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July 15, 2004

MARY CAROLYN BROWN
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IMMEDIATE ATTENTION REQUESTED

Board of Zoning Adjustment
for the District of Columbia
441 4th Street, N.W., Suite 210S
Washington, D.C. 20001

RE: BZA Case No. 17109
Motion for Partial Reconsideration of BZA's June 22, 2004 Decision

Dear Members of the Board:

On behalf of Montrose, LLC ("Montrose"), Intervenor in the above-referenced case, we are filing herewith its Motion for Partial Reconsideration of the Oral Decision rendered on June 22, 2004. Montrose requests a waiver of section 3126.2 of the Zoning Regulations to allow consideration of this motion prior to the issuance of a final written order. Montrose further requests that the Board of Zoning Adjustment consider this matter at its August 3, 2004, meeting.

Respectfully submitted,

Carolyn Brown

Mary Carolyn Brown

Enclosure

cc: Laurie Gisolfi Gilbert, Office of the General Counsel, DCRA, for Appellee
Andrea Ferster, Esq., counsel for Appellant Kalorama Citizens Association
Mr. and Mrs. Hargrove, Kalorama Citizens Association
Alan Roth, Chair, Advisory Neighborhood Commission 1C
Gail Montplaisir, Montrose, LLC

BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPEAL OF:

Kalorama Citizens Association from the Administrative Decision of David Clarke, Director, Department of Consumer and Regulatory Affairs, from the issuance of Building Permit Nos. B455571 and B455876, dated October 6 and 16, 2003, respectively, to Montrose, LLC, to adjust the building height to 70 feet and to revise penthouse roof structure plans to construct a five-story apartment building in the R-5-D District at 1819 Belmont Road, N.W., Washington, D.C.	)	**BZA Appeal No. 17109** **Decision Date: June 22, 2004**

INTERVENOR'S MOTION FOR PARTIAL RECONSIDERATION OF BOARD OF ZONING ADJUSTMENT'S DECISION OF JUNE 22, 2004

I. INTRODUCTION

Intervenor Montrose, LLC, hereby moves the Board of Zoning Adjustment (the "Board" or "BZA") to reconsider a portion of its oral decision of June 22, 2004, in the above-referenced appeal, and to waive the requirements of section 3126.2 of the Zoning Regulations to allow reconsideration of the decision prior to the issuance of a final written order. The Board's decision pertaining to the building height and penthouse setback issues, as recorded in the transcript of its June 22, 2004 meeting, does not flow rationally from the evidence of record, the statute being interpreted, or the discussions of the Board; is inconsistent with the long-standing interpretations of the Height of Buildings Act of 1910 and Zoning Regulations; and has a direct and deleterious effect on projects already approved by the District's Building and Land Regulation Administration, the BZA and the Zoning Commission. Because of the immediate

and adverse consequences of this decision, the Intervenor requests a waiver of section 3126.2 to allow immediate reconsideration of the Board's decision at its August 3, 2004, meeting.

II.
BACKGROUND

On June 22, 2004, the Board unanimously voted to deny one of three aspects of the appeal filed by the Kalorama Citizens Association ("KCA") challenging the construction of the building at 1819 Belmont Road, N.W., Washington, D.C. *See* Excerpt of Board of Zoning Adjustment Transcript, June 22, 2004 (hereinafter "Tr."), a copy of which is attached hereto as Exhibit A. The Board denied the appeal with respect to the floor area ratio ("FAR"), finding that the Zoning Administrator did not abuse his discretion in using the "perimeter wall method" to calculate the portions of the lower level included in FAR and accepted the calculations submitted by the Intervenor. The Board also held that the Zoning Administrator correctly interpreted the uppermost level as attic space, which is excluded from FAR calculations because the space provides structural headroom of less than six feet, six inches. The Board determined that it should not second-guess the structural elements as presented on the drawings to determine whether the building could be altered later to create habitable space that would count toward FAR. Tr. at 9-16; 34-37. The Board's decision on this issue is consistent with its discussions on the record and no contrary views were expressed by any Board member.

The Board approved the appeal on the basis of (i) excessive height by virtue of a roof deck and railing, and (ii) inadequate penthouse setbacks. With respect to the roof deck and railing, the Board determined that these elements are not specifically listed as exemptions from the Height of Buildings Act of 1910 (the "1910 Height Act"), and thus, as constructed, exceeded the maximum allowable height of 70 feet. Tr. at 27-37. With respect to the penthouse setbacks,

the Board debated whether the walls in question were party walls or exterior walls, and thus subject to the setback provisions. Without resolving the issue in their discussions, the Board nevertheless voted unanimously to approve this aspect of the appeal. Tr. at 16-26; 34-37.

III.
DISCUSSION

A. Board's Decision on the Roof Deck, Railing and Penthouse Setback Does Not Flow Rationally from the Discussion of the Board Members or the Evidence of Record.

In rendering a decision, the Board's action must be based on reliable, probative and substantial evidence in the whole administrative record and the conclusions must flow rationally from those findings. *George Washington University v. District of Columbia Board of Zoning Adjustment,* 831 A.2d 921, 932 (D.C. 2003); *see also Giles v. District of Columbia Dep't of Employment Servs.,* 758 A.2d 522, 524 (D.C. 2000); *Russell v. District of Columbia Board of Zoning Adjustment*, 402 A.2d 1231 (D.C. 1979). Under the Administrative Procedures Act, "[f]or agency's findings in contested administrative cases to be adequate, agency must make findings on all contested issues material to the underlying substantive statute or rule, its findings must be supported by substantial evidence apparent from the record as a whole and agency's conclusions of law must be derived rationally from findings which are in accord with the underlying statute." *Spevek v. District of Columbia Alcoholic Beverage Control Board*, 407 A.2d 549 (D.C. 1979).

Here, the Board's decision does not flow rationally from its deliberations, the facts in the case or the record as a whole, nor are they in accord with the underlying statute. he rationale provided by the Board for granting the appeal based on the excessive height of the roof deck and railing contradicts past interpretations of the Zoning Administrator, the Board and the Zoning Commission on the 1910 Height Act. Alternatively, even if the Board could overturn these past

interpretations, under the principle of *stare decisis*, any new interpretations can only apply prospectively and not retroactively. Similarly, the two Board members articulating the rationale for approval of the penthouse setback issue applied the wrong standard to facts not present in the record, resulting in a flawed decision. Thus, the Board's decision on the height and setback issues should be overturned and the appeal denied.

B. The Board's Decision that the Roof Deck and Railing Violate the 1910 Height Act Does Not Flow Rationally from the Facts in the Case or the Statute Being Interpreted.

1. The Board's Rationale for Granting Appeal for Roof Deck and Railing Height Issues.

In voting to grant the appeal on the issue of excessive height with respect to the roof deck and railing, the Board determined that the 1910 Height Act permits a maximum building height of 70 feet at the subject property and that roof decks and railings are not exempted from this restriction. The Board's decision on this issue, however, does not flow rationally from the evidence of record. Even if the Board's decision were supported by evidence of record, given the long-standing interpretation of the Zoning Regulations on this matter, any new interpretation must apply prospectively only, and not to buildings for which permits have already been issued.

