Rec'd.
4. 6. 04

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

Appellant's Supplemental Memorandum of Law on the Height of Buildings Act

At the hearing on this appeal on March 9, 2004, the Board *sua sponte* raised a question as to whether the Board had jurisdiction over the issues in this appeal concerning the 1910 Height of Buildings Act, D.C. Code §§ 6-601 *et seq.* (hereinafter referred to as the "Height Act"). In response, the representative of the Corporation Counsel expressed the view that the practice of the agency was to refer issues raising the Height Act to the D.C. Board of Appeals and Review. For the reasons indicated below, Appellant Kalorman Citizens Association ("KCA") believes that this Board clearly has jurisdiction to hear and determine appeals alleging that a decision by the Zoning Administrator violates the Height Act.

1. <u>The BZA Has Jurisdiction Over This Appeal Because the Zoning Regulations Specifically Require Compliance with the Height Act.</u>

The Height Act provides that, on residence streets, the highest part of the roof or parapet may not exceed in height the width of the street, avenue, or highway upon which it abuts, diminished by 10 feet D.C. Code § 6-601.05(b). However, the Zoning Regulations provide for height restrictions by zone district, which may, in some cases

BZA
Case No. 17109
Exhibit No. 63

(and indeed, does in this case), authorize building height in excess of the Height Act[1]. Rather than reiterate the more restrictive limits in the Height Act, the Zoning Regulations provide generally that "all buildings or structures shall comply with the Act to Regulate the Height of Buildings in the District of Columbia." *See* 11 DCMR § 2510.1.

This Board has raised the question of whether it has authority to decide a question involving the application of the Height Act's height limit on residence streets, which limit is found solely in D.C. Code § 6-601.05(b) and is not also found in the Zoning Regulations. Presumably, the source of this Board's concern is the fact that its jurisdiction to hear and decide appeals is limited to "administrative decisions based in whole or in part upon *any zoning regulation* or map *adopted under this subchapter [IV]* and subchapter V of this chapter." D.C. Code, §§ 6-641.07(f), 6-641.07(g) (emphasis added).

However, there is no question here that the Zoning Administrator has the power to enforce the Height Act by virtue of 11 DCMR § 2510.1. Like this Board, the Zoning Administrator's authority is also limited to the enforcement of the provisions of the Zoning Regulations themselves. *See* Reorganization Plan No. 55 (attached as Exhibit 1). Nonetheless, the Zoning Administrator enforced the Height Act in other cases and has taken the position before this Board that, "[t]he height of buildings in the District of Columbia is governed by *both* the DCMR 11 Zoning Regulations *and* the Act to Regulate the Height of Buildings in D.C. June 10 1910. *When determining the allowable height of a structure, the more restrictive of the two laws must apply.*" *Appeal of Howard University*, BZA Appeal No.15568, at 3 (October 22, 1993) (attached as Exhibit 2)

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[1] The building at issue here is in the R-5-D zone, in which zone district the Zoning Regulations provide for 90 foot height restriction. However, Belmont Road has a street width of 80 feet, and therefore the Height Act requires a 70-foot height limit. *See* KCA Pre-hearing Submission, Exhibit 6

(emphasis added) (citing 11 DCMR § 101.4, which provides that other statutes "shall govern" where they impose higher standards than are required by the Zoning Regulations.)

It makes no sense for this Board to concede, on the one hand, that the Zoning Administrator has sufficient regulatory authority to enforce the Height Act, but to suggest on the other hand this Board lacks such authority. Indeed, there is precedent to the contrary in *Appeal of Howard University*, in which this Board heard an appeal from the decision of the Zoning Administrator "to the effect that the height of a university building located in the R-5-B District is limited by the provisions of" the Height Act. In that case, the Board specifically found that, "in instances of conflict between the provisions of the Zoning Regulations and any statute or other municipal regulations, the higher or more restrictive provisions would apply as set forth in Sections 101.3 and 101.4 of the Zoning Regulations." *See Appeal of Howard University, supra*, at 7. Accordingly, the Board ruled "that the Zoning Administrator properly applied the criteria set forth in the Zoning Regulations *and the Height Act*." *Id.*, at 8 (emphasis added).

It may be the case that this Board lacks jurisdiction over an appeal challenging the Zoning Administrator's failure to exercise his authority under 11 DCMR § 101.4 to apply in lieu of the provision of the Zoning Regulations, another statutory provision that, unlike the Height Act, is not specifically identified and incorporated by reference in the Zoning Regulations. However, the obligation of strict compliance with the Height Act so permeates the Zoning Regulations so as to be well within the enforcement authority of this Board.

For example, in addition to the general provision in 11 DCMR §2510.1 that "all buildings or structures shall comply with the Act to Regulate the Height of Buildings in the District of Columbia," Section 400.13 of the regulations provides that the Mayor may authorize an excess height only where permitted under the Height Act (*i.e.*, section 6-601.05(h), which permits spires, towers, domes, etc. to exceed the normal height limitations). Section 411.1 of the regulations provides that certain roof structures shall be permitted when not in conflict with the Height Act. Section 2511.1 defines "business street" as used in the Height Act. Section 2512 adopts a schedule of building heights adjacent to public buildings, as permitted by the Height Act. The obligation to comply with the Height Act, specifically identified by, and incorporated in, the regulations, was so important that the Zoning Regulations repeatedly limit the authority of zoning officials, including this Board, to approve deviations from the Act. *See* 11 DCMR § 2522 (c) (limiting the authority to permit minor deviations by providing that "all deviations of roof structure setback requirements comply with the Act to Regulate the Height of buildings in the District of Columbia approved June 1, 1910; 11 DCMR §2516.7 (permitting the height of a building to be measured from the finished grade at the middle of the front of the building only "[w]here not in conflict with the Act to Regulate the Height of Buildings... ")

Accordingly, the provisions of the Height Act are accorded, under the Zoning Regulations, a very different status from other statutory provisions not specifically identified in the regulations that might impose a higher standard than required under the Zoning Regulations. Put another way, the fact that the Zoning Commission chose to incorporate the obligations of the Height Act by reference to the statute rather than repeat

every provision of the Height Act word for word in the regulations does not render the requirement of the Act any less a "zoning regulation" subject to the BZA's jurisdiction under section 6-641.07 of the DC Code or the corresponding section of the regulations. Indeed, only recently, this Board ruled that "[t]he definition of 'community-based residential facility' in the Zoning Regulations includes *and incorporates by reference* 'facilities covered by D.C. Law 2-35, relating to community residence Facilities Licensure Act of 1977.'" *See Appeal of Southeast Citizens for Smart Development, Inc. and ANC 6B*, BZA Appeal No. 16791 at 19 (June 21, 2002). No jurisdictional concerns arising from the fact that this definition was not specifically reiterated in the Zoning Regulations but instead was simply incorporated by reference deterred this Board from applying this definition.[2]

In sum, D.C. Code § 6-641.07 provides that the BZA shall hear appeals of decisions based on the Zoning Regulations adopted under subchapter IV, or appeals alleging an error in the carrying out or enforcement of such regulations. Section 2510.1 of the Zoning Regulations requires compliance with the Height Act. This regulation was adopted under subchapter IV. Thus, the BZA has jurisdiction to hear cases where, as in the present case, an appellant is arguing that the Zoning Administrator's decision issuing a building permit is in violation of the Height Act, since any such decision necessarily constitutes an error in the carrying out of Section 2510.1 of the Zoning Regulations.

2. <u>No Other Administrative Agency Has BZA has jurisdiction over Height Act Appeals</u>

[2] Indeed, in that case, the Board relied on a definition of "facility" contained in D.C.'s Health Care Licensing Regulations, 22 DCMR § 3099, that had been repealed in 1992, but nonetheless found that the superceded definition remained incorporated by reference in the Zoning Regulations. *See Appeal No. 16791 of Southeast Citizens for Smart Development, Inc. and ANC 6B*, at 12 n. 2. Here, by contrast, the provisions of the Height Act remain good law.

KCA has been unable to locate any decisions of this Board, the Zoning Commission, or the D.C. Court of Appeals that address the question of whether this Board has jurisdiction over appeals concerning the Height Act. While the practice of the Office of the Zoning Administrator is apparently, at least in some cases (although it did not do so in this case), to direct persons seeking to appeal Height Act issues to the D.C. Board of Appeals and Review ("BAR"), there is also precedent for this Board exercising jurisdiction over Height Act issues.

Specifically, reference was made to the *Appeal of American Tower, Inc.*, BZA Appeal No. 16990 (June 25, 2003) (attached hereto as Exhibit 3). However, that case did not address the BZA's jurisdiction to hear appeals based on the Height Act. Rather, the BZA simply stated, in its recitation of facts, that "Plaintiff [American Towers] was informed that the side-yard and setback issue could be appealed to the BZA and the remaining grounds for rescission to the BAR." *Id.* at 4. Likewise, the subsequent (unpublished) decision by the U.S. District Court for the District of Columbia, attached hereto, in addressing American Tower's Due Process challenge to the rescission of its building permit, did no more than acknowledge that American Tower was "taking advantage of the District's administrative processes by appealing the rescission to the Board of Zoning Appeals and to the Board of Appeals and Review." *American Tower, Inc. v. Williams*, C.A. No. 00-2436, at 8 (D.D.C., June 14, 2001) (attached as Exhibit 4).

Thus, at most, the American Tower case corroborates the assertion of Corporation Counsel that the practice of the Zoning Administrator, at least at the time of the American Tower case, was to direct appellants who seek to challenge a decision by the Zoning Administrator to apply the Height Act to the Board of Appeals and Review. However,

the existence of this practice within the Office of Zoning does not thereby signify that this Board must lack jurisdiction over appeals raising issues under the Height Act. To the contrary, as noted above, there is precedent for this Board exercising jurisdiction over appeals raising Height Act issues. *See Appeal of Howard University,* BZA Appeal No. 15568 (October 22, 1993) (Exhibit 2).

More importantly, it is not clear that the BAR would have jurisdiction over Height Act issues. The jurisdiction of the BAR is confined to "appeals timely filed by persons who are aggrieved by orders issued by hearing examiners pursuant to this unit or by the Mayor, except that appeals involving infractions of *Chapter 6 of Title 6 or* the District of Columbia Zoning Regulations shall be entertained and determined by the District of Columbia Board of Zoning Adjustment." D.C. Code § 2-1803.01 (emphasis added). The Height Act, of course, is codified in Chapter 6 of Title 6 of the D.C. Code (D.C. Code § 6-601 *et seq.*) Accordingly, by the plain language of this provision, the BAR could not have jurisdiction over Height Act issues because it involves "infractions of *Chapter 6 of Title 6.*" *See Felicity's, Inc. v. DCRA*, 817 A.2d 825 (D.C. 2003) (BAR did not have jurisdiction over appeal from DCRA hearing examiner's imposition of fines for violation of Zoning Regulations regarding parking); *Walsh v. D.C. Board of Appeals and Review*, 826 A2d 375 (D.C. 2003) ("[A]ppeals involving infractions of . . . the District of Columbia Zoning Regulations shall be entertained and determined by the District of Columbia Board of Zoning Adjustment").

In any event, the BAR's functions will soon be wholely assumed by a newly created entity, the Office of Administrative Hearings ("OAH"), established by the City Council in Act 14-196, the Office of Administrative Hearings Establishment Act of 2001

("the Act"), as amended. *See* D.C. Law 15-39, 50 DC Register 5668 (Nov. 13, 2003). The Act was intended to create a new independent agency to adjudicate administrative disputes that would take over and centralize the hearing functions previously handled by a variety of District agencies, including the BAR.[3] It did not create any new right of appeal from the actions of any District agency.

Specifically, following the confirmation of the Chief Administrative Law Judge of the OAH, OAH will have jurisdiction over "adjudicated cases" under the jurisdiction of specified agencies, including the BAR, and after October 1, 2004, will also have jurisdiction over "adjudicated cases" under the jurisdiction of the D.C. Department of Consumer and Regulatory Affairs ("DCRA"). D.C. Code § 2-1831.03(a), (b). *See* D.C. Law 15-39, § 402(b). "Adjudicated case" means a contested case or other administrative adjudicative proceeding before the Mayor or any agency that results in a final disposition by order and in which the legal rights, duties, or privileges of specific parties are required by any law or constitutional provision to be determined after an adjudicative hearing of any type." D.C. Code § 2-1831.01(1). *See also Id.* § 2-1831.03(e) ("Nothing in this act shall be construed to grant a right to a hearing not created independently by a constitutional provision or a provision of law other than this act . . .") Thus, OAH only has jurisdiction to hear appeals from orders issued after a contested case hearing. The issuance of building permits does not occur pursuant to a "contested case" hearing. Therefore, the OAH would not have jurisdiction to hear appeals from DCRA permitting decisions.

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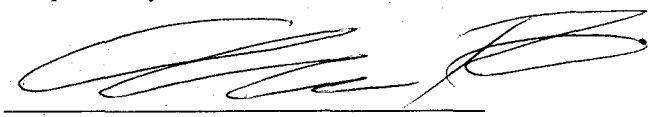
[3] Report of the Committee on the Judiciary, Council of the District of Columbia, on Bill 14-208, the "Office of Administrative Hearings Establishment Act of 2001", September 25, 2001, p. 1.

Moreover, the Act affords OAH jurisdiction as to adjudicated cases under the jurisdiction only of those agencies listed in Section 6 of the Act (DC Code § 2-1831.03). The Board of Zoning Adjustment is not among those agencies. Therefore it cannot be argued that the OAH was intended to take over the jurisdiction of the BZA to hear appeals from decisions under the Height Act. DCRA, by contrast, is among the agencies to which the Act applies (as of October 1, 2003), but, as indicated in the preceding paragraph, building permit decisions are not issued as part of an "adjudicated case" and therefore the OAH would not have jurisdiction over such appeals.

Conclusion

For the above reasons, the BZA has jurisdiction over an appeal in which the Zoning Administrator is alleged to have issued a building permit in violation of the Height Act.

Respectfully submitted,



Andrea C. Ferster
1100 17th Street, N.W. 10th Fl.
Washington, D.C. 20036
(202) 974-5142

Counsel for Kalorama Citizens Association

April 5, 2004

CERTIFICATE OF SERVICE

I hereby certify that, on April 6, 2004, a copy of Appellant's Supplemental Memo on the Height of Buildings Act was served by hand on:

Carolyn Brown
Holland and Knight, LLP
2099 Pennsylvania Ave., N.W. Suite 100
Washington, D.C. 20006

Laura Gilbert, Attorney or Office of
General Counsel
DC Department of Consumer & Regulatory Affairs
941 N. Capitol Street, N.E 2nd Fl.
Washington, D.C. 20002

Alan Roth, Chairperson
Advisory Neighborhood Commission 1C
1845 Vernon Street, N.W.
Washington, D.C. 20009

Andrea Ferster

DISTRICT OF COLUMBIA CODE

ANNOTATED

1973 EDITION

CONTAINING THE LAWS, GENERAL AND PERMANENT IN THEIR NATURE, RELATING TO OR IN FORCE IN THE DISTRICT OF COLUMBIA (EXCEPT SUCH LAWS AS ARE OF APPLICATION IN THE DISTRICT OF COLUMBIA BY REASON OF BEING GENERAL AND PERMANENT LAWS OF THE UNITED STATES), IN FORCE ON JANUARY 2, 1973

NOTES TO DECISIONS THROUGH DECEMBER 1972

VOLUME ONE

TITLE 1—ADMINISTRATION
TO
TITLE 17—REVIEW

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1973

C. That the Corporation Counsel and such of his assistants as he may designate in writing are hereby authorized to execute in the name of the District of Columbia any release in connection with the settlement of any claim of the District of Columbia in the following cases:

1. Where the full amount of the claim as it appears on the books of the Accounting Office has been paid; or

2. Where the full amount set forth in the original demand for payment has been paid; or

3. Where the full amount of any settlement or compromise as approved by the Commissioners has been paid; or

4. Where damaged property of the District of Columbia has been satisfactorily repaired at the expense of the party responsible for such damage.

D. That the Corporation Counsel is hereby authorized to waive any claim and release any lien arising under the provisions of Section 18 of the Public Assistance Act of 1962 (Section 3-217, D.C. Code, 1967 ed. [now 1973 ed.]) when, in his judgment, such waiver or release is appropriate.

CHANGE OF NAME

"Public Utilities Commission", wherever it appears in this order, was changed to "Public Service Commission of the District of Columbia" by Act Aug. 30, 1964, 78 Stat. 634, Pub. L. 88-503, § 21. See § 2-2418.

[The name of the Municipal Court, wherever it appears in this order, was changed to "District of Columbia Court of General Sessions" by Act July 8, 1963, 77 Stat. 77, Pub. L. 88-60, § 1; and subsequently changed to "Superior Court of the District of Columbia" by Act July 29, 1970, Pub. L. 91-358, § 155(a), 84 Stat. 570.]

[The name of the Municipal Court of Appeals was changed to "District of Columbia Court of Appeals" by Act July 8, 1963, 77 Stat. 78, Pub. L. 88-60, § 6; and subsequently again changed to "District of Columbia Court of Appeals" by Act July 29, 1970, Pub. L. 91-358, § 155(b), 84 Stat. 570.]

REORGANIZATION ORDER NO. 51.—OFFICE OF THE CORONER

Reorganization Ord. No. 51, L.S. 4241-B, June 29, 1953, as amended July 17, 1953, and Mar. 5, 1965, was rescinded by section 3 of Commissioner's Order No. 71-16, dated Jan. 26, 1971, which also transferred all positions, personnel, property, records and unexpended balances of appropriations, allocations, and other funds available or to be made available, related to the functions assigned to the Office of the Coroner, to the Office of the Chief Medical Examiner. Commissioner's Order No. 71-16 is set out as a note under section 11-2301.

REORGANIZATION ORDER NO. 52.—DISTRICT OF COLUMBIA POUND

Reorganization Ord. No. 52, June 30, 1953, as amended Apr. 3, 1958, combined with Reorganization Order 57, amended and redesignated as Organization Order No. 141, dated Feb. 11, 1964, and effective Feb. 11, 1964.

REORGANIZATION ORDER NO. 53.—DEPARTMENT OF HIGHWAYS AND TRAFFIC

Reorg. Ord No. 53, June 30, 1953, which established a Department of Highways and Traffic, was redesignated Organization Ord. No. 122.

REORGANIZATION ORDER NO. 54.—DEPARTMENT OF VEHICLES AND TRAFFIC

Reorg. Ord. No. 54, June 30, 1953, which established a Department of Vehicles and Traffic, was repealed May 17, 1955, by Organization Orders No. 105, 106, 107, and 108.

REORGANIZATION ORDER NO. 55.—DEPARTMENT OF LICENSES AND INSPECTIONS

[Functions as stated in Reorg. Ord. No. 55 were transferred to the Director of the Department of Economic Development by Commissioner's Order (Organization Action) No. 69-96, dated Mar. 7, 1969, as amended.]

Reorganization Ord. No. 55, L.S. 4263-B, June 30, 1953, as amended Aug. 13, 1953, Dec. 17, 1953, June 30, 1954, Oct. 26, 1954, Aug. 11, 1955, Jan. 31, 1956, July 10, 1956, Oct. 2, 1956, Oct. 16, 1956, June 13, 1957, Nov. 27, 1957, July 22, 1958, June 1, 1960, Feb. 21, 1961, Nov. 7, 1961, Dec. 4, 1962, May 12, 1964, June 17, 1965, Mar. 16, 1967, and Feb. 28, 1969, ordered that:

PART I

Department of Licenses and Inspections.—There is established under the direction and control of a Commissioner, a Department of Licenses and Inspections headed by a Director. The Director shall have full authority over such Department and all functions and personnel assigned thereto, including the power to redelegate to other officials and employees of the Department such of the powers herein delegated as, in his judgment, are warranted in the interests of efficiency and good administration. However, the power to grant variances from the requirements of the housing code shall be limited to the Director and Deputy Director or, in their absence, the Acting Director of the Department. All authority vested in the Director shall be exercised in accordance with applicable laws, rules, and regulations.

PART II

Purpose.—The Department of Licenses and Inspections is established for the purpose of: administering the laws enacted by Congress and the regulations for the control of construction, zoning and occupancy, use, erection, maintenance and repair, inspection and removal of all buildings and their appurtenances, and electrical and mechanical equipment within the District of Columbia, excepting public buildings or premises under the control of the Federal Government; enforcing the Consumer Affairs Regulations (effective July 1, 1969); administering the D.C. Standard Weights and Measures Law [D.C. Code, § 10-101 et seq]; supervising and controlling the municipal markets and collecting annual revenue for rents and space and for wharfage at the Municipal Fish Wharf [D.C. Code, § 10-135]; administering the License Act of 1932, as amended [D.C. Code, § 47-2301 et seq.], and regulations promulgated thereunder requiring licenses of certain businesses and callings in the District of Columbia; administering the acts requiring licenses for Cooperative Associations, Credit Unions, Pawnbrokers, and Loan Brokers; administering such portions of the Acts as require licenses for: Cigarette Vending Machine Operators and Retail and Wholesale Cigarette dealers [D.C. Code, § 47-2804]; administering the portions of the Act of July 5, 1945 which require the payment of a dog tax and the issuance of a dog tag [D.C. Code, § 47-2001 et seq.]; administering the provisions relating to the licensing of peddlers and the granting of permits for the use of public space contained in the act of August 6, 1956, known as the "Presidential Inaugural Ceremonies Act [D.C. Code, §§ 1-1202, 1-1204];" administering and interpreting all laws and regulations governing housing in the District of Columbia; and proposing to the Commissioner appropriate provisions for codes and regulations relating to such housing: provided, however, that the Department of Public Health shall fully collaborate in the development and presentation to the Commissioner of such proposed provisions to the extent that they affect the public health of the community and its individual members.

PART III

Organization and functions.—There are established in the Department of Licenses and Inspections the following organizational components, responsible for the performance of the functions outlined below, consistent with the purpose specified above:

A. *Office of the Director.*

1. Develops and proposes to the Board of Commissioners major policies and procedures, regulations and revisions thereto, on licensing, permit and certificate issuance, inspection, and related regulatory activities within the purview of the Department's functions, including the issuance of collateral notices in the enforcement of orders for compliance with applicable codes, regulations and statutes administered by the Department.

2. Administers and interprets all housing regulations of the District of Columbia. The Director shall in writing effect a specific delineation of responsibilities between himself and the Deputy Director, particularly in connection with development, interpretation and enforcement of standards and regulations relating to housing.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 15568 of Howard University, pursuant to 11 DCMR 8102 and 8206, from the decision of the Zoning Administrator, dated July 8, 1991, to the effect that the height of a university building located in the R-5-B District is limited by the provisions of the Act to Regulate the Height of Buildings in the District of Columbia, June 10, 1910, as set forth in Subsection 2511.1 of the Zoning Regulations, as related to the proposed construction of an addition to an existing dormitory in the R-5-B District at premises 345 Bryant Street, N.W., (Square 3068, Lot 30).

HEARING DATE: September 25, 1991
DECISION DATE: October 23, 1991

ORDER

SUMMARY OF EVIDENCE OF RECORD:

1. The subject case is an appeal from the decision of the Zoning Administrator, dated July 8, 1991, that the height of a building located on the east side of 4th Street N.W., between College Street on the north and W Street on the south, is not subject to the business street provisions of 11 DCMR Subsection 2511.1 because the proposed building is located on a residentially zoned lot. At issue in this case is the appellant's proposal to construct an addition to the Bethune Dormitory Complex on the Central Campus of Howard University.

2. The appellant's proposal for the subject site was conceived in the late 1970's as three, eight-story interconnected buildings. It was represented as such in the 1980 and the 1988 Howard University Central Campus Plan. Those plans were presented in 1981 and 1988, respectively, for the Board's review and approval. By BZA Order No. 13416 dated March 22, 1982, and BZA Order No. 14733 dated December 23, 1988, the Board concluded that Howard University's Central Campus Plans, including the proposed addition to Bethune Dormitory, met the requirements of 11 DCMR Subsections 210 and 3108.1 of the Zoning Regulations.

