BEFORE THE BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

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

REPLY OF ADVISORY NEIGHBORHOOD COMMISSION 1C
AND KALORAMA CITIZENS ASSOCIATION
TO RESPONSES OF MONTROSE LLC AND DCRA TO
THE BOARD'S REQUEST FOR
SUPPLEMENTAL BRIEFING OF THE EXTERIOR WALL ISSUE

Advisory Neighborhood Commission 1C, Kalorama Citizens Association, Montrose LLC and the Department of Consumer and Regulatory Affairs each submitted responses to the Board's request for supplemental briefing on the exterior wall issue. ANC 1C and KCA hereby reply to the submissions of the latter two parties.

1. THE RESPONSE OF MONTROSE LLC EXCEEDS THE SCOPE OF THE BOARD'S REQUEST AND ATTEMPTS TO INTRODUCE NEW EVIDENCE OUTSIDE THE RECORD. THESE IMPROPER ADDITIONS SHOULD BE DISREGARDED.

Montrose submitted extensive new, unsworn, and otherwise unverified photographic evidence that, on the Board's present schedule, KCA and ANC 1C will have no opportunity to subject to cross-examination. This new evidence, introduced after the record has closed, is improper. (By contrast, our own response to the Board's request limited itself to photographic evidence already in the record of this Appeal or the related Special Exception case.)

Some of this photographic evidence, and accompanying text, is devoted to reopening and rearguing the issue of the lawfulness of the roof deck and railing—an issue already decided by

the Board and wholly beyond the scope of the Board's present request. This is only the latest in a series of attempts by Montrose to relitigate issues already decided by the Board, in advance of the issuance of a written order, in disregard of the requirements of the Zoning Regulations regarding motions for Rehearing and Reconsideration. It is also beyond the scope of the Board's request for supplemental briefing. This conduct should not be countenanced by the Board.

In view of this evidence improperly submitted by Montrose, KCA and ANC 1C have no alternative but to insist on an equal right to submit new photographic evidence of their own. Accordingly, Exhibit B contains photographs of roof structures on various buildings that are set back from all sides of the roof, by distances apparently at least equal to their height. These photos illustrate clearly that it is neither impossible nor even unusual for buildings in Washington, D.C. to comply with the Height Act's setback requirement.

2. MONTROSE HAS AGAIN MISREPRESENTED THE HISTORY OF THE INTERPRETATION OF THE HEIGHT ACT BY THE NCPC AND THE ZONING COMMISSION.

Despite the lack of any basis in the plain language of the Height Act, there is a long history of efforts by some to construe the Act to permit developers to evade the requirements of setback from non-street-facing walls, as well as a history of counter-efforts by District officials to bring the District's regulations into closer conformity with the Height Act. Montrose's approach to this history continues to be to cite, as if authoritative, statements over the years from various sources that assert or merely comment on the "street-facing-walls-only" theory of the Height Act – sometimes even misrepresenting the content of these statements – while ignoring the authoritative decisions of the Zoning Commission and NCPC to the contrary. Repeatedly, things turn out not to say what Montrose says they say.

Item: Montrose cites, as supporting its position, a 1958 Report of the Zoning Advisory Council (ZAC), issued at a time when the Zoning Commission was considering proposed amendments to the setback provisions of the Zoning Regulations that would have required setback from "all lot lines of the lot"—thus requiring setback from side walls of attached structures. In that report, the ZAC asserted that under prior regulations the Zoning Commission had construed the Height Act to require setback from street sides only, describing that approach as one of several possible alternatives to the "all lot lines" proposal—a view Montrose suggests the ZAC shared. In fact the ZAC itself *rejected* this approach, and endorsed the "all lot lines" proposal as one that would "*more closely follow the intent of the 1910 Act* and assure adequate light and air for adjoining properties under all conceivable circumstances, whereas adoption of one of the other methods might in some instances adversely affect adjoining structures" [*emphasis added*].[1] The ZAC thus clearly rejected the "street-facing-walls-only" approach as inconsistent with the Height Act. With this recommendation before it, the Zoning Commission, one week later, on July 22, 1958, adopted the "all lot lines" proposal, a formulation replaced by "all exterior walls" in the Commission's 1986 order in ZC Case No. 84-10, which completed the process of conforming the regulations to the Act.