2. Roof Decks and Railings Have Been Routinely Approved to Exceed the 1910 Height Limits.

As the evidence of record clearly demonstrates, roof decks and railings exceeding the 1910 Height Act limits have been approved routinely by the Zoning Administrator and through plans approved by the Board or the Zoning Commission. Among the cited examples in the record are the buildings at 2099 Pennsylvania Ave., N.W., 1667 K Street, N.W., and 400 Massachusetts Avenue, N.W. Both 2099 Pennsylvania Ave and 1667 K Street were constructed to the maximum allowable height of 130 feet under the 1910 Height Act, with a roof deck and railing exceeding that height. The building at 400 Massachusetts Avenue, N.W., received BZA

approval for unequal penthouse enclosure heights in Case No. 16881. The plans approved by the BZA, from which the Applicant cannot deviate without a modification of the order, include a roof deck and trellis above the maximum permitted height under the 1910 Height Act.

Several planned unit developments (PUD) have also been approved with roof decks and railings above the 1910 Height Act restrictions. In 1978, the Board of Zoning Adjustment approved further processing of a PUD for the Embassy Park Apartments on Massachusetts Avenue between Ward Circle and New Mexico Avenue, N.W., which allowed a swimming pool on the roof of an apartment building constructed to the maximum height of ninety feet under the 1910 Height Act. Certain rooftop elements were eliminated, such as a sauna, toilets and lounge, because of restrictions under the 1910 Height Act. The swimming pool was allowed, however, because it was sunken into the building's roof. Pursuant to the D.C. Construction Codes, the pool is surrounded by a safety fence that exceeds the 1910 Height Act limits. *See* Order in BZA Case No. 12760, November 8, 1978, at 6 (Finding No. 13) (copy attached as Exhibit B); *see also* Zoning Commission Order No. 218, May 19, 1978. Implicit in the approval of the pool was the Zoning Commission's opinion that the fences exceeding the rooftop height of ninety feet were permitted under the 1910 Height Act. This is further supported by the other several dozens of apartment buildings throughout the city constructed to the maximum height of 90 feet under the 1910 Height Act, with rooftop swimming pools. These include the Newport Apartments at 1250 21st Street, N.W., the Apolline at 1330 New Hampshire Ave., N.W., the Concord Apartments at 1816 New Hampshire Ave., N.W., and the apartment buildings at 2414 and 2500 K Streets, N.W. Other examples of roof decks and railings authorized above the 1910 Height Act limit include the Watergate PUD, the Residences at Ritz Carlton, a PUD at 22nd and M Streets, N.W., International Square at 1875 I Street, N.W., 1899 K Street, N.W., and 1901 K Street, N.W.,

among many others. Thus, in a similar fashion, the deck and safety railing in the instant case are likewise exempt from the restrictions of the 1910 Height Act.[1]

It would be incongruous, and an abuse of discretion, to conclude otherwise. As historically interpreted, the 1910 Height Act allows antennas and flagpoles on roofs above the permitted height, even though these items are not specifically exempted from the 1910 Height Act. Similarly, a long-standing interpretation of the 1910 Height Act has allowed air conditioning equipment to be placed on a roof above the prescribed height limits, even though such equipment is not specifically enumerated among the items exempted from the height limits, and even though such equipment blocks light and ventilation far more than a roof deck and railing. Currently, the Applicant can cure the perceived deficiencies of its project by simply relocating the mechanical equipment to the front of the roof in place of the deck and railing, and move the deck and railing to the lower level of the roof at the rear of the building. Such a solution, however, while in full compliance with the 1910 Height Act and the Zoning Regulations, would create far greater consequences to light and air, and be far more visually intrusive. It is reasonable and rational, then, to conclude that a less intrusive roof deck and railing is permitted as a matter-of-right under the 1910 Height Act, as well.

3. The Zoning Administrator Did Not Err in Relying on Long-Standing Interpretations That Roof Decks and Fences are Exempt from the 1910 Height Act.

Based on the cases cited above, the Zoning Administrator, the Board of Zoning Adjustment and the Zoning Commission have consistently interpreted roof decks and safety fences to be exempt from the restrictions of the 1910 Height Act. Thus, the current Zoning Administrator did not abuse his discretion in following this long-standing interpretation.

[1] Rooftop antennas are another common roof structure that frequently exceed the permitted height of the 1910 Height Act, as shown in the attached photographs.

Consequently, the Board's decision on this issue does not flow rationally from the evidence of record.

Even if the Board in the present case has determined that this historical interpretation is in error, the Board cannot apply its new interpretation retroactively to building permits already issued. Under the principle of *stare decisis*, an agency's change in a long-standing interpretation of a rule can only apply prospectively, not retroactively. *See Smith v. District of Columbia Board of Zoning Adjustment*, 342 A.2d 356 (D.C. 1975), a copy of which is attached as Exhibit C.

In *Smith*, the petitioning homeowners added a deck on their home in reliance on a building permit issued by the District. They subsequently requested a variance and invoked the doctrines of estoppel and laches. The Board of Zoning Adjustment ruled against them without making findings with respect to these equitable issues or the homeowners' claim that the building permit for the deck was approved in accordance with a long-standing interpretation of the Zoning Regulations. The Court found that:

> the Board made no findings relevant to petitioners' claim that the Zoning Administrator's approval of the deck was given pursuant to a long-standing interpretation of the Zoning Regulations which had been approved in the past by the Board, so that established principles of *stare decisis* require any change in that interpretation to be made prospective only. While the Board is of course not bound for all time by its prior positions, we think it should have considered this contention, not only in connection with its decision of the merits of the case, but also as it relates to petitioners' claim of estoppel.

Smith, 342 A.2d at 359.

Here, the Board likewise failed in its deliberations to take into account the Zoning Administrator's and Intervenor's claim that the Zoning Administrator's approval of the building permit for the roof deck and railing were given pursuant to a long-standing interpretation of the Zoning Regulations by the Zoning Administrator's office, the Board itself, and the Zoning

Commission. Consistent with the holding of *Smith*, if the Board now wishes to change that long-standing interpretation, under the principle of *stare decisis* it may only apply that new interpretation prospectively. Thus, the Board is precluded under *Smith* from retroactively requiring the Intervenor to remove the roof deck and railing in order to comply with this new interpretation.

C. The Board's Decision on the Penthouse Setback Likewise Does Not Flow Rationally from the Facts in the Case or the Statute Being Interpreted.

1. The Board's Rationale for Granting the Penthouse Setback Appeal Issue.

In its appeal to the Board, KCA argued that the penthouse did not meet the setback requirements under the 1910 Height Act or the Zoning Regulations. The 1910 Height Act provides that "penthouses, ventilation shafts, and tanks shall 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 use an identical standard, requiring that a penthouse "shall 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).