3. The appellant proposes to modify its original proposal for the subject site. The current proposal, which is the subject of the instant appeal, contemplates the construction of an addition to the existing Bethune Hall Dormitory which would result in a single seven-story building measuring approximately 67 feet in height.

4. The appellant's rationale for the location and height of the subject structure is summarized as follows:

a. The subject site is located on university-owned property within the approved Central Campus Plan area.

b. The proposed use, height and bulk is consistent with other university buildings in the immediate area.

c. All of the property in the 4th Street corridor between W Street on the south and Howard Place on the north is owned by the University and used exclusively for University purposes.

d. The Harriett Tubman Quadrangle of five dormitories is located immediately to the north of the Bethune site, which enhances the efficiency of management and student conveniences associated with having those dormitories in close proximity.

e. The proposed height of the Bethune addition is consistent with the heights of other buildings in the area, including the existing Bethune Hall Dormitory within the Harriet Tubman Complex which is 69 feet in height; and, the Frazier Hall Dormitory in the Harriet Tubman Complex which is 70 feet in height.

4. Howard University, established as a private nonprofit corporation, historically has had a close relationship with the federal government. Many of its buildings, including the Bethune Hall Dormitory, were built by the federal government. As a consequence, the Bethune Hall Dormitory building was not subject to the Zoning Regulations at the time of construction and was built to a height that exceeds the 50-foot height that a residence street designation would mandate for that site.

5. The portion of 4th Street N.W. that abuts the subject area is 50 feet wide. A zone district line bisects the street with an SP-2 District being to the west of the line and an R-5-B District to the east.

6. The Building Height Limitation Act of 1910, D.C. Code Subsection 405 (1981 ed.), limits building heights in the District of Columbia according to the classification and width of the street that abuts the proposed structure. Buildings on "business streets" are permitted greater heights under the Height Act than buildings on "residence streets". The Act does not specify the justification for these distinctions, nor define the terms "business" or "residence" street.

7. The Zoning Regulations define a "business street" as one whose "...sides and portions...are located within a Special Purpose, Waterfront, Mixed-use, Commercial or Industrial district."

8. The appellant argued that the plain meaning of Subsection 2511.1 with its plural form of the words "side" and "portion" requires both sides of 4th Street to be designated as a business street. The appellant further argued that it makes no difference that one side of 4th Street is in a residence district because the regulation requires both sides and portions of a street located in a Special Purpose district to be designated a business street.

9. The Appellant also asserted that there is no regulation that prevents a building located in a residence district from being deemed to be on a business street and that there is no regulation that requires a street that is split-zoned residential and commercial to be treated as a business street on one side and a residence street on the other.

10. By testimony at the public hearing, the Zoning Administrator supported his position, as follows:

a. The height of buildings in the District of Columbia is governed by both the DCMR 11 Zoning Regulations and the Act to Regulate the Height of Buildings in D.C. June 10, 1910. When determining the allowable height of a structure, the more restrictive of the two laws must apply.

b. The Act of 1910 further reads in part, as follows: "On a residence street, avenue or highway, no building shall be erected, altered or raised in any manner so as to be over 90 feet in height at the highest point of the roof or parapet, nor shall the highest part of the roof or parapet exceed in height the width of the street, avenue or highway upon which it abuts, diminished by ten feet, except on a street, avenue or highway 60 to 65 feet wide, where a height of 50 feet may be allowed, and on a street, avenue or highway 60 feet wide or less where height equal to the width of the street may be allowed.

c. Subsection 2511.1 of the D.C. Zoning Regulations, reads as follows: "For the purpose of administering this title, that portion of the Act (Act of 1910) referred to in Section 2510 that designates certain streets as business streets shall be interpreted to mean those sides and portions of any street located in a Special Purpose, Waterfront, Mixed-use, Commercial or Industrial district.

d. The property in question is located in an R-5-B District on the east side of 4th Street, between Bryant and College Streets N.W. The property located on the south side of Bryant Street and on the north side of College Street is also zoned R-5-B. The property located on the west side of 4th Street is zoned SP-2.

e. The width of 4th Street between Bryant and College Streets is only 50 feet. The R-5-B District generally permits a maximum height of 60 feet. However, the Act of 1910 limits the allowable height of a building in a "residence street" to that equal to the width of the street.

f. In most instances, the zone boundary line extends to the middle of the adjacent street. Because the subject property is located in an R-5-B District, the adjacent portion of 4th Street is determined to be located in a "residence district" for zoning purposes. If the subject lot were on the west side of 4th Street in the SP-2 District, the Zoning Administrator would interpret the permitted height, based on the allowance for a "business street."

g. The interpretation in the instant case case would set citywide precedent in applying the criteria set forth in the Height Act and the Zoning Regulations based on the existing zoning and any further map amendments adopted by the Zoning Commission.

11. In response to the Zoning Administrator's testimony, counsel for the appellant noted that the precedential aspects of the subject case would be limited in that this particular situation is the only case in the District in which a 50-foot wide street is split-zoned between SP and residential zones thereby restricting the allowable height to less than would be permitted as a matter of right in the underlying zone if the adjoining street is classified as a "residence street."

12. Counsel for the appellant noted that there are basically two instances where streets are split-zoned between commercial and residential districts. Neither of those instances produce a situation similar to the instant case. First, in uptown neighborhood centers, underlying zoning is generally C-1 for small strip centers adjacent to R-2 or R-3 residential areas and are located on 50-foot wide streets. The maximum height for both the commercial and residential areas is limited to 40 feet under the

Zoning Regulations, thereby prohibiting a height in excess of the width of the street absent variance approval by the Board.

The second instance occurs in the downtown area where the underlying zones are generally the C -3-A zone abutting an R-5-D zone on a 90-foot street. The maximum height for C-3-A is 65 feet and for R-5-D is 90 feet. Again, the Height Act would not prohibit the maximum building height allowed under the Zoning Regulations.

13. Advisory Neighborhood Commission (ANC) 1B did not submit written issues and concerns relative to the subject appeal.

14. Two neighborhood residents testified at the public hearing on the appeal expressing concern relative to the reference to 4th Street as a "business street". The residents' testimony did not oppose the subject appeal and noted that the appellant represents a good neighbor and a dynamic social, academic, and political force in the community.

15. At the conclusion of the public hearing, the Board left the record open to receive a report from the Office of Planning to determining whether there are existing similar zoning patterns in the city with respect to matter of right development and the Height Act.

16. By memorandum dated October 9, 1991, the OP submitted its evaluation of the planning and zoning impacts and precedent-setting possibilities which could result from a decision to grant the subject appeal. The OP was of the opinion that the proposed height of the dormitory building would be compatible with existing buildings in the area and is appropriate for location on the central campus.

Regarding the precedent-setting nature of the Board's decision, the OP found the appellant's argument persuasive in that the appellant's research indicated that no other instance could be found in the District of Columbia where the underlying zoning permits a greater height than the Height Act would permit based on the width of the abutting street. However, the OP was unable to substantiate the appellant's findings because of severe time constraints.

With respect to the interpretation of the applicable regulations, the OP indicated that it could find no sound rationale for designating 4th Street as a "business street" simply because an SP district is located across the street from the subject site. The OP noted that a possible solution to this issue would be for the appellant to request a map amendment from the Zoning Commission which would change the zoning in the subject square from R-5-B to SP-2.

17. By submission received on October 18, 1991, counsel for the appellant responded to the OP report as follows:

a. The OP's response to the proposed height of the subject structure is consistent with its findings based on its review in conjunction with the special exception for further processing sought by the appellant in Application No. 15551.

b. The OP's response to the precedent-setting nature of the case is consistent with the evidence of record in which the appellant argues that the planning and zoning process would not be harmed if the subject appeal were granted.

c. The OP's response to the interpretation of the applicable requirements is not helpful to the Board's deliberations because it ignores the applicable Zoning Regulations and incorrectly assumes that a regulation exists which precludes 4th Street from being designated as a "business street" in the subject area.

FINDINGS OF FACT:

1. The Board finds that the appellant has failed to demonstrate that the decision of the Zoning Administrator is in error.

2. The Board does not accept the appellant's argument that the plain meaning of Subsection 2511.1 requires that both sides of 4th Street be designated as a "business street" because of the plural form of the words "side" and "portion." The Board notes that Paragraph 199.2(b) of the Zoning Regulations reads as follows:

> "Words in the singular number shall include the plural number, and words in the plural number shall include the singular number."

Therefore, the Board finds that the pluralization of terms in the wording of Subsection 2511.1 has no major impact on the interpretation of that provision.

3. The Board finds that zoning district boundary lines are intended to follow existing lot lines, the center lines of streets, alleys, and natural water courses as set forth in Section 107.5 of the Zoning Regulations. In the instant case, the Board finds that 4th Street is split-zoned with SP-2 zoning on the west side and R-5-B zoning on the east side. Based on the location of the zone district boundary line in the center of 4th Street, the Board

finds that the term "business street" would apply to the west sides or portions of 4th Street which are located in an SP District but would not be applicable to the east side or portion of 4th Street which is located in an R-5-B District for the purpose of applying the limitations set forth in the Height Act.

4. The Board notes that while there is no regulation which specifies that a street which is split-zoned be designated as a business street on one side and a residence street on the other, the Board finds that it would be unreasonable to accept that the regulations as written, would allow for the designation of a "business street" for purposes of determining the height of a building which directly abuts a street located in a residence district, simply because the zoning on the other side of the street would allow for such a designation.

5. The Board notes that the proposed height and use seem to be in harmony with existing development and the general purpose and intent of the Zoning Regulations. However, the Board finds that the material facts presented in the instant case are not sufficient to justify the designation of an entire street as a business street on a city-wide basis if any side or portion of such street is located in a Special Purpose, Waterfront, Commercial or Industrial district.

6. The Board finds that, although the appellant has shown evidence that there are few, if any, similar situations in the District, future rezonings could possibly be impacted by a decision favorable to the appellant. The Board further finds that in instances of conflict between the provisions of the Zoning Regulations and any statute or other municipal regulations, the higher or more restrictive provisions would apply as set forth in Sections 101.3 and 101.4 of the Zoning Regulations.

CONCLUSIONS OF LAW AND OPINION:

Based on the foregoing findings of fact and the evidence of record, the Board concludes that the appellant has failed to demonstrate that the Zoning Administrator's decision is in error. The Board concludes that, based on the circumstances presented, the Zoning Administrator correctly interpreted the provisions of the Zoning Regulations and the Height Act in determining the permitted height on the subject lot. Subsection 2511.1 provides that a business street shall mean those sides and portions of any street located in a Special Purpose, Waterfront, Mixed-Use, Commercial or Industrial District. There is no existing zoning regulation which sets forth any circumstances or criteria which would deem appropriate the designation of "business street" for an entire street simply because any side or portion of a split-zoned street is located in an SP, Waterfront, Mixed-Use, Commercial or Industrial District.

The Board concludes, based on the circumstances affecting the subject site, that the subject lot abuts a street located in a residential zone district and that the Zoning Administrator properly applied the criteria set forth in the Zoning Regulations and the Height Act. The Board notes that the appellant's argument that the resulting height of the proposed structure as a result of the designation of this portion of 4th Street as a residence street is inconsistent with existing institutional development in the area and that the overall zoning policy of maintaining reasonable and uniform heights should more appropriately be presented as part of a petition for a map amendment before the Zoning Commission. The Board concludes that the inconsistencies related to existing height and development relative to the subject site do not represent a basis for overturning the Zoning Administrator's interpretation of the existing regulations which must be uniformly applied throughout the District of Columbia.

Accordingly, it is ORDERED that the appeal is hereby **DENIED** and the decision of the Zoning Administrator is hereby **UPHELD.**

VOTE: 3-0 (John G. Parsons, Sheri M. Pruitt and Carrie L. Thornhill to deny; Charles R. Norris not voting, not having heard the case; Paula L. Jewell not voting, having recused herself).

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

ATTESTED BY: Madeliene H. Robinson
MADELIENE H. ROBINSON
Director

FINAL DATE OF ORDER: OCT 22 1993

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

ord15568/ss/LJP

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 15568

As Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on OCT 22 1993 a copy of the order entered on that date in this matter was mailed postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

Jerry A. Moore, III, Esquire
Linowes and Blocher
800 K Street, N.W., Suite 840
Washington, D.C. 20001

Mary Treadwell, Chairperson
Advisory Neighborhood Commission 1-B
1012 U Street, N.W., Second Floor
Washington, D.C. 20001

Theresa F. Brown
317 V Street, N.W.
Washington, D.C. 20001

Robert Brannum
158 Adams Street, N.W.
Washington, D.C. 20001

Tony Norman
1735 First Street, N.W.
Washington, D.C. 20001

MADELIENE H. ROBINSON
Director

DATE: OCT 22 1993

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16990 of American Towers, Inc. pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Acting Director of the Department of Consumer and Regulatory Affairs (DCRA) rescinding Building Permits Nos. B425271, 420358, 429362, et al., relating to the construction of an antenna tower in a C-2-B District at premises 4623 41st Street, N.W. (Square 1769, Lots 20 and 30).

HEARING DATE: April 29, 2003
DECISION DATE: April 29, 2003

ORDER

PRELIMINARY AND PROCEDURAL MATTERS:

On January 10, 2003, American Towers, Inc.[1] ("American Towers") filed this appeal with the Board of Zoning Adjustment ("Board" or "BZA"). The appeal states that it challenges an October 5, 2000 administrative decision by the Acting Director of the Department of Consumer and Regulatory Affairs ("DCRA") to rescind and cancel building permits for construction of an antenna tower at 4623 41st Street, N.W. Exh. 1.

By letter dated January 14, 2003, American Towers requested that the Board stay the proceedings pending resolution of related judicial proceedings. Exh. 15. On January 30, 2003, DCRA filed a motion for dismissal of the appeal as untimely. Exh. 16. The Board then scheduled a hearing on the appeal for April 29, 2003, with DCRA's motion for dismissal to be considered as a preliminary matter. Exh. 17-21. On April 24, 2003, DCRA filed an opposition to American Towers' request for a stay. Exh. 23. On April 25, 2003, American Towers filed its opposition to DCRA's motion for dismissal and renewed its earlier request for a stay. Exh. 24.

The Advisory Neighborhood Commission for the subject property, ANC 3E, did not file a statement on the appeal. Exh. 25.

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[1] Appellant in this case is American Towers, Inc. Exh. 1. Attached to the Appeal is a permit application (B425271) that listed American Tower Systems as the property owner. Exh. 4. For purposes of this appeal, the Board will assume that American Towers, Inc. is an aggrieved party.

On April 29, 2003, the Board heard argument from DCRA and American Towers on DCRA's motion for dismissal and American Towers' request for a stay. At the conclusion of the argument, the Board voted 3-0-2 to grant the motion for dismissal.

FINDINGS OF FACT:

1. On March 18, 1999, American Tower Systems applied to the Building and Land Regulation Administration (DCRA) for a permit for construction at 4623 41st Street, N.W., of an antenna tower and two T.V. antennas with an "[o]verall height" of 756 feet. Exh. 4. On March 13, 2000, the Building and Land Regulation Administration issued Building Permit No. B425271 to American Tower Systems for construction of the proposed antenna tower and T.V. antennas. Exh. 6.

2. On September 18, 2000, Jill Diskan filed an appeal with the Board from two earlier administrative decisions of the Zoning Administrator relating to the proposed construction of a tower at 4623 41st Street, N.W. (BZA Appeal No. 16649). In her appeal, Ms. Diskan stated that "[b]ecause of [the] height of [the proposed] tower the application should have been referred to the BZA and to the mayor for an exception." Exh. 16 (Attach. A thereto). Ms. Diskan appealed in her capacity as Chair of Advisory Neighborhood Commission 3E ("ANC"). Exh. 16 (Attach. C thereto).

3. On October 5, 2000, the Acting Director of DCRA issued a Notice to Rescind and Cancel Building Permit No. B425271 and ten other related building and plumbing permits. The Notice to Rescind and Cancel cited five "errors identified in the original permit review process that resulted in the erroneous issuance of these permits": (1) insufficient side yard setback, (2) tower height in excess of Height Act limitations, (3) absence of any environmental impact analysis, (4) submitting an application for a construction permit without a Certificate of Authority to transact business in the District of Columbia, and (5) applying for building permits without having registered with the Office of Tax and Revenue.[2] Exh. 5.

4. The Notice to Rescind and Cancel provided that the "decision to cancel and rescind these invalid permits will become effective at 5 pm on Tuesday October 10, 2000, unless, prior to 12 noon that same day, I receive written statements, evidence, or documentation . . . demonstrating that the errors I cited did not take place." Exh. 5. By letter to the Acting Director of DCRA dated October 10, 2000,

[2] The Notice to Rescind and Cancel was mailed to "American Tower Corp." in Massachusetts, "American Tower Systems" in Virginia, and "American Tower" in the District of Columbia, as well as to other entities and individuals. Exh. 5.

John J. Brennan, III, Esq. and Robert Clayton Cooper, Esq., writing on behalf of "American Tower Corporation," challenged the Acting Director's stated reasons for rescission and cancellation and requested that construction of the antenna tower be authorized to continue. Exh. 22 (attachment thereto).

5. On October 10, 2000, the Acting Director of DCRA issued a Final Notice Rescinding and Canceling the eleven building and plumbing permits that had been the subject of the Notice to Rescind and Cancel. Pursuant to the Final Notice Rescinding and Canceling, the Notice to Rescind and Cancel would "become effective as of 5:00 p.m. October 10, 2000," and work at the site was to cease by 7:00 p.m. on October 12, 2000. The Final Notice Rescinding and Canceling provided notice of the right to appeal the "inadequate side yard setback" issue to this Board:

> Please be advised that you have a right to challenge this Notice. In order to exercise this right, you must appeal the portion of the Notice that is based upon the inadequate side yard setback to the Board of Zoning Adjustment. The remaining issues are to be appealed to the Board of Appeals and Review.
>
> In order to exercise this right, you must file written requests for hearings with the appropriate Board. A timely appeal to the Board of Zoning Adjustment must be filed with the Board at 441 4th Street, N.W., Suite 210 South, Washington, DC 20001, (202) 727-6311. . . Exh. 16 (Attach. G thereto).

6. By letter dated October 25, 2000, on behalf of "American Towers, Inc.," Mr. Cooper requested that the Board stay the proceedings in BZA Appeal No. 16649, which was still pending. He explained:

> The request for the Stay is simple. The underlying matters from which the ANC has filed this Appeal, are either moot or are otherwise presently before the U.S. District Court as Civil Action # 00-2436 (PLF). That pending case, brought by American Towers, Inc. against the District of Columbia, seeking a judicial determination that the Permit(s) to construct a telecommunications Tower were unlawfully and illegally revoked by the D.C. Department of Consumer and Regulatory Affairs on October 10, 2000. . . . Exh. 24 (Exh. 1 thereto).

7. Similarly, by letter to the Board dated October 26, 2000, Jill Diskan requested "that ANC 3E's request for an expedited hearing on our Appeal be

placed on hold, pending the outcome of American Tower Systems lawsuit against the District government in the Federal courts." Exh. 24 (Exh. 2 thereto).

8. By letter dated October 30, 2000, Jerrily R. Kress, FAIA, Director of the Office of Zoning, informed Mr. Cooper of Ms. Diskan's request that her appeal "be placed on hold pending the outcome of the American Tower, Inc. lawsuit in District Court." Ms. Kress stated: "[i]t is almost certain that this request will be granted." She then advised Mr. Cooper: "[i]n the interest of maintaining your options, the Office of Zoning recommends American Tower Systems, Inc. file an appeal based on the revocation of the permits for the tower." Exh. 24 (Exh. 3 thereto). Mr. Cooper has represented to the Board that he never received Ms. Kress' letter and that he did not become aware of the letter until receiving a copy in early 2003. Exh. 24 at 3.

9. By letter dated September 6, 2001, Ms. Kress informed Mr. Brennan: Please be advised that the Office of Zoning will honor your telephone request made on September 5, 2001, requesting that the scheduling of the Board of Zoning Adjustment appeal hearing in the above-referenced case ["BZA Application No. 16649 – American Tower Systems"] be postponed until the recently filed court proceedings in this matter are concluded. Exh. 24 (Exh. 5 thereto).

10. In a motion filed on or about December 20, 2000 in the United States District Court for the District of Columbia in *American Towers, Inc. v. The Honorable Anthony Williams, et al.* (Civ. No. 00-2436 (PLF)), counsel for the District of Columbia ("District") stated:

> Plaintiff [American Towers] was informed that the side-yard setback issue could be appealed to the BZA and the remaining grounds for rescission to the BAR. Amend Cmplt. At Exh. 11. In fact, plaintiff has filed appeals with both bodies. Plaintiffs cannot now seek to have this Court replace the appropriate District body as the forum for resolution of this dispute. Exh. 24 (Exh. 4 thereto).[3]

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[3] In its decision granting the motion to dismiss, the district court acknowledged, but did not appear to rely upon, the District's representation that American Towers had appealed to this Board:

> Since American Tower does not contest the fact that it has been provided with post-deprivation procedures – indeed, it currently is taking advantage of the District's administrative procedures by appealing the rescission to the Board of Zoning Appeals [sic] and to the Board of Appeals and Review, see Defs.' Suppl. Memo. at 8 – the question for the Court to decide on this motion is whether the notice sent by the District and the opportunity for hearing provided before rescission were sufficient to comport with due process.

Exh. 10 at 4.

11. Subsequently, in a motion to dismiss filed on October 17, 2002 in the D.C. Superior Court in *American Towers, Inc. v. District of Columbia* (Civ. No. 02-2183), counsel for the District stated: "Under District of Columbia law, plaintiff is required to seek review of DCRA's decision in the appropriate administrative tribunals. Plaintiff has in fact brought such administrative appeal in the Board of Administrative Appeals [sic] ("BAR") but has not sought review in the Board of Zoning Adjustment ("BZA")." Exh. 26 (Motion at 1-2).

12. By letter dated November 1, 2002, Ms. Diskan informed Ms. Kress that BZA Appeal No. 16649 was "being withdrawn as moot (without prejudice in the event the permits in question were ever reactivated), in light of the official rescission of the permits on October 10, 2000." The letter shows that a copy was mailed to Mr. Cooper by first-class mail. Exh. 16 (Attach. E. thereto).

13. On January 10, 2003, American Towers, Inc. ("American Towers" or "Appellant") filed the instant appeal --BZA Appeal No. 16990 -- challenging DCRA's October 5, 2000 decision rescinding and canceling Building Permit No. B425271 (and the related permits). Exh. 1. Appellant's primary contention on appeal is that "the final building permit application and related approved drawings" did not create or provide for a side yard, and "therefore none is required." Exh. 2. In its "Statement of Ag[g]rievement," filed on January 10, 2003, with its appeal to the BZA, American Towers stated:

> This Appeal is being filed in order for the Appellant to preserve its earlier exercised exhaustion of administrative remedies. It was previously understood and agreed by the Appellant and the BZA, that the previously pending action (BZA Case #16649) would encompass all issues related to that case, including the side yard issue, and would be stayed pending the resolution of all matters before the U.S. District Court. However, despite that understanding, the matter has since been withdrawn and dismissed. So, in order to preserve its position based upon the status-quo, prior to that dismissal, Appellant American Towers submits this appeal, and requests that all matters before the BZA be stayed pending resolution of all judicial proceedings. Exh. 2.