Item: In ZC Case No. 84-10, on roof structures, the Commission initially had proposed, in the advertisement of the case, new language requiring setback measurement from "the perimeter of the roof," but later proposed less restrictive amendments that would retain "lot lines" as the point of measurement. Both the Office of Planning and the National Capital Planning Commission (NCPC) submitted comments in which they referred to a reported Corporation Counsel opinion (incidentally never produced) to the effect that the Height Act

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[1] Statement of the Applicant, *Application of Montrose LLC for Special Exception,* BZA Case No. 17221, Exhibit F ("Report of the ZAC on Proposed Amendments to the Zoning Regulations") at p. 2 (filed Sept. 28, 2004).

imposes a still less restrictive requirement, namely, penthouse setback only from the *lot line on the side facing a street*. Montrose cites these references to this memorandum apparently as indicating support by these agencies for the "street-facing-walls-only" approach. In fact, however, as the testimony of George Oberlander submitted in this Appeal (attached as Exhibit A) confirms, the NCPC *opposed* this interpretation, and advised the Zoning Commission to reject the "all lot lines of the lot" language. The NCPC stated that "[s]etbacks from exterior walls should be included in the regulations in keeping with the Heights [sic] Act," and accordingly urged the Commission to "consider adopting text language in keeping with the Height Act and the proposed text change advertised for this case [i.e., the 'perimeter of the roof' formulation]."

Item: Montrose argues that, in acceding to the NCPC's recommendation to reject the "all lot lines" language and adopting the formulation "all exterior walls" in its 1986 amendments on roof structure setback, the Zoning Commission "expressly rejected" the view that setback should be from the perimeter of the roof. In fact the Commission did no such thing. It adopted a formulation, using the precise words of the Height Act – "exterior walls" – that the record clearly indicates both the Commission and the NCPC regarded as interchangeable with and having the same effect as "perimeter of the roof" (which necessarily implies a setback from all walls of the building). What the Zoning Commission did reject were the less restrictive formulations "all lot lines of the lot", "lot lines fronting on a street", and "exterior walls fronting on a street".

For a full discussion of these points, see *BZA Case No. 17221, Statement of Advisory Neighborhood Commission 1C and Kalorama Citizens Association in Opposition to Application for Special Exception,* pp. 6-15, and Exhibits thereto.

3. UNABLE TO CITE ANY ORDER BY THE BOARD OR THE ZONING COMMISSION ADDRESSING THE HEIGHT ACT ISSUE, MONTROSE NOW CLAIMS THAT THE MERE FACT THAT NON-COMPLYING BUILDINGS EXIST SOMEHOW ESTABLISHES LEGAL PRECEDENT THAT NON-STREET-FACING WALLS CANNOT BE REGARDED AS "EXTERIOR" UNDER THE HEIGHT ACT. THIS ARGUMENT IS UTTERLY DEVOID OF LEGAL MERIT.

The proposition that some builders have been able to erect buildings that do not comply with the Height Act requirement of setback from all exterior walls is not in dispute. What is disputed is its relevance to this case. Montrose has previously claimed that a set of BZA orders associated with these projects constitute precedent that such setback is not required. As we have pointed out, however, there is no such body of precedent: in order to constitute precedent on a point of law, that point must be properly raised before the tribunal, and then specifically and explicitly addressed in its opinion. These orders do not address or even mention the Height Act setback issue. *See Memorandum of ANC 1C and KCA in Response to the Board's Request for Supplemental Briefing of the Exterior Wall Issue [*hereinafter *ANC/KCA Exterior Wall Memorandum], Exhibit A, pp. 11-13*

