

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPEAL OF:

Kalorama Citizens Association from
Administrative Decision of DCRA
On Permits B455571 and B455876

BZA Appeal No. 17109

D.C. OFFICIAL CODE
2011 APR 20 PM 0:36

APPELLEE'S SUBMISSION TO THE BOARD
REGARDING JURISDICTION OF THE BOARD OF ZONING ADJUSTMENT
TO DECIDE ISSUES INVOLVING THE HEIGHT ACT

The Board of Zoning Adjustment (BZA or Board) has requested that the parties address the Board with respect to the question of whether the Board has jurisdiction to decide the issues presented in the above-referenced appeal that involve compliance or noncompliance with the provisions of the 1910 Height of Buildings Act, D.C. Official Code §§6-601 *et seq.* (2001), (hereinafter cited as the "Height Act".)

The Zoning Regulations of the District of Columbia were promulgated by the District of Columbia Zoning Commission, pursuant to the authority set forth in Chapter 6 of Title 6 of the D.C. Official Code. Pursuant to D.C. Official Code §6-621.01(e) (2001), "[t]he Zoning Commission shall exercise all the powers and perform all the duties with respect to zoning in the District as provided by law." Pursuant to D.C. Official Code §6-641.01 (2001), the Zoning Commission is:

empowered, in accordance with the conditions and procedures specified in this subchapter, to regulate the location, *height*, bulk, *number of stories* and *size of buildings and other structures*, the percentage of the lot which may be occupied, the sizes of yards, the density of population, and the uses of buildings, structures, and the land for trade, industry, residence, recreation, public activities, or other purposes; . . . [Emphasis added.]

BZA

Case No. 17109
Exhibit No. 66

The general purpose of the D.C. Zoning Regulations is set forth in 11 DCMR 100.4, which provides:

The long title of the Zoning Regulations, as adopted, shall be as follows:

REGULATIONS CONTROLLING AND RESTRICTING THE *HEIGHT*, BULK, *NUMBER OF STORIES*, AND *SIZE OF BUILDINGS* AND OTHER STRUCTURES, THE OPEN SPACES AROUND THEM, THE DENSITY OF POPULATION, AND THE USES OF BUILDINGS, STRUCTURES, AND LAND IN THE DISTRICT OF COLUMBIA, AND FOR SAID PURPOSES DIVIDING THE DISTRICT OF COLUMBIA INTO ZONING DISTRICTS. [Emphasis added.]

The grant of rulemaking authority to the Zoning Commission and the long title of the Zoning Regulations clearly indicate that *height* is one of the key areas that the Zoning Commission is given power to regulate and is one of the key areas covered by the Zoning Regulations. Chapter 4 of the Zoning Regulations is titled “Residence Districts: Height, Area and Density Regulations.” Section 400 of Chapter 4 is titled “Height of Buildings or Structures (R)” and includes a chart in §400.1 that specifies the maximum height of buildings in the various “R” zone districts. The maximum height specified for R-5-D and R-5-E zone districts is 90 feet. However, this provision is modified by a number of other provisions in the Zoning Regulations that specifically reference the Height Act and specifically require adherence to the requirements of the Height Act, including 11 DCMR 2510.1, 11 DCMR 400.13, 11 DCMR 411.1 and 11 DCMR 2522(c).¹

11 DCMR 2510.1 specifically provides that “in addition to any controls established in this title, all buildings or other structures shall comply with [the Height Act].” 11 DCMR 400.13 provides that a height in excess of that permitted [under the

¹ As a result, on a residence street, the highest part of the roof shall not be over 90 feet in height and further may not exceed the width of the street that it fronts on, diminished by 10 feet. Thus, if the street is 80 feet wide, the highest point of the building cannot exceed 70 feet. [D.C. Official Code 6-601.05(c)(2001)]

regulations] can be authorized by the Mayor, when “required by” the Height Act.² 11 DCMR 411 makes provisions for architectural controls of roof structures and housing for mechanical equipment, stairway and elevator penthouses, when not in conflict with the Height Act. 11 DCMR 2522(c) provides that the minor deviations from the strict requirements of the Zoning Regulations that the Zoning Administrator is authorized to make, cannot result in violations of the Height Act. Other provisions of the Chapter 4 of the Zoning Regulations, such as 11 DCMR 400.3 and 11 DCMR 400.7, actually paraphrase certain provisions of the Height Act, D.C. Official Code 6-601.05 (h)(2001).

