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

FINDINGS OF FACTS AND CONCLUSIONS OF LAW PROPOSED BY APPELLANT KALORAMA CITIZENS ASSOCIATION AND ADVISORY NEIGHBORHOOD COMMISSION 1 C

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

DECISION DATE: June 8, 2004

PROCEDURAL HISTORY

On March 11, 2003, a building permit was issued to Montrose LLC ("Montrose") for "alteration and repair" of an existing building at 1819 Belmont Road, N.W. for use as a four-unit apartment building. On September 12, 2003, a stop work order was issued by the Department of Consumer and Regulatory affairs (DCRA), appellee in this appeal. On September 16, 2003 KCA filed a notice of intent to appeal.

The present appeal was filed by KCA on November 10, 2003, challenging two permits issued on October 6 and 16 respectively to Montrose LLC ("Montrose"), Intervenor in this appeal, on the basis of plans reflecting certain revisions in the project. These revisions purported to address three zoning violations in the March 11 permit—roof height, roof structure floor area, and roof structure rear setback.

Advisory Neighborhood Commission 1C ("the ANC") joined KCA in this appeal. In its report to the Board, ANC 1C stated that at a public meeting on December 3, 2003, with a quorum present, it decided by a vote of 7-0 to urge the Board to sustain the appeal.

At the hearing on February 17, 2004, Mary and James McAndrew, Donald Brooks, Laura Gubisch, Jonathan Orloff, Gordon Schwartz, and David Wilton, residents of the 1800 block of Belmont Road, N.W., joined in the appeal to be represented by KCA.

In a Motion to Dismiss presented at the February 17, 2004 hearing, Montrose alleged that the Appeal should be dismissed for untimeliness and that it was barred by laches and estoppel. At the March 9, 2004 hearing, the Board decided as follows: by a vote of 5-0-0 to deny the

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Motion of Montrose to dismiss on the basis of timeliness; by a vote of 5-0-0 that it had jurisdiction to amend the appeal to include the March 11, 2003 permit as well as the October 2004 permits; by a vote of 4-1-0 so to amend the appeal; and by a vote of 5-0-0 to deny the motion to dismiss on grounds of laches and estoppel. *[March 9, 2004 Transcript, pp. 233, 235-6, 239-40 and 242]*

JURISDICTIONAL ISSUES

1. TIMELINESS OF APPEAL

FINDINGS OF FACT

1. On December 26, 2002, Montrose LLC ("Montrose") obtained a demolition permit for "Alteration and Repair – Interior Demolition/Excavation only". *[Declaration of Ann Hughes Hargrove and John Lawrence Hargrove, p. 2]*

2. By April, 2003 Montrose, without a public space or other necessary permits, had removed the front stoop exceeding 5 feet in height that extended into public space to the sidewalk, removed a front berm of approximately 1 foot in height, removed a low concrete retaining wall abutting the sidewalk, and demolished portions of the façade so as to enlarge a ground-level window opening, apparently to accommodate a planned driveway and garage. *[Declaration of Alan J. Roth, p. 14; Hargrove Declaration, p. 2]*

3. On March 11, 2003, Montrose obtained a permit for "Alteration and repair of exist. Bldg. Addition in rear, add 2 floors plus attic; retaining wall & stair at rear", with the additional notation indicating 5 stories plus basement. Montrose attributed 39% of the costs to repair and renovation, and 61% to new construction. *[Roth Declaration, p. 7; Hargrove Declaration*, p. 2; *Appellant's Chronology of the Case*, p. 1]

4. At no time during the period from March 11 through mid-September, 2003, when a stop work order was issued for the project was this permit visible on the outside of the building, or inside the building from a vantage point just outside openings at the front and rear, or on the garage which stood at the rear of the lot until its demolition in September. *[Hargrove Declaration, p. 2; Roth Declaration, pp. 7-9]*

5. On March 19, 2003, Representatives of Montrose LLC attended a meeting of the Planning, Zoning and Transportation Committee of Advisory Neighborhood Commission 1C and requested support for a curb-cut adjacent to 1819 Belmont Road, N.W., to permit removal of a curbside tree in public space and access to a proposed inside parking space through the front bay of the row house. They stated that they proposed to add one apartment unit to the existing 4-unit row house. Montrose states that at that meeting elevation drawings showing the garage and the full height of the row house, including the addition of the fourth, fifth and attic levels, and the penthouse, were "shared with the community". The Hargroves saw no such elevations at the meeting, and Bryan Weaver, ANC Commissioner for the area, has no recollection of seeing any such elevations. Montrose presented drawings in connection with its curb cut and driveway request, which showed the proposed curb cut, driveway through public space and garage space,

but they did not address the scale of the building relative to surrounding structure. The only discussion of the building's proposed height came when, in response to a question about the intended height of the building, Montrose stated that they proposed to add one story. Montrose conveyed the general impression of a project consisting of substantial renovation of, and an addition to, an existing row house. As indicated below, the project in fact entailed total demolition of the existing row house except for a portion of the façade, and erection of a new building in its place. *[Hargrove Declaration, p. 2; Declaration of ANC Commissioner Bryan Weaver, p. 2; testimony of Bryan Weaver, April 6 Transcript, pp. 159, 162]*

6. On May 15, 2003, at a meeting of the Kalorama Citizens Association, Ms. Hargrove discussed the long-standing proposal to conduct a survey of the Washington Heights area, which includes 1819 Belmont Road, N.W., preparatory to a possible application for a historic district for that area. At that meeting a photograph of 1819 Belmont Road, previously circulated at block meetings concerning the proposed historic survey, was presented. *[Opposition of Appellant KCA to Montrose LLC's Motion to Dismiss, Exhibit 3]* The photograph depicts the removal of the stoop, removal of the berm, and partial demolition of the façade to enlarge the ground level opening. These actions by the developers, but not the scale or height of the planned construction project, of which Ms. Hargrove was unaware, were cited by Ms. Hargrove as illustrative of the reasons why the proposed historic district for the area was a good idea. *[Hargrove Declaration, p. 2-3]*

