BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPEAL OF:

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

BZA Appeal No. 17109

Decision Date: February 1, 2005

REPLY BRIEF OF INTERVENOR MONTROSE, LLC ON MEANING OF "EXTERIOR WALL"

I. INTRODUCTION

The parties to this appeal have urged the Board of Zoning Adjustment ("Board" or "BZA") to take to contrary views on the meaning of "exterior wall" under the Height of Buildings Act of 1910 (the "Height Act") and the District of Columbia Zoning Regulations ("Zoning Regulations") and whether "party walls," "face-on-line walls" or "common division line walls" constitute exterior walls. In analyzing these questions, the BZA must decide several key issues:

(i) Is the meaning of the term "exterior walls" clear from the plain language of the statute or regulation?

(ii) If so, should the Board's inquiry end there or continue?

(iii) If the meaning is not clear, or the Board's inquiry should continue, what is the legislative history and what have the government bodies charged with its interpretation understood "exterior walls" to mean?

(iv) Finally, given the plain language of the statute or its historical interpretation, do common division walls, face-on-line walls, or party walls constitute "exterior walls" thereby triggering the roof structure setback provisions of the Height Act or Zoning Regulations?

Each question is discussed below, based on the opening briefs supplied by Appellants Kalorama Citizens Association ("KCA") and Advisory Neighborhood Commission ("ANC") 1C, the Appellee District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"), and Intervenor Montrose LLC ("Montrose").

II.
THE PLAIN MEANING OF "EXTERIOR WALLS" UNDER THE HEIGHT ACT AND ZONING REGULATIONS

A. Appellants' Position

KCA and the ANC argue that the meaning of the term "exterior wall" is clear from the plain language of the Height Act and Zoning Regulations and that the Board's inquiry ends there. They argue that "exterior walls" can only be construed to mean any wall that is exposed to the elements. In support of this position, KCA and the ANC rely on the rule of statutory construction that states that the plain meaning of the statute governs and cite several District of Columbia case that stand for this proposition. They also contend that the Zoning Commission understands the term "exterior walls" to have clear meaning based on the 1986 text amendments. They do not, however, identify what the Zoning Commission's clear understanding is, other than to quote from the 1986 Zoning Commission Order in Case No. 84-10, which states that "[t]o the Commission, the reference of the Height to 'exterior walls' is clear and leaves no room for amendment by administrative construction." Unfortunately, the Commission also falied to state in its order what that clear reference is.

B. Appellee's and Intervenor's Position

DCRA and Montrose, on the other hand, argue that the term "exterior walls" has historically been interpreted differently under the Height Act and the Zoning Regulations. They contend that "exterior walls" under the Height Act means only the walls facing the street, while under the Zoning Regulations the term "exterior walls" has been interpreted more restrictively to mean walls facing streets, alleys or yards. In support of their position, Montrose and/or DCRA have offered testimony from the Zoning Administrator's office and cited memoranda from the Office of Attorney General, the Zoning Administrator, the general counsel to the National Capital Planning Commission, and Zoning Commission Order No. 749-A dated April 29, 1994 (the "WETA case").

The ANC and KCA have not addressed or refuted in any way the evidence and memoranda cited by Montrose and/or DCRA. They do contend, however, that ZC Order No. 749-A is void and a legal nullity because, on appeal, the Zoning Commission asked the court to remand the case so that the findings and conclusions in the order could be clarified. The Zoning Commission never took any further action on the order, however, and the entitlements granted thereunder lapsed when the applicants determined not to proceed with the project. There has not been any action by any court or by the Zoning Commission to invalidate the order. Thus, the Appellants contention that the order is void and a legal nullity is not, in fact, true.

It is true, however, that the Zoning Commission did not make an actual finding on the meaning of "exterior wall" under the Zoning Regulations and the Height Act. It is also accurate to state that, over the very same objections raised by KCA and ANC 1C in this appeal on the meaning of "exterior wall", the Zoning Commission approved the WETA PUD without requiring a setback ratio for the penthouse along walls not facing a street. Thus, the Zoning Commission

made an implicit finding that "exterior walls" under the Height Act means only walls facing a street.