Because the provisions of the Height Act are specifically incorporated into the Zoning Regulations and because *height* is one of the principal matters regulated by the Zoning Regulations, the Board of Zoning Adjustment necessarily has to have jurisdiction to determine whether or not there is compliance with the provisions of the Height Act that are incorporated into the Zoning Regulations, when those issues are appealed to the Board.

If the Board of Zoning Adjustment were deemed to not have jurisdiction to enforce the provisions of the Height Act, when the issuance or denial of a permit is appealed to the BZA, it could well result in contradictory interpretations of the law. In the instant case, for example, the Zoning Division of the Department of Consumer and Regulatory Affairs (DCRA), Building and Land Regulation Administration (BLRA), (after an initial error in calculation) determined that the building height could not exceed 70 feet, based upon the requirements of the Height Act as incorporated into the Zoning Regulations. If the BZA has no authority to enforce the requirements of the Height Act as incorporated into the Zoning Regulations, then the BZA is without authority to uphold

² The Mayor’s authority was delegated to DCRA pursuant to the Reorganization Plan establishing DCRA.

the decision of the DCRA Zoning Administrator that the building cannot not exceed 70 feet in height. Further, had the builder appealed (instead) and claimed that he was entitled to build to a height of 90 feet, pursuant to 11 DCMR 400.1, the BZA would have no authority to enforce or overrule the decision of the Zoning Administrator. If the BZA refused to hear an appeal that involves the issuance or denial of a permit involving the “height of buildings” it is questionable whether the Office of Administrative Hearings would have jurisdiction under current law.³ Thus, the appellant might be effectively denied any right to an administrative appeal.

The permit holder/building owner suggests that because the Height Act is not contained in subchapter IV or V of Chapter 6, that the BZA does not have jurisdiction to hear appeal. Pursuant to D.C. Official Code §6-641.07(f) and 6-641.07(g), appeals “to the Board of Zoning Adjustment may be taken by any person aggrieved . . . by any decision of the Inspector of Buildings granting or refusing a building permit or granting or withholding a certificate of occupancy, or any other administrative decision based in whole or in part upon any zoning regulation or map adopted under this subchapter or subchapter V of this chapter.”

The building owner overlooks the facts that: 1) the provisions of the Height Act are incorporated by reference into the Zoning Regulations and 2) the regulation of *height of buildings* is clearly within the purview of zoning. Owner’s counsel makes the point that the Zoning Regulations include references to other laws that the BZA does not have the power to enforce, however, the two examples given are clearly distinguishable from

³ Under current law, the action issuing or denying a permit, does not meet the definition of an “adjudicated case” appealable to the Office of Administrative Hearings under D.C. Official Code §2-1831.01 et seq.

the references to the Height Act. First, the regulation of *signs* is not within the clear grant of power to the Zoning Commission, and 11 DCMR 2506.1 explicitly refers the reader to the District of Columbia Construction Codes, which include their own appeal provisions for alleged violations. Likewise the reference in 11 DCMR 2513.1 to the Shipstead-Luce Act makes clear that the architectural review imposed by that law is to be administered by the Commission of Fine Arts.

Counsel for Appellee, DCRA, has reviewed the provisions of the District of Columbia Zoning Regulations (11 DCMR) that cite the Height Act; Appellant's Supplemental Memorandum of Law on the Height of Buildings Act; BZA Order, dated October 23, 1991, in Appeal No. 15568 of Howard University; BZA Order, dated April 29, 2003, in Appeal No. 16990 of American Towers; the Opinion of the U.S. District Court in American Towers v. Anthony Williams, Mayor of the District of Columbia, C.A. 00-2436, dated June 14, 2001; and the decision of the U.S. District Court in Techworld Development Corporation v. D.C. Preservation League, et al., 648 F. Supp. 106 (D.C. 1986).

In Appeal No. 15568 before the BZA, Howard University appealed a decision by the Zoning Administrator that the proposed height of a dormitory building violated the maximum height limitations under the Zoning Regulations and the Height Act. There was no question as to the Zoning Administrator's or the BZA's authority to decide the appeal and the decision of the Zoning Administrator was upheld in a decision dated October 23, 1991. In the instant case, the Zoning Administrator determined that the building owner had complied with the requirements of the Zoning Regulations and the

Height Act, and the appellant has questioned that determination. Although the outcomes for the building owners in the Howard University case and the instant matter differ, the jurisdictional foundation is the same in both cases - the BZA has jurisdiction to resolve issues regarding the Height Act.