7. As the project proceeded, during the late spring and summer, 2003, the existing turreted row house was totally demolished except for the remaining portion of the façade, and a new building constructed in its place from the ground up. It was not until early September, as framing for the upper levels was erected, that it became evident to the community that the new building had become a towering narrow structure visible from distant points in the Adams Morgan area. *[Id., p. 3; Appellant's Pre-hearing Statement, Exhibit 4, and Attachment 1 to Hargrove Declaration*]

8. At that time, KCA began efforts to see and obtain from DCRA a copy of the plans, starting with a request by Mr. Hargrove in person at DCRA, only to be repeatedly refused on various grounds (including alleged disarray in the filing system and inability to locate the file). It was joined in these efforts by Jonathan Orloff, a neighbor residing across the street from 1819 Belmont Road, whose request for the plans was also refused by DCRA. *[Hargrove Declaration, p. 3]*

9. On September 10 and 15, 2003, KCA wrote DCRA [*Opposition to Motion to Dismiss, Exhibit 4*]. In these letters, and in follow-up conversations between Ms. Hargrove and DCRA over the next several days, KCA complained about the lack of displayed permits, protested DCRA's denial of access to the plans, again asked for the plans, noted possible Height of Buildings Act height and setback violations, raised questions about the possible exclusion of the basement from FAR calculations, and urged that a stop work order be issued. *[Id.]*

10. A stop work order was posted on the property on September 12, 2003. *[Id.]*

11. Shortly thereafter, an array of copies of permits, including the March 11, 2003 permit, was posted on the building along with the stop work order. *[Id.]*

12. A document in the DCRA case file dated September 15, 2003, entitled "Fact Sheet 1819 Belmont Street, NW" states: "Based on inspections and review of the building plans, it was determined that the demolition exceeded the scope of the permit, and that the proposed building height exceeds the 70 feet maximum allowable." It also states: "The developer will transmit a letter to BLRA asking for permission to brace the existing walls against the anticipated hurricane later the week of 9/15/03." *[Id., p. 3-4; Opposition to Motion to Dismiss, Exhibit 7]*

13. On September 16, 2003, still lacking the plans, KCA filed a Notice of Intent to Appeal, on the basis of Height Act and zoning violations, with the Office of Zoning on the form provided by that Office for that purpose. *[Id., p. 4]*

14. Shortly thereafter, KCA was orally informed by DCRA that it expected that new, revised permits relating to the project would be issued. *[Id.]*

15. On September 22, 2003, KCA submitted a Freedom of Information Act request for the plans to DCRA *[Id.; Opposition to Motion to Dismiss, Exhibit 5].*

16. Continuing neighborhood concerns about the project were discussed in a meeting of the KCA on September 29 and the ANC on October 1 (in both of which Montrose participated). After the ANC meeting Ms. Hargrove asked a Montrose representative for a copy of the plans; the request was refused. *[Hargrove Declaration, p. 4]*

17. On September 29, 2003, DCRA wrote KCA asking for assurance that KCA would pay the cost of producing the documents requested (KCA provided that assurance), and stating that the statutory 10-day deadline for response to FOIA requests "is suspended until all processing issues are resolved". *[Id.]*

18. On September 29, 2003 Montrose submitted a permit application, and on October 6 and 16, 2003, received new permits on the basis of plans reflecting certain revisions in the project. These plans displayed all the features alleged by the Appeal to be non-complying. They depicted the roof deck and railing, the roof parapet at its original height, the roof without the parapet and reduced in height with pitch adjustment, the "attic", basement and all other levels of the building, the roof structure in its original configuration, the roof structure with reduced floor area and increased rear wall setback, the east and west wall setbacks of the roof structure, and revised FAR calculations. The revisions in the project included revised FAR calculations; removing the front roof parapet and making other adjustments so as to reduce the maximum height of the roof to 70 feet 0 inches; and reducing the footprint but not the height of the penthouse roof structure, so as to reduce its gross floor area and increase its setback from the rear wall. *[Id.; Appeal of KCA, Attachment 2]*

19. On October 16, 2003, Ms. Hargrove met with ANC 1C Commissioners Alan Roth and Bryan Weaver, and Councilmember Jim Graham in Mr.Graham's office. In the course of

that meeting, in a speakerphone conversation with DCRA officials, Mr. Graham insisted that the plans be made available to KCA. DCRA informed KCA that they were then in the process of preparing new permits to be issued to Montrose. *[Roth Declaration, pp. 11-12; Hargrove Declaration, p. 4]*

20. On October 17, 2003 KCA received copies of the plans, lacking certain documents that KCA believed to exist and to be of possible relevance to its appeal. These included a certification of the actual height of the re-positioned roof, indicating the method of measurement and the result of the measurement, and initial FAR worksheets for the original as well as the revised plans. Thereafter KCA received a reply from DCRA, dated October 23, 2003, to the September 22 FOIA request, indicating that the documents requested on September 22 had been located and copies could be picked up. *[Hargrove Declaration, p. 4]*

21. On October 20, 2003, Ms. Hargrove met with ANC Commissioner Alan Roth, Jeff Jennings of Councilmember Graham's staff, DCRA Deputy Director Theresa Lewis and Acting Zoning Administrator Denzil Noble, to discuss KCA's concerns about the "attic", roof structure setback, and building height. *[Id., p. 5; Roth Declaration, pp. 12-14]*

22. KCA filed the present appeal challenging the issuance of the October 6 and 16 permits on November 10, 2003. *[Appeal of KCA]*

23. During the period November 5 through November 13, 2003, KCA communicated several times with DCRA, directly and through the office of Councilmember Jim Graham, in an effort to obtain the documents not yet received. *[Hargrove Declaration, p. 5]*

24. On January 22, 2004, KCA wrote DCRA by fax, again requesting the missing documents. *[Id.]*

25. On January 30, by e-mail to the Hargroves, Councilmember Graham's office stated that DCRA had responded to the request for the missing documents that "he was not sure of the location of the file" *[Id., Attachment 2].*

26. On February 8, 2004, KCA filed a motion before the Board of Zoning Adjustment to have the Board cause DCRA to supply KCA with the missing documents. *[Hargrove Declaration, p. 5]*

27. On February 12 and 16, 2004 DCRA supplied the missing documents except for the original FAR worksheets. *[Id.]*

CONCLUSIONS OF LAW AND OPINION ON MOTION TO DISMISS

1. The Zoning Regulations require that an appeal of a building permit or other administrative decision must be filed "within 60 days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier." 11

DCMR §3112.2(a) It is undisputed that the appeal was timely as to the October 6 and 16, 2003 permits.