C. The Plain Meaning Doctrine

The D.C. Court of Appeals has frequently turned to the "plain meaning" doctrine of statutory construction to analyze a disputed interpretation of a statute or regulations. In *1618 Twenty-First Street Tenants' Association v. The Phillips Collection,* the court described the plain meaning doctrine when it considered the meaning of "bona fide offer of sale" under D.C. Code § 42-3404.02:

> "As a threshold matter, we acknowledge the often stated axiom that 'the words of [a] statute should be construed according to their ordinary sense and with the meaning commonly attributed to them.'" *E.R.B. v. J.H.F.,* 496 A.2d 607, 609 (D.C. 1985) (quoting *Davis v. United States,* 397 A.2d 951, 956 (D.C. 1979); *see also United States v. Goldenberg,* 168 U.S. 95, 102-03, 42 L.Ed. 394, 18 S.Ct. 3 (1897); *accord Gallagher,* 734 A.2d at 1090. "When the plain meaning of the statutory language is unambiguous, the intent of the legislature is clear, and judicial inquiry need go no further." *Id.* at 1091.

1618 Twenty-First Street Tenants' Association v. The Phillips Collection, 829 A.2d 201, 203 (D.C. 2003).

Here, despite the claim of KCA and the ANC to the contrary, the meaning of "exterior walls" is not unambiguous. First, the term is not defined in the Zoning Regulations or the Height Act. Second, the term is not defined in the dictionary. While the words "exterior" and "walls" are, of course, found in the dictionary, their independent meanings cannot necessarily be joined to adequately reflect the intent of the legislature. Moreover, eight years after amending the roof structure setback provisions of the Zoning Regulations, the Zoning Commission debated in the WETA case the very meaning of "exterior walls" under the Height Act and the Zoning Regulations, further indicating that the term is not unambiguous. *See* record in Z.C. Order No. 749-A, April 29, 1994.

During the time the WETA case was being considered, counsel to the National Capital Planning Commission, which is charged with protecting federal interests and federal laws including the Height Act, recognized that the term is not clear from the plain language of the statute. When NCPC reviewed the WETA PUD, NCPC counsel advised staff member, George Oberlander, that the meaning of "exterior walls" cannot be gleaned from the plain words of the Height Act:

> In their pleadings, ANC 2A presents no other arguments for the all around setback requirement other than the plain words of the [Height] Act itself.
>
> Based on the above [Report of the Advisory Council on Proposed Amendments to the Zoning Regulations dated July 16, 1958], it appears that, for at least forty years, and probably longer, those entities with authority to administer zoning provisions in the District of Columbia have interpreted the Height Act setback provisions to apply only to exterior walls facing the street. A court of law, in interpreting a statute, will give great deference to long standing administrative interpretation of that law by the body which has responsibility for administering that law.

Note from Sandra Shapiro, NCPC Counsel, to George Oberlander, NCPC staff, Re: George Washington University/WETA Zoning Commission Case No. 93-9C, February 17, 1994. A copy of this note is attached to Applicant's Memorandum of Points and Authorities on Board's Authority to Hear Argument on the 1910 Height Act in BZA Case No. 17221, which Memorandum is hereby incorporated by reference.

NCPC staff member Mr. Oberlander, in his staff draft report, nevertheless advised NCPC that the PUD penthouse setbacks were inadequate and in violation of the 1910 Height Act requiring roof structures to be set back from exterior walls, and thus would adversely affect the Federal Establishment and other Federal interests. However, NCPC rejected the staff draft report and concluded that the PUD "*would not* adversely affect the Federal Establishment or other Federal interests and would not be inconsistent with the Comprehensive Plan for the National

Capital" (emphasis added.) *See* Exhibit D to Applicant's Memorandum of Points and Authorities, BZA Case No. 17221.

NCPC's finding is significant in at least three key respects. First, it undermines the Appellants' reliance on Mr. Oberlander interpretation of the 1986 zoning text amendments on roof structure setbacks, for his views were subsequently rejected by NCPC in the WETA case. Second, and more important, regardless of whether the Zoning Commission's order in the WETA case is a "legal nullity," as suggested by the Appellants, the official action of NCPC on this issue is not a legal nullity and has never been overturned. Because of this federal agency's specific task is to ensure that interpretations of the Zoning Regulations are consistent with federal law and the Height Act in particular, NCPC's finding is persuasive and should be followed by the Board. The Board should reject any interpretation of the Height Act that requires penthouses to be set back from any walls other those fronting on a street.