The Board debated at length the meaning of "exterior wall" and its distinctions from a party wall. In their deliberations, the Board agreed that if the east and west walls of the subject property were "party walls," then no setback would be required. Conversely, if those walls constituted "exterior walls," a one-to-one ratio setback would be required. *See* Tr. at 17-27 (Mr. Parsons: "The party wall issue is something I think we probably understand as a matter of right, would permit this building to have this party wall and that they're at their own risk by building windows into it." Tr. at 17; Vice Chairperson Miller: "With respect to the penthouse, I see the issue as turning on, deciding on, whether side walls are exterior or party walls...." Tr. at 18; Mr. Mann: "I think to me it's almost a joke to call those exterior walls party walls, but at the end of

the day, unfortunately, I have to come down on the side of calling them party walls...."; *accord* discussion of Chairperson Griffis that issue to decide is exterior versus party wall, Tr. at 20-25.)

The Board analyzed the issue in light of both the current and future status of the east and west walls. At present, the upper portion of these walls do not abut construction on the adjoining properties to either side. The Zoning Regulations, however, permit the adjoining structures to build additional stories. The Board could not agree whether the existing condition rendered the east and west walls "exterior walls," or whether the present ability of adjacent property owners to construct adjacent to the walls rendered these walls "party walls."

Without resolving the issue in its discussions, the Board voted to grant the appeal with respect to the setback issue. In so doing, however, the Board failed to provide any logical support for its position based on the record or its deliberations. Only two Board members spoke in support of the contention that the side walls were exterior walls. Vice Chairperson Miller stated that she relied on the Webster's Dictionary definition of "exterior" in making her determination, in accordance with section 199.2 of the Zoning Regulations. That section provides that terms not defined in the Zoning Regulations shall have the meaning prescribed in Webster's Unabridged Dictionary. The vice chairperson went on to conclude that the "penthouse should be set back in accordance with the Height Act for those [side] walls as well as the front and back." Tr. at 19. Further, both Mr. Parsons and Mrs. Miller stated that because all sides of the penthouse can currently be viewed from various vantage points along the street, then the 1910 Height Act should be strictly construed to require this particular penthouse to be set back from both the street frontage walls *and* the side walls. Tr. at 17; 24-25.

2. The Board's Decision is Unsupported by its Discussions on the Record.

There is no support in the Board's deliberations or record that the 1910 Height Act requires penthouses to be set back from side walls. In fact, the opposite is true. The materials submitted to the record demonstrate that the 1910 Height Act "requires a penthouse set back only from the lot line on the ***frontage facing the street***." *See* Memorandum from Office of Planning to the Zoning Commission, Roof Structure Text Amendment, February 3, 1984, at 6 (emphasis added), submitted to the record as Attachment 4 to KCA's Memorandum of Law on the Height of Buildings Act, March 9, 2004; *see also* Zoning Commission Order No. 476 at 6, submitted to the record as Attachment 1 to KCA's Memorandum of Law on the Height of Buildings Act.

And although not offered as a rationale by the Board, the record likewise does not support an argument that the Zoning Regulations require a stricter interpretation than the 1910 Height Act. The Zoning Commission considered this very issue when drafting text amendments to the roof structure requirements. The Office of Planning suggested clarifying the text by stating that penthouses must be set back from all perimeter walls of a building, thus including both interior and exterior walls. The Zoning Commission expressly rejected this proposed amendment stating that the language of the 1910 Height Act was clear: that setbacks are required from all exterior walls. Because the Zoning Commission specifically rejected this clarifying language and chose to follow the 1910 Height Act language, which applies only to street frontage walls, the Commission clearly intended the Zoning Regulations to be interpreted in the same manner as the 1910 Height Act. *Id.* That is, the only conclusion of law that flows rationally from the evidence of record is that the penthouse setback requirements apply only to the front and rear walls of the Intervenor's building and not to the east and west walls.

The Board is not at liberty to provide a different meaning to a section of the regulations when the Zoning Commission has already provided its own interpretation of that section. *Sheridan-Kalorama Neighborhood Council v. District of Columbia Bd. of Zoning* Adjustment, 341 A.2d 312 (D.C. 1975) (Board may not trespass upon the policy-making areas reserved to the Zoning Commission); *Citizens Association of Georgetown v. District of Columbia Board of Zoning Adjustment,* 337 A.2d 495 (D.C. 1975) (sole authority for any amendment of zoning regulations is in Zoning Commission, not Board of Zoning Adjustment). Thus, the Board's reliance on the definition of "exterior" in Webster's Unabridged Dictionary, by itself is insufficient. It must also consider the Zoning Commission's determination of what "exterior" means and make finding in accordance with the Zoning Commission's clear intent. Here, the Zoning Commission clearly intends the term "exterior walls" to have the same meaning as in the 1910 Height Act, which only means those exterior walls fronting on a street.

The Board's only other articulated reason for granting the penthouse appeal issue is that "there's no reason for a penthouse of this size to gain access to the roof." Tr. at 17. The standard of review for the Board, however, is not what is necessary but what is permitted as a matter of right under the Zoning Regulations and the 1910 Height Act. Thus, a finding that there is no reason for a penthouse of this size is arbitrary, does not flow rationally from the statute or regulations being interpreted, and thus is insufficient to sustain the vote of the Board on this issue.

IV.
WAIVER OF SECTION 3126.2 IS NECESSARY DUE TO IMMEDIATE ADVERSE EFFECT OF BOARD'S ACTION

Pursuant to section 3126.2 of Board's Rules of Practice and Procedure, "[a]ny party may file a motion for reconsideration or rehearing of any decision of the Board, provided that the

motion is filed with the Director within ten (10) days from the date of issuance of a final written order by the Board." Here, the Board has not yet issued a final written order. Based on the normal turn-around time in issuing final written decisions, coupled with the unusual and exceptionally complex issues presented by this case, it is unlikely that the Board will issue its final written order in this matter until late Fall, or possibly later. The Intervenor has already expended considerable sums of money in reliance on the approvals granted by the Zoning Administrator and the issued building permits, and it would work a great hardship to the Intervenor if these issues were not reconsidered immediately.

Additionally, the decision of the Board has serious ramifications for projects already approved. Numerous projects that have been approved matter-of-right or that have received BZA or Zoning Commission approval, may be in jeopardy as a consequence of the Board's retroactive ruling. Several projects located in the commercial DD districts have achieved additional height and density to construct residential buildings, and have located a portion of their residential recreation space on the roof. Such residential recreation space invariably includes a roof deck and safety railing in excess of the maximum permitted height under the 1910 Height Act. Similarly, commercial office buildings constructed to the maximum height under the 1910 Height Act along Massachusetts Avenue, K Street, or Pennsylvania Avenue, for example, frequently provide rooftop decks as special amenities to their tenants. Any new projects nearing completion or already constructed are now vulnerable to this new interpretation.

In order to resolve the uncertainty created by this new ruling, and to avoid unfair hardship on the Intervenor, the Board should waive the requirements of section 3126.2 and reconsider its decision prior to the issuance of a final written order.