2. For the following reasons, we concluded that Appellant did not have actual or constructive notice of knowledge of any decision in the March 9, 2003 permit that was in violation of the Zoning Regulations, within the meaning 11 DCMR §3112.2, until it obtained the building plans on October 17, 2003, and accordingly denied the motion of Montrose LLC to dismiss for untimeliness. First, constructive knowledge did not arise merely as a result of the issuance of a building permit on March 11. The face of the permit would not have been sufficient to inform KCA of any zoning violations, since it is possible to have a building consisting of five stories, basement and attic that does not, as KCA claims in this appeal, exceed the height limit, violate roof structure setback requirements, or exceed FAR allowances.

3. Nor did KCA have actual knowledge of the permit, which was not properly displayed at the site until months after its issuance, on September 12. Further, information provided at the March 19, 2003 ANC Committee Meeting did not address the height of the building or other features alleged to be in violation of the Zoning Regulations and thus give actual knowledge of those violations. Finally, while the completion of the framing of the main building in early September was sufficient to raise questions about whether the building complied with height and setback requirements, mere observation of the apparently excessive height was not sufficient to give KCA the information it needed to determine that there were in fact such violations as well as the specific FAR violations complained of. Without the plans, KCA had no information relating to the actual height of the roof, the attic, the roof deck and railing, or the basement, and could not have formulated an appeal. Instead, KCA at that time promptly began efforts to correct this situation, by filing a Notice of Appeal, communicating its concerns to DCRA and vigorously seeking copies of the plans.

4. KCA argued that since the October permits and accompanying plans displayed all the features challenged, its appeal of those permits was sufficient and no appeal of the March 11 permit was necessary. At the same time it moved that the Board amend its appeal to encompass the March 11 permit. Without deciding that such an amendment was in fact necessary, the Board concluded that it had jurisdiction so to amend the appeal, and did so.

5. Finally, we denied the motion to dismiss on grounds of laches and estoppel. As the D.C. Court of Appeals has repeatedly noted, "the defenses of estoppel and laches are judicially disfavored n the zoning context because of the public interest in enforcement of the zoning laws." *Biens v. DCBZA,* 572 A.2d 122, 126 (D.C.App. 1990); *Sisson v. DCBZA*, 805 A.2d 964, 971 (D.C. 2002) Montrose has failed to satisfy its heavy burden of proof on either of these equitable defenses. As to laches, Montrose has failed to establish either that the delay was unreasonable or that Montrose was prejudiced by it. KCA acted diligently and with great urgency to obtain the building plans, without which it was unable to formulate an appeal, and Montrose itself contributed to KCA's inability to obtain the necessary information by failing to display permits properly, misrepresenting the increase in height at a public ANC committee meeting, and refusing KCA a copy of its plans. After receiving the plans, KCA moved with reasonable speed to formulate and file its appeal. Montrose has not provided evidence of any cost overruns or legal fees attributable to any unreasonable delay.

6. As to estoppel, even assuming, as is unlikely, that estoppel can lie against a private party, Montrose has failed to establish that the necessary elements for estoppel are present. First, in various respects it did have clean hands or act in good faith. Moreover, Montrose had notice at least as early as the issuance of the September 12 stop work order that it could not justifiably rely on the March permit, and in any event waived any claim of such reliance by failing to appeal the stop work order and instead seeking new permits.

CONCLUSIONS OF LAW AND OPINION ON JURISDICTION OVER ISSUES ARISING UNDER THE HEIGHT OF BUILDINGS ACT

1. At the hearing on this appeal on March 9, 2004, the Board raised the question of whether it has jurisdiction over issues arising under the Height of Buildings Act, D.C. Code §6-601, and requested that the parties brief the Board on that question. Subsequently KCA, DCRA and Montrose LLC provided memoranda on the question, the first two concluding that the Board does have jurisdiction. Montrose argued that it does not, and that only the Corporation Counsel has jurisdiction to enforce the Height Act.

2. We conclude that the Board does have jurisdiction to hear and determine issues arising under the Height Act. First, the Zoning Act, D.C. Code §§ 6-641.07(f), 6-641.07(g), requires the BZA to hear appeals of decisions based on the Zoning Regulations (adopted under Subchapter IV of that Act), or appeals alleging an error in the carrying out or enforcement of such regulations. 11 DCMR §2510.1 is such a regulation, and it specifically requires compliance with the Height Act by providing that "all buildings or structures shall comply with the Act to Regulate the Height of Buildings in the District of Columbia." This Board therefore 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.

3. This position is supported by the decision in the Howard University appeal (BZA Appeal No. 15568, October 22, 1991), in which this Board explicitly decided an issue as to whether the Zoning Administrator's decision was in compliance with the Height Act. Further, in addition to the blanket requirement of Section 2510.1, the requirements of the Height Act permeate the Zoning Regulations in numerous specific instances in which they are explicitly incorporated by reference throughout the regulations. To deny the Board's jurisdiction to hear appeals under the Height Act would read exceptions into the Zoning Act's grant of BZA jurisdiction into upwards of a half dozen provisions of the Zoning Regulations, where no such exceptions in fact exist. Additionally, we are satisfied that neither the newly-established Office of Administrative Hearings or any other agency has been given authority to hear appeals raising Height Act issues.

