignable to FAR is 147.3 square feet of gross floor area.

68. The Board further credits the calculations of Mr. Smith under the grade plane method that the grade plane line should be established between the front of the building and the rear of the lower level, and not the rear of the building. Accordingly, the Board finds that under the grade plane method, *none* of the lower level square footage would count toward gross floor area and the FAR calculation for the Project would be *reduced* by 147.3 square feet of FAR.

69. The Board also finds the FAR calculations as presented by Mr. Smith for the remainder of the building to be accurate and credible. Accordingly, the Project complies with the FAR requirements of the Zoning Regulations.

CONCLUSIONS OF LAW

70. The Board is authorized under section 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799; D.C. Official Code Ann. § 6-641.07(f) and (g)(1)(2001)), to hear and decide appeals where it is alleged by an appellant that there is error in any decision by an administrative official in carrying out or enforcement of the Zoning Regulations. This appeal is properly before the Board pursuant to 11 DCMR §§ 3100.2, 3101.5 and 3200.2. The notice requirements of section 3112 for the public hearing on the appeal have been met.

71. The Board is required under section 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21, as amended; D.C. Official Code Ann § 1-309.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC's recommendation. ANC 1C supports KCA's appeal. As discussed in this order, the Board has given careful consideration to the views of the ANC and affords them the "great weight" to which they are entitled. Nevertheless, as set forth above, the Board does not find those views persuasive.

72. The R-5-D District permits a building height of ninety feet with no limit on the number of stories. 11 DCMR § 400.1 (Feb. 2003). The Zoning Regulations further state that all buildings or other structures shall comply with the 1910 Height Act. 11 DCMR § 2510. The 1910 Height Act limits the height of building on a residential street to the width of the street diminished by ten feet. D.C. Code Ann. § 6-601.05(c) (2001 ed.). The width of

the 1800 block of Belmont Road, N.W., is 80 feet, yielding a maximum building height of 70 feet. Building height is 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. 11 DCMR § 199 (Feb. 2003) ("Building, height of").

73. The Project at 1819 Belmont Road, N.W., measures 69 feet, 9 and 3/8ths inches from the level of the curb opposite the middle of the front of the building to the highest point of the roof. The Board concludes that the roof deck and railing are exempt from height calculations under both the Zoning Regulations and the 1910 Height Act, and thus the Project complies with the provisions of section 400.1.

74. The Board further concludes that it does not have jurisdiction to enforce the 1910 Height Act. Consequently, even if the roof deck and railing were not exempt from height calculations, the increase in height to approximately 75 feet created by these roof elements would still fall within the permitted height limit of 90 feet under the Zoning Regulations, the only regulations that the Board can enforce.

75. Pursuant to section 400.7(b) of the Zoning Regulations, if housing for mechanical equipment or a stairway or elevator penthouse is provided on the roof of a building, it shall be set back from all exterior walls a distance at least equal to its height above the roof upon which it is located. The Board concludes that the phrase "exterior wall" means a wall of a building with public street frontage and not each perimeter wall. Thus, the Board concludes that roof structure of the Project does not require setbacks at either the east and west walls because those walls are interior perimeter walls, not exterior walls that front on a public street.

76. Pursuant to section 402.4 of the Zoning Regulations, all structures within the R-5-D Districts are limited to a maximum density of 3.5 FAR. Pursuant to section 199 of the Zoning Regulations, floor area ratio is defined as "a figure that expresses the total gross floor area as a multiple of the area of the lot. This figure is determined by dividing the gross floor area of all buildings on a lot by the area of that lot." Pursuant to section 199 of the Zoning Regulations, the term "gross floor area" includes basements and attic space, whether or not a floor has actually been laid, providing structural headroom of six feet, six inches or more. A basement is defined under section 199 as "that portion of a story partly below grade, the ceiling of which is four feet or more above the adjacent finished grade.

77. The Board concludes that the collar ties located in the attic level of the Project create structural headroom of less than six feet, six inches, and thus the space is excluded from FAR calculations. The Board also concludes that at most, only 147.3 square feet of space on the lower level is a basement, which counts toward FAR. The Board concludes that the FAR calculations presented by Montrose are accurate and that the Project complies with the density limitation of 3.5 FAR for the R-5-D District.

78. Because the Board finds no violation of the Zoning Regulations pertaining to height, density or roof structure setbacks, the appeal is without merit.

For the reasons stated above, it is hereby **ORDERED** that the appeal is **DENIED.**

Vote taken June __, 2004, on the motion to deny the appeal of the Kalorama Citizens Association challenging the issuance of Building Permit Nos. B449218, B455571, and B455876 issued to Montrose LLC for the building at 1819 Belmont Road, N.W., Washington, D.C.

VOTE: _____

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order.

ATTESTED: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: _____

PURSUANT TO 11 DCMR 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES EFFECTIVE.

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