The same is true of the one additional order submitted by Montrose in *Intervenor's Brief on Meaning of "Exterior Wall" Under the 1910 Height Act* [hereinafter *Intervenor's Brief*] ,at Exhibit B, which makes no mention of the Height Act or even of any roof structure. This order is of some interest, however. Montrose somehow concludes from the order's silence that "the Zoning Review Branch conducted a thorough review of the project and concluded that relief from the roof structure setback requirements" – meaning, presumably, the Height Act requirements – "was not needed." If so, the Zoning Branch apparently also concluded in its zeal that compliance with the Zoning Regulations on roof structure setback was also not required. The building was located not in a commercial district, as stated by Montrose, but in a Special Purpose district, HR/SP-2 (see Order). Our research indicates that the Regulations in force for

this district in 1983 required roof structure setback from all lot lines of the lot—obviously not the case with this building's roof structure, which is flush with a side lot line. It would therefore be imprudent to place much stock in this order as evidence of the diligence of the Zoning Branch as custodian of either the Height Act or the Regulations. And in any event, this 1983 Order is irrelevant inasmuch as it precedes by nearly three years the Zoning Commission's explicit 1986 ruling in Order No. 476 that "the reference of the Height Act to 'exterior walls' is clear, and leaves no room for amendment by administrative construction. The Commission intends that its use of the phase [*sic*] 'exterior walls' not be subject to exceptions under any circumstance."

Turning aside from the Board orders, now Montrose apparently asserts that the mere existence of these non-complying buildings constitutes "precedents that can be found throughout the city," attaching a number of aerial photographs. See *Intervenor's Brief*, pp.3-7. The otherwise superfluous photographs do constitute some evidence that the buildings exist, which is in any event not disputed. But the fact of their existence, with or without photographs, is completely without value as legal precedent on the Height Act setback issue, for the same reasons that the accompanying Board orders establish no precedent on that issue. *See ANC/KCA Exterior Wall Memorandum, Exhibit A, pp. 11-13.* Whatever clues these buildings may provide as to how developers and their attorneys have operated in this city over the years, the mere fact that these illegal structures exist simply has no bearing on the legal principle of *stare decisis.*

4. MONTROSE AND DCRA CITE ASSERTIONS BY CERTAIN OFFICIALS OF A "CONSISTENT INTERPRETATION" OF THE HEIGHT ACT BY DISTRICT AUTHORITIES AS NOT REQUIRING SETBACK FROM SIDE WALLS, CONTRARY TO THE PLAIN LANGUAGE OF THE STATUTE. THESE ASSERTIONS ARE NOT CREDIBLY AUTHORITATIVE.

Unable to produce precedent in the form of Board or Zoning Commission orders or court decisions, Montrose and DCRA claim that at least there has been a consistent interpretation by District authorities that the Height Act requires no setback from non-street-facing walls, pointing to assertions to that effect by selected District officials. Those assertions do not withstand analysis.

The stated position of the current Chief of the Zoning Review Branch, Faye Ogunneye, for example, may be dismissed summarily. Even when testifying in this case, Ms. Ogunneye seemed to apprehend only vaguely that the Height Act is involved; she relied instead entirely on the Zoning Regulations – specifically, a totally irrelevant regulation on side yards – but was ignorant of the definitive 1986 Zoning Commission Order on roof structures, No. 476. See *ANC/KCA Exterior Wall Memorandum*, p. 3. This is hardly surprising, in view of the fact that in the permitting process in this case, as in numerous others, the Height Act – far from being "interpreted" – was simply ignored, not only by the Zoning Review Branch but in this case by the former Zoning Administrator who was retained to do the initial review and certification. The minimum requirement for an official "interpretation" is that the official be aware of what is being interpreted.

Montrose also invokes the 1993 statement by then Zoning Administrator Joseph Bottner, in the aborted GWU/WETA case, that the "setback requirements of a roof structure under the provisions of the Act of 1910 have always been interpreted by the Zoning Division as being required to set back from the property line which adjoins a street." *Intervenor's Brief*, p. 2. See also *Applicant's Memorandum of Points and Authorities on Board's Authority to Hear Argument on the 1910 Height Act [hereinafter "Applicant's Memorandum"], BZA Case No., 17221, p. 4 and Exhibit B* . This somewhat strange statement may indeed reflect Mr. Bottner's belief, but it

strongly suggests that he was unaware of the history or content ZC Order 476 in which the Zoning Commission *dropped* the reference to lot lines from the setback regulations as inconsistent with the Height Act and substituted "all exterior walls," and that the Act itself speaks only of "exterior walls." He makes no effort to reconcile his position with the plain language of the Act, with which it clearly conflicts, and acknowledges that he "had no written authority for his position." See *Note to George Oberlander from Sandra Shapiro, Applicant's Memorandum, part of Exhibit D.*