4. Montrose invokes the Height Act's provision specifying the penalties for violating the Height Act (D.C. Code §6-601.08), and argues that because the Height Act explicitly grants authority to the Corporation Counsel to bring an enforcement action in Court, Congress must have intended that an action brought by the Corporation Counsel would be the only proceeding

in which an issue of compliance with the Height Act could be heard. This argument is unpersuasive.

5. The language of the Height Act in no way suggests that Congress intended its grant of authority to the Corporation Counsel to exclude the raising of issues under the Height Act in other appropriate proceedings, judicial or administrative. See *Techworld Development Corporation v. D.C. Preservation League*, 648 F. Supp. 106 (D.D.C. 1986) rejecting the argument that the Height Act confers exclusive enforcement authority on the D.C. Corporation Counsel. Indeed, the Court held that neighboring landowners can still challenge Height Act violations under the general private right of action available for enforcement of the Zoning Regulations found at what is now codified as D.C. Code 6-641.09 (formerly D.C. Code 5-426), clearly recognizing, in so doing, that a violation of the Height Act was a violation of the Zoning Regulations.

6. Montrose also argues that this Board does not have jurisdiction to hear appeals relating to violations of statutes or regulations that are incorporated by reference in the Zoning Regulations. However, in matters relating to this Board's jurisdiction, the Height Act is fundamentally different from, for example, the sign regulations or the Shipstead-Luce Act (cited by Montrose) or any number of other provisions of law incorporated by reference in the Zoning Regulations. Unlike the Height Act, the Zoning Administrator lacks authority to apply sign regulations or undertake an architectural review. Rather, such authority lies, varyingly, with DCRA, the National Capitol Planning Commission, and the Commission of Fine Arts. By contrast, there is no question that the Zoning Administrator is responsible for ensuring compliance with the Height Act, which responsibility is not within the purview of any entity other that the Zoning Administrator.

7. Finally, we would be concerned about the chaotic effects, on the administration of the Height Act and more broadly on the regulation of any projects involving Height Act issues, of adopting Montrose's position that "enforcement authority over the 1910 Height Act rests solely with the OCC" *[Intervenor's Reply on Jurisdiction, at p. 4]*. That position is tantamount to saying that there is no administrative appeal on Height Act issues, or indeed any remedy at all until a building project is at or near completion—because the Height Act gives the Office of Corporation Counsel no authority to act until a building has been "erected, altered, or raised or converted" in violation of the Act (D.C. Code §6-601.08)—and then only if it chooses to exercise that authority.

8. That would mean that no administrative appeal could be made either by a third party alleging a too permissive interpretation of the Height Act, or by a builder alleging a too restrictive interpretation, before the building has been erected. Avoiding such situations is the very purpose of the District's permitting process—of requiring builders to get authorization for their projects in advance, so as to allow an orderly process for resolving in advance any disagreements about whether the project as proposed will comply with the relevant building and zoning requirements. A forum for securing an administrative determination should be available before property owners expend substantial funds in erecting or altering a building that they may be required to tear down if its height is excessive, or which they would have been entitled to

erect to a greater height. It would be disruptive and costly to exclude so fundamental a feature as the height of a proposed building from this process.

FINDINGS OF FACT RELATING TO HEIGHT, ROOF STRUCTURE SETBACK AND FLOOR AREA RATIO

1. The project is located on the site of a former row house, 16.67 feet in width, of which the only part now remaining is a portion of the façade now remains, all the rest of the original structure having been demolished and replaced by new construction. *[Supplemental Report of Don Hawkins, p. 2; Hargrove Declaration, p. 3]*

2. The height of the building from the mid-point of the curb in front of the building to the highest point of the roof or parapet, as erected pursuant to the revised plans, is 70 feet 0 inches. *[Testimony of Norman Smith, April 6, p. 121]*

3. With the inclusion of a roof deck the height of the building exceeds 70 feet by approximately one foot four inches, and with the inclusion of the roof deck railing the building height exceeds 70 feet by more than four feet. *[Testimony of Norman Smith, April 6, p. 142-143; Supplemental Report of Don Hawkins, p. 2]*

4. There is a penthouse on the roof of the subject building, enclosing a staircase leading to the roof deck from the top level of the building. The penthouse is set back from the front and rear walls of the building by a distance at least equal to its height, which is approximately 11 feet, 7.5 inches, but is not set back from the east and west (side) walls of the building by a distance at least equal to its height. Instead, the penthouse is flush with the east wall of the building and is set back only about six feet from the west wall of the building. *[Testimony of Norman Smith, April 6, p. 123]*

5. The east and west (side) walls of the building are face on line walls. *[Testimony of Norman Smith, April 6, p. 123; Supplemental Report of Don Hawkins, p. 2]* The side walls, not including the roof structure, rise by as much as three stories above the adjacent buildings. *[Appellant's Pre-hearing Statement, pp. 4-5, and Exhibit 4; Supplemental Report of Don Hawkins, Exhibit 2]*

6. The east and west walls above the adjacent buildings are fully open and exposed to the exterior elements. *[Appellant's Pre-hearing Statement, pp. 4-5; Supplemental Report of Don Hawkins, Exhibit 2]*

7. The east and west walls contain numerous windows, of which eight are located at the sixth floor ("attic") level alone. *[Testimony of Don Hawkins, April 6, p. 177]*

8. The sixth floor of the building, labeled "attic", does not extend over the full footprint of the building, leaving a substantial space at the front of the building which is open to the fifth floor below. *[Appellant's Pre-hearing Statement, Exhibit 6 and 7]* The sixth floor has a ceiling, mounted on ceiling joists and collar ties interspersed with the joists, located below the roof

rafters. The headroom afforded by this ceiling is 6 feet 5 1/4 inches. *[Testimony of Norman Smith, April 6, p. 134]*

9. There is a space above the sixth floor ceiling joists and below the roof rafters. It has a maximum height of only a few inches and is not habitable or readily usable for any practical purpose. All of the houses in the 1800 block of Belmont Road N.W. that have not been altered have such a space called an attic, whatever its height. *[Testimony of Don Hawkins, April 6, 2004 Transcript, p. 185-6]*