In both BZA Appeal 16990 of American Towers, Order dated April 29, 2003, and in the Opinion of the U.S. District Court in American Towers v. Anthony Williams, Mayor of the District of Columbia, C.A. 00-2436, dated June 14, 2001, there is a reference to the fact that American Towers was directed to appeal certain issues (including height issues) to the Board of Appeals and Review (B.A.R.). The facts in American Towers distinguished that case from the instant case. There, DCRA rescinded a building permit that had already been issued. There were also requirements and limitations imposed by the Construction Codes that caused DCRA to direct the appellant to go to the B.A.R. More importantly, there was never a decision reached by either the U.S. District Court or the B.A.R. in the American Towers cases, as to where the height considerations should more properly be considered, as both cases were dismissed on other grounds.⁴

The building owner, in the instant case, has stated in oral argument that because the Office of the Corporation Counsel is given authority to enforce the Height Act, and this authority is reiterated in Techworld Development Corporation v. D.C. Preservation League, et al., 648 F. Supp. 106 (1986), that the BZA has no jurisdiction over appeals pertaining to Height Act issues. This simply does not follow. The enforcement authority

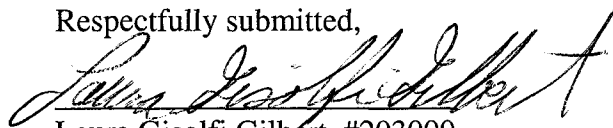
⁴ Appellee does not maintain that, in all instances, Height Act issues can only be considered by the BZA. There may be circumstances, such as in the American Towers case, where DCRA rescinded a building permit and there were other issues under the Construction Codes, in which the appeal might be more properly before another body.

of the Office of the Corporation Counsel comes into play in the situation in which a person builds a structure in excess of the height permitted under the Height Act. In such a case, the Corporation Counsel is authorized to bring suit against the violator to enforce the requirements of the Height Act. The fact that the Office of the Corporation has the authority to initiate and prosecute an enforcement action, does not alter the jurisdiction of the BZA to consider a case on appeal from the action of the DCRA Zoning Administrator. In the instant case, the appellant is alleging that the Zoning Administrator incorrectly interpreted the requirements of the Height Act, as those requirements are incorporated into the DC Zoning Regulations.

DCRA and the Zoning Administrator agree with appellant that the BZA has the jurisdiction and authority to make determinations with respect to the claims made in the instant appeal under the provisions of the Zoning Regulations that incorporated provisions of the Height Act.

DCRA and the Zoning Administrator contend that no errors were made in the instant case. Rather DCRA and the Zoning Administrator maintain that the provisions of the Zoning Regulations and the Height Act were correctly applied and interpreted in the instant case. These matters will be addressed in the post-hearing memorandum and conclusions of law to be submitted to the Board after the conclusion of the hearing in this case on April 20, 2004.

Respectfully submitted,



Laura Gisolfi Gilbert, #203000

Attorney for Appellee

Office of the General Counsel

Department of Consumer & Regulatory
Affairs
941 N. Capitol Street, NE
Washington, D.C. 20002

Certificate of Service

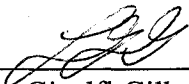
I hereby certify that a copy of the foregoing is being served on the following parties and counsel:

Appellant's counsel, Andrea Ferster, 1100 17th Street, N.W., 10th Floor, Wash., D.C. 20036;

Counsel for the Permit Holder, Carolyn Brown, Holland & Knight, 2099 Pennsylvania Avenue, N.W., Suite 100, Washington, D.C. 20006

Chairperson, ANC 1C, Alan Roth, 1845 Vernon Street, N.W., Washington, D.C.

by e-mail on this 19th day of April 2004 and will be served by hand-delivery or mail on the 20th day of April 2004.



Laura Gisolfi Gilbert, Esq.

APPEALS
BZA
2004 APR 20 11 7:40

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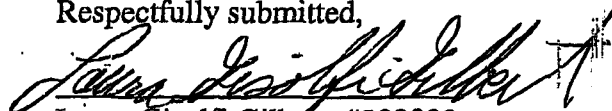
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Respectfully submitted,



Laura Gisolfi Gilbert, #203000
Attorney for Appellee
Office of the General Counsel

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Certificate of Service

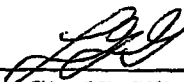
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Laura Gisolfi Gilbert, Esq.

District of Columbia
DEPARTMENT OF CONSUMER AND
REGULATORY AFFAIRS

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FAX Number: 202/442-9447

FACSIMILE COVER SHEET

DATE:

4/19/04

TO:

*BZA - Attention Clifford May or
FAX #: 727-6072 Rick Nero - filing for BZA*

FROM: Laurie Gisolfi Gilbert

PHONE: (202) 442-8199

RE:

BZA Appeal 17109

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