V.
CONCLUSION

For the reasons stated above, Intervenor Montrose, LLC, respectfully requests the Board to waive the requirements of section 3126.2 and reconsider its decision on the penthouse setback and the roof deck and railing issues at its next meeting of August 3, 2004.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: 

Mary Carolyn Brown
2099 Pennsylvania Ave., N.W., #100
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(202) 955-3000

July 14, 2004

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Partial Reconsideration was served this 15th day of July, 2004, by hand-delivery, or first-class mail postage prepaid, on the following:

Andrea Ferster, Esq.
1100 17th Street, N.W., 10th Fl.
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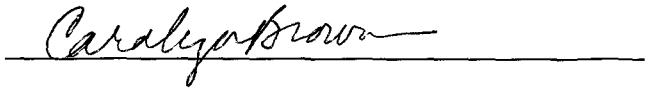

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GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC MEETING

EXCERPT OF CASE 17109

KALORAMA CITIZENS

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TUESDAY
JUNE 22, 2004

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The Public Meeting convened in Room 220 South, 441 4th Street, Northwest, Washington, D.C., 20001, pursuant to notice at 9:00 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
RUTHANE MILLER	Vice Chairperson
CURTIS ETHERLEY, JR.	
JOHN MANN	

ZONING COMMISSION MEMBERS PRESENT:

ANTHONY J. HOOD
JOHN G. PARSONS

COMMISSION STAFF PRESENT:

BEVERLY BAILEY
CLIFFORD MOY
JOHN K. A. NYARKU

OTHER AGENCY STAFF PRESENT:

KAREN THOMAS
KEVIN HILDEBRAND
STEVEN COCHRAN
TRAVIS PARKER

D.C. OFFICE OF CORPORATION COUNSEL:

MARY NAGELHOUT, ESQ.
SHERRY GLAZER, ESQ.
JACOB RITTING, ESQ.
JANICE SKIPPER, ESQ.

P-R-O-C-E-E-D-I-N-G-S

9:37 a.m.

MR. MOY: The next case for decision is the appeal of Application Number 17109 of Kalorama Citizens Association, pursuant to 11 DCMR 3100 and 3112, from the administrative decision of David Clarke, Director, Department of Consumer and Regulatory Affairs, from the issuance of Billing Permit Numbers, B, as in bravo, 455571 and B, as in bravo, 455873, dated October 6, 2003 and October 16, 2003, respectively, to Montrose LLC to adjust the building height to 70 feet and to revise penthouse roof structure plans to construct a five-story apartment house in the R-5-D district.

The Appellant alleges that the under construction building is in violation of the building height, floor area ratio and roof structure setback requirements of the zoning regulations. The subject property is located at 1819 Belmont Road, Northwest, Square 2551, Lot 45.

On April 20 of 2004, the Board completed public testimony on the application and scheduled its decision on June 8, 2004. And on June 8, 2004, the Board rescheduled its decision to today, June 22.

The Board previously had asked for post-

hearing documents from the Appellant, a supplemental statement addressing the BZA jurisdiction over the Height Act issues and response to documents submitted by the Intervenor. This was filed by the Appellant and is in your case folders as Exhibits 77 and 75, respectively.

From DCRA, a response to Jim Fahey's memorandum, dated September 11, 1990. Now, this is also in your case folders, identified as Exhibit 78. This is a letter of Denzel Nobel, Acting Zoning Administrator at DCRA.

Finally, the Board also requested proposed findings of fact and conclusions of law, and the filings were submitted by the Appellant, the Intervenor and the Appellee. These are identified as Exhibits 79, 80 and 81, respectively.

And that completes the staff's briefing, Mr. Chairman.

CHAIRMAN GRIFFIS: Good. Thank you very much, Mr. Moy, appreciate that.

This is obviously a very complicated and issue-specific case, as we find that most appeals are. I want to get quickly into this. We have numerous elements to talk about, which are part of the appeal, the majority of which rise out of the height of the

building and how it is to be calculated and what elements go into that calculation and actually whether the BZA has jurisdiction to look at this appeal for those elements.

We also have the fact of the penthouse structure and the setbacks and where are those calculated and required to be calculated from. We have an issue of an attic, an attic space that's been defined by the developer and whether it is within the definition of the regulation as is allowable as an attic, which would not count to FAR. We had the FAR calculations for other portions of the building and the process of how the FAR was calculated and whether the Zoning Administrator erred in making their calculations for the compliant FAR for this structure.

I believe, lastly, there is the issue of whether the appeal was timely filed. We have dispensed with that in a preliminary deliberation and vote, but I do want to enumerate that again as a large portion of what the appeal was based, as well as the other motions that were attendant to that.

Getting right into it, I think we're going to be expeditious in looking at all of these issues. First of all, I think that when this came to us -- well, let me say, this building has been described as

sticking out like a sore thumb. I think in the evidence and the photographs that have been provided, there is no question that it is taller than the adjacent buildings. I think that it is an aesthetic opinion of whether it fits in or doesn't fit in; however, I don't think it's a very close one. It is clearly out of context with the rest of the block and the adjacent structure.

The basis of the appeal, of course, is not whether it is in context, whether it fits in or whether it doesn't fit in. One of the difficulties I had in deliberating on this, reviewing and hearing the entire appeal, was the fact that really we are up against what the zone district is. The Zoning Commission laid out the R-5-D zone for this, which gave it an extreme amount of height. Of course, the Height Act then comes into play in terms of calculating what would actually be allowable, but the R-5-D was a 90-foot height. Clearly, it puts itself out of context with what was an existing developed block and, frankly, as has been evidenced in the case record, a very contextual block for this part of the District of Columbia.

So we're being asked, obviously, to review on the facts and the substance of what's being raised

here with all the issues, but I don't think any Board member is -- well, I think all Board members and myself clearly, clearly understand a community's street view of a building that is out of context and wonder how it could have happened, but we are, of course, required to look at the regulations, and it seems -- frankly, I start to question how it ever became an R-5-D zone, but that's not what's before us.

So let us get into the issues at hand, and I think the first and most important that will really fall out of some of the other issues is whether -- and it has been briefed by all those participating in the appeal -- whether the BZA has the jurisdiction to look at those elements that go towards the calculation of the height of this building within this appeal, and I'll open it up for folks to discuss.

VICE CHAIRPERSON MILLER: Okay. I'll start. I think the parties did an excellent, excellent job in briefing this matter, and I think it came before us because Corporation Counsel under the Height Act has the authority to enforce the Height Act, and so the question came as to whether this Board then had jurisdiction over the Height Act.

And I certainly looked at all the statutes that were referenced in the pleadings and that were

not, and I think that the BZA certainly does have jurisdiction over the Height Act. The Height Act permeates our regulations, and we have statutory authorities set forth in 6-641.07, which provides for appeals being taken to the BZA based in whole or part upon any zoning regulation or map adopted under this subchapter. And GA Section G1 gives us the authority to hear and decide appeals where it's alleged by the Appellant that there is error in any order decision, determination, et cetera, in the carrying out or enforcement of any regulation adopted, pursuant to this subchapter.

I believe that Office of Corporation's powers are a complement to the BZA's. The BZA isn't exactly enforcing in this case. What we're doing is determining whether or not an error has been made in the issuance of a permit.

CHAIRMAN GRIFFIS: Good. I think that's excellently stated, and I would tend to agree. I think for clarity in my thought and process in looking at this is whether -- and it's clear, as you've stated, that the BZA is the proper board to bring appeals of the issuance of a permit and to establish whether that permit was issued in error. Based on the fact that this building was issued a permit, that

permit is under appeal, and attendant to the issuance of that permit was the review of several elements, roof structures and the calculation of the height of the building. I think it is fully within the jurisdiction of the BZA to review those elements of the building permit that was issued in this appeal. Others? Any opposition to those statements?