The note just mentioned, sent by an NCPC counsel in the course of the GWU/WETA case, is particularly instructive. Essentially, it bootstraps on the Bottner statement and on an excerpt from a document supplied by counsel for the applicants in that case, which turns out to be the 1958 Report of the Zoning Advisory Council discussed above at pp. 3-4, asserting that the Zoning Commission had previously applied the street-facing-walls-only view. *"Based on the above,"* Ms. Shapiro concludes that there has been a longstanding interpretation of the Act, but notes correctly that the opponents in the case "present no other argument than the plain words of the Act itself," and that "the force of this long standing interpretation may be somewhat undercut by the apparent lack of ambiguity in the statute itself" [*emphasis added*]. As we have repeatedly noted, one has only to read the entire ZAC report to see that the ZAC *rejected* the street-facing-walls-only view in favor of the "lot lines" formulation, which the ZAC believed to be more consistent with the Height Act, and immediately thereafter the Commission adopted regulations incorporating the ZAC's recommendation.

Beyond this, the very existence of a consistent official interpretation that the Act requires only setback from street-facing walls is controverted by statements emanating repeatedly from NCPC, which of course has extensive responsibilities connected with the application of the

Height Act and the Zoning Regulations. The NCPC itself in 1984-86, and its experienced staff in 1993, argued vigorously that the Height Act requires setback from all four walls. The 1993 NCPC staff document in the GWU/WETA case, cited by Montrose, characterizes a common division wall of the PUD as an exterior wall, and states: "In the staffs [*sic*] experience (since 1967), all public and private buildings reviewed by the Commission, that required penthouses, have had those penthouses setback from all exterior walls in accordance with the Height Act." The staff argued that "[a]ny other departure creates a building inconsistent with the Comprehensive Plan policy to protect the historic horizontal character of the National Capital." Finally, these views are confirmed by the statement of George Oberlander, a former longtime NCPC staff member, previously introduced into the record of this appeal (attached hereto as Exhibit A).

In sum, it is doubtful at best that there has been a consistent and uniform interpretation of the Height Act on the part of District officials limiting the setback requirement to street-facing walls. Moreover, any such interpretation contradicting the plain and unambiguous language of the federal Height Act would exceed the authority of those officials.

In this connection, Montrose again invokes, and misrepresents, the case of *Smith v. District of Columbia Board of Zoning Adjustment,* 342 A.2d 356 (D.C. 1975), to argue that a Board decision to require setback from side walls would be a new interpretation that could be applied only to future cases, not to 1819 Belmont Road, under the principle of *stare decisis.* But as we have previously pointed out, (1) the Court in *Smith* said no such thing, but rather was merely restating the petitioners' contention in that case without deciding it; (2) in the nearly three decades since it was decided, *Smith* has never been cited by any court for the proposition urged by Montrose; (3) there are no prior BZA precedents from which such a decision in this case

would be a departure; and (4) even if there were, an agency may readily apply a new position in a present case so long as it presents a reasoned explanation for doing so. See *ANC/KCA Memorandum*, p.7.

5. RAMIFICATIONS

As we have noted previously, the Board may not usurp the legislative power in order to address the claimed adverse effects of applying the plain language of the Height Act. DCRA would seem to agree, stating "the Board cannot go beyond the language and intent of the regulations [or, we presume, the Height Act] to consider the ramifications of the Board's decision on future residential and commercial development in the District." *Appellee's Response*, p. 4.

Nevertheless, both Montrose and to a lesser extent DCRA have alleged various adverse consequences of declaring that non-street-facing walls may be regarded as exterior walls under the Height Act. In our view these range from the incoherent to the highly exaggerated.