CONCLUSIONS OF LAW AND OPINION:

One who is aggrieved by a zoning decision must file a "timely appeal" to the Board. 11 DCMR § 3112.2. The District of Columbia Court of Appeals has held that the requirement "that an appeal be timely is jurisdictional," and that the Board lacks the power to consider an untimely appeal. *Waste Management of*

Maryland, Inc. v. District of Columbia Bd. of Zoning Adjustment, 775 A.2d 1117, 1121 (D.C. 2001). The Court has described the "limit of timeliness" as "two months between notice of a decision and appeal therefrom," absent "exceptional circumstances substantially impairing the *ability* of an aggrieved party to appeal." Id. at 1122 (emphasis in original); *accord Sisson v. District of Columbia Bd. of Zoning Adjustment*, 805 A.2d 964, 969 (D.C. 2002).[4]

Whether Appellant is appealing from the Notice to Rescind and Cancel dated October 5, 2000, as American Towers has stated (Exh. 1 & 5), or from the Final Notice Rescinding and Canceling dated October 10, 2000, as DCRA has stated (Exh. 16, Mem. at 1 & n.1), the appeal is untimely. The record in this case shows that Appellant had notice of the DCRA's October 5, 2000 decision on or before October 10, 2000, the date of Mr. Brennan and Mr. Cooper's letter challenging the Acting Director's stated reasons for the proposed rescission and cancellation. The record in this case also shows that Appellant had notice of DCRA's October 10, 2000 decision on or before October 25, 2000, the date of Mr. Cooper's letter to Ms. Kress stating that the permits for the tower "were unlawfully and illegally revoked by the D.C. Department of Consumer and Regulatory Affairs on October 10, 2000." Moreover, DCRA's October 10, 2000 decision expressly informed Appellant that "[i]n order to exercise" its "right to challenge this Notice," it had to "appeal the portion of the Notice that is based upon the inadequate side yard setback to the Board of Zoning Adjustment."

It follows that the "limit of timeliness" for appealing to the Board from DCRA's October 10, 2000 revocation decision was reached not later than December 25, 2000, *i.e.* two months after the last possible date (*i.e.* October 25, 2000) that Appellant could have received notice of the revocation decision. Therefore, in filing BZA Case #16990 on January 10, 2003, Appellant filed more than two years late.

In its opposition to DCRA's January 30, 2003 motion for dismissal, Appellant states:

> It was clear from 2000 to 2002 that the parties were in full agreement to stay all action before the BZA pending resolution of the related judicial proceedings, and that agreement and understanding should not now be disturbed. This Appeal presents the same or similar issues, parties and property presented in the ANC Appeal.

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[4] The Zoning Commission's recent rulemaking setting 60 days as the time limit for appeals to the Board did not become effective until February 7, 2003, and, therefore, is inapplicable to this appeal.

Opposition at 5. However, an agreement among the parties to stay a pending appeal from DCRA's administrative decisions to issue permits for the proposed tower (BZA Case #16649) would not have served to extend the time limit for appealing DCRA's *subsequent* administrative decisions to revoke the permits for the proposed tower (BZA Case #16990). Further, Appellant's decision to appeal the revocation of the permits in the United States District Court did not somehow relieve it of its responsibility to properly file an appeal before the BZA. The fact that American Towers "chose to concentrate on avenues that reasonably may have appeared more promising than an appeal [to the BZA] does not excuse its delay" in noting such an appeal. *Waste Management*, 775 A.2d at 1123.

Appellant contends that "[i]t was previously understood and agreed by the Appellant and the BZA, that [BZA Case #16649] would encompass all issues related to that case, including the side yard issue," and further contends that, following the dismissal of that action, Appellant filed BZA Case #16990 "in order to preserve its position based upon the status-quo." But whatever Appellant's understanding of the status quo, it is clear from Ms. Kress' October 30, 2000 letter that there was no agreement to treat BZA Case #16649 as an appeal from DCRA's decision to revoke the permits. That letter recommended that American Tower Systems, Inc., "[i]n the interest of maintaining [its] options . . . file an appeal based on the revocation of the permits for the tower." Such a recommendation would have been unnecessary if the BZA were treating Case No. 16649 as an appeal of DCRA's decision to revoke the permits. Moreover, it does not make sense to, as American Towers contends, treat Appeal No. 16649 as an appeal from both the issuance and the revocation of the same permits. In fact, the timing is irreconcilable. The permits were revoked on, at the earliest, October 5, 2000. Appeal No. 16649 was filed on September 18, 2000. There is no way that Ms. Diskan, when she filed the appeal, could have intended it to apply to the revocation of the permits -- an action which had not yet occurred.

American Towers' injecting itself into another party's appeal of a related, but clearly different matter, could not substitute for filing its own appeal with the BZA. However, in support of its position that it could rely on its involvement in BZA Case #16649 as the functional equivalent of its own appeal, Appellant also relies on a statement made by an attorney for the District, in a motion filed in the U.S. District Court on or about December 20, 2000, that Appellant *had* filed an appeal with the Board. Appellant cites this incorrect statement as evidence of the parties' "mutual understanding" that American Towers' "responsibilities with respect to the BZA had been satisfied as a result of their injection into the then pending ANC Appeal." The District's statement, however, appears to reflect not an "understanding" but a misunderstanding as to whether American Towers had appealed to the Board. And even if the parties had agreed to treat BZA Case #16649 as including an appeal by American Towers, such an agreement, by itself,

could not satisfy the Board's jurisdictional requirement that American Towers file a timely appeal. Nothing in the record of this case shows that the Board was ever informed prior to January 10, 2003 – by *any* party – that BZA Appeal No. 16649 should have been deemed to include (1) an appeal by American Towers or (2) an appeal from DCRA's decision to revoke the permits.

Finally, even if there had been some equitable reason, based on the existence of BZA Appeal No. 16649, for tolling the period during which American Towers could file an appeal from DCRA's revocation decision, the tolling would have ended when Appellant received notice of the November 1, 2002 withdrawal of BZA Appeal No. 16649. The letter of withdrawal shows that it was sent to Mr. Cooper by first-class mail, and American Towers does not contend that it failed to receive the letter prior to November 10, 2002. In waiting until January 10, 2003 to file its appeal, American Towers waited for more than two months after it received notice that the ANC had withdrawn its appeal. Therefore, even if the period for appealing had been tolled until American Towers received notice of the withdrawal of the ANC's appeal, American Towers' appeal would still have been untimely. Because this appeal will be dismissed as untimely, American Towers' request for a stay is now moot.

For the reasons stated above, it is hereby **ORDERED** that (1) DCRA's motion to dismiss is **GRANTED** and that this appeal is therefore **DISMISSED**, (2) American Towers' request for a stay is **DENIED**, and (3) American Towers' motion for rehearing is **DENIED** without prejudice to its right to move for reconsideration or rehearing pursuant to 11 DCMR § 3126.2.

VOTE: 3-0-2 (Carol J. Mitten, David A. Zaidain, Geoffrey H. Griffis to deny, Curtis L. Etherly, JR. and the Third Mayoral Appointee not present, not voting)

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

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

FINAL DATE OF ORDER: JUN 25 2003

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 FINAL. LM/rsn

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN TOWERS, INC.,

Plaintiff,

v.

ANTHONY WILLIAMS, MAYOR OF THE DISTRICT OF COLUMBIA, et al.,

Defendants.

Civil Action No. 00-2436 (PLF)

OPINION

On March 13, 2000, the Building and Land Regulation Administration ("BLRA"), a division of the Department of Consumer and Regulatory Affairs ("DCRA") of the District of Columbia government, issued a building permit to American Towers, Inc. ("American Tower") authorizing it to commence construction of a 756-foot telecommunications tower on property American Tower owned on 41st Street near Wisconsin Avenue in the Tenley neighborhood in Northwest Washington, D.C. American Tower promptly began construction. On September 8, 2000, the BLRA issued a Notice of Stop Work Order, but then rescinded it a week later. On September 19, 2000, the District of Columbia Council passed legislation entitled the "Moratorium on the Construction of Certain Telecommunications Towers Emergency Amendment Act of 2000" (the "Moratorium Act"), temporarily prohibiting the issuance of building permits for construction or expansion of telecommunications structures above 200 feet.

(2)

36

On October 5, 2000, the DCRA issued a notice to American Tower indicating the DCRA's intention to rescind and cancel plaintiff's building permit based on five specific errors it said it had belatedly identified in the original permit review process that resulted in an ostensibly erroneous issuance of the permit. See Amended Complaint, Ex. 9 ("Notice of Intent to Rescind"). In the notice the DCRA invited American Tower to provide "written statements, evidence, or documentation . . . demonstrating that the errors . . . did not take place." Id. at 4. On October 10, 2000, counsel for American Tower responded by letter, addressing each of the five asserted errors. See Amended Complaint, Ex. 10. Later that same day, however, the DCRA responded to American Tower's arguments in a final notice rescinding and canceling the permits. See Amended Complaint, Ex. 11 ("Final Notice of Rescission"). The Final Notice effectively halted construction of the 756-foot broadcast tower.

On October 11, 2000, plaintiff filed suit in this Court seeking declaratory and injunctive relief that would allow it to proceed with the construction of the tower, as well as compensatory damages of $150 million and punitive damages of $100 million. In its amended complaint, filed November 20, 2000, plaintiff asserts denial of equal protection (Count One); taking of property and denial of due process (Count Two); deprivation of federal rights under color of law (Count Three); violation of the Telecommunications Act of 1996, 47 U.S.C. § 332 (Count Four); equitable estoppel (Count Five); confiscatory taking (Count Six); willful violation of District of Columbia law (Count Seven); and wrongful interference with prospective advantage and unfair competition (Count Eight).

On November 1, 2000, the Court held a hearing on and denied plaintiff's motion for immediate injunctive relief, finding that while plaintiff was likely to succeed on the merits of certain of its claims, there was no irreparable harm warranting a preliminary injunction. See Order of Nov. 1, 2000. The Court subsequently set a briefing schedule on defendants' motion to dismiss, staying discovery until the motion is resolved, see Order of Nov. 17, 2000, and heard oral argument on the motion. In its motion, defendants contend that all of plaintiff's federal claims — denial of equal protection, denial of due process and violation of the Telecommunications Act of 1996 — should be dismissed because they fail as a matter of law.[1] Defendants suggest that because these are the only claims that could give this Court original jurisdiction, the Court should dismiss the case in its entirety and allow it to be refiled in the "proper" forum — presumably in the Superior Court of the District of Columbia or before the appropriate administrative agency or board. Defendants' motion will be granted.

I. EQUAL PROTECTION

In Count One of its amended complaint, American Tower asserts that the District of Columbia's October 10, 2000 decision to rescind its building permit was arbitrary and capricious and that it violated plaintiff's vested property interests by singling it out for

[1] Defendants also argue that even if plaintiff's federal claims do not fail, the Court should either abstain from hearing them because they are too intertwined with the state law claims that are at the heart of this suit or dismiss the case because plaintiff failed to exhaust its administrative remedies prior to filing suit. Because the Court will dismiss this case for failure to state a federal claim, the Court will not reach defendants' alternative arguments.

adverse treatment in violation of the Equal Protection Clause.[2] American Tower asserts that it is similarly situated to several other companies that did not have their building permits revoked — specifically, three other broadcast towers in the Tenley area that all exceed 600 feet in height — and that the District's actions have had an adverse impact on it.

To pass constitutional muster under the equal protection component of the Fifth Amendment's Due Process Clause, an official government action need only bear a rational relationship to a legitimate governmental purpose so long as no suspect or quasi-suspect class is involved. See City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439-40 (1985). Because American Tower is not a member of a suspect or quasi-suspect class, the Court must consider only whether there was a rational basis for the decision reached by the District to rescind the permit. See Heller v. Doe, 509 U.S. 312, 319-20 (1993); Steffan v. Perry, 41 F.3d 677, 684-85 (D.C. Cir. 1994). In defending against an equal protection claim, the government must offer a rational basis for its conduct, but it has no obligation to present any evidence to sustain the rationality of its decision. See Steffan v. Perry, 41 F.3d at 684. Indeed, the burden is on the one attacking the government's action "to negative every conceivable [rational] basis which might support it, whether or not the basis has a foundation in the record." Id.

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[2] The Equal Protection Clause does not apply to the District of Columbia, but the Due Process Clause of the Fifth Amendment imposes the same equal protection requirements on the federal government and the District of Columbia as the Fourteenth Amendment's Equal Protection Clause imposes on the states. See Bolling v. Sharpe, 347 U.S. 497 (1954).

The District of Columbia suggests that there are several rational bases for its decision to rescind American Tower's building permit, chief among them that it must enforce the District of Columbia Height Act, D.C. Code § 5-405(h). Originally enacted by Congress in 1910, the Act requires builders of broadcast towers over 600 feet in height to obtain a waiver of the provisions of the Act before beginning construction, D.C. Code § 5-405(h), and provides that any tower built in violation of Section 5-405(h) constitutes a common nuisance. D.C. Code § 5-408. The District contends that since the owners of all the other towers cited by plaintiff obtained waivers of the Height Act while American Tower did not even attempt to do so, the District did not act arbitrarily, capriciously or unconstitutionally when it revoked American Tower's building permit.

American Tower does not argue with defendants' assertion that a violation of the Height Act would constitute a rational basis to rescind its permit. Rather, plaintiff contends that it received an implied waiver of the Height Act when the District issued it a permit to build a tower over the maximum height restriction — even though plaintiff did not formally request a waiver and even though the building permit it received did not expressly grant a waiver. The Court has some sympathy for this argument, since the District government was fully aware of the height of the tower throughout the process. The application for the building permit submitted to the District described the proposed tower as being 756 feet high, see Amended Complaint, Ex. 3; the 756-foot height was highlighted in a memorandum from the D.C. Office of Planning to the Chief of the Zoning Review Branch of the DCRA, see Amended Complaint, Ex. 4; and the building permit issued by the DCRA described the tower, including its purpose and its proposed — in plaintiff's view, its authorized — height. See

Amended Complaint, Ex. 5. Whether on these facts plaintiff may be entitled to substantial money damages on a theory of equitable estoppel or confiscatory taking, however, is irrelevant to plaintiff's equal protection claim.

In determining whether plaintiff has been denied equal protection of the law, this Court must decide only whether defendants have offered a rational basis for its action and whether plaintiff has negatived every conceivable basis that might support the District's action. See Steffan v. Perry, 41 F.3d at 684. The District has presented a rational basis for its rescission of plaintiff's building permit — violation of the Height Act — and plaintiff has failed to negative that rational basis. It is not disputed that plaintiff's tower, if built, would violate the Height Act. What is disputed is whether the District implicitly waived the Height Act when it issued the permit. Such a question is not one of constitutional import; it is a question of state law and its resolution is best left to the local courts. The Court concludes that plaintiff has failed to state an equal protection claim.

II. DUE PROCESS

In Count Two of its amended complaint, American Tower asserts that the Moratorium Act passed by the District of Columbia Council and certain proposed zoning regulations constitute a taking of property without just compensation and thus violate plaintiff's right to substantive due process of law. American Tower suggests that the Moratorium Act violates plaintiff's due process rights because it unfairly authorizes the Mayor to halt construction of the tower and to create a regulatory scheme that could be used later to block the resumption of construction on the tower. See Defs.' Motion, Ex. A (Moratorium on the

Construction of Certain Telecommunications Towers Emergency Amendment Act of 2000, D.C. Act 13-442) ("Moratorium Act").[3] It also argues that the proposed zoning regulations, if passed, would retroactively destroy American Tower's zoning interests. See Amended Complaint, Ex. 12 (letter from D.C. Office of Planning to D.C. Zoning Commission regarding recommendation that Zoning Commission consider amending zoning regulations regarding standards for antenna towers) ("DCOP Proposal").

Plaintiff's due process claim fails as a matter of law because the Moratorium Act and the proposed zoning regulations do not affect any vested property interest American Tower may have in the building permit. No property interest of American Tower is adversely affected by the Moratorium Act because the Act by its express terms has only prospective application. It is not applicable to American Tower because it is a moratorium on the *future* issuance of building permits for telecommunications towers of over 200 feet until the Mayor formulates a policy on the matter. See Moratorium Act § 2. Furthermore, contrary to plaintiff's assertion, the legislation issues no legally binding "directives" to the Mayor regarding the tower at issue in this case. The Council expressed concerns about the tower and made requests of the Mayor in a section entitled "Sense of the Council," but it is clear from the plain language of the Act that those expressions of concern and suggestions have no legal effect. See Moratorium Act § 3. With respect to the proposed zoning regulations, any claim plaintiff might have with respect to those regulations is not yet ripe, as the regulations have not

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[3] Exhibit 8 to plaintiff's amended complaint is an early version of the Moratorium Act. The version attached as exhibit A to defendants' motion to dismiss is the final, enacted version of the Act, which differs in certain respects from the version attached to plaintiff's amended complaint.

yet been and may never be approved by the Zoning Commission. See DCOP Proposal. For these reasons, the Court finds that plaintiff's substantive due process claim must fail.

Although Count Two of plaintiff's amended complaint seems to state only a substantive due process claim, plaintiff argues in its opposition to defendants' motion to dismiss that it is also alleging a violation of its procedural due process rights — specifically, that it was not given sufficient notice or opportunity to be heard before the District of Columbia rescinded its building permit. Since American Tower does not contest the fact that it has been provided with post-deprivation procedures — indeed, it currently is taking advantage of the District's administrative processes by appealing the rescission to the Board of Zoning Appeals and to the Board of Appeals and Review, see Defs.' Suppl. Memo. at 8 — the question for the Court to decide on this motion is whether the notice sent by the District and the opportunity for hearing provided before rescission were sufficient to comport with due process.

On October 5, 2000, the Department of Consumer and Regulatory Affairs issued a notice of intent to rescind and cancel plaintiff's building permit based on five errors it said it had belatedly identified in the original permit review process that resulted in an ostensibly erroneous issuance of the permit. See Amended Complaint, Ex. 9. With that Notice, American Tower was informed of the specific grounds on which its permit might be rescinded and was offered an opportunity to respond by a date certain. See id. While American Tower submitted a response to the Notice, see Amended Complaint, Ex. 10, District officials found its response to be insufficient to refute the grounds asserted. See Amended

Complaint, Ex. 11.[4] The DCRA therefore rescinded the building permit on October 10, 2000 without a hearing, effectively halting construction of plaintiff's broadcast tower indefinitely. See id.

Although the procedure provided was not as extensive as plaintiff would have liked, and while plaintiff disagrees with the facts and the law upon which the District relied before issuing its Final Notice rescinding the permit, the Court concludes that the District gave American Tower sufficient notice and opportunity to be heard at a meaningful time and in a meaningful manner, which is all that due process requires. See Matthews v. Eldridge, 424 U.S. 319, 333 (1976); UDC Chairs v. Board of Trustees of the University of the District of Columbia, 56 F.3d 1469, 1472 (D.C. Cir. 1995). The notice sent to American Tower by the DCRA on October 5, 2000 set forth five reasons why the District believed the permit was improperly issued in the first place and explained why it would rescind it if American Tower did not provide "written statements, evidence, or documentation" by noon on October 10 sufficient to persuade DCRA that its reasons for rescission were invalid. See Amended Complaint, Ex. 9. American Tower thus was offered an opportunity to be heard, albeit in writing rather than in person, sufficiently in advance of any final action by DCRA. In the Court's view, this notice was sufficient to adequately inform American Tower of the proposed decision and the reasons for it; both the notice and the opportunity to respond were given "at a

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[4] In the Final Notice of Rescission the DCRA addresses each of plaintiff's responses to the asserted grounds for rescission. See Amended Complaint, Ex. 11. As defendants point out in their motion to dismiss, plaintiff's response to the Notice of Intent to Rescind provided "virtually no factual information challenging the factual predicate of the Notice and very little argument on the Notice's legal analysis." Defs.' Motion at 12. Plaintiff "merely threatened legal action and presented legal arguments and conclusions." Id. at 11.

meaningful time and in a meaningful manner." Propert v. District of Columbia, 948 F.2d 1327, 1332 (D.C. Cir. 1991) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)); see UDC Chairs v. Board of Trustees of the University of the District of Columbia, 56 F.3d at 1472-74. Because plaintiff was offered and took advantage of this pre-deprivation procedure and was also advised of its right to post-deprivation hearings before the Board of Zoning Appeals and the Board of Appeals and Review, see Amended Complaint, Exs. 9 & 11, the Court cannot find that defendants violated plaintiff's right to procedural due process.

The D.C. Circuit's decision in Tri County Industries, Inc. v. District of Columbia, 104 F.3d 455 (D.C. Cir. 1997), does not alter this conclusion. In Tri County, the court of appeals found that plaintiff's right to procedural due process had been violated when the District of Columbia suspended plaintiff's building permit — a scenario bearing a sufficient resemblance to the one here to warrant serious consideration. See Tri County Industries, Inc. v. District of Columbia, 104 F.3d at 460-62. As defendants point out in their post-hearing brief, however, the facts in Tri County are distinguishable from those in this case. In Tri County, the DCRA suspended Tri County's permit *sua sponte* at a public hearing based on inaccurate information and did not give Tri County any opportunity to dispute the facts upon which the suspension was predicated. Id. at 460-61. Applying the Matthews test, the D.C. Circuit found that the District's actions deprived plaintiff of its right to procedural due process. Id. at 461-62. In this case, by contrast, plaintiff was provided adequate pre-deprivation due process before the permit was rescinded. See supra at 8-10. The court of appeals' decision in Tri County, while instructive, therefore is not directly relevant to this case.

Finally, plaintiff suggests that its due process rights were violated when the District incorrectly interpreted and applied the Height Act and when it improperly circumvented District of Columbia regulations regarding the revocation of the permit. Such challenges to the District's interpretation of and compliance with its own statutes and regulations may or may not have merit, but the resolution of those claims does not implicate American Tower's due process rights. See supra at 5-6. Count Two of plaintiff's amended complaint therefore will be dismissed.[5]

III. TELECOMMUNICATIONS ACT

In Count Four of its amended complaint, plaintiff asserts that the District of Columbia's decision to rescind American Tower's building permit and the D.C. Council's moratorium legislation violate several provisions of the Telecommunications Act of 1996, 47 U.S.C. § 332. Specifically, plaintiff argues that the District's actions unreasonably discriminate against providers of functionally equivalent services (an alleged violation of 47 U.S.C. § 332(c)(7)(B)(i)); that they are not supported by substantial evidence (an alleged violation of Section 332(c)(7)(B)(iii)); and that they violate the Act's prohibition of any regulation on the placement of wireless facilities based upon environmental effects (an alleged violation of Section 332(c)(7)(B)(iv)).

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[5] Count Three of plaintiff's amended complaint asserts that defendants deprived American Tower of equal protection (Count One) and due process (Count Two) under color of law. Since the two constitutional claims underlying Count Three are dismissed, Count Three will be dismissed as well.

While the Telecommunications Act of 1996 generally preserves the zoning authority of state and local governments with respect to decisions regarding the placement, construction and modification of "personal wireless service facilities," see 47 U.S.C. § 332(c)(7)(A), the Act places five specific limitations on how the state or local government may exercise that authority.[6] Defendants argue that these statutory limitations do not apply in this case, however, because the facility at issue is not primarily a "personal wireless service facility" and because its actions only affected plaintiff's primary purpose for building the tower — the provision of high definition television ("HDTV") broadcast services. The District

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[6] The three limitations at issue in this case are the following:

> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof (I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services. . . .
>
> (iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.
>
> (iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

47 U.S.C. § 332(c)(7)(B).

asserts that since its actions did not affect the construction of a personal wireless service facility or the provision of personal wireless services within the meaning of Section 332, see 47 U.S.C. § 332(c)(7)(C) (defining "personal wireless services" and "personal wireless service facilities"), its ability to regulate the facility at issue is not limited by Section 332(c)(7)(B) of the Telecommunications Act.

Both parties acknowledge that, if built, plaintiff's tower would provide both HDTV services *and* personal wireless services. The parties also agree that while an antenna or antennas will be added to the tower to provide personal wireless services, the primary purpose of the tower — and, more importantly, the reason for its height — is to provide HDTV services. What the parties dispute is whether the existence of even a single personal wireless services antenna on a structure such as plaintiff's, regardless of the structure's other purpose or purposes, automatically subjects that structure to the statutory zoning limitations of the Telecommunications Act and therefore brings it outside the regulatory authority of the District. The answer to that question in light of the facts presented here is clearly no.