MR. PARSONS: I concur with the comments.

CHAIRMAN GRIFFIS: Mr. Parson concurs. I appreciate that. Very well. I think we can move on to the next issue attendant with this, and I think I'll leave it open to suggestion of what people would like to take on at this point. I think perhaps the roof deck and railing issue may be appropriate to go to or we can do whatever folks want to. Mr. Mann, did you want to weigh in?

MR. MANN: I was just going to suggest that we start at the basement and work our way up.

CHAIRMAN GRIFFIS: Fabulous idea. Let's do that then and talk about the FAR calculations attendant to the basement level. Of course, this was established to be a partial cellar and partial basement, and the question in the appeal was how one was to calculate that. The Zoning Administrator, of course, testified on their calculation and also

provided the specific calculations for what's at issue here, whether there is a great plane calculation to establish FAR or whether there is the perimeter ratio calculation. Did you want to start discussion on that?

MR. MANN: Well, I was going to suggest that my observation was that we heard two different methodologies, both of which seem entirely and seem entirely acceptable, at least at one point in time or another, and so the question is which one is more valid and more acceptable at this point in time. And it seems to me that the Zoning Administrator has a certain amount of discretion and has for some time been applying one particular methodology, and who are we to disagree with the methodology that he chose to use?

CHAIRMAN GRIFFIS: Excellent. Others?

VICE CHAIRPERSON MILLER: I concur. I think the standard might be whether the Zoning Administrator abused his discretion in employing the method that he employed, and I don't believe that I've got that expertise to second guess the Zoning Administrator in this case. It seems like this one that's been the clear practice, and I would have no reason to second guess that.

CHAIRMAN GRIFFIS: Very well. I think both of those are well said, and I agree with the comments. I think the method for calculation of the FAR by the Zoning Administrator was not in error and in fact is, as stated, the established procedure. And as Mr. Mann also stated very well, the fact that there is some logic to do each calculation but that the Zoning Administrator, which has the authority and discretion to decide which calculation and has been consistent in how they have calculated FAR, I would tend to agree with the fact.

Moving on then, it appears that we would go to the discussion of the attic as most appropriate, and the issue of the attic level is the fact that -- what was brought up of issue is I guess, generally speaking, when is an attic an attic and how one decides that. Let me open it up. There is a question of -- there are structure elements to the attic which establish a clearance of less than 6.6, which therefore then, according to our regulations, would remove that area from the FAR calculations. Of course, the appeal has given rise to the question of whether those structural members could be removed and then isn't it somewhat a temporary condition? And the once are those removed, it would not become an attic

or that attic area, or however you wanted to state it, would then go to the FAR calculations.

I think, getting straight into this, there was the testimony of the architect from the development that indicated that, yes, exactly, you could remove those structural elements. However, you would have to employ, or would need to employ a structural engineer in order to detail and design how you removed those structural elements. And after that being done, of course, that area would go into the FAR calculation. I think in fact that the development and the design went directly looking at trying to come into compliance with the regulation and how the regulations define attic and remove it from FAR calculations.

It's a difficult position to be in in terms of what could be the future possibility of a level on how you could manipulate structures, and I think it's a difficult piece for this Board to look at, especially under an appeal, to predict hypothetically what could happen. Interestingly, we just set a commercial jet into space. I think we could probably remove some collar tops in an attic level if we put our minds to it, but the exact fact of the matter is that what we're looking at is what the

permit was granted for and whether there was an error in reviewing that.

And when reviewing a permit, one, I do not believe that the Zoning Administrator should hypothetically predict what could or might possibly happen to the structure if it was renovated or somehow structurally altered but rather what are the drawings in front of the Zoning Administrator showing and whether they are compliant.

However, we go into the issue, and what gave me pause was the fact that we have this residential building that has, my opinion, but a sizable attic. It has this attic as well as having a penthouse structure, a mechanical penthouse. And, logically, I think, looking at it, one would say, "Well, what was the need for both? Is this some sort of redundancy in spaces?" And I think one could persuasively say this is redundant.

However, then for the jurisdiction and the correct deliberation that this Board does, we have to look at what the regulations tells us. We have to step away from our personal opinions, in many respects, and say, "Well, now, does the regulation preclude you from having both?" I have not found that in the regulations, and I have not been persuaded by

the fact that if you went in and structurally altered the attic or removed elements in the ceiling, that we should therefore calculate that into the FAR and therefore it would have been an error by the Zoning Administrator. But let me have others speak to that issue if need be.

VICE CHAIRPERSON MILLER: Well, it basically came down for me, even more so than the previous issue, a question of second guessing a potential structural feature of the building, and I wasn't convinced by the case that the Appellants made to take that leap in doing that. So I would deny this in the appeal.

MR. PARSONS: I agree. The unfortunate part of this, the only reason for this attic that was given by the Applicant was to let more light and air into this apartment from its street elevation, and it contributes to the obnoxious nature of it, but it does not exceed the Height Act. So even if you remove the floor of the attic to give 16-foot ceilings to this apartment, it would not change the exterior appearance.

CHAIRMAN GRIFFIS: That's an excellent point, Mr. Parsons, and that being, of course, the participants that brought the appeal have great

concern with, as you described it, the obnoxious element of this, and that being the mass, the height of this. And I absolutely agree with you. If you remove the attic by removing the floor or the ceiling of the upper most story, you would not change at all, any way, the exterior elevation. So that the height would not be diminished at all or the massing of it. The interior volume would end up changing. Okay. Others? Mr. Mann.

MR. MANN: One of the things that was implied during the testimony was that because of the certain number of outlets or the type of lighting fixtures or the light that was available to the room, was that perhaps the attic wasn't intended to be as attic space, and that may or may not be true, but, nonetheless, I agree with what you said earlier. I mean the structural portions of the building are there, and I find it hard to believe that they were there with the intention of tearing them out. The intention of that attic space may not be purely a storage or it may be, I don't know, but, nonetheless, it doesn't change what the construction of the building is.

CHAIRMAN GRIFFIS: Well said. And I think we're bound, of course, to what the regulations tell

us of what an attic is. And nowhere does it say it's limited to two outlets or one fixture, which may be true. Maybe the regulations should better define what an attic is and what it should be used for and how it should be proportioned or however else we want to deal with it if it is strongly felt by the Commission that it is inadequately described in the regulations.

Very well. Then moving on top of an attic, we can go to a penthouse, a penthouse which of course has brought the issue rising as to the setback and where is the setback location. This, of course, being taller than the adjacent buildings, the structure, of course, starts as a party wall, and then as the adjacent properties terminate, there is an exposed wall on the sides of the structure itself. The penthouse structure, of course, as has been interpreted in the regulations, I think are slightly clear on the fact of where the setback is taken on a building for the penthouse structure, and it is from the exterior walls and those have been procedurally interpreted as the front and rear of an attached row dwelling. That would then bring into, and I think there is no discrepancy, in the opinion that the penthouse structure is set back appropriately from the front and rear. What's at issue, of course, is the

size. Let me open it up to discussion on this.