10. The ceiling joists for the sixth floor ceiling are not necessary for the structural integrity of the building. Likewise the "collar ties" perform no structurally necessary function and could be removed without weakening the building in any way. *[Testimony of Don Hawkins, April 6, p. 173-176; Supplemental Report of Don Hawkins, p. 3]* The architect for Montrose, Mr. Norman Smith, stated that "You could remove collar ties", but that it would be very difficult, inadvisable, would require consent of apartment owners, and would trigger FAR calculations. *[Testimony of Norman Smith, April 6, pp. 145-6]*

11. The sixth floor, or "attic", is equipped with ten electrical outlets and 3 ceiling lights, comparable in number to those provided for the floor below. From this level, one can enjoy views of distant vistas in several directions through windows that provide the "attic" space with ample light from several directions. It is linked to the floor below by a full staircase. *[Testimony of Don Hawkins, April 6, pp. 6, 177-78; Appellant's Pre-hearing Statement, Exhibit 6]* According to Montrose, the "attic" space considerably enhances the marketability of the apartment unit of which it is a part. *[Testimony of Gail Montplasir, April 6, p. 137-138]*

12. On the basis of §199.1 (definition of "gross floor area") of the Zoning Regulations, the property owner and DCRA excluded the entire attic floor area from the calculation of gross floor area and thus from FAR, asserting that (1) this level of the building was an "attic", and (2) the ceiling headroom was less than 6 feet 6 inches. *[Testimony of Faye Ogunneye, March 16, p. 175 and Norman Smith, April 6, p. 134]*

13. Inclusion of the "attic" floor area would increase the FAR to 3.84, in excess of the 3.5 FAR plus 470 feet for the roof structure that is allowable under the Zoning Regulations in the R-5-D district. *[Supplemental Report of Don Hawkins, p. 5]*

14. The ground floor of the building does not extend over the whole footprint of the building, but extends from the front of the building to a point slightly beyond the midpoint of the distance to the back of the building. At the front of the building the ground level floor is approximately 6 inches above the adjacent front grade. The ground on which the building rests is higher at the rear of the building that at the front. The adjacent grade at the sides of the building cannot be observed because the building is directly abutted on either side by adjacent buildings. *[Supplemental Report of Don Hawkins, p.3-4]*

15. In order to apportion the floor area of the ground level between "basement" area required to be included in gross floor area and "cellar" area that is not included in FAR, pursuant to 11 DCMR §199.1 (definition of "basement", "cellar" and "gross floor area"), the property

owner, initially, and DCRA, employed the "perimeter method". This method consisted in measuring the length of the entire perimeter of the ground floor, measuring that length of the front wall of that perimeter, determining the percentage of the total length comprised by the length of the front wall, and then applying that percentage (20% in the present case) to the total floor area of the ground level. The resulting figure was treated as basement and included in gross floor area; the remaining ground level floor area was excluded. *[Appellant's Pre-hearing Statement, p. 7, and Exhibit 9; Testimony of Faye Ogunneye, March 16, pp. 177-178; Testimony of Norman Smith, April 6, p. 125-132]*

16. Testimony by the Chief of the Zoning Review Branch, Ms. Faye Ogunneye, indicated that the "perimeter" method is not uniformly applied in all zoning districts, and that the calculation employed in this case was done differently from other kinds of cases. *[March 16, p. 178]*

17. In 1958, when the concept of "floor area ratio" was included in the Zoning Regulations, the then Zoning Administrator addressed the problem of 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 readily determined such as when a 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", the Zoning Administrator consulted architects and others about the best method of measurement to employ. The method devised and subsequently applied by the zoning 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. *[Affidavit of James J. Fahey]*

18. The grade plane line provides a basis for determining the average grade plane, represented by a horizontal line bisecting the diagonal line, and thus for an apportionment between basement and cellar that bears some reasonable relationship to the actual grade. The architect for Montrose LLC employed such an average grade plane line at one point in the plans for the project, but did not use it in calculating basement gross floor area. *[Appellant's Memorandum on Additional Material Submitted by Montrose Concerning Basement/Cellar Calculation, p. 3, and Exhibit 6]* By this method, the entire ground level floor area, which extends only part way through the building, would be includable in "gross floor area". *[Supplemental Report of Don Hawkins, pp. 4-5; Testimony of Don Hawkins, April 6, pp. 192-194]*

19. While the current Acting Zoning Administrator states that the "perimeter" method is the "most accurate" way to pro-rate gross floor area between basement and cellar where the actual grade cannot be observed , and has been in use for a number of years, *[Statement of Denzil I. Noble]*, this method bears no reasonable relation either to the actual grade or to actual

floor area. The amount arbitrarily apportioned to "basement" by this method will remain constant regardless of the steepness of the grade, and will vary only modestly if the length of the ground floor, and thus its area, are greatly increased. *[Supplemental Report of Don Hawkins, pp. 4-5]*

20. At the April 20, 2004 hearing, Counsel for Montrose introduced into the record a section of the lower levels of 1819 Belmont Road showing two alternative grade plane lines, drawn diagonally from the grade at the front of the building to the back of the basement (not the grade at the back of the building), terminating respectively at the basement/cellar ceiling and the first floor. The two corresponding horizontal average grade plane lines were also shown. Counsel for Montrose characterized this as an application of the grade plane method, and stated that it demonstrated that all of the ground level floor area should be excluded from "gross floor area". *[Statement of Carolyn Brown, Esq., April 20, p. 318-319; Appellant's Memorandum on Additional Material Submitted by Montrose Concerning Basement/Cellar Calculation, Exhibit 2]* Such a purported "grade plane line", however, is not an accurate approximation of the actual grade along the sides of the building, since if extended the length of the building it ends up approximately eight feet above the actual grade. However, the average grade plane line drawn by Montrose's architect for other purposes was based on an accurate approximation of the actual grade. *[Appellant's Memorandum on Additional Material Submitted by Montrose LLC Concerning Basement/Cellar FAR Calculation, p. 3]*