Congress simply could not have intended that any structure that has personal wireless communications as a secondary purpose is beyond the zoning authority of the state or local government. The reason for the excessive height of the tower in this case is the fact that it must be tall enough to provide HDTV services, not personal wireless communications services. The District's concerns with the construction of plaintiff's tower stem from its proposed height and thus from the fact that it is primarily an HDTV tower, not a personal wireless service facility. The District's actions with respect to plaintiff's tower do not prevent it from constructing a "personal wireless service facility" on American Tower's site or from

providing "personal wireless services." Unfortunately for plaintiff's claim of federal jurisdiction, the zoning limitations set forth in Section 332(c)(7)(B) of Telecommunications Act do not apply in this case; plaintiff simply is not entitled to the protections from local regulation that the Act may provide in other contexts.

Even if the limitations of the Telecommunications Act did apply, it does not appear that the District violated any of those provisions. As discussed previously with respect to plaintiff's equal protection claim, defendants' actions neither "unreasonably discriminated among the providers of functionally equivalent services" nor had "the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i). It also is clear that since the factual and legal reasoning behind the District's decision to rescind the permit was explained to plaintiff in writing, see Amended Complaint, Exs. 9 & 11, and since that explanation indicates that the District's actions were supported by substantial evidence in the record before it, the requirements of Section 332(c)(7)(B)(iii) were satisfied. Finally, while Section 332(c)(7)(B)(iv) of the Act prohibits any regulation on the placement of wireless facilities based upon environmental effects, the restriction by its explicit terms applies only to regulations on facilities based on concerns over radio frequency emissions. Because the District's expressed concern was over falling ice and the resulting safety risk, the District's action would appear to fall outside of Section 332(c)(7)(B)(iv)'s prohibition. The Court therefore will dismiss Count Four of plaintiff's amended complaint.

Since all of plaintiff's federal claims fail as a matter of law, they will be dismissed with prejudice. Plaintiff's non-federal claims are quintessentially local in nature; they therefore will be dismissed without prejudice to their being refiled in a more appropriate forum. See 28 U.S.C. § 1367(c)(3). An Order of Dismissal consistent with this Opinion will issue this same day.

SO ORDERED.

PAUL L. FRIEDMAN
United States District Judge

DATE: 6/14/01

Rec'd.
4. 6. 04

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

Appellant's Supplemental Memorandum of Law on the Height of Buildings Act

At the hearing on this appeal on March 9, 2004, the Board *sua sponte* raised a question as to whether the Board had jurisdiction over the issues in this appeal concerning the 1910 Height of Buildings Act, D.C. Code §§ 6-601 *et seq.* (hereinafter referred to as the "Height Act"). In response, the representative of the Corporation Counsel expressed the view that the practice of the agency was to refer issues raising the Height Act to the D.C. Board of Appeals and Review. For the reasons indicated below, Appellant Kalorman Citizens Association ("KCA") believes that this Board clearly has jurisdiction to hear and determine appeals alleging that a decision by the Zoning Administrator violates the Height Act.

1. <u>The BZA Has Jurisdiction Over This Appeal Because the Zoning Regulations Specifically Require Compliance with the Height Act.</u>

The Height Act provides that, on residence streets, the highest part of the roof or parapet may not exceed in height the width of the street, avenue, or highway upon which it abuts, diminished by 10 feet D.C. Code § 6-601.05(b). However, the Zoning Regulations provide for height restrictions by zone district, which may, in some cases

BZA
Case No. 17109
Exhibit No. 63

(and indeed, does in this case), authorize building height in excess of the Height Act[1]. Rather than reiterate the more restrictive limits in the Height Act, the Zoning Regulations provide generally that "all buildings or structures shall comply with the Act to Regulate the Height of Buildings in the District of Columbia." *See*11 DCMR § 2510.1.

This Board has raised the question of whether it has authority to decide a question involving the application of the Height Act's height limit on residence streets, which limit is found solely in D.C. Code § 6-601.05(b) and is not also found in the Zoning Regulations. Presumably, the source of this Board's concern is the fact that its jurisdiction to hear and decide appeals is limited to "administrative decisions based in whole or in part upon *any zoning regulation* or map *adopted under this subchapter [IV]* and subchapter V of this chapter." D.C. Code, §§ 6-641.07(f), 6-641.07(g) (emphasis added).

However, there is no question here that the Zoning Administrator has the power to enforce the Height Act by virtue of 11 DCMR § 2510.1. Like this Board, the Zoning Administrator's authority is also limited to the enforcement of the provisions of the Zoning Regulations themselves. *See* Reorganization Plan No. 55 (attached as Exhibit 1). Nonetheless, the Zoning Administrator enforced the Height Act in other cases and has taken the position before this Board that, "[t]he height of buildings in the District of Columbia is governed by *both* the DCMR 11 Zoning Regulations *and* the Act to Regulate the Height of Buildings in D.C. June 10 1910. *When determining the allowable height of a structure, the more restrictive of the two laws must apply.*" *Appeal of Howard University*, BZA Appeal No.15568, at 3 (October 22, 1993) (attached as Exhibit 2)

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[1] The building at issue here is in the R-5-D zone, in which zone district the Zoning Regulations provide for 90 foot height restriction. However, Belmont Road has a street width of 80 feet, and therefore the Height Act requires a 70-foot height limit. *See* KCA Pre-hearing Submission, Exhibit 6

(emphasis added) (citing 11 DCMR § 101.4, which provides that other statutes "shall govern" where they impose higher standards than are required by the Zoning Regulations.)

It makes no sense for this Board to concede, on the one hand, that the Zoning Administrator has sufficient regulatory authority to enforce the Height Act, but to suggest on the other hand this Board lacks such authority. Indeed, there is precedent to the contrary in *Appeal of Howard University*, in which this Board heard an appeal from the decision of the Zoning Administrator "to the effect that the height of a university building located in the R-5-B District is limited by the provisions of" the Height Act. In that case, the Board specifically found that, "in instances of conflict between the provisions of the Zoning Regulations and any statute or other municipal regulations, the higher or more restrictive provisions would apply as set forth in Sections 101.3 and 101.4 of the Zoning Regulations." *See Appeal of Howard University, supra*, at 7. Accordingly, the Board ruled "that the Zoning Administrator properly applied the criteria set forth in the Zoning Regulations *and the Height Act*." *Id.*, at 8 (emphasis added).

It may be the case that this Board lacks jurisdiction over an appeal challenging the Zoning Administrator's failure to exercise his authority under 11 DCMR § 101.4 to apply in lieu of the provision of the Zoning Regulations, another statutory provision that, unlike the Height Act, is not specifically identified and incorporated by reference in the Zoning Regulations. However, the obligation of strict compliance with the Height Act so permeates the Zoning Regulations so as to be well within the enforcement authority of this Board.

For example, in addition to the general provision in 11 DCMR §2510.1 that "all buildings or structures shall comply with the Act to Regulate the Height of Buildings in the District of Columbia," Section 400.13 of the regulations provides that the Mayor may authorize an excess height only where permitted under the Height Act (*i.e.*, section 6-601.05(h), which permits spires, towers, domes, etc. to exceed the normal height limitations). Section 411.1 of the regulations provides that certain roof structures shall be permitted when not in conflict with the Height Act. Section 2511.1 defines "business street" as used in the Height Act. Section 2512 adopts a schedule of building heights adjacent to public buildings, as permitted by the Height Act. The obligation to comply with the Height Act, specifically identified by, and incorporated in, the regulations, was so important that the Zoning Regulations repeatedly limit the authority of zoning officials, including this Board, to approve deviations from the Act. *See* 11 DCMR § 2522 (c) (limiting the authority to permit minor deviations by providing that "all deviations of roof structure setback requirements comply with the Act to Regulate the Height of buildings in the District of Columbia approved June 1, 1910; 11 DCMR §2516.7 (permitting the height of a building to be measured from the finished grade at the middle of the front of the building only "[w]here not in conflict with the Act to Regulate the Height of Buildings... ")

Accordingly, the provisions of the Height Act are accorded, under the Zoning Regulations, a very different status from other statutory provisions not specifically identified in the regulations that might impose a higher standard than required under the Zoning Regulations. Put another way, the fact that the Zoning Commission chose to incorporate the obligations of the Height Act by reference to the statute rather than repeat

every provision of the Height Act word for word in the regulations does not render the requirement of the Act any less a "zoning regulation" subject to the BZA's jurisdiction under section 6-641.07 of the DC Code or the corresponding section of the regulations. Indeed, only recently, this Board ruled that "[t]he definition of 'community-based residential facility' in the Zoning Regulations includes *and incorporates by reference* 'facilities covered by D.C. Law 2-35, relating to community residence Facilities Licensure Act of 1977.'" *See Appeal of Southeast Citizens for Smart Development, Inc. and ANC 6B*, BZA Appeal No. 16791 at 19 (June 21, 2002). No jurisdictional concerns arising from the fact that this definition was not specifically reiterated in the Zoning Regulations but instead was simply incorporated by reference deterred this Board from applying this definition.[2]

In sum, D.C. Code § 6-641.07 provides that the BZA shall hear appeals of decisions based on the Zoning Regulations adopted under subchapter IV, or appeals alleging an error in the carrying out or enforcement of such regulations. Section 2510.1 of the Zoning Regulations requires compliance with the Height Act. This regulation was adopted under subchapter IV. Thus, the BZA has jurisdiction to hear cases where, as in the present case, an appellant is arguing that the Zoning Administrator's decision issuing a building permit is in violation of the Height Act, since any such decision necessarily constitutes an error in the carrying out of Section 2510.1 of the Zoning Regulations.

2. <u>No Other Administrative Agency Has BZA has jurisdiction over Height Act Appeals</u>

[2] Indeed, in that case, the Board relied on a definition of "facility" contained in D.C.'s Health Care Licensing Regulations, 22 DCMR § 3099, that had been repealed in 1992, but nonetheless found that the superceded definition remained incorporated by reference in the Zoning Regulations. *See Appeal No. 16791 of Southeast Citizens for Smart Development, Inc. and ANC 6B*, at 12 n. 2. Here, by contrast, the provisions of the Height Act remain good law.

KCA has been unable to locate any decisions of this Board, the Zoning Commission, or the D.C. Court of Appeals that address the question of whether this Board has jurisdiction over appeals concerning the Height Act. While the practice of the Office of the Zoning Administrator is apparently, at least in some cases (although it did not do so in this case), to direct persons seeking to appeal Height Act issues to the D.C. Board of Appeals and Review ("BAR"), there is also precedent for this Board exercising jurisdiction over Height Act issues.

Specifically, reference was made to the *Appeal of American Tower, Inc.*, BZA Appeal No. 16990 (June 25, 2003) (attached hereto as Exhibit 3). However, that case did not address the BZA's jurisdiction to hear appeals based on the Height Act. Rather, the BZA simply stated, in its recitation of facts, that "Plaintiff [American Towers] was informed that the side-yard and setback issue could be appealed to the BZA and the remaining grounds for rescission to the BAR." *Id.* at 4. Likewise, the subsequent (unpublished) decision by the U.S. District Court for the District of Columbia, attached hereto, in addressing American Tower's Due Process challenge to the rescission of its building permit, did no more than acknowledge that American Tower was "taking advantage of the District's administrative processes by appealing the rescission to the Board of Zoning Appeals and to the Board of Appeals and Review." *American Tower, Inc. v. Williams*, C.A. No. 00-2436, at 8 (D.D.C., June 14, 2001) (attached as Exhibit 4).

Thus, at most, the American Tower case corroborates the assertion of Corporation Counsel that the practice of the Zoning Administrator, at least at the time of the American Tower case, was to direct appellants who seek to challenge a decision by the Zoning Administrator to apply the Height Act to the Board of Appeals and Review. However,

the existence of this practice within the Office of Zoning does not thereby signify that this Board must lack jurisdiction over appeals raising issues under the Height Act. To the contrary, as noted above, there is precedent for this Board exercising jurisdiction over appeals raising Height Act issues. *See Appeal of Howard University*, BZA Appeal No. 15568 (October 22, 1993) (Exhibit 2).

More importantly, it is not clear that the BAR would have jurisdiction over Height Act issues. The jurisdiction of the BAR is confined to "appeals timely filed by persons who are aggrieved by orders issued by hearing examiners pursuant to this unit or by the Mayor, except that appeals involving infractions of *Chapter 6 of Title 6 or* the District of Columbia Zoning Regulations shall be entertained and determined by the District of Columbia Board of Zoning Adjustment." D.C. Code § 2-1803.01 (emphasis added). The Height Act, of course, is codified in Chapter 6 of Title 6 of the D.C. Code (D.C. Code § 6-601 *et seq.*) Accordingly, by the plain language of this provision, the BAR could not have jurisdiction over Height Act issues because it involves "infractions of *Chapter 6 of Title 6*." *See Felicity's, Inc. v. DCRA*, 817 A.2d 825 (D.C. 2003) (BAR did not have jurisdiction over appeal from DCRA hearing examiner's imposition of fines for violation of Zoning Regulations regarding parking); *Walsh v. D.C. Board of Appeals and Review*, 826 A2d 375 (D.C. 2003) ("[A]ppeals involving infractions of . . . the District of Columbia Zoning Regulations shall be entertained and determined by the District of Columbia Board of Zoning Adjustment").

In any event, the BAR's functions will soon be wholely assumed by a newly created entity, the Office of Administrative Hearings ("OAH"), established by the City Council in Act 14-196, the Office of Administrative Hearings Establishment Act of 2001

("the Act"), as amended. *See* D.C. Law 15-39, 50 DC Register 5668 (Nov. 13, 2003). The Act was intended to create a new independent agency to adjudicate administrative disputes that would take over and centralize the hearing functions previously handled by a variety of District agencies, including the BAR.[3] It did not create any new right of appeal from the actions of any District agency.

Specifically, following the confirmation of the Chief Administrative Law Judge of the OAH, OAH will have jurisdiction over "adjudicated cases" under the jurisdiction of specified agencies, including the BAR, and after October 1, 2004, will also have jurisdiction over "adjudicated cases" under the jurisdiction of the D.C. Department of Consumer and Regulatory Affairs ("DCRA"). D.C. Code § 2-1831.03(a), (b). *See* D.C. Law 15-39, § 402(b). "Adjudicated case" means a contested case or other administrative adjudicative proceeding before the Mayor or any agency that results in a final disposition by order and in which the legal rights, duties, or privileges of specific parties are required by any law or constitutional provision to be determined after an adjudicative hearing of any type." D.C. Code § 2-1831.01(1). *See also Id.* § 2-1831.03(e) ("Nothing in this act shall be construed to grant a right to a hearing not created independently by a constitutional provision or a provision of law other than this act . . .") Thus, OAH only has jurisdiction to hear appeals from orders issued after a contested case hearing. The issuance of building permits does not occur pursuant to a "contested case" hearing. Therefore, the OAH would not have jurisdiction to hear appeals from DCRA permitting decisions.

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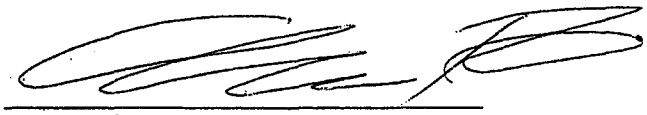
[3] Report of the Committee on the Judiciary, Council of the District of Columbia, on Bill 14-208, the "Office of Administrative Hearings Establishment Act of 2001", September 25, 2001, p. 1.

Moreover, the Act affords OAH jurisdiction as to adjudicated cases under the jurisdiction only of those agencies listed in Section 6 of the Act (DC Code § 2-1831.03). The Board of Zoning Adjustment is not among those agencies. Therefore it cannot be argued that the OAH was intended to take over the jurisdiction of the BZA to hear appeals from decisions under the Height Act. DCRA, by contrast, is among the agencies to which the Act applies (as of October 1, 2003), but, as indicated in the preceding paragraph, building permit decisions are not issued as part of an "adjudicated case" and therefore the OAH would not have jurisdiction over such appeals.

Conclusion

For the above reasons, the BZA has jurisdiction over an appeal in which the Zoning Administrator is alleged to have issued a building permit in violation of the Height Act.

Respectfully submitted,



Andrea C. Ferster
1100 17th Street, N.W. 10th Fl.
Washington, D.C. 20036
(202) 974-5142

Counsel for Kalorama Citizens Association

April 5, 2004

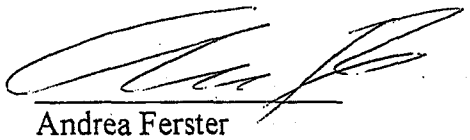
CERTIFICATE OF SERVICE

I hereby certify that, on April 6, 2004, a copy of Appellant's Supplemental Memo on the Height of Buildings Act was served by hand on:

Carolyn Brown
Holland and Knight, LLP
2099 Pennsylvania Ave., N.W. Suite 100
Washington, D.C. 20006

Laura Gilbert, Attorney or Office of
General Counsel
DC Department of Consumer & Regulatory Affairs
941 N. Capitol Street, N.E 2nd Fl.
Washington, D.C. 20002

Alan Roth, Chairperson
Advisory Neighborhood Commission 1C
1845 Vernon Street, N.W.
Washington, D.C. 20009



Andrea Ferster

DISTRICT OF COLUMBIA CODE

ANNOTATED

1973 EDITION

CONTAINING THE LAWS, GENERAL AND PERMANENT IN THEIR NATURE, RELATING TO OR IN FORCE IN THE DISTRICT OF COLUMBIA (EXCEPT SUCH LAWS AS ARE OF APPLICATION IN THE DISTRICT OF COLUMBIA BY REASON OF BEING GENERAL AND PERMANENT LAWS OF THE UNITED STATES), IN FORCE ON JANUARY 2, 1973

NOTES TO DECISIONS THROUGH DECEMBER 1972

VOLUME ONE

TITLE 1—ADMINISTRATION
TO
TITLE 17—REVIEW

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1973

C. That the Corporation Counsel and such of his assistants as he may designate in writing are hereby authorized to execute in the name of the District of Columbia any release in connection with the settlement of any claim of the District of Columbia in the following cases:

1. Where the full amount of the claim as it appears on the books of the Accounting Office has been paid; or

2. Where the full amount set forth in the original demand for payment has been paid; or

3. Where the full amount of any settlement or compromise as approved by the Commissioners has been paid; or

4. Where damaged property of the District of Columbia has been satisfactorily repaired at the expense of the party responsible for such damage.

D. That the Corporation Counsel is hereby authorized to waive any claim and release any lien arising under the provisions of Section 18 of the Public Assistance Act of 1962 (Section 3-217, D.C. Code, 1967 ed. [now 1973 ed.]) when, in his judgment, such waiver or release is appropriate.

CHANGE OF NAME

"Public Utilities Commission", wherever it appears in this order, was changed to "Public Service Commission of the District of Columbia" by Act Aug. 30, 1964, 78 Stat. 634, Pub. L. 88-503, § 21. See § 2-2418.

[The name of the Municipal Court, wherever it appears in this order, was changed to "District of Columbia Court of General Sessions" by Act July 8, 1963, 77 Stat. 77, Pub. L. 88-60, § 1; and subsequently changed to "Superior Court of the District of Columbia" by Act July 29, 1970, Pub. L. 91-358, § 155(a), 84 Stat. 570.]

[The name of the Municipal Court of Appeals was changed to "District of Columbia Court of Appeals" by Act July 8, 1963, 77 Stat. 78, Pub. L. 88-60, § 6; and subsequently again changed to "District of Columbia Court of Appeals" by Act July 29, 1970, Pub. L. 91-358, § 155(b), 84 Stat. 570.]

REORGANIZATION ORDER NO. 51.—OFFICE OF THE CORONER

Reorganization Ord. No. 51, L.S. 4241-B, June 29, 1953, as amended July 17, 1953, and Mar. 5, 1965, was rescinded by section 3 of Commissioner's Order No. 71-16, dated Jan. 26, 1971, which also transferred all positions, personnel, property, records and unexpended balances of appropriations, allocations, and other funds available or to be made available, related to the functions assigned to the Office of the Coroner, to the Office of the Chief Medical Examiner. Commissioner's Order No. 71-16 is set out as a note under section 11-2301.

REORGANIZATION ORDER NO. 52.—DISTRICT OF COLUMBIA POUND

Reorganization Ord. No. 52, June 30, 1953, as amended Apr. 8, 1958, combined with Reorganization Order 57, amended and redesignated as Organization Order No. 141, dated Feb. 11, 1964, and effective Feb. 11, 1964.

REORGANIZATION ORDER NO. 53.—DEPARTMENT OF HIGHWAYS AND TRAFFIC

Reorg. Ord No. 53, June 30, 1953, which established a Department of Highways and Traffic, was redesignated Organization Ord. No. 122.

REORGANIZATION ORDER NO. 54.—DEPARTMENT OF VEHICLES AND TRAFFIC

Reorg. Ord. No. 54, June 30, 1953, which established a Department of Vehicles and Traffic, was repealed May 17, 1955, by Organization Orders No. 105, 106, 107, and 108.

REORGANIZATION ORDER NO. 55.—DEPARTMENT OF LICENSES AND INSPECTIONS

[Functions as stated in Reorg. Ord. No. 55 were transferred to the Director of the Department of Economic Development by Commissioner's Order (Organization Action) No. 69-96, dated Mar. 7, 1969, as amended.]

Reorganization Ord. No. 55, L.S. 4263-B, June 30, 1953, as amended Aug. 13, 1953, Dec. 17, 1953, June 30, 1954, Oct. 26, 1954, Aug. 11, 1955, Jan. 31, 1956, July 10, 1956, Oct. 9, 1956, Oct. 16, 1956, June 19, 1957, Nov. 27, 1957, July 22, 1958, June 1, 1960, Feb. 21, 1961, Nov. 7, 1961, Dec. 4, 1962, May 12, 1964, June 17, 1965, Mar. 16, 1967, and Feb. 28, 1969, ordered that:

PART I

Department of Licenses and Inspections.—There is established under the direction and control of a Commissioner, a Department of Licenses and Inspections headed by a Director. The Director shall have full authority over such Department and all functions and personnel assigned thereto, including the power to redelegate to other officials and employees of the Department such of the powers herein delegated as, in his judgment, are warranted in the interests of efficiency and good administration. However, the power to grant variances from the requirements of the housing code shall be limited to the Director and Deputy Director or, in their absence, the Acting Director of the Department. All authority vested in the Director shall be exercised in accordance with applicable laws, rules, and regulations.

PART II

Purpose.—The Department of Licenses and Inspections is established for the purpose of: administering the laws enacted by Congress and the regulations for the control of construction, zoning, and occupancy, use, erection, maintenance and repair, inspection and removal of all buildings and their appurtenances, and electrical and mechanical equipment within the District of Columbia, excepting public buildings or premises under the control of the Federal Government; enforcing the Consumer Affairs Regulations (effective July 1, 1969); administering the D.C. Standard Weights and Measures Law [D.C. Code, § 10-101 et seq]; supervising and controlling the municipal markets and collecting annual revenue for rents and space and for wharfage at the Municipal Fish Wharf [D.C. Code, § 10-135]; administering the License Act of 1932, as amended [D.C. Code, § 47-2301 et seq.], and regulations promulgated thereunder requiring licenses of certain businesses and callings in the District of Columbia; administering the acts requiring licenses for Cooperative Associations, Credit Unions, Pawnbrokers, and Loan Brokers; administering such portions of the Acts as require licenses for: Cigarette Vending Machine Operators and Retail and Wholesale Cigarette dealers [D.C. Code, § 47-2804]; administering the portions of the Act of July 5, 1945 which require the payment of a dog tax and the issuance of a dog tag [D.C. Code, § 47-2001 et seq.]; administering the provisions relating to the licensing of peddlers and the granting of permits for the use of public space contained in the act of August 6, 1956, known as the "Presidential Inaugural Ceremonies Act [D.C. Code, §§ 1-1202, 1-1204];" administering and interpreting all laws and regulations governing housing in the District of Columbia; and proposing to the Commissioner appropriate provisions for codes and regulations relating to such housing: provided, however, that the Department of Public Health shall fully collaborate in the development and presentation to the Commissioner of such proposed provisions to the extent that they affect the public health of the community and its individual members.