MR. PARSONS: Well, I'll jump in.

CHAIRMAN GRIFFIS: Good, Mr. Parsons.

MR. PARSONS: The party wall issue is something I think we probably all understand that the regulations, as a matter of right, would permit this building to have this party wall and that they're at the own risk by building windows into it. That is, if the adjacent properties ever reach this height, they would butt up against that.

And, theoretically, I guess -- maybe not theoretically, but -- let me start over again. It seems to me that the obnoxious quality -- again, using that term rather subjective but that's my view -- of this penthouse as a temporary measure, if you will, should not be allowed to extend at the party wall edge. Certainly, there's no reason for a penthouse of this size to gain access to the roof. Certainly, 16 feet wide is much too wide for a simple stairway.

If the block was built out to this height in the future, possibly this penthouse, along with its neighbors, could be expanded, because the theory of the penthouse, of course, is the view from the street. So this temporary view from the street, I think, is unacceptable and should be reduced in some fashion;

that is, to set it back from the building edge to accommodate a stairway if that's needed. But that relates to the deck itself as to whether it violates the Height Act, and its railings I think do, so what is the necessity to get to the roof, which is what the argument has been about.

So, one, I don't think we should allow that penthouse to exist as it does but notch it back and then deal with the issue as to whether a stairway is really needed or not.

CHAIRMAN GRIFFIS: Very well. Others?

VICE CHAIRPERSON MILLER: With respect to the penthouse, I see the issue as turning on deciding on whether the side walls are exterior or party walls, because the Height Act requires the setback from all exterior walls. There are no regulations defining exterior walls, at least in our regulations, so then we turn to Webster's Dictionary, and I think that the side walls fit the definition of exterior walls in that Webster defines it as, one, being on an outside surface; two, observable by outward signs; three, suitable for use on outside surfaces. Whereas a party wall is defined as a wall which divides two adjoining properties usually having half its thickness on each property in which each of the owners of the adjoining

properties has rights of enjoinment. Anyway, it's defined as a wall between two structures, and the upper parts of the building on the sides don't exist for a party wall to exist.

And I know that the issue is, well, they could exist someday because they are allowed to build up, but I think we need to look at what exists when the requirement's being imposed. So I think I would agree with Mr. Parsons that -- well, I don't know if he said that, actually, but I would consider these exterior walls in which case I would conclude that the penthouse should be setback in accordance with the Height Act for those walls as well as the front and the back.

CHAIRMAN GRIFFIS: Mr. Mann?

MR. MANN: I think to me it's almost a joke to call those exterior walls party walls, but at the end of the day, unfortunately, I have to come down on the side of calling them party walls because, as Ms. Miller just said, of the potential that those buildings on either side of that structure could one day reach those same heights, and that's what defined in the zoning regulations and not exterior wall.

VICE CHAIRPERSON MILLER: It's not specifically defined on the basis of could. I mean I

read it as defined on what exists. And if you look at this block, I mean the other houses are established. It's not like there's nothing on either side at all and you don't know what's going to be built. So I'm basically looking at the reality of what's there.

MR. MANN: But there's a certain reality of what it's zoned to be also, potentially.

CHAIRMAN GRIFFIS: I think that's a critical dividing point, and I think that -- it certainly is not clear to me what the exact right avenue to take is. But what you've hit on is exactly what we're struggling with, and that is do you, when you look at the zoning regulations and compliance with the regulations, go beyond the property line of the instant application or property to see what's happening next door, which would then define how you would look at a building itself. Mr. Parsons hit it correctly that 411 in roof structures and attendant sections in the regulations that really the intent is to not create visual impairments of these penthouse structures which have not been the most visually intriguing pieces of the building.

So do you then have to look adjacent or down the street or where does your view stop and start of these? And so the issue is, is it the instant

snapshot of what's there or is it looking at what is potential as a matter of right? And I think it would be very difficult for the Board to find that we'd look at what's currently there and then assess how it impacts the property under question, meaning I think Mr. Mann's correct in looking at you have to look at what the matter-of-right development is on the adjacent properties in order to assess and analyze what is and isn't in terms of the definitions of the specific property.

When you look at party wall, clearly it starts as a party wall. How does it not vertically change in degree and become something totally different when in the future, as Mr. Parsons has said, those windows would be covered up? They have built half a party wall all the way to the extent and they have built a full party wall down below, but the party wall definition goes to the fact that a wall is built on one property and the other and it's adjoined. I mean it is a common ownership, perhaps, of a single wall.

Well, they've built half of it, and so it seems to start to fit the definition. Again, I think we're caught with a difficult situation and that is what's actually allowable in terms of height on this

block based on the R-5-D zone. And that's what I have. Others?

You know, it goes to the fact of say this was an undeveloped square and this was the first building. Would you be precluded from doing certain things that are essentially matter of right in the regulations based on the fact that no one else had developed yet? And doesn't that then, in a logical extreme, say that no one would want to go first based on the fact that all their property would be assessed and analyzed on their adjacent neighbors? I mean I think it's a difficult analysis to really agree with that we look at an instant snapshot of what's there or what isn't there. I think we have to look at what is allowable in order to define it.

Now, again, Mr. Parsons, I think, has eloquently described the building for those that have participated, brought this appeal, in terms of its intrusion of its mass, but there is nothing precluding at this point any of the other properties from doing somewhat of an identical massing on this block.

MR. PARSONS: Well, that's true, but the probability of that happening, I think, is remote. I would sense soon after this case is decided that there's going to be a movement on the part of the

citizens of this community to rezone this area. Obviously, this building is out of context with its neighbors, as you've pointed out is probably ill-zoned. I'm not going to defend my Zoning Commission. I probably was on the case that decided this should be what it is, but to say this is okay and this is the kind of buildings we would like to see in the city as the cutting edge of who development should occur in a community that's properly zoned for it, I just think it's a bad signal to anybody who's watching that common sense says this is wrong.

CHAIRMAN GRIFFIS: Right. And to stick to the regulations and say, "Well, that's the way it is, looks fine to us," is just not looking favorably on this Board as somebody -- as a panel and is here to adjudicate things like this.

CHAIRMAN GRIFFIS: I absolutely agree with you. I think if I based on my decision solely on personal opinion, I would probably remove substantial portions of this building.

MR. PARSONS: Yes.

CHAIRMAN GRIFFIS: But it's fairly clear what we're charged with doing, and that has created the struggle. We must be legally based on the decision, and I think that there has been an

incredible amount from each of the members on the Board in its deliberation, its investigation of the facts of this case. And it is very difficult to look at the regulations and the law and to find that there are numerous errors in the issuance of this permit.

Okay. Other issues for the penthouse setback?

VICE CHAIRPERSON MILLER: Well, I just want to make a couple points. One is that my impression of the Height Act is that it's supposed to be pretty strictly construed. The Zoning Administrator cannot allow any deviations from setback provisions under the Height Act. And I think it is a difficult issue to decide whether the exterior versus party wall issue turns on the present day or what could be done in the future, but I think that the Height Act deals somewhat with views from the street, and you have to look at what are the views, I think, right then and there. I mean if there is nothing else around this building, then the penthouse could be seen from all sides, and I don't think that -- I think it would be in accordance with the Height Act to strictly apply it to all four sides.