21. Inclusion of the ground level floor area in gross floor area would increase the FAR to 3.78, in excess of the 3.5 FAR plus 470 feet for the roof structure that is allowable under the Zoning regulations in the R-5-D district. *[Supplemental Report of Don Hawkins, p. 5]*

22. In 1984-86, in case No. 84-10, the Zoning Commission considered proposals for revision of the requirements regarding roof structure setback, eventually adopting Zoning Commission Order No. 476. The Commission originally proposed changing the then-existing provisions, requiring setback from "all lot lines of the lot", to "the perimeter of the roof", but later proposed retaining the less restrictive "lot lines" formulation. Other still less restrictive formulations before it included setback from lot lines fronting on a street and setback from exterior walls fronting on a street. The National Capital Planning Commission, which the Zoning Commission is required by the Zoning Act, D.C. Code §6-641.05, to consult on proposed changes in the Zoning Regulations, urged that the regulations be consistent with the Height Act and opposed the less restrictive formulations, and communicated its views to the Zoning Commission. The NCPC regarded the "perimeter of the roof" formulation to be in keeping with the Height Act and to have the same purpose and intent as the Height Act's requirement of setback from the exterior walls, and urged the Commission to consider reverting to it. Ultimately the Zoning Commission adopted a formulation that the NCPC regarded as having the same effect as "the perimeter of the roof", namely, the requirement of setback from "*all* exterior walls". There was no provision or discussion for exempting row house party walls from setback requirements reflected in the NCPC files. *[Testimony of George H.F. Oberlander, April 20, p. 292-293 and Oberlander affadavit]*

23. There is no evidence in the record that the Zoning Administrator requested or received a report from the Office of Planning on the proposed roof structure, as required by 11 DCMR 411.10. *[Testimony of Ann Hughes Hargrove, April 20, p. 300]*

CONCLUSIONS OF LAW AND OPINION RELATING TO HEIGHT, ROOF STRUCTURE SETBACK AND FLOOR AREA RATIO

A. GENERAL

1. Under § 3202.1 of the Zoning Regulations, a building permit shall not be issued for the proposed erection, construction, conversion, or alteration of any structure unless that structure complies with the provisions of the Zoning Regulations.

2. Under § 3100.2 The Board of Zoning Adjustment shall hear and decide appeals where it is alleged by the appellant that there is an error in any order, requirement, decision, determination, or refusal made by any administrative officer or body, including the Mayor, in the administration or enforcement of this title.

3. Under 11 DCMR §199.2(g), the meaning of terms not defined in the Zoning Regulations is governed by Webster's Unabridged Dictionary.

B. CONCLUSIONS OF LAW RELATING TO HEIGHT

4. Under the 1910 Height of Buildings Act, "[o]n 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 part 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 10 feet . ." D.C. Code § 6-601.05(b)

5. The height limit allowed for buildings in the 1800 block of Belmont Road, N.W., which has a street width of 80 feet, is 70 feet. *[KCA Pre-hearing Submission, Exhibit 6].*

6. District officials are without authority to permit, whether by variance, special exception or exercise of discretionary authority, structures whose height or other characteristics do not comply with the terms of the Act. As to zoning, the Zoning Regulations make this clear by providing that "in addition to any controls established in this title, all buildings or other structures shall comply with the Act to Regulate the Height of Buildings in the District of Columbia . . .." 11 DCMR §2520.1

7. 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). Roof deck and roof deck railings are not among the types of structures enumerated in the Act and are therefore not allowed to exceed the Act's height limitations

8. This conclusion is not altered by the fact that the Height Act has been interpreted to permit air conditioning, heating equipment, or stairways leading to the roof, or antennas—structures not included in the Act's enumeration of structures – to exceed the Act's height

limitation. This interpretation, reflected in 11 DCMR §§400.8 for the R districts, is narrowly based on the rationale of the 1953 opinion of the Corporation Counsel that limits such additional structures to those that are necessary for the operation of the building and, as required by the language of the Act, are not intended for human occupancy. A roof deck meets neither of these criteria. Specifically, the roof deck in the present case is physically accessible exclusively by occupants of the top residential apartment in a multi-unit residential apartment building.

9. The fact that the Zoning Regulations provide for an additional exception from the height limit imposed by *zoning* regulations for roof structures that are less than four feet is immaterial. 11 DCMR 411.17. While such an exception may apply in contexts where a building does not exceed the height limit imposed by the Height Act, the Zoning Commission has no authority to expand the list of permitted roof structures beyond those specified in the Height Act and the Corporation Counsel's 1953 opinion.

10. Both Montrose and KCA have brought to the Board's attention that there are a number of buildings in the District of Columbia having roof decks and railings in excess of the Height Act, or which have roof structures that do not meet the setback requirements of the Height Act, some of which in past years have been the subject of BZA proceedings. In many if not all of the BZA orders on those proceedings there appears no reference to the Height Act or other indication that the Board was made aware of or addressed the Height Act issue. Our conclusion that roof decks and roof deck railings are not among the structures allowed to exceed the Height Act's limitations is not altered the mere fact that there exist buildings in the District of Columbia on which there are roof decks or roof deck railings exceeding the Height Act limits or which otherwise do not conform to the Height Act. Nothing of legal relevance to this Board's deliberations follows from that fact. Even if there were an explicit earlier decision by the Board interpreting the Height Act, we would be compelled to examine its consistency with the Act in deciding the present case.

11. Therefore, the Zoning Administrator was without discretion to permit a roof deck and railing, since the roof deck and railing result in a building height that exceeds the applicable 70-foot Height Act limit by more than four feet.

C. CONCLUSIONS OF LAW RELATING TO ROOF STRUCTURE SETBACK

12. The Height Act requires that roof structures permitted to exceed the Act's Height Limits "be set back from the exterior walls distances equal to their respective heights above the adjacent roof; . . ." D.C. Code § 6-601.05(h). The Zoning Regulations require that such structures "be set back from all exterior walls a distance at least equal to its height above the roof upon which it is located." 11 DCMR § 400.7(b).