PART III

Organization and functions.—There are established in the Department of Licenses and Inspections the following organizational components, responsible for the performance of the functions outlined below, consistent with the purpose specified above:

A. *Office of the Director.*

1. Develops and proposes to the Board of Commissioners major policies and procedures, regulations and revisions thereto, on licensing, permit and certificate issuance, inspection, and related regulatory activities within the purview of the Department's functions, including the issuance of collateral notices in the enforcement of orders for compliance with applicable codes, regulations and statutes administered by the Department.

2. Administers and interprets all housing regulations of the District of Columbia. The Director shall in writing effect a specific delineation of responsibilities between himself and the Deputy Director, particularly in connection with development, interpretation, and enforcement of standards and regulations relating to housing.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 15568 of Howard University, pursuant to 11 DCMR 8102 and 8206, from the decision of the Zoning Administrator, dated July 8, 1991, to the effect that the height of a university building located in the R-5-B District is limited by the provisions of the Act to Regulate the Height of Buildings in the District of Columbia, June 10, 1910, as set forth in Subsection 2511.1 of the Zoning Regulations, as related to the proposed construction of an addition to an existing dormitory in the R-5-B District at premises 345 Bryant Street, N.W., (Square 3068, Lot 30).

HEARING DATE: September 25, 1991
DECISION DATE: October 23, 1991

ORDER

SUMMARY OF EVIDENCE OF RECORD:

1. The subject case is an appeal from the decision of the Zoning Administrator, dated July 8, 1991, that the height of a building located on the east side of 4th Street N.W., between College Street on the north and W Street on the south, is not subject to the business street provisions of 11 DCMR Subsection 2511.1 because the proposed building is located on a residentially zoned lot. At issue in this case is the appellant's proposal to construct an addition to the Bethune Dormitory Complex on the Central Campus of Howard University.

2. The appellant's proposal for the subject site was conceived in the late 1970's as three, eight-story interconnected buildings. It was represented as such in the 1980 and the 1988 Howard University Central Campus Plan. Those plans were presented in 1981 and 1988, respectively, for the Board's review and approval. By BZA Order No. 13416 dated March 22, 1982, and BZA Order No. 14733 dated December 23, 1988, the Board concluded that Howard University's Central Campus Plans, including the proposed addition to Bethune Dormitory, met the requirements of 11 DCMR Subsections 210 and 3108.1 of the Zoning Regulations.

3. The appellant proposes to modify its original proposal for the subject site. The current proposal, which is the subject of the instant appeal, contemplates the construction of an addition to the existing Bethune Hall Dormitory which would result in a single seven-story building measuring approximately 67 feet in height.

4. The appellant's rationale for the location and height of the subject structure is summarized as follows:

a. The subject site is located on university-owned property within the approved Central Campus Plan area.

b. The proposed use, height and bulk is consistent with other university buildings in the immediate area.

c. All of the property in the 4th Street corridor between W Street on the south and Howard Place on the north is owned by the University and used exclusively for University purposes.

d. The Harriett Tubman Quadrangle of five dormitories is located immediately to the north of the Bethune site, which enhances the efficiency of management and student conveniences associated with having those dormitories in close proximity.

e. The proposed height of the Bethune addition is consistent with the heights of other buildings in the area, including the existing Bethune Hall Dormitory within the Harriet Tubman Complex which is 69 feet in height; and, the Frazier Hall Dormitory in the Harriet Tubman Complex which is 70 feet in height.

4. Howard University, established as a private nonprofit corporation, historically has had a close relationship with the federal government. Many of its buildings, including the Bethune Hall Dormitory, were built by the federal government. As a consequence, the Bethune Hall Dormitory building was not subject to the Zoning Regulations at the time of construction and was built to a height that exceeds the 50-foot height that a residence street designation would mandate for that site.

5. The portion of 4th Street N.W. that abuts the subject area is 50 feet wide. A zone district line bisects the street with an SP-2 District being to the west of the line and an R-5-B District to the east.

6. The Building Height Limitation Act of 1910, D.C. Code Subsection 405 (1981 ed.), limits building heights in the District of Columbia according to the classification and width of the street that abuts the proposed structure. Buildings on "business streets" are permitted greater heights under the Height Act than buildings on "residence streets". The Act does not specify the justification for these distinctions, nor define the terms "business" or "residence" street.

7. The Zoning Regulations define a "business street" as one whose "...sides and portions...are located within a Special Purpose, Waterfront, Mixed-use, Commercial or Industrial district."

8. The appellant argued that the plain meaning of Subsection 2511.1 with its plural form of the words "side" and "portion" requires both sides of 4th Street to be designated as a business street. The appellant further argued that it makes no difference that one side of 4th Street is in a residence district because the regulation requires both sides and portions of a street located in a Special Purpose district to be designated a business street.

9. The Appellant also asserted that there is no regulation that prevents a building located in a residence district from being deemed to be on a business street and that there is no regulation that requires a street that is split-zoned residential and commercial to be treated as a business street on one side and a residence street on the other.

10. By testimony at the public hearing, the Zoning Administrator supported his position, as follows:

a. The height of buildings in the District of Columbia is governed by both the DCMR 11 Zoning Regulations and the Act to Regulate the Height of Buildings in D.C. June 10, 1910. When determining the allowable height of a structure, the more restrictive of the two laws must apply.

b. The Act of 1910 further reads in part, as follows: "On a residence street, avenue or highway, no building shall be erected, altered or raised in any manner so as to be over 90 feet in height at the highest point of the roof or parapet, nor shall the highest part of the roof or parapet exceed in height the width of the street, avenue or highway upon which it abuts, diminished by ten feet, except on a street, avenue or highway 60 to 65 feet wide, where a height of 50 feet may be allowed, and on a street, avenue or highway 60 feet wide or less where height equal to the width of the street may be allowed.

c. Subsection 2511.1 of the D.C. Zoning Regulations, reads as follows: "For the purpose of administering this title, that portion of the Act (Act of 1910) referred to in Section 2510 that designates certain streets as business streets shall be interpreted to mean those sides and portions of any street located in a Special Purpose, Waterfront, Mixed-use, Commercial or Industrial district.

d. The property in question is located in an R-5-B District on the east side of 4th Street, between Bryant and College Streets N.W. The property located on the south side of Bryant Street and on the north side of College Street is also zoned R-5-B. The property located on the west side of 4th Street is zoned SP-2.

e. The width of 4th Street between Bryant and College Streets is only 50 feet. The R-5-B District generally permits a maximum height of 60 feet. However, the Act of 1910 limits the allowable height of a building in a "residence street" to that equal to the width of the street.

f. In most instances, the zone boundary line extends to the middle of the adjacent street. Because the subject property is located in an R-5-B District, the adjacent portion of 4th Street is determined to be located in a "residence district" for zoning purposes. If the subject lot were on the west side of 4th Street in the SP-2 District, the Zoning Administrator would interpret the permitted height, based on the allowance for a "business street."

g. The interpretation in the instant case case would set citywide precedent in applying the criteria set forth in the Height Act and the Zoning Regulations based on the existing zoning and any further map amendments adopted by the Zoning Commission.

11. In response to the Zoning Administrator's testimony, counsel for the appellant noted that the precedential aspects of the subject case would be limited in that this particular situation is the only case in the District in which a 50-foot wide street is split-zoned between SP and residential zones thereby restricting the allowable height to less than would be permitted as a matter of right in the underlying zone if the adjoining street is classified as a "residence street."

12. Counsel for the appellant noted that there are basically two instances where streets are split-zoned between commercial and residential districts. Neither of those instances produce a situation similar to the instant case. First, in uptown neighborhood centers, underlying zoning is generally C-1 for small strip centers adjacent to R-2 or R-3 residential areas and are located on 50-foot wide streets. The maximum height for both the commercial and residential areas is limited to 40 feet under the

Zoning Regulations, thereby prohibiting a height in excess of the width of the street absent variance approval by the Board.

The second instance occurs in the downtown area where the underlying zones are generally the C -3-A zone abutting an R-5-D zone on a 90-foot street. The maximum height for C-3-A is 65 feet and for R-5-D is 90 feet. Again, the Height Act would not prohibit the maximum building height allowed under the Zoning Regulations.

13. Advisory Neighborhood Commission (ANC) 1B did not submit written issues and concerns relative to the subject appeal.

14. Two neighborhood residents testified at the public hearing on the appeal expressing concern relative to the reference to 4th Street as a "business street". The residents' testimony did not oppose the subject appeal and noted that the appellant represents a good neighbor and a dynamic social, academic, and political force in the community.

15. At the conclusion of the public hearing, the Board left the record open to receive a report from the Office of Planning to determining whether there are existing similar zoning patterns in the city with respect to matter of right development and the Height Act.

16. By memorandum dated October 9, 1991, the OP submitted its evaluation of the planning and zoning impacts and precedent-setting possibilities which could result from a decision to grant the subject appeal. The OP was of the opinion that the proposed height of the dormitory building would be compatible with existing buildings in the area and is appropriate for location on the central campus.

Regarding the precedent-setting nature of the Board's decision, the OP found the appellant's argument persuasive in that the appellant's research indicated that no other instance could be found in the District of Columbia where the underlying zoning permits a greater height than the Height Act would permit based on the width of the abutting street. However, the OP was unable to substantiate the appellant's findings because of severe time constraints.

With respect to the interpretation of the applicable regulations, the OP indicated that it could find no sound rationale for designating 4th Street as a "business street" simply because an SP district is located across the street from the subject site. The OP noted that a possible solution to this issue would be for the appellant to request a map amendment from the Zoning Commission which would change the zoning in the subject square from R-5-B to SP-2.

17. By submission received on October 18, 1991, counsel for the appellant responded to the OP report as follows:

> a. The OP's response to the proposed height of the subject structure is consistent with its findings based on its review in conjunction with the special exception for further processing sought by the appellant in Application No. 15551.
>
> b. The OP's response to the precedent-setting nature of the case is consistent with the evidence of record in which the appellant argues that the planning and zoning process would not be harmed if the subject appeal were granted.
>
> c. The OP's response to the interpretation of the applicable requirements is not helpful to the Board's deliberations because it ignores the applicable Zoning Regulations and incorrectly assumes that a regulation exists which precludes 4th Street from being designated as a "business street" in the subject area.

FINDINGS OF FACT:

1. The Board finds that the appellant has failed to demonstrate that the decision of the Zoning Administrator is in error.

2. The Board does not accept the appellant's argument that the plain meaning of Subsection 2511.1 requires that both sides of 4th Street be designated as a "business street" because of the plural form of the words "side" and "portion." The Board notes that Paragraph 199.2(b) of the Zoning Regulations reads as follows:

> "Words in the singular number shall include the plural number, and words in the plural number shall include the singular number."

Therefore, the Board finds that the pluralization of terms in the wording of Subsection 2511.1 has no major impact on the interpretation of that provision.

3. The Board finds that zoning district boundary lines are intended to follow existing lot lines, the center lines of streets, alleys, and natural water courses as set forth in Section 107.5 of the Zoning Regulations. In the instant case, the Board finds that 4th Street is split-zoned with SP-2 zoning on the west side and R-5-B zoning on the east side. Based on the location of the zone district boundary line in the center of 4th Street, the Board

finds that the term "business street" would apply to the west sides or portions of 4th Street which are located in an SP District but would not be applicable to the east side or portion of 4th Street which is located in an R-5-B District for the purpose of applying the limitations set forth in the Height Act.

4. The Board notes that while there is no regulation which specifies that a street which is split-zoned be designated as a business street on one side and a residence street on the other, the Board finds that it would be unreasonable to accept that the regulations as written, would allow for the designation of a "business street" for purposes of determining the height of a building which directly abuts a street located in a residence district, simply because the zoning on the other side of the street would allow for such a designation.

5. The Board notes that the proposed height and use seem to be in harmony with existing development and the general purpose and intent of the Zoning Regulations. However, the Board finds that the material facts presented in the instant case are not sufficient to justify the designation of an entire street as a business street on a city-wide basis if any side or portion of such street is located in a Special Purpose, Waterfront, Commercial or Industrial district.

6. The Board finds that, although the appellant has shown evidence that there are few, if any, similar situations in the District, future rezonings could possibly be impacted by a decision favorable to the appellant. The Board further finds that in instances of conflict between the provisions of the Zoning Regulations and any statute or other municipal regulations, the higher or more restrictive provisions would apply as set forth in Sections 101.3 and 101.4 of the Zoning Regulations.

CONCLUSIONS OF LAW AND OPINION:

Based on the foregoing findings of fact and the evidence of record, the Board concludes that the appellant has failed to demonstrate that the Zoning Administrator's decision is in error. The Board concludes that, based on the circumstances presented, the Zoning Administrator correctly interpreted the provisions of the Zoning Regulations and the Height Act in determining the permitted height on the subject lot. Subsection 2511.1 provides that a business street shall mean those sides and portions of any street located in a Special Purpose, Waterfront, Mixed-Use, Commercial or Industrial District. There is no existing zoning regulation which sets forth any circumstances or criteria which would deem appropriate the designation of "business street" for an entire street simply because any side or portion of a split-zoned street is located in an SP, Waterfront, Mixed-Use, Commercial or Industrial District.

The Board concludes, based on the circumstances affecting the subject site, that the subject lot abuts a street located in a residential zone district and that the Zoning Administrator properly applied the criteria set forth in the Zoning Regulations and the Height Act. The Board notes that the appellant's argument that the resulting height of the proposed structure as a result of the designation of this portion of 4th Street as a residence street is inconsistent with existing institutional development in the area and that the overall zoning policy of maintaining reasonable and uniform heights should more appropriately be presented as part of a petition for a map amendment before the Zoning Commission. The Board concludes that the inconsistencies related to existing height and development relative to the subject site do not represent a basis for overturning the Zoning Administrator's interpretation of the existing regulations which must be uniformly applied throughout the District of Columbia.

Accordingly, it is ORDERED that the appeal is hereby DENIED and the decision of the Zoning Administrator is hereby UPHELD.

VOTE: 3-0 (John G. Parsons, Sheri M. Pruitt and Carrie L. Thornhill to deny; Charles R. Norris not voting, not having heard the case; Paula L. Jewell not voting, having recused herself).

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

ATTESTED BY: Madeliene H. Robinson
MADELIENE H. ROBINSON
Director

FINAL DATE OF ORDER: OCT 22 1993

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

ord15568/ss/LJP

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 15568

As Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on OCT 22 1993 a copy of the order entered on that date in this matter was mailed postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

Jerry A. Moore, III, Esquire
Linowes and Blocher
800 K Street, N.W., Suite 840
Washington, D.C. 20001

Mary Treadwell, Chairperson
Advisory Neighborhood Commission 1-B
1012 U Street, N.W., Second Floor
Washington, D.C. 20001

Theresa F. Brown
317 V Street, N.W.
Washington, D.C. 20001

Robert Brannum
158 Adams Street, N.W.
Washington, D.C. 20001

Tony Norman
1735 First Street, N.W.
Washington, D.C. 20001

MADELIENE H. ROBINSON
Director

DATE: OCT 22 1993

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16990 of American Towers, Inc. pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Acting Director of the Department of Consumer and Regulatory Affairs (DCRA) rescinding Building Permits Nos. B425271, 420358, 429362, et al., relating to the construction of an antenna tower in a C-2-B District at premises 4623 41st Street, N.W. (Square 1769, Lots 20 and 30).

HEARING DATE: April 29, 2003
DECISION DATE: April 29, 2003

ORDER

PRELIMINARY AND PROCEDURAL MATTERS:

On January 10, 2003, American Towers, Inc.[1] ("American Towers") filed this appeal with the Board of Zoning Adjustment ("Board" or "BZA"). The appeal states that it challenges an October 5, 2000 administrative decision by the Acting Director of the Department of Consumer and Regulatory Affairs ("DCRA") to rescind and cancel building permits for construction of an antenna tower at 4623 41st Street, N.W. Exh. 1.

By letter dated January 14, 2003, American Towers requested that the Board stay the proceedings pending resolution of related judicial proceedings. Exh. 15. On January 30, 2003, DCRA filed a motion for dismissal of the appeal as untimely. Exh. 16. The Board then scheduled a hearing on the appeal for April 29, 2003, with DCRA's motion for dismissal to be considered as a preliminary matter. Exh. 17-21. On April 24, 2003, DCRA filed an opposition to American Towers' request for a stay. Exh. 23. On April 25, 2003, American Towers filed its opposition to DCRA's motion for dismissal and renewed its earlier request for a stay. Exh. 24.

The Advisory Neighborhood Commission for the subject property, ANC 3E, did not file a statement on the appeal. Exh. 25.

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[1] Appellant in this case is American Towers, Inc. Exh. 1. Attached to the Appeal is a permit application (B425271) that listed American Tower Systems as the property owner. Exh. 4. For purposes of this appeal, the Board will assume that American Towers, Inc. is an aggrieved party.

On April 29, 2003, the Board heard argument from DCRA and American Towers on DCRA's motion for dismissal and American Towers' request for a stay. At the conclusion of the argument, the Board voted 3-0-2 to grant the motion for dismissal.

FINDINGS OF FACT:

1. On March 18, 1999, American Tower Systems applied to the Building and Land Regulation Administration (DCRA) for a permit for construction at 4623 41st Street, N.W., of an antenna tower and two T.V. antennas with an "[o]verall height" of 756 feet. Exh. 4. On March 13, 2000, the Building and Land Regulation Administration issued Building Permit No. B425271 to American Tower Systems for construction of the proposed antenna tower and T.V. antennas. Exh. 6.

2. On September 18, 2000, Jill Diskan filed an appeal with the Board from two earlier administrative decisions of the Zoning Administrator relating to the proposed construction of a tower at 4623 41st Street, N.W. (BZA Appeal No. 16649). In her appeal, Ms. Diskan stated that "[b]ecause of [the] height of [the proposed] tower the application should have been referred to the BZA and to the mayor for an exception." Exh. 16 (Attach. A thereto). Ms. Diskan appealed in her capacity as Chair of Advisory Neighborhood Commission 3E ("ANC"). Exh. 16 (Attach. C thereto).

3. On October 5, 2000, the Acting Director of DCRA issued a Notice to Rescind and Cancel Building Permit No. B425271 and ten other related building and plumbing permits. The Notice to Rescind and Cancel cited five "errors identified in the original permit review process that resulted in the erroneous issuance of these permits": (1) insufficient side yard setback, (2) tower height in excess of Height Act limitations, (3) absence of any environmental impact analysis, (4) submitting an application for a construction permit without a Certificate of Authority to transact business in the District of Columbia, and (5) applying for building permits without having registered with the Office of Tax and Revenue.[2] Exh. 5.

4. The Notice to Rescind and Cancel provided that the "decision to cancel and rescind these invalid permits will become effective at 5 pm on Tuesday October 10, 2000, unless, prior to 12 noon that same day, I receive written statements, evidence, or documentation . . . demonstrating that the errors I cited did not take place." Exh. 5. By letter to the Acting Director of DCRA dated October 10, 2000,

[2] The Notice to Rescind and Cancel was mailed to "American Tower Corp." in Massachusetts, "American Tower Systems" in Virginia, and "American Tower" in the District of Columbia, as well as to other entities and individuals. Exh. 5.

John J. Brennan, III, Esq. and Robert Clayton Cooper, Esq., writing on behalf of "American Tower Corporation," challenged the Acting Director's stated reasons for rescission and cancellation and requested that construction of the antenna tower be authorized to continue. Exh. 22 (attachment thereto).

5. On October 10, 2000, the Acting Director of DCRA issued a Final Notice Rescinding and Canceling the eleven building and plumbing permits that had been the subject of the Notice to Rescind and Cancel. Pursuant to the Final Notice Rescinding and Canceling, the Notice to Rescind and Cancel would "become effective as of 5:00 p.m. October 10, 2000," and work at the site was to cease by 7:00 p.m. on October 12, 2000. The Final Notice Rescinding and Canceling provided notice of the right to appeal the "inadequate side yard setback" issue to this Board:

> Please be advised that you have a right to challenge this Notice. In order to exercise this right, you must appeal the portion of the Notice that is based upon the inadequate side yard setback to the Board of Zoning Adjustment. The remaining issues are to be appealed to the Board of Appeals and Review.
>
> In order to exercise this right, you must file written requests for hearings with the appropriate Board. A timely appeal to the Board of Zoning Adjustment must be filed with the Board at 441 4th Street, N.W., Suite 210 South, Washington, DC 20001, (202) 727-6311. . . . Exh. 16 (Attach. G thereto).

6. By letter dated October 25, 2000, on behalf of "American Towers, Inc.," Mr. Cooper requested that the Board stay the proceedings in BZA Appeal No. 16649, which was still pending. He explained:

> The request for the Stay is simple. The underlying matters from which the ANC has filed this Appeal, are either moot or are otherwise presently before the U.S. District Court as Civil Action # 00-2436 (PLF). That pending case, brought by American Towers, Inc. against the District of Columbia, seeking a judicial determination that the Permit(s) to construct a telecommunications Tower were unlawfully and illegally revoked by the D.C. Department of Consumer and Regulatory Affairs on October 10, 2000. . . . Exh. 24 (Exh. 1 thereto).

7. Similarly, by letter to the Board dated October 26, 2000, Jill Diskan requested "that ANC 3E's request for an expedited hearing on our Appeal be

placed on hold, pending the outcome of American Tower Systems lawsuit against the District government in the Federal courts." Exh. 24 (Exh. 2 thereto).

8. By letter dated October 30, 2000, Jerrily R. Kress, FAIA, Director of the Office of Zoning, informed Mr. Cooper of Ms. Diskan's request that her appeal "be placed on hold pending the outcome of the American Tower, Inc. lawsuit in District Court." Ms. Kress stated: "[i]t is almost certain that this request will be granted." She then advised Mr. Cooper: "[i]n the interest of maintaining your options, the Office of Zoning recommends American Tower Systems, Inc. file an appeal based on the revocation of the permits for the tower." Exh. 24 (Exh. 3 thereto). Mr. Cooper has represented to the Board that he never received Ms. Kress' letter and that he did not become aware of the letter until receiving a copy in early 2003. Exh. 24 at 3.

9. By letter dated September 6, 2001, Ms. Kress informed Mr. Brennan: Please be advised that the Office of Zoning will honor your telephone request made on September 5, 2001, requesting that the scheduling of the Board of Zoning Adjustment appeal hearing in the above-referenced case ["BZA Application No. 16649 – American Tower Systems"] be postponed until the recently filed court proceedings in this matter are concluded. Exh. 24 (Exh. 5 thereto).

10. In a motion filed on or about December 20, 2000 in the United States District Court for the District of Columbia in *American Towers, Inc. v. The Honorable Anthony Williams, et al.* (Civ. No. 00-2436 (PLF)), counsel for the District of Columbia ("District") stated:

> Plaintiff [American Towers] was informed that the side-yard setback issue could be appealed to the BZA and the remaining grounds for rescission to the BAR. Amend Cmplt. At Exh. 11. In fact, plaintiff has filed appeals with both bodies. Plaintiffs cannot now seek to have this Court replace the appropriate District body as the forum for resolution of this dispute. Exh. 24 (Exh. 4 thereto).[3]

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[3] In its decision granting the motion to dismiss, the district court acknowledged, but did not appear to rely upon, the District's representation that American Towers had appealed to this Board:

> Since American Tower does not contest the fact that it has been provided with post-deprivation procedures – indeed, it currently is taking advantage of the District's administrative procedures by appealing the rescission to the Board of Zoning Appeals [sic] and to the Board of Appeals and Review, see Defs.' Suppl. Memo. at 8 – the question for the Court to decide on this motion is whether the notice sent by the District and the opportunity for hearing provided before rescission were sufficient to comport with due process.

Exh. 10 at 4.

11. Subsequently, in a motion to dismiss filed on October 17, 2002 in the D.C. Superior Court in *American Towers, Inc. v. District of Columbia* (Civ. No. 02-2183), counsel for the District stated: "Under District of Columbia law, plaintiff is required to seek review of DCRA's decision in the appropriate administrative tribunals. Plaintiff has in fact brought such administrative appeal in the Board of Administrative Appeals [sic] ("BAR") but has not sought review in the Board of Zoning Adjustment ("BZA")." Exh. 26 (Motion at 1-2).