CHAIRMAN GRIFFIS: But that would make sense if this was an application for approval, and

somehow we were the authority on approving compliance with the building height. But you have to catch it, and I'm trying to understand, you're saying that the Zoning Administrator in looking at this said, "This is not visually intruding," and somehow that's an error because we see it more logically as a visual intrusion?

VICE CHAIRPERSON MILLER: No. I was just going to what I thought one of the purposes of the Height Act was. I think --

CHAIRMAN GRIFFIS: Well, and I think it's -- the intent of the Height Act is directly incorporated in Section 411. But so what? What do we do with that?

VICE CHAIRPERSON MILLER: Well, I think the stricter application of it would be to consider in this case all four walls exterior walls. The more lenient would be to consider the two on the side a party wall and not be concerned about the view, because the fact that they're treated as exterior -- because there are party walls, you can see from those sides.

CHAIRMAN GRIFFIS: Yes. So how do you logically take it because all buildings in a row won't be built to exact heights. Even when the same height

allowable, they may be different heights and variances. How do you then establish what is visual, what isn't? Look at this particular block. As evidenced in the photographs, it has a grade change. The buildings all may be the same height as calculated correctly by the zoning regulations, but those on the higher portion of the grade will obviously be more visual. So where do you then establish what your visual aspect is? Where do you take your point of view? And across the street, if there's a building on a the top floor and they can see a penthouse, is it then a visual intrusion? Where does the visual impact start and

VICE CHAIRPERSON MILLER: Well, what I see as distinct in this case is we're talking about the Height Act. If you were just talking about other heights allowed in zoning districts, I think you have a lot more flexibility. But with respect to the Height Act, it's very strictly applied for good reason.

MR. PARSONS: So let's deal with the Height Act and the roof deck and its railing. What are your views on that? That it exceeds it?

VICE CHAIRPERSON MILLER: Yes. I think it does exceed it with respect to those features as well.

MR. PARSONS: I would agree.

VICE CHAIRPERSON MILLER: Okay. I mean the Height Act allows for waivers for certain features, such as stair or towers, et cetera, but not for a floor compartment used for human occupancy, and I think a roof deck is definitely used for human occupancy.

CHAIRMAN GRIFFIS: One of the other aspects, just to jump in here, in terms of the Height Act, of course, as you've indicated, there are certain elements that can be granted a waiver as far as in the penthouse in this case, although there is in evidence, to my recollection and reviewing the entire record, that there was a waiver granted. Clearly, that would be something that would be required for this penthouse structure. But what you're saying in your analysis is that fact that the roof deck, which is, as you've described it, is occupiable, which is an interesting -- but the roof deck and the railing itself go into elements that would not be allowed to exceed that height which is established from the Building Height Act or the Height of Buildings Act.

VICE CHAIRPERSON MILLER: Right, because it doesn't fall within the exceptions that are specifically delineated.

CHAIRMAN GRIFFIS: Others?

MR. PARSONS: Perhaps "living space" would be a better term then "occupiable space."

CHAIRMAN GRIFFIS: Is a roof deck living space?

MR. PARSONS: Occupiable implies something other than a deck, I think.

CHAIRMAN GRIFFIS: Yes.

MR. PARSONS: A living space, to me, is an amenity that this is.

CHAIRMAN GRIFFIS: Right. I don't think we need to spend a lot of time on it, because I don't think it's critical, unless others do, in defining that, whether it's occupiable or not, but bringing up the occupancy, there's arguments on both sides, but I think in looking at it for this calculation, I mean, certainly, occupiable doesn't mean -- to make it occupiable -- all the structures they're talking about in the Height Act are occupiable, meaning you can get into them and you can walk in. I mean a mechanical penthouse you certainly have to occupy.

I think there's a different higher threshold in which occupancy was looking at, which is I think what Mr. Parson is starting to say is it's actually going to the more habitable or permanent

space for living. For instance, a rear yard is occupiable space, but a rear yard cannot have lot occupancy in certain zone districts. It's the element of more of a full structure, I think, with a roof and enclosure and in fact probably some sort of protection from the elements.

But let's move on with that. Let's hear more about why in fact this roof deck, which the record shows actually goes above a four-foot dimension if you take it from the roof to the top of the railing, why it is not allowed under the allowable height for this district.

MR. PARSONS: Well, I'm not sure that's our decision here. I mean it violates the Height Act.

CHAIRMAN GRIFFIS: That's right.

MR. PARSONS: Whether it's permitted in the zone district, I don't understand.

CHAIRMAN GRIFFIS: No. I was saying more to the height allowable in this district based on the Height Act is 70, so it is a fact in the case.

MR. PARSONS: Right.

CHAIRMAN GRIFFIS: Yes. I'm not going -- sorry, that wasn't clear. It is the height established by the Height of Buildings Act. So why does it not comply? Because it goes above the 70

feet?

MR. PARSONS: Correct.

CHAIRMAN GRIFFIS: And that's the clear nature of it.

MR. PARSONS: Right.

CHAIRMAN GRIFFIS: And it then would be a structure that would not be allowable.

MR. PARSONS: Right.

CHAIRMAN GRIFFIS: I see.

MR. PARSONS: And if that is not there, there is really no need for this penthouse to gain access to the roof.

CHAIRMAN GRIFFIS: Right.

MR. PARSONS: Certainly not of this size. And that's where I feel we should focus our attention on restricting that to something that should be set back as is required in the zoning regulations for penthouses, period, and not deal with the fact that someday if these buildings were all built out to the same height that this penthouse might be expanded to this party wall. I mean I'm talking about a temporary situation. I don't know whether you're ever dealt with something like this before, but that to me would cure a portion of this eyesore.

CHAIRMAN GRIFFIS: Okay. Others?

VICE CHAIRPERSON MILLER: I think there's the question of the railings, whether or not they're allowed, and the Zoning Administrator determined that they were allowed, because they didn't exceed four feet. Therefore, they didn't have to be included in the calculations for height and cited 11 DCMR 2503. However, 2503 talks about structures in open spaces with respect to yards, and I don't believe it has anything to do with the Height Act. And, again, the Zoning Administrator has no flexibility to permit deviations of roof structure heights, pursuant to 2522.1. So I find that to be in violation of the Height Act, that being the railing.

CHAIRMAN GRIFFIS: Others?

MR. PARSONS: Well, I guess our silence means we've beat this to death.

CHAIRMAN GRIFFIS: Perhaps. One last thing, I think there is not clarity in terms of whether the railings go to -- and it's really two issues that I think we need to -- well, I have struggled with, and that is how the Height of Buildings Act takes and restructures and defines those and let's them allowable and how our regulations actually look at those, and it's two different and distinct issues. This appeal has brought it up as

under the Height of Buildings Act.

Because I think you stated 2503 in terms of projections into structures in required open spaces, and you look at it and say, "But, look, I don't see anything that says railings on the top of the roof; therefore, they're not allowable." But I think it's fairly logical and implicit to say that as it is not calculated in the required open spaces, that being a yard where it starts to talk about that it would not necessarily be calculated based on our zoning regulations calculated into the projection in to the open space, which is that of height or open air above a building. I think 2502 reinforces the implicit intent of our regulations in terms of projections into required open spaces.