13. The Zoning Administrator is without authority to deviate in any respect from the set back limits imposed by the Height Act. This is confirmed by 11 DCMR § 2522.1(c), which

specifically provides that "all deviations of roof structure setback requirements comply with the Act to Regulate the Height of Buildings."

14. The side walls of the building in the present case, being fully open to the outside and exposed to the elements, rising several stories above the adjacent structures, obviously constructed as outside walls intended to resist deterioration from such exposure, and supplied with numerous windows looking out on the outside, have all the physical characteristics of exterior walls and cannot reasonably be described as anything other than that. A wall with windows opening to the outdoors must be an exterior wall by definition. Therefore any penthouse roof structure is required both by the Height Act and the Zoning Regulations to be set back from these walls by a distance at least equal to its height.

15. We believe that Zoning Commission Order No. 476 (June 9, 1986) is conclusive on this point as a matter of interpretation both of the Height Act and the implementing Zoning Regulations. That order revised the regulations on roof structure setback. Its regulatory history makes clear that: (1) the Zoning Commission had before it a variety of setback proposals of varying degrees of restrictiveness, including proposals that would have limited the setback requirement to the side of the building facing a street (in accord with the position urged by Montrose LLC and DCRA in the present case); (2) the Commission intended to adopt regulations consistent with the Height Act, and (3) to that end, the Commission adopted a setback formulation—"*all* exterior walls"—that both the Commission and the NCPC regarded as requiring setback from *all* outside walls of a building, and not just the street-facing walls or the front and rear walls. Specifically, they regarded setback from "exterior walls" and from "the perimeter of the roof" as equivalent in intent and effect. *[Appellant's Memorandum of Law on the Height Act, pp. 9-10; testimony of Mr. George Oberlander, pp. 292-3].* The position that setback should be limited to street-facing walls was rejected.

16. The Zoning Administrator's present position, that the setback requirements do not apply to any side walls that are party walls or lot line walls, is without support in the Zoning Regulations. That position is even more lax as applied to the present case than the formulation adopted in 1958, which required setback from "all lot lines", and the "all lot lines" formulation was specifically rejected by the Zoning Commission in 1986 at the urging of the NCPC as being inconsistent with the Height Act.

17. DCRA took the position initially that the high exposed side walls of the subject building are party walls, and that the fact that an adjacent property owner might some day build a structure abutting these side walls to the same height warrants treating them as other than exterior walls. *[Testimony of Faye Ogunneye, March 16, pp. 169-170; Statement of Laura Gisolfi Gilbert, April 20, p. 310]* In fact it appears that these walls are face-on-line (i.e. "lot line walls"), but in either case that possibility is not, in our view, legally relevant. It is the Height Act that governs, and the Height Act contains no suggestion that an exception can be made to its requirements for setback from exterior walls on the basis of what an owner of an adjacent property owner might legally be able to do with that property in the future. Even if it did, it is an error to assume that in the R-5-D district or other R-3 to R-5 districts, future construction will abut an existing structure with side walls that are party or face-on-line walls, since detached and semi-detached buildings are permitted in these districts as well as attached. In any event the

height and type of structure that a particular adjacent property owner might legally be allowed to build -- not to mention might actually build – in the future is too variable from one property to the next to form a suitable basis for setting standards for building projects being undertaken now. These questions are dependent not only on matter-of-right height limits in any zoning district but on other factors such as FAR, lot occupancy, rear yard space, allowable number of stories in some districts, and other constraints. *[Statement of Lawrence Hargrove, pp.336-338, April 20; testimony of Ann Hughes Hargrove on March 9, pp. 245-251 and April 20, pp 296-297];*

18. The Zoning Administrator therefore erred in failing to require the roof structure to be set back from the east and west walls of the building by at least a distance equal to the height of the penthouse.

D. CONCLUSIONS OF LAW RELATING TO FLOOR AREA RATIO

1. THE "ATTIC"

19. §199.1 (definition of "gross floor area") of the Zoning Regulations offers an inducement to builders to include an attic in building plans: a potentially large and relatively usable space that need not count toward the building's FAR. It is important that the criteria by which a builder qualifies for this FAR benefit be scrupulously applied, especially since one of the basic functions of the Regulations is to regulate the density of development in the various zoning districts. Specifically, the space in question must genuinely be an attic, and its structural headroom must not exceed a specified limit (6 feet 6 inches). If the sixth floor space is either not an "attic," *or* its structural head room exceeds 6 feet, six inches, then the gross floor area devoted to this space must be included in the calculation of the building's FAR.

(A) DEFINITION OF "ATTIC"

20. "Attic" is not defined in the Zoning Regulations. Therefore, the Zoning Administrator and this Board, under §199.2(g) of the Regulations, are governed by the definition of the term found in Webster's Unabridged Dictionary. That definition, in relevant part, is: "the part of a building immediately below the roof and wholly or partly within the roof framing." Similarly, the BOCA Code definition, invoked by the property owner in connection with its application for permits despite its obvious inapplicability, is "The space between the ceiling beams of the top story and the roof rafters." The sixth floor level of the building clearly does not meet this description. We conclude therefore that it is not an attic, and that its floor area must thus be included in the calculation of "gross floor area" under §199.1 of the Zoning Regulations, and hence FAR.

21. It is immaterial that the small space in the building that does qualify as an attic is-- like many attics -- too small to be readily usable as a storage garret or for or any other practical purpose. The term "attic" is defined, precisely, by reference to the structural characteristics of the space in question, not its size or usability, and nothing in the Zoning Regulations entitles a property owner to a usable attic. Had Montrose wished to have one, it could readily have included it in the building plans. It chose not to do so, opting instead to devote building height that might have been taken up by a more spacious attic to the more attractively usable sixth floor

of the building. Having made that choice, Montrose is not now in a position under the Zoning Regulations to garner the FAR benefits of having a genuine attic simply by placing an "attic" label on the sixth floor.