12. By letter dated November 1, 2002, Ms. Diskan informed Ms. Kress that BZA Appeal No. 16649 was "being withdrawn as moot (without prejudice in the event the permits in question were ever reactivated), in light of the official rescission of the permits on October 10, 2000." The letter shows that a copy was mailed to Mr. Cooper by first-class mail. Exh. 16 (Attach. E. thereto).

13. On January 10, 2003, American Towers, Inc. ("American Towers" or "Appellant") filed the instant appeal --BZA Appeal No. 16990 -- challenging DCRA's October 5, 2000 decision rescinding and canceling Building Permit No. B425271 (and the related permits). Exh. 1. Appellant's primary contention on appeal is that "the final building permit application and related approved drawings" did not create or provide for a side yard, and "therefore none is required." Exh. 2. In its "Statement of Ag[g]rievement," filed on January 10, 2003, with its appeal to the BZA, American Towers stated:

> This Appeal is being filed in order for the Appellant to preserve its earlier exercised exhaustion of administrative remedies. It was previously understood and agreed by the Appellant and the BZA, that the previously pending action (BZA Case #16649) would encompass all issues related to that case, including the side yard issue, and would be stayed pending the resolution of all matters before the U.S. District Court. However, despite that understanding, the matter has since been withdrawn and dismissed. So, in order to preserve its position based upon the status-quo, prior to that dismissal, Appellant American Towers submits this appeal, and requests that all matters before the BZA be stayed pending resolution of all judicial proceedings. Exh. 2.

CONCLUSIONS OF LAW AND OPINION:

One who is aggrieved by a zoning decision must file a "timely appeal" to the Board. 11 DCMR § 3112.2. The District of Columbia Court of Appeals has held that the requirement "that an appeal be timely is jurisdictional," and that the Board lacks the power to consider an untimely appeal. *Waste Management of*

Maryland, Inc. v. District of Columbia Bd. of Zoning Adjustment, 775 A.2d 1117, 1121 (D.C. 2001). The Court has described the "limit of timeliness" as "two months between notice of a decision and appeal therefrom," absent "exceptional circumstances substantially impairing the *ability* of an aggrieved party to appeal." Id. at 1122 (emphasis in original); *accord Sisson v. District of Columbia Bd. of Zoning Adjustment*, 805 A.2d 964, 969 (D.C. 2002).[4]

Whether Appellant is appealing from the Notice to Rescind and Cancel dated October 5, 2000, as American Towers has stated (Exh. 1 & 5), or from the Final Notice Rescinding and Canceling dated October 10, 2000, as DCRA has stated (Exh. 16, Mem. at 1 & n.1), the appeal is untimely. The record in this case shows that Appellant had notice of the DCRA's October 5, 2000 decision on or before October 10, 2000, the date of Mr. Brennan and Mr. Cooper's letter challenging the Acting Director's stated reasons for the proposed rescission and cancellation. The record in this case also shows that Appellant had notice of DCRA's October 10, 2000 decision on or before October 25, 2000, the date of Mr. Cooper's letter to Ms. Kress stating that the permits for the tower "were unlawfully and illegally revoked by the D.C. Department of Consumer and Regulatory Affairs on October 10, 2000." Moreover, DCRA's October 10, 2000 decision expressly informed Appellant that "[i]n order to exercise" its "right to challenge this Notice," it had to "appeal the portion of the Notice that is based upon the inadequate side yard setback to the Board of Zoning Adjustment."

It follows that the "limit of timeliness" for appealing to the Board from DCRA's October 10, 2000 revocation decision was reached not later than December 25, 2000, *i.e.* two months after the last possible date (*i.e.* October 25, 2000) that Appellant could have received notice of the revocation decision. Therefore, in filing BZA Case #16990 on January 10, 2003, Appellant filed more than two years late.

In its opposition to DCRA's January 30, 2003 motion for dismissal, Appellant states:

> It was clear from 2000 to 2002 that the parties were in full agreement to stay all action before the BZA pending resolution of the related judicial proceedings, and that agreement and understanding should not now be disturbed. This Appeal presents the same or similar issues, parties and property presented in the ANC Appeal.

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[4] The Zoning Commission's recent rulemaking setting 60 days as the time limit for appeals to the Board did not become effective until February 7, 2003, and, therefore, is inapplicable to this appeal.

Opposition at 5. However, an agreement among the parties to stay a pending appeal from DCRA's administrative decisions to issue permits for the proposed tower (BZA Case #16649) would not have served to extend the time limit for appealing DCRA's *subsequent* administrative decisions to revoke the permits for the proposed tower (BZA Case #16990). Further, Appellant's decision to appeal the revocation of the permits in the United States District Court did not somehow relieve it of its responsibility to properly file an appeal before the BZA. The fact that American Towers "chose to concentrate on avenues that reasonably may have appeared more promising than an appeal [to the BZA] does not excuse its delay" in noting such an appeal. *Waste Management*, 775 A.2d at 1123.

Appellant contends that "[i]t was previously understood and agreed by the Appellant and the BZA, that [BZA Case #16649] would encompass all issues related to that case, including the side yard issue," and further contends that, following the dismissal of that action, Appellant filed BZA Case #16990 "in order to preserve its position based upon the status-quo." But whatever Appellant's understanding of the status quo, it is clear from Ms. Kress' October 30, 2000 letter that there was no agreement to treat BZA Case #16649 as an appeal from DCRA's decision to revoke the permits. That letter recommended that American Tower Systems, Inc., "[i]n the interest of maintaining [its] options . . . file an appeal based on the revocation of the permits for the tower." Such a recommendation would have been unnecessary if the BZA were treating Case No. 16649 as an appeal of DCRA's decision to revoke the permits. Moreover, it does not make sense to, as American Towers contends, treat Appeal No. 16649 as an appeal from both the issuance and the revocation of the same permits. In fact, the timing is irreconcilable. The permits were revoked on, at the earliest, October 5, 2000. Appeal No. 16649 was filed on September 18, 2000. There is no way that Ms. Diskan, when she filed the appeal, could have intended it to apply to the revocation of the permits -- an action which had not yet occurred.

American Towers' injecting itself into another party's appeal of a related, but clearly different matter, could not substitute for filing its own appeal with the BZA. However, in support of its position that it could rely on its involvement in BZA Case #16649 as the functional equivalent of its own appeal, Appellant also relies on a statement made by an attorney for the District, in a motion filed in the U.S. District Court on or about December 20, 2000, that Appellant *had* filed an appeal with the Board. Appellant cites this incorrect statement as evidence of the parties' "mutual understanding" that American Towers' "responsibilities with respect to the BZA had been satisfied as a result of their injection into the then pending ANC Appeal." The District's statement, however, appears to reflect not an "understanding" but a misunderstanding as to whether American Towers had appealed to the Board. And even if the parties had agreed to treat BZA Case #16649 as including an appeal by American Towers, such an agreement, by itself,

could not satisfy the Board's jurisdictional requirement that American Towers file a timely appeal. Nothing in the record of this case shows that the Board was ever informed prior to January 10, 2003 – by *any* party – that BZA Appeal No. 16649 should have been deemed to include (1) an appeal by American Towers or (2) an appeal from DCRA's decision to revoke the permits.

Finally, even if there had been some equitable reason, based on the existence of BZA Appeal No. 16649, for tolling the period during which American Towers could file an appeal from DCRA's revocation decision, the tolling would have ended when Appellant received notice of the November 1, 2002 withdrawal of BZA Appeal No. 16649. The letter of withdrawal shows that it was sent to Mr. Cooper by first-class mail, and American Towers does not contend that it failed to receive the letter prior to November 10, 2002. In waiting until January 10, 2003 to file its appeal, American Towers waited for more than two months after it received notice that the ANC had withdrawn its appeal. Therefore, even if the period for appealing had been tolled until American Towers received notice of the withdrawal of the ANC's appeal, American Towers' appeal would still have been untimely. Because this appeal will be dismissed as untimely, American Towers' request for a stay is now moot.

For the reasons stated above, it is hereby **ORDERED** that (1) DCRA's motion to dismiss is **GRANTED** and that this appeal is therefore **DISMISSED**, (2) American Towers' request for a stay is **DENIED**, and (3) American Towers' motion for rehearing is **DENIED** without prejudice to its right to move for reconsideration or rehearing pursuant to 11 DCMR § 3126.2.

VOTE: 3-0-2 (Carol J. Mitten, David A. Zaidain, Geoffrey H. Griffis to deny, Curtis L. Etherly, JR. and the Third Mayoral Appointee not present, not voting)

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

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

FINAL DATE OF ORDER: JUN 25 2003

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 FINAL. LM/rsn

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN TOWERS, INC., Plaintiff, v. ANTHONY WILLIAMS, MAYOR OF THE DISTRICT OF COLUMBIA, et al., Defendants.	Civil Action No. 00-2436 (PLF)

OPINION

On March 13, 2000, the Building and Land Regulation Administration ("BLRA"), a division of the Department of Consumer and Regulatory Affairs ("DCRA") of the District of Columbia government, issued a building permit to American Towers, Inc. ("American Tower") authorizing it to commence construction of a 756-foot telecommunications tower on property American Tower owned on 41st Street near Wisconsin Avenue in the Tenley neighborhood in Northwest Washington, D.C. American Tower promptly began construction. On September 8, 2000, the BLRA issued a Notice of Stop Work Order, but then rescinded it a week later. On September 19, 2000, the District of Columbia Council passed legislation entitled the "Moratorium on the Construction of Certain Telecommunications Towers Emergency Amendment Act of 2000" (the "Moratorium Act"), temporarily prohibiting the issuance of building permits for construction or expansion of telecommunications structures above 200 feet.

(2)

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On October 5, 2000, the DCRA issued a notice to American Tower indicating the DCRA's intention to rescind and cancel plaintiff's building permit based on five specific errors it said it had belatedly identified in the original permit review process that resulted in an ostensibly erroneous issuance of the permit. See Amended Complaint, Ex. 9 ("Notice of Intent to Rescind"). In the notice the DCRA invited American Tower to provide "written statements, evidence, or documentation . . . demonstrating that the errors . . . did not take place." Id. at 4. On October 10, 2000, counsel for American Tower responded by letter, addressing each of the five asserted errors. See Amended Complaint, Ex. 10. Later that same day, however, the DCRA responded to American Tower's arguments in a final notice rescinding and canceling the permits. See Amended Complaint, Ex. 11 ("Final Notice of Rescission"). The Final Notice effectively halted construction of the 756-foot broadcast tower.

On October 11, 2000, plaintiff filed suit in this Court seeking declaratory and injunctive relief that would allow it to proceed with the construction of the tower, as well as compensatory damages of $150 million and punitive damages of $100 million. In its amended complaint, filed November 20, 2000, plaintiff asserts denial of equal protection (Count One); taking of property and denial of due process (Count Two); deprivation of federal rights under color of law (Count Three); violation of the Telecommunications Act of 1996, 47 U.S.C. § 332 (Count Four); equitable estoppel (Count Five); confiscatory taking (Count Six); willful violation of District of Columbia law (Count Seven); and wrongful interference with prospective advantage and unfair competition (Count Eight).

On November 1, 2000, the Court held a hearing on and denied plaintiff's motion for immediate injunctive relief, finding that while plaintiff was likely to succeed on the merits of certain of its claims, there was no irreparable harm warranting a preliminary injunction. See Order of Nov. 1, 2000. The Court subsequently set a briefing schedule on defendants' motion to dismiss, staying discovery until the motion is resolved, see Order of Nov. 17, 2000, and heard oral argument on the motion. In its motion, defendants contend that all of plaintiff's federal claims — denial of equal protection, denial of due process and violation of the Telecommunications Act of 1996 — should be dismissed because they fail as a matter of law.[1] Defendants suggest that because these are the only claims that could give this Court original jurisdiction, the Court should dismiss the case in its entirety and allow it to be refiled in the "proper" forum — presumably in the Superior Court of the District of Columbia or before the appropriate administrative agency or board. Defendants' motion will be granted.

I. EQUAL PROTECTION

In Count One of its amended complaint, American Tower asserts that the District of Columbia's October 10, 2000 decision to rescind its building permit was arbitrary and capricious and that it violated plaintiff's vested property interests by singling it out for

[1] Defendants also argue that even if plaintiff's federal claims do not fail, the Court should either abstain from hearing them because they are too intertwined with the state law claims that are at the heart of this suit or dismiss the case because plaintiff failed to exhaust its administrative remedies prior to filing suit. Because the Court will dismiss this case for failure to state a federal claim, the Court will not reach defendants' alternative arguments.

adverse treatment in violation of the Equal Protection Clause.[2] American Tower asserts that it is similarly situated to several other companies that did not have their building permits revoked — specifically, three other broadcast towers in the Tenley area that all exceed 600 feet in height — and that the District's actions have had an adverse impact on it.

To pass constitutional muster under the equal protection component of the Fifth Amendment's Due Process Clause, an official government action need only bear a rational relationship to a legitimate governmental purpose so long as no suspect or quasi-suspect class is involved. See City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439-40 (1985). Because American Tower is not a member of a suspect or quasi-suspect class, the Court must consider only whether there was a rational basis for the decision reached by the District to rescind the permit. See Heller v. Doe, 509 U.S. 312, 319-20 (1993); Steffan v. Perry, 41 F.3d 677, 684-85 (D.C. Cir. 1994). In defending against an equal protection claim, the government must offer a rational basis for its conduct, but it has no obligation to present any evidence to sustain the rationality of its decision. See Steffan v. Perry, 41 F.3d at 684. Indeed, the burden is on the one attacking the government's action "to negative every conceivable [rational] basis which might support it, whether or not the basis has a foundation in the record." Id.

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[2] The Equal Protection Clause does not apply to the District of Columbia, but the Due Process Clause of the Fifth Amendment imposes the same equal protection requirements on the federal government and the District of Columbia as the Fourteenth Amendment's Equal Protection Clause imposes on the states. See Bolling v. Sharpe, 347 U.S. 497 (1954).

The District of Columbia suggests that there are several rational bases for its decision to rescind American Tower's building permit, chief among them that it must enforce the District of Columbia Height Act, D.C. Code § 5-405(h). Originally enacted by Congress in 1910, the Act requires builders of broadcast towers over 600 feet in height to obtain a waiver of the provisions of the Act before beginning construction, D.C. Code § 5-405(h), and provides that any tower built in violation of Section 5-405(h) constitutes a common nuisance. D.C. Code § 5-408. The District contends that since the owners of all the other towers cited by plaintiff obtained waivers of the Height Act while American Tower did not even attempt to do so, the District did not act arbitrarily, capriciously or unconstitutionally when it revoked American Tower's building permit.

American Tower does not argue with defendants' assertion that a violation of the Height Act would constitute a rational basis to rescind its permit. Rather, plaintiff contends that it received an implied waiver of the Height Act when the District issued it a permit to build a tower over the maximum height restriction — even though plaintiff did not formally request a waiver and even though the building permit it received did not expressly grant a waiver. The Court has some sympathy for this argument, since the District government was fully aware of the height of the tower throughout the process. The application for the building permit submitted to the District described the proposed tower as being 756 feet high, see Amended Complaint, Ex. 3; the 756-foot height was highlighted in a memorandum from the D.C. Office of Planning to the Chief of the Zoning Review Branch of the DCRA, see Amended Complaint, Ex. 4; and the building permit issued by the DCRA described the tower, including its purpose and its proposed — in plaintiff's view, its authorized — height. See

Amended Complaint, Ex. 5. Whether on these facts plaintiff may be entitled to substantial money damages on a theory of equitable estoppel or confiscatory taking, however, is irrelevant to plaintiff's equal protection claim.

In determining whether plaintiff has been denied equal protection of the law, this Court must decide only whether defendants have offered a rational basis for its action and whether plaintiff has negatived every conceivable basis that might support the District's action. See Steffan v. Perry, 41 F.3d at 684. The District has presented a rational basis for its rescission of plaintiff's building permit — violation of the Height Act — and plaintiff has failed to negative that rational basis. It is not disputed that plaintiff's tower, if built, would violate the Height Act. What is disputed is whether the District implicitly waived the Height Act when it issued the permit. Such a question is not one of constitutional import; it is a question of state law and its resolution is best left to the local courts. The Court concludes that plaintiff has failed to state an equal protection claim.

II. DUE PROCESS

In Count Two of its amended complaint, American Tower asserts that the Moratorium Act passed by the District of Columbia Council and certain proposed zoning regulations constitute a taking of property without just compensation and thus violate plaintiff's right to substantive due process of law. American Tower suggests that the Moratorium Act violates plaintiff's due process rights because it unfairly authorizes the Mayor to halt construction of the tower and to create a regulatory scheme that could be used later to block the resumption of construction on the tower. See Defs.' Motion, Ex. A (Moratorium on the

Construction of Certain Telecommunications Towers Emergency Amendment Act of 2000, D.C. Act 13-442) ("Moratorium Act").[3] It also argues that the proposed zoning regulations, if passed, would retroactively destroy American Tower's zoning interests. See Amended Complaint, Ex. 12 (letter from D.C. Office of Planning to D.C. Zoning Commission regarding recommendation that Zoning Commission consider amending zoning regulations regarding standards for antenna towers) ("DCOP Proposal").

Plaintiff's due process claim fails as a matter of law because the Moratorium Act and the proposed zoning regulations do not affect any vested property interest American Tower may have in the building permit. No property interest of American Tower is adversely affected by the Moratorium Act because the Act by its express terms has only prospective application. It is not applicable to American Tower because it is a moratorium on the *future* issuance of building permits for telecommunications towers of over 200 feet until the Mayor formulates a policy on the matter. See Moratorium Act § 2. Furthermore, contrary to plaintiff's assertion, the legislation issues no legally binding "directives" to the Mayor regarding the tower at issue in this case. The Council expressed concerns about the tower and made requests of the Mayor in a section entitled "Sense of the Council," but it is clear from the plain language of the Act that those expressions of concern and suggestions have no legal effect. See Moratorium Act § 3. With respect to the proposed zoning regulations, any claim plaintiff might have with respect to those regulations is not yet ripe, as the regulations have not

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[3] Exhibit 8 to plaintiff's amended complaint is an early version of the Moratorium Act. The version attached as exhibit A to defendants' motion to dismiss is the final, enacted version of the Act, which differs in certain respects from the version attached to plaintiff's amended complaint.

yet been and may never be approved by the Zoning Commission. See DCOP Proposal. For these reasons, the Court finds that plaintiff's substantive due process claim must fail.

Although Count Two of plaintiff's amended complaint seems to state only a substantive due process claim, plaintiff argues in its opposition to defendants' motion to dismiss that it is also alleging a violation of its procedural due process rights — specifically, that it was not given sufficient notice or opportunity to be heard before the District of Columbia rescinded its building permit. Since American Tower does not contest the fact that it has been provided with post-deprivation procedures — indeed, it currently is taking advantage of the District's administrative processes by appealing the rescission to the Board of Zoning Appeals and to the Board of Appeals and Review, see Defs.' Suppl. Memo. at 8 — the question for the Court to decide on this motion is whether the notice sent by the District and the opportunity for hearing provided before rescission were sufficient to comport with due process.

On October 5, 2000, the Department of Consumer and Regulatory Affairs issued a notice of intent to rescind and cancel plaintiff's building permit based on five errors it said it had belatedly identified in the original permit review process that resulted in an ostensibly erroneous issuance of the permit. See Amended Complaint, Ex. 9. With that Notice, American Tower was informed of the specific grounds on which its permit might be rescinded and was offered an opportunity to respond by a date certain. See id. While American Tower submitted a response to the Notice, see Amended Complaint, Ex. 10, District officials found its response to be insufficient to refute the grounds asserted. See Amended

Complaint, Ex. 11.[4] The DCRA therefore rescinded the building permit on October 10, 2000 without a hearing, effectively halting construction of plaintiff's broadcast tower indefinitely. See id.

Although the procedure provided was not as extensive as plaintiff would have liked, and while plaintiff disagrees with the facts and the law upon which the District relied before issuing its Final Notice rescinding the permit, the Court concludes that the District gave American Tower sufficient notice and opportunity to be heard at a meaningful time and in a meaningful manner, which is all that due process requires. See Matthews v. Eldridge, 424 U.S. 319, 333 (1976); UDC Chairs v. Board of Trustees of the University of the District of Columbia, 56 F.3d 1469, 1472 (D.C. Cir. 1995). The notice sent to American Tower by the DCRA on October 5, 2000 set forth five reasons why the District believed the permit was improperly issued in the first place and explained why it would rescind it if American Tower did not provide "written statements, evidence, or documentation" by noon on October 10 sufficient to persuade DCRA that its reasons for rescission were invalid. See Amended Complaint, Ex. 9. American Tower thus was offered an opportunity to be heard, albeit in writing rather than in person, sufficiently in advance of any final action by DCRA. In the Court's view, this notice was sufficient to adequately inform American Tower of the proposed decision and the reasons for it; both the notice and the opportunity to respond were given "at a

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[4] In the Final Notice of Rescission the DCRA addresses each of plaintiff's responses to the asserted grounds for rescission. See Amended Complaint, Ex. 11. As defendants point out in their motion to dismiss, plaintiff's response to the Notice of Intent to Rescind provided "virtually no factual information challenging the factual predicate of the Notice and very little argument on the Notice's legal analysis." Defs.' Motion at 12. Plaintiff "merely threatened legal action and presented legal arguments and conclusions." Id. at 11.

meaningful time and in a meaningful manner." Propert v. District of Columbia, 948 F.2d 1327, 1332 (D.C. Cir. 1991) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)); see UDC Chairs v. Board of Trustees of the University of the District of Columbia, 56 F.3d at 1472-74. Because plaintiff was offered and took advantage of this pre-deprivation procedure and was also advised of its right to post-deprivation hearings before the Board of Zoning Appeals and the Board of Appeals and Review, see Amended Complaint, Exs. 9 & 11, the Court cannot find that defendants violated plaintiff's right to procedural due process.

The D.C. Circuit's decision in Tri County Industries, Inc. v. District of Columbia, 104 F.3d 455 (D.C. Cir. 1997), does not alter this conclusion. In Tri County, the court of appeals found that plaintiff's right to procedural due process had been violated when the District of Columbia suspended plaintiff's building permit — a scenario bearing a sufficient resemblance to the one here to warrant serious consideration. See Tri County Industries, Inc. v. District of Columbia, 104 F.3d at 460-62. As defendants point out in their post-hearing brief, however, the facts in Tri County are distinguishable from those in this case. In Tri County, the DCRA suspended Tri County's permit *sua sponte* at a public hearing based on inaccurate information and did not give Tri County any opportunity to dispute the facts upon which the suspension was predicated. Id. at 460-61. Applying the Matthews test, the D.C. Circuit found that the District's actions deprived plaintiff of its right to procedural due process. Id. at 461-62. In this case, by contrast, plaintiff was provided adequate pre-deprivation due process before the permit was rescinded. See supra at 8-10. The court of appeals' decision in Tri County, while instructive, therefore is not directly relevant to this case.

Finally, plaintiff suggests that its due process rights were violated when the District incorrectly interpreted and applied the Height Act and when it improperly circumvented District of Columbia regulations regarding the revocation of the permit. Such challenges to the District's interpretation of and compliance with its own statutes and regulations may or may not have merit, but the resolution of those claims does not implicate American Tower's due process rights. See supra at 5-6. Count Two of plaintiff's amended complaint therefore will be dismissed.[5]

III. TELECOMMUNICATIONS ACT

In Count Four of its amended complaint, plaintiff asserts that the District of Columbia's decision to rescind American Tower's building permit and the D.C. Council's moratorium legislation violate several provisions of the Telecommunications Act of 1996, 47 U.S.C. § 332. Specifically, plaintiff argues that the District's actions unreasonably discriminate against providers of functionally equivalent services (an alleged violation of 47 U.S.C. § 332(c)(7)(B)(i)); that they are not supported by substantial evidence (an alleged violation of Section 332(c)(7)(B)(iii)); and that they violate the Act's prohibition of any regulation on the placement of wireless facilities based upon environmental effects (an alleged violation of Section 332(c)(7)(B)(iv)).