Claim: *No property owner would be willing to build to the full height allowable under the Height Act, and "[a]ny subsequent owner could only match the height of the first building unless he conceded to setting back the roof structures on a taller building." Intervenor's Brief*, p. 8. This point is garbled, but in any event the assertion that no one would build is demonstrably wrong: else there would be no buildings in the District erected to the height limit and having roof structures set back from all edges of the roof, such as, for example, those referred to in the NCPC staff memorandum mentioned above or shown in Exhibit B. Builders, whether the first on the block or a subsequent one, would be restrained from building only if they could not or did not care to design their roof structures in compliance with the requirements of law – the normal state of affairs with any zoning law or regulation. Exhibit B presents only a sampling of

Washington commercial buildings. (Most of them appear to have been built to the Height Act limit, but whether they have is not relevant here, since the difficulty of properly setting back the roof structure does not vary with the height of the building.) Exhibit B suggests that roof structures properly set back from all walls of the building are more nearly the norm than the exception, and that straightforward compliance with this requirement, in building after building, has presented no insuperable technical difficulty. In short, architects and builders have found setback compliance no big deal, whereas Montrose would have the Board believe that it would cause construction up to the Height Act limit to grind to a halt.

Claim: *Properties would be treated differently depending on the grade of the street, because a roof structure on a building at a higher elevation would be more visible. Matter of right zoning would be "rendered meaningless." Id.* This is simply wrong. Variations in elevation, not being mentioned in the Height Act, play no part in applying the Act's requirements of setback from exterior walls. At best, Montrose is confusing the issues in this case with its argument in a separate case for a special exception.

Claim: *In the interest of preserving uniformity of treatment, the Board cannot consider the particular undesirable features of an individual building – such as the "obnoxious" quality of 1819 Belmont Road – as a basis for departing from the Zoning Administrator's supposed interpretation that setback is required only from street-facing walls. Id.*, pp. 8-9; *Appellee's Response*, pp. 3-4. This argument is remarkable when one considers that the supposed "interpretation" whose integrity these parties seek to protect is itself a departure from the plain language of the statute, carved out to relieve a whole class of developers from its strictures. If the application of this groundless exception to the Height Act can be seen to have obnoxious consequences in this or future cases, that is all the more reason to stick with the language of the

statute, and – now that the issue has been squarely presented to the Board – to apply it uniformly in all cases.

Claim: *Some existing buildings would become non-conforming, and therefore "potentially be subject to civil infractions and fines," and would face difficulties in getting financing. Intervenor's Brief,* p. 11. First, it is by no means clear that a decision that the roof structure at 1819 Belmont Road, N.W. does not meet the Height Act's setback requirements would automatically render any previously existing building "non-conforming" under Chapter 20 of the Zoning Regulations. Moreover, there are thousands of buildings that have that status in the District, including many in the vicinity of 1819 Belmont Road. The record is absolutely devoid of any evidence that they suffer any ill-effects as to financing, sale price, or insurability. The notion that sustaining this appeal would trigger a rash of prosecutions, citations, and penalties against, for example, the buildings in Montrose's photo gallery, seems entirely fanciful and speculative, and Montrose has offered no reason to think otherwise. More importantly, even if any significantly undesirable consequences for existing buildings could be proven – a doubtful proposition at best – it is not the job of the Board to address those consequences. The Board's job in this case is to apply the plain language of the Height Act and the regulations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing submission was served by United States Mail, postage prepaid, this 25th day of January, 2005 upon the following:

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Statement of George H.F. Oberlander, AICP

I am George H.F. Oberlander. I served on the staff of the National Capital Planning Commission (NCPC) from 1965 to 1996. As Associate Executive Director for District of Columbia Affairs, I participated in the consideration within the NCPC of it position regarding issues raised by Zoning Commission Case No. 84-10 with respect to proposed changes in the Zoning Regulations regarding roof structures, and specifically, changes in the regulations regarding setback of rooftop penthouses. (NCPC August 1, 1985 Transcript attached).

The 1958 regulations required setback of penthouses, by a distance equal to their height above the roof, from "*all lot lines of the lot*" in most zoning districts.

The Zoning Commission had originally proposed changing these provisions to require setback to be measured from "*the perimeter of the roof*".

Later, however, the Zoning Commission proposed less restrictive language that would retain the requirement of measurement from "*all lot lines of the lot*".

The Zoning Commission also had before it less restrictive language that setback should be measured from the *lot lines fronting on a street* (reportedly expressed by the Corporation Counsel) or *exterior walls fronting on a street* (expressed by the Office of Planning).