II.
BOARD'S INQUIRY DOES NOT NECESSARILY END EVEN IF THE PLAIN MEANING OF THE STATUTE'S WORDS IS CLEAR.

The discussion above and the documents previously submitted to the record in BZA Case Nos. 17221 and 17109 clearly demonstrate that the meaning of "exterior walls" under the Height Act and the Zoning Regulations is less than crystal clear. Assuming *arguendo,* however, that Appellants are correct in stating that the plain meaning of "exterior walls" is clear, the Board's inquiry does not necessarily end there. The D.C. Court of Appeals has held that "[w]hile we first employ the plain meaning rule to our task of statutory interpretation, we have acknowledged that in certain circumstances it is appropriate to look beyond even the plain and unambiguous language of a statute to understand the legislative intent." *1618 Twenty-First Street Tenants' Association,* 829 A.2d at 203. Further,

> the literal words of a statute, however, are "not the sole index to legislative intent," but rather are "to be read in the light of the purpose of the statute taken as a whole, and are to be given a sensible construction and one that would not work an obvious injustice." The Supreme Court has observed that even when the words of a statute may appear, on "superficial examination," to be clear and unambiguous, "words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history...." The Court has also declared that "the plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'"

District of Columbia v. Gallagher, 734 A.2d 1087, 1091-92 (D.C. 1999) (internal citations omitted).

Here, the term "exterior walls" is inexact because it is undefined in the Height Act and the Zoning Regulations. Further, its meaning cannot be readily gleaned from Webster's Unabridged Dictionary. Thus, resort to legislative history and long-standing interpretation is not only appropriate but necessary.

In 1953, the Office of Corporation Counsel ("OCC", now known as the Office of Attorney General) reached a similar conclusion when the Zoning Commission presented OCC with the question of whether penthouses may be constructed above the Height Act limits for purposes other than to cover elevator shafts. There, the Corporation Counsel concluded that Zoning Commission must not only look to the language of the Height Act, but also to long-standing interpretation of the Act,

> "inasmuch as the long-continued contemporaneous and practical interpretation of a statute by the executive officers charged with its administration***** constitutes an invaluable aid in determining the meaning of a doubtful statute." Sutherland, Statutory Construction, sec. 5103. It might be said that the phrase "penthouses over elevator shafts" is plain and unambiguous, permitting the construction of penthouses only over elevator shafts, and that therefore there is not a need to administrative construction of this phrase. But it may hardly be said that Congress, by the use of this phrase, intended, for example, to prohibit the construction of penthouses over stairways leading to the roof of a building, as is commonly the practice in the construction of buildings, and as was the practice at the time of the Act of June 1, 1910 was enacted, according to persons in the

Department of Inspection having knowledge of the construction practices at that time.

Opinion of the Corporation Counsel to the Zoning Commission re penthouses, July 27, 1953.

Thus, it is entirely appropriate to resort legislative history and long-standing interpretations of the Height Act and Zoning Regulations, even if the Board finds the words "exterior walls" to be superficially clear.

III.
LONG-STANDING INTERPRETATION

No legislative history exists on the meaning of "exterior walls" under Height Act. However, there is ample memoranda and authority cited by Montrose in the record that the term has historically meant walls fronting on a street. Neither KCA nor the ANC have refuted or even addressed this evidence and have only responded by turning to the "plain meaning" rule. Based on the memorandum from Corporation Counsel, and the advice of NCPC's counsel, and discussion of the "plain meaning" rule above, the Board's inquiry cannot end with just a superficial reading of the term "exterior walls." It must turn to the long-standing interpretation and follow that precedent based on the principle of *stare decisis* as discussed in the *Smith* case. *Smith v. District of Columbia Board of Zoning Adjustment*, 342 A.2d 356 (D.C. 1975).