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[5] Count Three of plaintiff's amended complaint asserts that defendants deprived American Tower of equal protection (Count One) and due process (Count Two) under color of law. Since the two constitutional claims underlying Count Three are dismissed, Count Three will be dismissed as well.

While the Telecommunications Act of 1996 generally preserves the zoning authority of state and local governments with respect to decisions regarding the placement, construction and modification of "personal wireless service facilities," see 47 U.S.C. § 332(c)(7)(A), the Act places five specific limitations on how the state or local government may exercise that authority.[6] Defendants argue that these statutory limitations do not apply in this case, however, because the facility at issue is not primarily a "personal wireless service facility" and because its actions only affected plaintiff's primary purpose for building the tower — the provision of high definition television ("HDTV") broadcast services. The District

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[6] The three limitations at issue in this case are the following:

> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof (I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services. . . .
>
> (iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.
>
> (iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

47 U.S.C. § 332(c)(7)(B).

asserts that since its actions did not affect the construction of a personal wireless service facility or the provision of personal wireless services within the meaning of Section 332, see 47 U.S.C. § 332(c)(7)(C) (defining "personal wireless services" and "personal wireless service facilities"), its ability to regulate the facility at issue is not limited by Section 332(c)(7)(B) of the Telecommunications Act.

Both parties acknowledge that, if built, plaintiff's tower would provide both HDTV services *and* personal wireless services. The parties also agree that while an antenna or antennas will be added to the tower to provide personal wireless services, the primary purpose of the tower — and, more importantly, the reason for its height — is to provide HDTV services. What the parties dispute is whether the existence of even a single personal wireless services antenna on a structure such as plaintiff's, regardless of the structure's other purpose or purposes, automatically subjects that structure to the statutory zoning limitations of the Telecommunications Act and therefore brings it outside the regulatory authority of the District. The answer to that question in light of the facts presented here is clearly no.

Congress simply could not have intended that any structure that has personal wireless communications as a secondary purpose is beyond the zoning authority of the state or local government. The reason for the excessive height of the tower in this case is the fact that it must be tall enough to provide HDTV services, not personal wireless communications services. The District's concerns with the construction of plaintiff's tower stem from its proposed height and thus from the fact that it is primarily an HDTV tower, not a personal wireless service facility. The District's actions with respect to plaintiff's tower do not prevent it from constructing a "personal wireless service facility" on American Tower's site or from

providing "personal wireless services." Unfortunately for plaintiff's claim of federal jurisdiction, the zoning limitations set forth in Section 332(c)(7)(B) of Telecommunications Act do not apply in this case; plaintiff simply is not entitled to the protections from local regulation that the Act may provide in other contexts.

Even if the limitations of the Telecommunications Act did apply, it does not appear that the District violated any of those provisions. As discussed previously with respect to plaintiff's equal protection claim, defendants' actions neither "unreasonably discriminated among the providers of functionally equivalent services" nor had "the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i). It also is clear that since the factual and legal reasoning behind the District's decision to rescind the permit was explained to plaintiff in writing, see Amended Complaint, Exs. 9 & 11, and since that explanation indicates that the District's actions were supported by substantial evidence in the record before it, the requirements of Section 332(c)(7)(B)(iii) were satisfied. Finally, while Section 332(c)(7)(B)(iv) of the Act prohibits any regulation on the placement of wireless facilities based upon environmental effects, the restriction by its explicit terms applies only to regulations on facilities based on concerns over radio frequency emissions. Because the District's expressed concern was over falling ice and the resulting safety risk, the District's action would appear to fall outside of Section 332(c)(7)(B)(iv)'s prohibition. The Court therefore will dismiss Count Four of plaintiff's amended complaint.

Since all of plaintiff's federal claims fail as a matter of law, they will be dismissed with prejudice. Plaintiff's non-federal claims are quintessentially local in nature; they therefore will be dismissed without prejudice to their being refiled in a more appropriate forum. See 28 U.S.C. § 1367(c)(3). An Order of Dismissal consistent with this Opinion will issue this same day.

SO ORDERED.

PAUL L. FRIEDMAN
United States District Judge

DATE: 6/14/01

BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

Rec'd.
4.6.04

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

Appellant's Supplemental Memo on Historical Treatment By Corporation Counsel and Zoning Authorities of Roof Structure and Basement FAR Issues

I. ***Treatment of Penthouse-enclosed "Mechanical Equipment", and Antennas, as Roof Structures that May Exceed Height Act Limits.***

The Height Act provides that "spires, towers, domes, minarets, pinnacles, penthouses over elevator shafts, ventilation shafts, chimneys, smokestacks and fire sprinkler tanks" may be approved to exceed the Height Act limit, provided that, among other things, these structures "cannot be used for human occupancy." DC Code §6-601.05(h). At the hearing on March 9, 2004, Counsel for Montrose suggested that, because the Height Act has been interpreted by the Zoning Commission to allow penthouses for air conditioning or heating equipment, or antennas—structures that are not including in the Act's enumeration of roof structures—to exceed the Act's height limitation, that the roof deck and railing at issue in the present case should be permitted. *See, e.g.*, 11 DCMR § 400.8. However, the Zoning Commission's additions to the list of statutorily-enumerated roof structures narrowly hews to the rationale of a 1953 opinion of the Corporation Counsel, which opinion provides a closely reasoned analysis that cannot be expanded to encompass roof decks or other structures intended for human occupancy.

BZA
Case No. 17109
Exhibit No. 63

In 1953, the then Corporation Counsel, Vernon E. West, was asked whether the term "penthouses" might include penthouses for housing heating or air conditioning equipment, and "perhaps other kinds of equipment which ordinarily might be located within a building", and whether the prohibition on "human occupancy" precluded the presence of an operating engineer in such penthouses. *See* Memorandum to the Commissioners from Vernon E. West, Corporation Counsel (July 27, 1953), attached as Exhibit 1. In a narrowly reasoned opinion that relies closely on the language employed by the Height Act, the D.C. Corporation Counsel concluded:

> the phrase in [§6-601.05(h)], "penthouses over elevator shafts" may be construed to include penthouses *over stairways leading to the roof* and penthouses over *other utilities necessary in connection with the operation of a building, but not to include penthouses to be used for residential, office or business purposes.* Further, I have concluded that the term "human occupancy" as it is used in [§6-601.05(h)], should be construed to *preclude the construction or use of penthouses for residential, office or business purposes,* but not to preclude the presence in such penthouses of building maintenance personnel charged with the operation and maintenance of the building's utilities.

Id. at 4 (emphasis added). The current Zoning Regulations reflect this position, in providing that "Housing for mechanical equipment or a stairway or elevator penthouses may be erected to a height in excess of that authorized in the district in which located" (§400.8, for the R districts[1]). Subsequently this interpretation regarding functional equipment on the roof was extended to include roof-mounted antennas, which necessarily are freestanding structures and cannot be fully enclosed in a penthouse (note that

[1] Identical provisions are included for the SP, CR, C, C-M, M and W Districts. *See* 11 DCMR §§ 530.5, 630.5,770.7,840.4 and 930.4.

antennas mounted on roof-top towers were arguably already covered by the term "towers" in §6-601.05(h) of the Height Act).[2]

It is clear that this interpretation of the Height Act to include by analogy other types of mechanical equipment connected with the functioning of the building than those originally enumerated in the Act, with an explicit prohibition on use of such facilities for residential purposes, cannot remotely be construed as including a roof deck and railing, the sole purpose of which is for residential use and occupancy and which by no stretch of the imagination can be regarded as essential to or otherwise connected with the operation of the building. Such an interpretation of the Height Act simply cannot be squared with the plain language of the Act.

Accordingly, the Corporation Counsel's 1953 opinion provides a narrow rationale justifying the Zoning Commission's addition of penthouses and antennae to the list of roof structures permitted to exceed the Height Act's height limits. However, it is important to note that, unlike the Zoning Commission, the *Zoning Administrator* does not have the discretion to include additional roof structures to the list of structures set out in 11 DCMR § 400.8, which are permitted to exceed the Act's height limitation, even if the addition of such structures would be consistent with the rationale of the 1953 Corporation Counsel opinion. The Zoning Regulations do not contain the words "or similar structures" after the enumeration of roof structures that are permitted to exceed the Height Act's height limitation. The Zoning Administrator's discretion – as well as that of this Board -- is limited to the interpretation of the Zoning Regulations, and only the

[2] *See* 11 DCMR §400.3, for the R districts: "A spire, tower, dome, pinnacle, minaret serving as an architectural embellishment, or antenna may be erected to a height in excess of that which t his section otherwise authorizes in the district in which it is located."

Zoning Commission has the discretion to promulgate what it might view as a reasonable interpretation of the provisions of the Height Act.

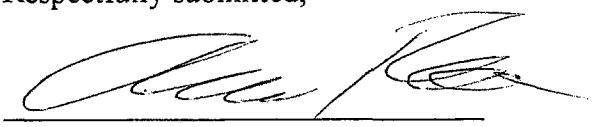
II. ***Historical Treatment Zoning Authorities of Basement FAR Issues.***

There is no dispute in this case that a portion of the basement level of the project is more than four feet above grade, and therefore not properly excludable as "cellar" from Floor Area Ratio ("FAR") calculations. *See* 11 DCMR § 199.1 ("the term 'gross floor area' shall not include cellars;" the term "cellar" means "the portion of a story, the ceiling of which is less than four feet (4 ft.) above the adjacent finished grade."). Instead, Appellants challenge the "perimeter" method used by the Office of Zoning to calculate the portion of the basement level that is includable within the FAR where some but not all of this space is more than four feet above grade. The "perimeter" method calculates the percentage of gross floor area of basement to include in FAR by constructing a ratio between the length of the perimeter of the basement and the length of some designated portion of that perimeter (in this case, the front bay wall). As Appellant has demonstrated, this method does not provide a rational basis for calculating gross floor area since the gross floor area includable in FAR remains constant regardless of the steepness of the actual grade, and moreover, bears no rational relationship to the length (and resulting floor area) of the basement.

In response, the Zoning Administrator's representative testified at the hearing on March 9 that the "perimeter method" was the accepted methodology for calculating basement FAR in the case of row dwellings. However, as is demonstrated by the attached declaration by Mr. Jim Fahey, who served as Zoning Administrator from 1970 to 1986 (and served in the District of Columbia government in capacities relating to

zoning from 1949 to 1970), the historical treatment of this issue by the Office of Zoning recognized the special problem in distinguishing between a "basement" and a "cellar" for purposes of determining "gross floor area," in the case of a row house or other building where the grade on either side could not be observed because the building was directly abutted by other buildings on either side. *See* Exhibit 2, attached hereto. To address this problem, the method devised and subsequently applied by the Office of Zoning involved drawing a grade plane line, from the grade at the front of the building to the grade at the rear of the building. *Id.* This grade plane was then used to determine how much of the floor area should properly be treated as "basement" and included in "gross floor area", because the ceiling was four or more feet above the average grade plane, and how much should be treated as "cellar." The so-called "perimeter" method applied here by the Office of Zoning was not the methodology that was historically applied to deal with this situation. *Id.*

Respectfully submitted,



Andrea C. Ferster
1100 17th Street, N.W. 10th Fl.
Washington, D.C. 20036
(202) 974-5142

Counsel for Kalorama Citizens Association

April 6, 2004

Exhibit 1

C
O
P
Y

GF.5-112

Jul.27, 1953

TO: THE COMMISSIONERS

IN RE: Whether penthouses may be constructed above the height limits established by the Act of Congress approved June 1, 1910, regulating the height of buildings, for purposes other than to cover elevator shafts; and whether the presence of an operating engineer in such penthouses constitutes "human occupancy" within the meaning of such Act.

There have been referred to this office for an opinion certain questions which have been raised by the Chief Engineer of the Department of Inspection, relating to the permissible use of penthouses constructed above the height limits established by section 5 of the Act of Congress approved June 1, 1910 (36 Stat. 452, as amended; sec. 5-405, D. C. Code, 1951 ed.). These questions may be expressed briefly as follows:

1. May the Act of June 1, 1910, permitting the construction of "penthouses over elevator shafts" to a greater height than any limit set by the Act, be construed to permit the construction of penthouses for the purpose of housing air-conditioning equipment, heating equipment, and perhaps other kinds of equipment which ordinarily might be located within a building?

2. Does the phrase "human occupancy" as used in the Act of June 1, 1910, in connection with the construction or use of penthouses, preclude the presence of an operating engineer in penthouses containing air-conditioning or heating equipment, including boilers?

The answers to the foregoing questions depend upon an interpretation of the last paragraph of Section 5 of the Act of June 1, 1910, the pertinent part of which reads as follows:

"Spires, towers, domes, minarets, pinnacles, pent houses over elevator shafts, ventilation shafts, chimneys, smokestacks, and fire sprinkler tanks may be erected to a

> greater height than any limit prescribed in the Act when and as the same may be approved by the Commissioners of the District of Columbia: Provided, however, That such structures when above such limit of height shall be fireproof, and no floor or compartment thereof shall be constructed or used for human occupancy above the top story of the building upon which such structures are placed: And provided, That pent houses, ventilation shafts, and tanks shall be set back from the exterior walls distances equal to their respective heights above the adjacent roof: * * * *."

In connection with the first of the above questions, however, it is also necessary, in construing the statute, to consider any long-standing administrative interpretations of the statute with respect to the construction of penthouses for other uses than "over elevator shafts", 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 need for 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 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.

It would appear, therefore, that the phrase "penthouses over elevator shafts", rather than being plain and unambiguous, has required interpretation by the officials of the District of Columbia charged with the administration of the statute containing the phrase. The Director of Inspection over the years has interpreted the statute as permitting the construction over the height limit of penthouses to provide shelter for air-conditioning equipment such as water towers, evaporative condensers, and air-conditioning fans. The question now arises, however, in the light of changed construction practices, whether the Director's interpretation of the statute may extend to permitting the construction of penthouses to shelter heating equipment including boilers. Much of the air-conditioning and heating equipment in use today requires the services of operating engineers, and the presence of operating engineers in penthouses constructed above the permissible height limit also involves an interpretation of the meaning of the phrase "human occupancy", as used in the Act of June 1, 1910.

In connection with the consideration of both of the questions discussed in this opinion, it is of interest to consider the intent of the

Congress in enacting the Act of June 1, 1910. Strangely enough, although it is commonly believed that the purpose of the Act was to preserve the skyline of the city and to prevent the overshadowing of the Capitol by excessively tall buildings, it would not appear that the Congress, at the time it was considering the bill that later became the Act of June 1, 1910, had such a purpose in mind. Rather, according to a statement by one of the sponsors of the bill during debate in the House of Representatives, the principal concern of the Congress involved the lack of fireproofing on the "upper or mansard stories" of buildings then constructed, and the sponsor stated "this act is for the purpose of requiring that buildings of a certain height shall be of fireproof material throughout." Congressional Record, Vol. 45, p. 4535.

Another consideration of the Congress during its debate on what later became the Act of June 1, 1910, would appear to relate to matters of light and ventilation, as the following exchange during the debate would indicate:

> "MR. CAMPBELL (a sponsor of the bill) The buildings on Pennsylvania avenue would be limited to the height provided for in this bill (160 feet).
>
> "MR. SIMS. Now, why should they be permitted to be, say 30 feet higher on Pennsylvania avenue than any other business street or otherwise in the city?
>
> "MR. CAMPBELL. It is the widest street in the city.
>
> "MR. SIMS. Is not New York avenue fully as wide?
>
> "MR. CAMPBELL. No; Pennsylvania Avenue is the wider.
>
> "MR. SIMS. Is it the object and purpose of regulating the height of buildings in the District of Columbia that the height of buildings should be regulated on each street in reference to the width of that particular street?
>
> "MR. CAMPBELL. We are far below the limit of height that could be provided for on Pennsylvania Avenue when we provide for 160 feet." (Cong. Record, Vol. 45, p. 6799; parenthetical notations added)

Accordingly, it would seem that the last paragraph of section 5 of the Act of June 1, 1910, should be construed in the light of the intent of the Congress in enacting the Act; i.e., in terms of fireproofing and of light and ventilation.

On this basis, therefore, it would appear that the 61st Congress, insofar as penthouses were involved, was not concerned so much with the

use to which such penthouses would be put as with the fireproofing of such penthouses, and it would seem there was no objection on the part of Congress to the construction of fireproof penthouses above the height limit, just so such penthouses were (1) set back from the exterior walls, apparently for reasons of light and ventilation, and (2) were not constructed or used for human occupancy.

The term "human occupancy" moreover, perhaps should be construed in the light of the intent of the Congress in enacting the Act. The Congress, in specifically recognizing the necessity for elevator machinery above the height limit, obviously did not intend that no elevator machinery repairman could enter the penthouse over such machinery for the purpose of repairing it. Yet in one sense this is "human occupancy" of such a penthouse.

The term "occupancy" means, to quote Webster's New International Dictionary, 2nd Edition, the "act of taking or holding possession". An "occupant", to quote the same authority, is "one who occupies or takes possession; one who has the actual use or possession of a thing"; "occupy" means "to take or enter upon possession of; to hold possession of, to hold or keep for use; to use"; while "occupation" means "actual possession or control". I am of the view, therefore, that the prohibition of "human occupancy", in the last paragraph of section 5 of the Act of June 1, 1910 was intended by the Congress to prevent the use of enclosed space above the height limit for residential, office or business purposes, either by the owner of a building or by any tenant holding under him, but was not intended to preclude the use of such space in connection with the maintenance of such building and the operation of its utilities. I am of the view, therefore, that the last paragraph of section 5 of the Act of June 1, 1910, does not prohibit the presence of building maintenance personnel in fireproof structures constructed above the permissible height limit.

In summation, I caused a study to be made of the Act approved June 1, 1910, and the legislative history of such Act, with particular reference to the last paragraph of section 5 of such Act, as a result of which I have concluded that the phrase in such paragraph, "penthouses over elevator shafts", may be construed to include penthouses over stairways leading to the roof and penthouses over other utilities necessary in connection with the operation of a building, but not to include penthouses to be used for residential, office or business purposes. Further, I have concluded that the term "human occupancy" as it is used in such paragraph should be construed to preclude the construction or use of penthouses for residential, office or business purposes, but not to preclude the presence in such penthouses of building maintenance personnel charged with the operation and maintenance of the building's utilities.

The memorandum of the Chief Engineer of the Department of Inspection also refers to paragraph numbered 1 of Section XIII of the Zoning Regulations of the District of Columbia, as amended, which reads as follows:

"1. The provisions of the Act of June 1, 1910, as to spires, towers, domes pinnacles (sic), penthouses over elevator shafts, ventilation shafts, chimneys, smoke stacks, and fire-sprinkler tanks shall continue in full force and effect, except that on buildings hereafter erected the Commissioners of the District of Columbia shall not approve the construction of fire-sprinkler tanks, water towers, or housing for air conditioning to a height in excess of 130 feet measured from the level of the curb opposite the middle of the front of the building. Fire sprinkler tanks, water towers, or housing for air conditioning equipment may be erected or enlarged on buildings existing prior to December 1, 1944 as provided under Section XXIII of these regulations. (As amended Dec. 1, 1944 and Feb. 25, 1948.)"

This regulation of the Zoning Commission, as has been pointed out in the memorandum of the Chief Engineer of the Department of Inspection, would appear to have a double effect. First, it imposes a limitation on the Act of June 1, 1910, since it prohibits the construction of fire-sprinkler tanks and water towers above 130 feet, although the June 1, 1910, Act specifically permits fire-sprinkler tanks above the 130-foot height limit and may be construed to permit water towers above that limit. But more important, the regulation would appear to delimit the Act of June 1, 1910 by impliedly authorizing the construction of housing for air conditioning equipment above any height limit established by the June 1, 1910, Act, with the exception of the 130-foot height limit. It would appear, therefore, that the Zoning Commission, like the Director of Inspections, has construed the phrase "penthouses over elevator shafts" to permit the construction of housing for air-conditioning equipment above all height limits except the 130-foot height limit.

The Zoning Regulations of the District of Columbia, as amended, have been promulgated by the Zoning Commission of the District of Columbia under the authority contained in the Act approved June 20, 1938 (52 Stat. 797, as amended; Title 5, sections 413 through 428, D. C. Code, 1951 ed. Among other things, such Act empowers the Zoning Commission to regulate the height of buildings, except the permissible height of any building shall not exceed the maximum height of buildings authorized by the Act of June 1, 1910, supra. Further, section 12 of the Act of June 20, 1938 (Section 5-424, D. C. Code, 1951 ed.) provides:

"Sec. 12. Wherever the regulations made under the authority of this Act require a greater width or size of yards, courts, or other open spaces, or require a lower height of buildings or smaller number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required in or under any other statute or municipal regulation the regulations made under authority of this Act shall govern. * *
(Underscoring supplied)

Accordingly, I am of the opinion that although the Act of June 1, 1910, may be construed to permit the construction, above the maximum height limits established by such Act, of penthouses sheltering building utilities, providing such penthouses meet the other requirements of such Act, nevertheless paragraph 1 of Section XIII of the Zoning Regulations of the District of Columbia has the effect of prohibiting the construction of such penthouses above the 130 foot height limit, although impliedly permitting the construction of penthouses for air conditioning equipment above the lower height limits established by the June 1, 1910, Act.

The Chief Engineer of the Department of Inspection concludes his memorandum of June 16, 1953, with the following paragraphs:

> "It is apparent that a situation difficult both for this office and for the architects, owners, and mechanical engineers will continue to exist until both the Act of 1910 and the Zoning Regulations are clarified and a consistent and equitable policy established for both.
>
> "It seems to me that the intent and limitation of the Act of 1910 should be established by Commissioners directive, and that thereafter the Zoning Regulations be clarified in order to be consistent with such directive.
>
> "It is recommended that such directive clearly establish what equipment may be in a 'penthouse' above the height limit as established by the Act of 1910, that there be a limiting size to such pent-house based on a percentage of roof area, and that the Zoning Commission establish regulations consistent therewith, also for such pent-houses as exceed the zoning height limits but are not above the limits established by the Act of June 1, 1910."

Inasmuch as in my view, the Act of June 1, 1910, may be construed to permit the construction, above the various height limits established by such Act, of penthouses to house utilities necessary in the operation of buildings, and to permit the presence in such penthouses of personnel required to operate such utilities, the only action required of the Commissioners with respect to establishing "the intent and limitation of the Act of 1910" would be to direct their Secretary to forward a copy of this opinion to the Director of Inspection for his information and guidance.

But as has been pointed out earlier, the construction of the Act of June 1, 1910, is not all that is required to furnish the "clarification" recommended by the Chief Engineer. Since the Zoning regulations prohibit the construction of fire-sprinkler tanks, water towers, or housing, for air-conditioning equipment above 130 feet, such regulations effectively establish, for all buildings, an extreme height of 130 feet, not including spires, domes, pinnacles, penthouses over elevator shafts, ventilation shafts, chimneys, and smokestacks.

RECOMMENDATIONS:

1. That although the Act of June 1, 1910, regulating the height of buildings, may be construed to permit the construction, above the various height limits established by such Act, of penthouses to shelter building utilities of all kinds, and to permit the presence in such penthouses of building maintenance personnel, paragraph 1 of section XIII of the Zoning Regulations prohibits the construction above a height of 130 feet of fire-sprinkler tanks, water towers, and penthouses for air conditioning equipment.

2. That should the Commissioners desire to authorize the Director of Inspection to approve plans for the construction, above the maximum height limits established by the Act of June 1, 1910, of penthouses to shelter building utilities, it would appear necessary that there first be a change in the Zoning Regulations of the District of Columbia, which are controlling.

3. That the Commissioners forward a copy of this opinion to (1) the Director of Inspection, D. C., and (2) the D. C. Building Code Advisory Committee, for appropriate recommendation relating to the desirability of amending the Zoning Regulations of the District of Columbia so as to clarify the present uncertainty regarding the construction, above certain height limits, of penthouses to shelter building utilities.

/s/ VERNON E. WEST,
Corporation Counsel, D. C.