22. As to whether it is possible to design a row house with more than one attic, we need not address this question. Our responsibility here is merely to ensure that anything labeled "attic" for zoning purposes is really an attic.

(B) ATTIC HEADROOM REQUIREMENT

23. The evident effect and intent of the requirement that the restricted attic headroom be "structural" is to ensure that buildings that are constructed in such a way as to qualify for the added density cannot later be altered so as to open up that space to a wider array of uses, thus frustrating an underlying purpose of the regulations. This is true regardless of the actual intent of a present or future owner—an issue we need not, and do not, address.

24. The evidence establishes that the "collar ties", as well as the ceiling joists, on which the "attic" ceiling drywall is mounted perform no necessary structural function, and that the "attic" headroom therefore does not meet the requirements of §199.1. At best, the collar ties are structurally redundant, and while in general a property owner is free to build redundancies into a structure, he or she is not free to do so if the direct effect is to circumvent the requirements of the Zoning Regulations.

2. THE BASEMENT

25. The Zoning Regulations definition of "gross floor area" in §199.1 require that the floor area of a "basement" be included in the calculation of gross floor area, but allows the floor area of a "cellar" to be excluded. A "basement" is defined as "that portion of a story partly below grade, the ceiling of which is four feet (4 ft.) or more above the adjacent finished grade," whereas a "cellar" is defined as "that portion of a story partly below grade, the ceiling of which is less than four feet (4 ft.) above the adjacent finished grade".

26. The reference to "that portion" in the definitions of "cellar" and "basement" plainly contemplates that, in all buildings where the first level is partly below grade, it is necessary to measure how much, if any, of the floor area of the ground floor has ceiling more than four feet above the adjacent finished grade in order to determine how much of the gross floor area is attributable to "basement", and therefore includable in calculating the building's total FAR. *[Appellant's Memorandum on Additional Material Submitted by Montrose LLC concerning Basement/Cellar FAR Calculation, p. 1, and Exhibit 1, Memorandum dated September 11, 1990, from Jim Fahey to Steve Sher)]* Where a building abuts other buildings on either side, making it impossible to observe and measure the actual grade adjacent to the side walls, the Zoning Regulations do not explicitly prescribe a method by which the apportionment required by §199.1 is to be done, so the Zoning Administrator is charged with devising a method of implementing that provision. That is the situation presented by the present appeal, and the Board must now determine if the method employed by the Zoning Administrator and the developer is a reasonable application of §199.1 in this class of situations.

27. As a general rule the Board will defer to the Zoning Administrator's interpretation or application of the Zoning Regulations by the Zoning Administrator, where it reasonably carries out the intent of the regulations and has been consistently employed over time, even though other reasonable interpretations may exist.

28. We conclude, however, that the "perimeter" method of apportioning gross floor area between "basement" and "cellar", applied to the present case, does not meet this description. It has not been consistently or uniformly employed over time. *[Statement of Denzil L. Noble; Affidavit of James J. Fahey; testimony of Faye Ogunneye, March 16, p. 178]*

29. Nor does it reasonably carry out the intent of §199.1 (definitions of "basement", "cellar", and "gross floor area") of the Zoning Regulations. Rather, it bears no rational relation to either of the two variables—floor area and grade—that go into making the apportionment between basement and cellar required by §199.1, producing results that vary not at all with variations in the steepness of the grade, and only modestly if the basement length and floor area are greatly increased. No party, including the Zoning Administrator, has even attempted to provide a reason why this method, with its arbitrary and indeed bizarre results, should be regarded as a reasonable means of implementing §199.1 or why it should have been substituted for the grade plane method. In his written statement the Acting Zoning Administrator "submits that the most accurate way to arrive at a pro-rated number is through the perimeter calculation methodology that was utilized in this project . . .", but offers no hint as to how this characterization might be justified.

30. By contrast, the "grade plane method," used by the Zoning Administrator for many years, which involves approximating the unobservable grade adjacent to the sides of the building on the basis of the actual and observable grades at the front and rear, and produces results that vary proportionately both with grade steepness and with total floor area, is a reasonable method of carrying out the intent of §199.1.

31. To draw a purported grade plane line extending only part way through the building , because the basement does not extend through the full length of the building, as proposed by Montrose LLC, misconstrues the concept of a grade plane as applied by its own architect elsewhere in the plans for this project, and misses the point of the grade plane method as just described. The grade adjacent to the sides of the building, which the grade plane line is intended to approximate, remains the same regardless of the length of the basement that the builders choose to construct.

32. The Zoning Administrator is correct that the grade plane line alone will not provide an apportionment between basement and cellar. Once it is drawn, however; an average grade plane line can be drawn that will provide a basis for a fair apportionment.

33. We conclude therefore that the Zoning Administrator erred in employing the "perimeter" method to determine the amount of the ground level floor area that could be excluded from "gross floor area", particularly in light of the availability of a reasonable alternative method historically recognized and employed over many years by earlier Zoning

Administrators, by which all of the ground level floor area should be included in "gross floor area".

34. In light of the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the subject appeal is granted, and the building permits of March 11, October 6 and October 16, 2003, along with any certificate of occupancy if issued, are revoked, because

(1) The roof deck and railing are not permitted under the Height of Buildings Act;

(2) The penthouse roof structure is not set back from all exterior walls as required by the Height of Buildings Act.

(3) Since the sixth floor is not an attic, its floor area must be included in the calculation of "gross floor area" and hence FAR, as a result of which total FAR will exceed the allowable limit;

(4) Since the sixth floor's structural headroom exceeds 6 feet 6 inches, its floor area must be included in the calculation of "gross floor area" and hence FAR, as a result of which total FAR will exceed the allowable limit; and

(5) All of the ground level floor area must be included in the calculation of "gross floor area", as a result of which total FAR will exceed the allowable limit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing submission was served by United States Mail, postage prepaid, this 25th day of May, 2004 upon the following:

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