KCA and the ANC have suggested that the *Smith* case does not stand for the proposition espoused by Montrose and that no other court as cited for that proposition. They claim that the court remanded the case so the Board could decide whether it is bound by precedent. KCA and the ANC have misread the case. The court simply states that the Board failed to address the precedent identified by the Zoning Administrator and should have made a finding on this issue. *Smith; see also C&P Building Limited Partnership v. District of Columbia Board of Zoning Adjustment,* 442 A.2d 129, 132 (D.C. 1982), *citing Smith.*

The principle of *stare decisis* is well-established and there is no question that any changes to long-standing interpretation should be made prospectively only. In *Reichley v. District of Columbia Department of Employment Services,* 531 A.2d 244 (D.C. 1987), the D.C. Court of Appeals held that

> if an agency's adjudication is a clear break with the past and a party reasonably relied to its detriment on the previous rule, then the new rule should be applied prospectively, unless the agency ... can demonstrate that this reliance interest is outweighed because prospective application would impose a severe administrative burden, otherwise interfere with a significant statutory interest, or fail to provide an essential reward to those who innovate change.

Reichley, 531 A.2d at 253.

Here, if the Board finds that the Zoning Administrator erred in his long-standing interpretation, the Board's decision should only apply prospectively because Montrose reasonably relied to its detriment on the Zoning Administrator's previous interpretation of the rule, and neither KCA nor the ANC, or the Board for that matter, can demonstrate that prospective application would impose a severe administrative burden or otherwise interfere with a significant statutory interest.

IV.
COMMON DIVISIONN WALLS, FACE ON LINE WALLS AND PARTY WALLS HAVE NEVER BEEN CONSIDERED "EXTERIOR WALLS" UNDER HEIGHT ACT OR ZONING REGULATIONS

There is also ample evidence of record and numerous examples cited by Montrose to support a finding that common division walls, face-on-line walls and party walls have historically been interpreted to be *interior walls* that are not subject to the penthouse setback provisions of the Zoning Regulations. KCA and the ANC continue to contend that the Zoning Administrator has approved such penthouses in error and that the issue has never been decided

by the Board despite BZA approval of buildings where penthouses are not setback along interior lot lines.

In addressing this issue, the Board must decide on the most rational and reasonable interpretation based on the arguments presented by the parties. That is, is more reasonable to believe that Zoning Administrator and BZA, either implicitly or explicitly, have been making long-standing mistakes in their interpretation, or whether they have historically determined that interior lot line walls are *not* exterior walls subject to the setback provisions? Neither KCA nor the ANC have offered any evidence to suggest that there is no long-standing interpretation or that the long-standing interpretation is in error. Rather, they simply offer arguments without substance to support their views.

In contrast, DCRA and Montrose have supplied credible testimony, evidence and numerous examples demonstrating the historical interpretation that interior lot line walls are *not* considered exterior walls for purposes of the penthouse setback provisions of the Zoning Regulations. It is clear from the Zoning Administrator's testimony and evidence of record that the buildings cited by Montrose as examples have been approved because they are compliant with the Zoning Regulations. This interpretation is entitled to great deference by the Board and should not be overturned unless it is clearly erroneous or otherwise not in accordance with law. Under the authority granted by the Zoning Act and Reorganization Order No. 55,[1] the Zoning Administrator is charged with interpreting the Zoning Regulations and that office's long-standing interpretation of the setback provisions should stand. Even if the Board were to decide that the interpretation was error, any new interpretation should only be applied prospectively under the principle of *stare decisis*. *See Smith* and *Reichley, supra.*

[1] "The Zoning Division shall be headed by a Zoning Administrator who shall be responsible for administratively interpreting and enforcing the Zoning Regulations." D.C. Code Ann., Title 1 – Administration, Appendix (1974 ed).

VI.
CONCLUSION

For the reasons stated herein, the Board should find that the east and west walls of the building at 1819 Belmont Road, N.W., are *interior,* not exterior walls, and thus not subject to the penthouse setback provisions of the Zoning Regulations. According, the appeal should be denied.

Respectfully submitted,

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January 25, 2005

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Intervenor Montrose LLC was served this 25th day of January, 2005, by hand-delivery, or first-class mail postage prepaid, on the following:

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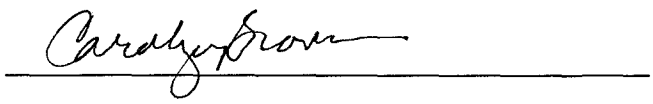

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