The NCPC was concerned that the Zoning Regulations be consistent with the Height of Buildings Act, which requires setback from the "exterior walls" in cases where the roof structure height exceeds the building height allowed by the Act. Therefore the NCPC opposed the then-current provisions measuring setback from lot lines, because the lot lines might be located some distance away from the exterior walls. It also opposed measuring setback only from lot lines or exterior walls that front on a street, since that would require setback from only some

exterior walls and would therefore, in the NCPC's view, be inconsistent with the Height Act.

In my current review of the NCPC files and Commission consideration of this matter, there were no provisions or discussion for exempting rowhouse party walls from the setback requirements.

The NCPC regarded the Zoning Commission's original proposal to require setback from the perimeter of the roof, which had the effect of requiring setback from all walls of the building, to be in keeping with and to have the same intent and effect as the Height Act's requirement of setback from the exterior walls.

The NCPC communicated its views on the setback issue to the Zoning Commission on August 1, 1985, requesting that the Commission consider reverting to its original proposal requiring penthouse setback to be measured from the perimeter of the roof. Ultimately the Zoning Commission adopted a formulation that the NCPC regarded as having the same effect, namely, the requirement of setback from "*all* exterior walls".

George H.F. Oberlander, AICP

04/19/04
Date

ACKNOWLEDGEMENT

State of Maryland
County of Montgomery

I, Zulienne C Wolfrey, a Notary Public of said county, do hereby certify that George H.F. Oberlander, whose name is signed to the foregoing writing bearing the date of the 19th day of April, 2004, has t his day acknowledged the same before my in my said County.

Given under my hand this 19th day of April 2004.

Zulienne C Wolfrey
Notary Public

My commission expires May 1, 2007

Zulienne C. Wolfrey, Notary Public
Montgomery County
State of Maryland

EXHIBIT B

The following list is a sampling of buildings in two largely commercial areas of the northwest quadrant of Washington, D.C. compiled from inspection of low-altitude aerial photographs,[1] copies of portions of which are attached. Buildings indicated in the photographs by an arrow appear to have roof structures set back from all edges of the roof in compliance with the Height of Buildings Act requirement of setback from "exterior walls". Some have party walls or walls on line. These images provide a revealing indication of the pattern of roof structure construction in Washington.

1. 1100 L Street
2. 1300 L Street
3. 1275 K Street
4. 1400 K Street
5. 1225 I Street
6. 1250 I Street
7. 1234 Massachusetts Avenue
8. 1155 14th Street
9. 1101 14th Street
10. 1199 Vermont Avenue
11. 1101 Vermont Avenue
12. 1501 M Street
13. 1177 M Street
14. 1156 15th Street
15 1125 15th Street
16. 1090 Vermont Avenue
17. 1015 15th Street
18. 1025 15th Street
19. 1101 16th Street
20. 1615 L Street
21. 1145 17th Street
22. 1150 17th Street
23. 1200 17th Street
24. 1726 M Street
25. 1750 M Street
26. 1730 Rhode Island Avenue
27. 1660 L Street
28. 1667 K Street
29. 1666 K Street
30. 901 17th Street
31. 815 Connecticut Avenue
32. 1776 K Street
33. 1800 K Street
34. 1801 K Street
33. 1800 K Street
34. 1801 K Street
35. 1025 Connecticut Avenue
36. 1133 Connecticut Avenue
37. 1150 Connecticut Avenue
38. 1120 Connecticut Avenue
39. 1050 Connecticut Avenue
40. 1801 L Street
41. 1150 18th Street
42. 1900 K Street
43. 1909 K Street
44. 1020 19th Street
45. 1900 L Street
46. 1111 19th Street
47. 1899 L Street
48. 1120 19th Street
49. 1850 M Street
50. 1030 15th Street
51. 1501 K Street
52. 1575 I Street
53. 1850 K Street
54. 1800 M Street
55. 600 19th Street
56. SW corner, Connecticut Ave. and K, since demolished

[1] Source: Elysa Fazzino, *Washington from the Air* (White Star Publishers, 2003), at pp. 84-85, 98-99.