RFK:hs
7/24/53

GOVERNMENT OF THE DISTRICT OF COLUMBIA
ENGINEER DEPARTMENT
DEPARTMENT OF INSPECTION
WASHINGTON 4, D. C.

ADDRESS REPLY TO
DIRECTOR OF INSPECTION

May 13, 1953.

To Whom It May Concern:

Re: Housing for air conditioning equipment above 130 foot level.

Prior to December 1, 1944, fire-sprinkler tanks, water towers and air conditioning equipment were permitted above height limits of buildings as established by the Zoning Regulations and the Act of June 1, 1910, whichever was the more restrictive.

On November 15, 1944, a public hearing was held by the Zoning Commission to consider amendments regarding the location of air conditioning equipment above the 130 foot height limit. The Commission evidently felt that air conditioning equipment was unsightly, and where fans were used they created a noise nuisance. The upshot was that the following amendment in part was promulgated: "* * * * the Commissioners of the District of Columbia shall not approve the construction of fire-sprinkler tanks, water towers, or housing for air conditioning equipment to a height in excess of 130 feet measured from the level of the curb opposite the middle of the front of the building. * * *"

The erection of ventilating shafts permitted by the Act of June 1, 1910 was not included in the above mentioned prohibitions. However, I am of the opinion that the installation of fans is not permitted.

The American Society of Heating and Ventilating Engineers defines "Air Conditioning: The simultaneous control of all, or at least the first three, of those factors affecting both the physical and chemical conditions of the atmosphere within any structure. These factors include temperature, humidity, motion, distribution, dust, bacteria, odors and toxic gases, most of which affect in greater or lesser degree human health or comfort," and "Ventilation: The process of supplying or removing air, by nature or mechanical means, to or from any space."

For purposes of administration, air conditioning and forced ventilation should be considered as synonymous.

Robert H. Davis

ROBERT H. DAVIS,
Director of Inspection, D. C.

Exhibit 2

BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

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

Statement of James J. Fahey

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

James J. Fahey

James J. Fahey

ACKNOWLEDGEMENT

State of Maryland
County of Frederick

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

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

Notary Public

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

BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

Rec'd.
4.6.04

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

Appellant's Supplemental Memo on Historical Treatment By Corporation Counsel and Zoning Authorities of Roof Structure and Basement FAR Issues

I. ***Treatment of Penthouse-enclosed "Mechanical Equipment", and Antennas, as Roof Structures that May Exceed Height Act Limits.***

The Height Act provides that "spires, towers, domes, minarets, pinnacles, penthouses over elevator shafts, ventilation shafts, chimneys, smokestacks and fire sprinkler tanks" may be approved to exceed the Height Act limit, provided that, among other things, these structures "cannot be used for human occupancy." DC Code §6-601.05(h). At the hearing on March 9, 2004, Counsel for Montrose suggested that, because the Height Act has been interpreted by the Zoning Commission to allow penthouses for air conditioning or heating equipment, or antennas—structures that are not including in the Act's enumeration of roof structures—to exceed the Act's height limitation, that the roof deck and railing at issue in the present case should be permitted. *See, e.g.,* 11 DCMR § 400.8. However, the Zoning Commission's additions to the list of statutorily-enumerated roof structures narrowly hews to the rationale of a 1953 opinion of the Corporation Counsel, which opinion provides a closely reasoned analysis that cannot be expanded to encompass roof decks or other structures intended for human occupancy.

BZA
Case No. 17109
Exhibit No. 63

In 1953, the then Corporation Counsel, Vernon E. West, was asked whether the term "penthouses" might include penthouses for housing heating or air conditioning equipment, and "perhaps other kinds of equipment which ordinarily might be located within a building", and whether the prohibition on "human occupancy" precluded the presence of an operating engineer in such penthouses. *See* Memorandum to the Commissioners from Vernon E. West, Corporation Counsel (July 27, 1953), attached as Exhibit 1. In a narrowly reasoned opinion that relies closely on the language employed by the Height Act, the D.C. Corporation Counsel concluded:

> the phrase in [§6-601.05(h)], "penthouses over elevator shafts" may be construed to include penthouses *over stairways leading to the roof* and penthouses over *other utilities necessary in connection with the operation of a building, but not to include penthouses to be used for residential, office or business purposes.* Further, I have concluded that the term "human occupancy" as it is used in [§6-601.05(h)], should be construed to *preclude the construction or use of penthouses for residential, office or business purposes,* but not to preclude the presence in such penthouses of building maintenance personnel charged with the operation and maintenance of the building's utilities.

Id. at 4 (emphasis added). The current Zoning Regulations reflect this position, in providing that "Housing for mechanical equipment or a stairway or elevator penthouses may be erected to a height in excess of that authorized in the district in which located" (§400.8, for the R districts[1]). Subsequently this interpretation regarding functional equipment on the roof was extended to include roof-mounted antennas, which necessarily are freestanding structures and cannot be fully enclosed in a penthouse (note that

[1] Identical provisions are included for the SP, CR, C, C-M, M and W Districts. *See* 11 DCMR §§ 530.5, 630.5,770.7,840.4 and 930.4.

antennas mounted on roof-top towers were arguably already covered by the term "towers" in §6-601.05(h) of the Height Act).[2]

It is clear that this interpretation of the Height Act to include by analogy other types of mechanical equipment connected with the functioning of the building than those originally enumerated in the Act, with an explicit prohibition on use of such facilities for residential purposes, cannot remotely be construed as including a roof deck and railing, the sole purpose of which is for residential use and occupancy and which by no stretch of the imagination can be regarded as essential to or otherwise connected with the operation of the building. Such an interpretation of the Height Act simply cannot be squared with the plain language of the Act.

Accordingly, the Corporation Counsel's 1953 opinion provides a narrow rationale justifying the Zoning Commission's addition of penthouses and antennae to the list of roof structures permitted to exceed the Height Act's height limits. However, it is important to note that, unlike the Zoning Commission, the *Zoning Administrator* does not have the discretion to include additional roof structures to the list of structures set out in 11 DCMR § 400.8, which are permitted to exceed the Act's height limitation, even if the addition of such structures would be consistent with the rationale of the 1953 Corporation Counsel opinion. The Zoning Regulations do not contain the words "or similar structures" after the enumeration of roof structures that are permitted to exceed the Height Act's height limitation. The Zoning Administrator's discretion – as well as that of this Board -- is limited to the interpretation of the Zoning Regulations, and only the

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[2] *See* 11 DCMR §400.3, for the R districts: "A spire, tower, dome, pinnacle, minaret serving as an architectural embellishment, or antenna may be erected to a height in excess of that which t his section otherwise authorizes in the district in which it is located."

Zoning Commission has the discretion to promulgate what it might view as a reasonable interpretation of the provisions of the Height Act.

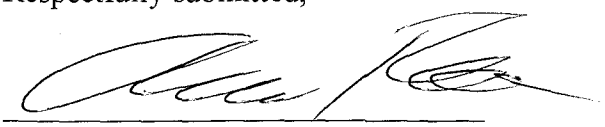
II. ***Historical Treatment Zoning Authorities of Basement FAR Issues.***

There is no dispute in this case that a portion of the basement level of the project is more than four feet above grade, and therefore not properly excludable as "cellar" from Floor Area Ratio ("FAR") calculations. *See* 11 DCMR § 199.1 ("the term 'gross floor area' shall not include cellars;" the term "cellar" means "the portion of a story, the ceiling of which is less than four feet (4 ft.) above the adjacent finished grade."). Instead, Appellants challenge the "perimeter" method used by the Office of Zoning to calculate the portion of the basement level that is includable within the FAR where some but not all of this space is more than four feet above grade. The "perimeter" method calculates the percentage of gross floor area of basement to include in FAR by constructing a ratio between the length of the perimeter of the basement and the length of some designated portion of that perimeter (in this case, the front bay wall). As Appellant has demonstrated, this method does not provide a rational basis for calculating gross floor area since the gross floor area includable in FAR remains constant regardless of the steepness of the actual grade, and moreover, bears no rational relationship to the length (and resulting floor area) of the basement.

In response, the Zoning Administrator's representative testified at the hearing on March 9 that the "perimeter method" was the accepted methodology for calculating basement FAR in the case of row dwellings. However, as is demonstrated by the attached declaration by Mr. Jim Fahey, who served as Zoning Administrator from 1970 to 1986 (and served in the District of Columbia government in capacities relating to

zoning from 1949 to 1970), the historical treatment of this issue by the Office of Zoning recognized the special problem in distinguishing between a "basement" and a "cellar" for purposes of determining "gross floor area," in the case of a row house or other building where the grade on either side could not be observed because the building was directly abutted by other buildings on either side. *See* Exhibit 2, attached hereto. To address this problem, the method devised and subsequently applied by the Office of Zoning involved drawing a grade plane line, from the grade at the front of the building to the grade at the rear of the building. *Id.* This grade plane was then used to determine how much of the floor area should properly be treated as "basement" and included in "gross floor area", because the ceiling was four or more feet above the average grade plane, and how much should be treated as "cellar." The so-called "perimeter" method applied here by the Office of Zoning was not the methodology that was historically applied to deal with this situation. *Id.*

Respectfully submitted,



Andrea C. Ferster
1100 17th Street, N.W. 10th Fl.
Washington, D.C. 20036
(202) 974-5142

Counsel for Kalorama Citizens Association

April 6, 2004

Exhibit 1

C
O
P
Y

GF.5-112

Jul.27, 1953

TO: THE COMMISSIONERS

IN RE: Whether penthouses may be constructed above the height limits established by the Act of Congress approved June 1, 1910, regulating the height of buildings, for purposes other than to cover elevator shafts; and whether the presence of an operating engineer in such penthouses constitutes "human occupancy" within the meaning of such Act.

There have been referred to this office for an opinion certain questions which have been raised by the Chief Engineer of the Department of Inspection, relating to the permissible use of penthouses constructed above the height limits established by section 5 of the Act of Congress approved June 1, 1910 (36 Stat. 452, as amended; sec. 5-405, D. C. Code, 1951 ed.). These questions may be expressed briefly as follows:

1. May the Act of June 1, 1910, permitting the construction of "penthouses over elevator shafts" to a greater height than any limit set by the Act, be construed to permit the construction of penthouses for the purpose of housing air-conditioning equipment, heating equipment, and perhaps other kinds of equipment which ordinarily might be located within a building?

2. Does the phrase "human occupancy" as used in the Act of June 1, 1910, in connection with the construction or use of penthouses, preclude the presence of an operating engineer in penthouses containing air-conditioning or heating equipment, including boilers?

The answers to the foregoing questions depend upon an interpretation of the last paragraph of Section 5 of the Act of June 1, 1910, the pertinent part of which reads as follows:

"Spires, towers, domes, minarets, pinnacles, pent houses over elevator shafts, ventilation shafts, chimneys, smokestacks, and fire sprinkler tanks may be erected to a

> greater height than any limit prescribed in the Act when and as the same may be approved by the Commissioners of the District of Columbia: Provided, however, That such structures when above such limit of height shall be fireproof, and no floor or compartment thereof shall be constructed or used for human occupancy above the top story of the building upon which such structures are placed: And provided, That pent houses, ventilation shafts, and tanks shall be set back from the exterior walls distances equal to their respective heights above the adjacent roof: * * * *."

In connection with the first of the above questions, however, it is also necessary, in construing the statute, to consider any long-standing administrative interpretations of the statute with respect to the construction of penthouses for other uses than "over elevator shafts", 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 need for 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 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.

It would appear, therefore, that the phrase "penthouses over elevator shafts", rather than being plain and unambiguous, has required interpretation by the officials of the District of Columbia charged with the administration of the statute containing the phrase. The Director of Inspection over the years has interpreted the statute as permitting the construction over the height limit of penthouses to provide shelter for air-conditioning equipment such as water towers, evaporative condensers, and air-conditioning fans. The question now arises, however, in the light of changed construction practices, whether the Director's interpretation of the statute may extend to permitting the construction of penthouses to shelter heating equipment including boilers. Much of the air-conditioning and heating equipment in use today requires the services of operating engineers, and the presence of operating engineers in penthouses constructed above the permissible height limit also involves an interpretation of the meaning of the phrase "human occupancy", as used in the Act of June 1, 1910.

In connection with the consideration of both of the questions discussed in this opinion, it is of interest to consider the intent of the

Congress in enacting the Act of June 1, 1910. Strangely enough, although it is commonly believed that the purpose of the Act was to preserve the skyline of the city and to prevent the overshadowing of the Capitol by excessively tall buildings, it would not appear that the Congress, at the time it was considering the bill that later became the Act of June 1, 1910, had such a purpose in mind. Rather, according to a statement by one of the sponsors of the bill during debate in the House of Representatives, the principal concern of the Congress involved the lack of fireproofing on the "upper or mansard stories" of buildings then constructed, and the sponsor stated "this act is for the purpose of requiring that buildings of a certain height shall be of fireproof material throughout." Congressional Record, Vol. 45, p. 4535.

Another consideration of the Congress during its debate on what later became the Act of June 1, 1910, would appear to relate to matters of light and ventilation, as the following exchange during the debate would indicate:

> "MR. CAMPBELL (a sponsor of the bill) The buildings on Pennsylvania avenue would be limited to the height provided for in this bill (160 feet).
>
> "MR. SIMS. Now, why should they be permitted to be, say 30 feet higher on Pennsylvania avenue than any other business street or otherwise in the city?
>
> "MR. CAMPBELL. It is the widest street in the city.
>
> "MR. SIMS. Is not New York avenue fully as wide?
>
> "MR. CAMPBELL. No; Pennsylvania Avenue is the wider.
>
> "MR. SIMS. Is it the object and purpose of regulating the height of buildings in the District of Columbia that the height of buildings should be regulated on each street in reference to the width of that particular street?
>
> "MR. CAMPBELL. We are far below the limit of height that could be provided for on Pennsylvania Avenue when we provide for 160 feet." (Cong. Record, Vol. 45, p. 6799; perenthetical notations added)

Accordingly, it would seem that the last paragraph of section 5 of the Act of June 1, 1910, should be construed in the light of the intent of the Congress in enacting the Act; i.e., in terms of fireproofing and of light and ventilation.

On this basis, therefore, it would appear that the 61st Congress, insofar as penthouses were involved, was not concerned so much with the

use to which such penthouses would be put as with the fireproofing of such penthouses, and it would seem there was no objection on the part of Congress to the construction of fireproof penthouses above the height limit, just so such penthouses were (1) set back from the exterior walls, apparently for reasons of light and ventilation, and (2) were not constructed or used for human occupancy.

The term "human occupancy" moreover, perhaps should be construed in the light of the intent of the Congress in enacting the Act. The Congress, in specifically recognizing the necessity for elevator machinery above the height limit, obviously did not intend that no elevator machinery repairman could enter the penthouse over such machinery for the purpose of repairing it. Yet in one sense this is "human occupancy" of such a penthouse.

The term "occupancy" means, to quote Webster's New International Dictionary, 2nd Edition, the "act of taking or holding possession". An "occupant", to quote the same authority, is "one who occupies or takes possession; one who has the actual use or possession of a thing"; "occupy" means "to take or enter upon possession of; to hold possession of, to hold or keep for use; to use"; while "occupation" means "actual possession or control". I am of the view, therefore, that the prohibition of "human occupancy", in the last paragraph of section 5 of the Act of June 1, 1910 was intended by the Congress to prevent the use of enclosed space above the height limit for residential, office or business purposes, either by the owner of a building or by any tenant holding under him, but was not intended to preclude the use of such space in connection with the maintenance of such building and the operation of its utilities. I am of the view, therefore, that the last paragraph of section 5 of the Act of June 1, 1910, does not prohibit the presence of building maintenance personnel in fireproof structures constructed above the permissible height limit.

In summation, I caused a study to be made of the Act approved June 1, 1910, and the legislative history of such Act, with particular reference to the last paragraph of section 5 of such Act, as a result of which I have concluded that the phrase in such paragraph, "penthouses over elevator shafts", may be construed to include penthouses over stairways leading to the roof and penthouses over other utilities necessary in connection with the operation of a building, but not to include penthouses to be used for residential, office or business purposes. Further, I have concluded that the term "human occupancy" as it is used in such paragraph should be construed to preclude the construction or use of penthouses for residential, office or business purposes, but not to preclude the presence in such penthouses of building maintenance personnel charged with the operation and maintenance of the building's utilities.

The memorandum of the Chief Engineer of the Department of Inspection also refers to paragraph numbered 1 of Section XIII of the Zoning Regulations of the District of Columbia, as amended, which reads as follows:

"1. The provisions of the Act of June 1, 1910, as to spires, towers, domes pinnacles (sic), penthouses over elevator shafts, ventilation shafts, chimneys, smoke stacks, and fire-sprinkler tanks shall continue in full force and effect, except that on buildings herafter erected the Commissioners of the District of Columbia shall not approve the construction of fire-sprinkler tanks, water towers, or housing for air conditioning to a height in excess of 130 feet measured from the level of the curb opposite the middle of the front of the building. Fire sprinkler tanks, water towers, or housing for air conditioning equipment may be erected or enlarged on buildings existing prior to December 1, 1944 as provided under Section XXIII of these regulations. (As amended Dec. 1, 1944 and Feb. 25, 1948.)"

This regulation of the Zoning Commission, as has been pointed out in the memorandum of the Chief Engineer of the Department of Inspection, would appear to have a double effect. First, it imposes a limitation on the Act of June 1, 1910, since it prohibits the construction of fire-sprinkler tanks and water towers above 130 feet, although the June 1, 1910, Act specifically permits fire-sprinkler tanks above the 130-foot height limit and may be construed to permit water towers above that limit. But more important, the regulation would appear to delimit the Act of June 1, 1910 by impliedly authorizing the construction of housing for air conditioning equipment above any height limit established by the June 1, 1910, Act, with the exception of the 130-foot height limit. It would appear, therefore, that the Zoning Commission, like the Director of Inspections, has construed the phrase "penthouses over elevator shafts" to permit the construction of housing for air-conditioning equipment above all height limits except the 130-foot height limit.

The Zoning Regulations of the District of Columbia, as amended, have been promulgated by the Zoning Commission of the District of Columbia under the authority contained in the Act approved June 20, 1938 (52 Stat. 797, as amended; Title 5, sections 413 through 428, D. C. Code, 1951 ed.) Among other things, such Act empowers the Zoning Commission to regulate the height of buildings, except the permissible height of any building shall not exceed the maximum height of buildings authorized by the Act of June 1, 1910, supra. Further, section 12 of the Act of June 20, 1938 (Section 5-424, D. C. Code, 1951 ed.) provides:

"Sec. 12. Wherever the regulations made under the authority of this Act require a greater width or size of yards, courts, or other open spaces, or require a lower height of buildings or smaller number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required in or under any other statute or municipal regulations the regulations made under authority of this Act shall govern. * *
(Underscoring supplied)

Accordingly, I am of the opinion that although the Act of June 1, 1910, may be construed to permit the construction, above the maximum height limits established by such Act, of penthouses sheltering building utilities, providing such penthouses meet the other requirements of such Act, nevertheless paragraph 1 of Section XIII of the Zoning Regulations of the District of Columbia has the effect of prohibiting the construction of such penthouses above the 130 foot height limit, although impliedly permitting the construction of penthouses for air conditioning equipment above the lower height limits established by the June 1, 1910, Act.

The Chief Engineer of the Department of Inspection concludes his memorandum of June 16, 1953, with the following paragraphs:

> "It is apparent that a situation difficult both for this office and for the architects, owners, and mechanical engineers will continue to exist until both the Act of 1910 and the Zoning Regulations are clarified and a consistent and equitable policy established for both.
>
> "It seems to me that the intent and limitation of the Act of 1910 should be established by Commissioners directive, and that thereafter the Zoning Regulations be clarified in order to be consistent with such directive.
>
> "It is recommended that such directive clearly establish what equipment may be in a 'penthouse' above the height limit as established by the Act of 1910, that there be a limiting size to such pent-house based on a percentage of roof area, and that the Zoning Commission establish regulations consistent therewith, also for such pent-houses as exceed the zoning height limits but are not above the limits established by the Act of June 1, 1910."

Inasmuch as in my view, the Act of June 1, 1910, may be construed to permit the construction, above the various height limits established by such Act, of penthouses to house utilities necessary in the operation of buildings, and to permit the presence in such penthouses of personnel required to operate such utilities, the only action required of the Commissioners with respect to establishing "the intent and limitation of the Act of 1910" would be to direct their Secretary to forward a copy of this opinion to the Director of Inspection for his information and guidance.

But as has been pointed out earlier, the construction of the Act of June 1, 1910, is not all that is required to furnish the "clarification" recommended by the Chief Engineer. Since the Zoning regulations prohibit the construction of fire-sprinkler tanks, water towers, or housing, for air-conditioning equipment above 130 feet, such regulations effectively establish, for all buildings, an extreme height of 130 feet, not including spires, domes, pinnacles, penthouses over elevator shafts, ventilation shafts, chimneys, and smokestacks.

RECOMMENDATIONS:

1. That although the Act of June 1, 1910, regulating the height of buildings, may be construed to permit the construction, above the various height limits established by such Act, of penthouses to shelter building utilities of all kinds, and to permit the presence in such penthouses of building maintenance personnel, paragraph 1 of section XIII of the Zoning Regulations prohibits the construction above a height of 130 feet of fire-sprinkler tanks, water towers, and penthouses for air conditioning equipment.

2. That should the Commissioners desire to authorize the Director of Inspection to approve plans for the construction, above the maximum height limits established by the Act of June 1, 1910, of penthouses to shelter building utilities, it would appear necessary that there first be a change in the Zoning Regulations of the District of Columbia, which are controlling.

3. That the Commissioners forward a copy of this opinion to (1) the Director of Inspection, D. C., and (2) the D. C. Building Code Advisory Committee, for appropriate recommendation relating to the desirability of amending the Zoning Regulations of the District of Columbia so as to clarify the present uncertainty regarding the construction, above certain height limits, of penthouses to shelter building utilities.

/s/ VERNON E. WEST,
Corporation Counsel, D. C.

RFK:hs
7/24/53

GOVERNMENT OF THE DISTRICT OF COLUMBIA
ENGINEER DEPARTMENT
DEPARTMENT OF INSPECTION
WASHINGTON 4, D. C.

ADDRESS REPLY TO
DIRECTOR OF INSPECTION

May 13, 1953.

To Whom It May Concern:

Re: Housing for air conditioning equipment above 130 foot level.

Prior to December 1, 1944, fire-sprinkler tanks, water towers and air conditioning equipment were permitted above height limits of buildings as established by the Zoning Regulations and the Act of June 1, 1910, whichever was the more restrictive.

On November 15, 1944, a public hearing was held by the Zoning Commission to consider amendments regarding the location of air conditioning equipment above the 130 foot height limit. The Commission evidently felt that air conditioning equipment was unsightly, and where fans were used they created a noise nuisance. The upshot was that the following amendment in part was promulgated: "* * * * the Commissioners of the District of Columbia shall not approve the construction of fire-sprinkler tanks, water towers, or housing for air conditioning equipment to a height in excess of 130 feet measured from the level of the curb opposite the middle of the front of the building. * * *"

The erection of ventilating shafts permitted by the Act of June 1, 1910 was not included in the above mentioned prohibitions. However, I am of the opinion that the installation of fans is not permitted.

The American Society of Heating and Ventilating Engineers defines "Air Conditioning: The simultaneous control of all, or at least the first three, of those factors affecting both the physical and chemical conditions of the atmosphere within any structure. These factors include temperature, humidity, motion, distribution, dust, bacteria, oders and toxic gases, most of which affect in greater or lesser degree human health or comfort." and "Ventilation: The process of supplying or removing air, by nature or mechanical means, to or from any space."

For purposes of administration, air conditioning and forced ventilation should be considered as synonymous.

Robert H. Davis
ROBERT H. DAVIS,
Director of Inspection, D. C.

Exhibit 2

BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

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

Statement of James J. Fahey

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

James J. Fahey

ACKNOWLEDGEMENT

State of Maryland
County of Frederick

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

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

Notary Public

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