However, the difficulty is as we run into the Height Act, and it isn't enumerated, and it seems to be so specific that I'm surprised we don't have more spyers all across the District, because that's something that can be granted a waiver, and it's so limiting in how it's stated, somewhat tragically, if we look at personal opinions, that we wouldn't be able to animate our roofs. But, nonetheless, I tend to agree that I think we are somewhat bound to look at the strict reading of the Height Act in order to

interpret whether this is an allowable element to the building.

So that being said -- well, you know, the other piece of it in terms of the regulations when we look at that, and that's why it's so specific to the Building Height Act with this application is that as we look at other applications that would come into the height of buildings and how they would be calculated. Our definitions in 189 are very clear on how we define the height of buildings, and I think the subsequent sections go to what elements are in and are not and what structures are in or not. Again, just to be of all clarity, that the Height Act doesn't get into that detail and specificity, which is somewhat difficult for my own deliberation on this to find clarity to the issues of whether the Zoning Administrator erred or not. But I'll leave it at that. Anything else?

Very well. If there's nothing else on that issue, are there other issues that I may not have enumerated or that need to be revisited? Anything else on the Board's mind regarding this appeal?

Very well. I think we're prepared and ready then for action if someone is so motivated.

MR. PARSONS: Well, Mr. Chairman, do you

want me to start a motion here or somebody's got to do something.

CHAIRMAN GRIFFIS: Yes, I'll say.

MR. PARSONS: It would appear based on our discussion that we should -- this divides into four sections, I guess, first being the calculation of gross floor area. Would you like one motion on this?

CHAIRMAN GRIFFIS: I think we need to get it into one motion.

MR. PARSONS: Okay. So I would move as part of that motion to deny that aspect of the appeal. Regarding the attic and whether it is actually a floor ad should be included in the calculation of gross floor area, I would add to that motion denial of that aspect of it. I would grant the appeal regarding the roof deck and railing that are not permitted under the Heights Act and grant that aspect of the appeal that would require the penthouse to be set back from all exterior walls.

CHAIRMAN GRIFFIS: Is there a second to the motion? It can be restated if need be. We have four elements of the motion. The FAR, Mr. Parsons said, moves to deny the appeal in regards to that element; also to deny the appeal in regards to the attack and has moved to approve the appeal -- to

uphold the appeal in regards to the requirement of the setback of the penthouse and also that with the non-compliance of the deck rail, the deck and the rail, finding that the Zoning Administrator erred in those elements in issuing the permit.

VICE CHAIRPERSON MILLER: I would second that.

CHAIRMAN GRIFFIS: Okay. Very well. Further discussion on the motion? Interesting. I think it's well put to put all these elements into a single motion. However, I have great trepidation in terms of the elements of the penthouse and the setback. I think this is an incredibly peculiar and unique situation that we're in in looking at this, and, overall, do support the motion except for great concern about the establishment of the party wall issues. I would make a friendly motion, Mr. Parsons, to remove that element if we could and take up a motion of the first FAR attic and deck and rail, and then we can take up as a separate motion the penthouse setbacks.

MR. PARSONS: I think it would be worthwhile just to vote on the motion.

CHAIRMAN GRIFFIS: Very well.

MR. PARSONS: I wouldn't take that as a

friendly amendment.

VICE CHAIRPERSON MILLER: I just want to make a comment here. Often I don't like to separate out certain issues because they affect the property as a whole, but I think in this case it would not affect it. In either event, we would be granting the appeal and we would just have a separate opinion on a legal issue, really.

MR. PARSONS: I call the question.

CHAIRMAN GRIFFIS: Very well. There is a motion for us to call the question without dispensing with all the required process that takes up more time. The maker of the motion is not accepting of breaking it out. I think we need to move ahead. We have the four elements, two to deny and two to uphold the appeal, and I would -- I think the facts and the opinions in this case have been well stated and deliberated, and I would ask that all those in favor of the motion signify by saying aye.

And opposed?

MR. MOY: Staff would record the motion as five-zero-zero in favor of the motion. The motion made by Mr. Parsons, seconded by Ms. Miller. Also supporting in favor of the motion Mr. Etherley and Mr. Mann.

CHAIRMAN GRIFFIS: Good. Thank you very much, Mr. Moy.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 12760 of Embassy Park Associates Limited Partnership, pursuant to Article 75, Section 7501.4 of the Zoning Regulations, for further processing of a Planned Unit Development for property located south of Ward Circle between New Mexico and Massachusetts Avenues, N. W., (Square 1601, Lot 2) (Assessment and Taxation Lots 813, 814 and 815).

HEARING DATE: September 27, 1978
DECISION DATE: October 4, 1978

FINDINGS OF FACT:

1. The subject property is located approximately 1/4 mile south of Ward Circle between Massachusetts and New Mexico Avenues, N.W. The property is carried as assessment and taxation Lots 813, 814 and 815, which make up record Lot 2.

2. The land included in the PUD is split zoned between R-5-A and R-5-B. A 200 foot wide R-5-B zone is found parallel to Massachusetts Avenue; the remainder of the site is zoned R-5-A.

3. Lot 815, on which the proposed development is to occur, is approximately 8.73 acres or 380.278 square feet in area. The lot forms the largest portion of the entire 13.62 acre PUD. The site is wooded and irregular in topography.

4. The eastern edge of the site borders the Glover-Archbold Nature Trail and Park (a Federal Reservation) and slopes sharply to the south and east. The western portion of the site is generally less topographically irregular and slopes more gently to the south and east.

5. Immediately north of the site is a 149 unit town house development by Kettler Brothers which is presently under construction and which was approved by the Board in Case No. 12395. North of the townhouse development is a parking lot used by American University for its students and faculty. It accomodates over 600 cars. Across Massachusetts Avenue from the subject site are the Berkshire and Greenbrier Apartments which have a total of approximately 938 units. To the south of the site is located the remainder of the former Glover Estate which totals approximately 13.42 acres and which is under construction in accordance with Board approval in Case No. 12609. A total of 192 dwelling units in an apartment building

and 200 stacked units in townhouse style buildings will be built.

6. This application is for further processing of a modification to a Planned Unit Development which was given final approval by the Zoning Commission in October of 1970. Of the 13½ acre site, only the first phase of the PUD, the 126 unit condominium known as Foxhall East was constructed. As originally approved in 1970, the PUD was to consist of 485 apartment units in three high rise buildings and fifteen townhouses.

7. The applicant now proposes to construct approximately ninety single family townhouses and a 352 unit apartment building.

8. Under the original approval by the Zoning Commission for that portion of the tract known as Lot 815, two high rise apartment buildings and fifteen townhouses, sixteen percent lot occupancy and a 1.2218 FAR were provided, resulting in a permitted gross floor area for Lot 815 of approximately 485,722 square feet. The height of the apartment buildings was set at a maximum of ninety feet and parking was to be provided at a ratio of not less than one per dwelling unit.

9. By Z.C. Order No. 218 dated May 11, 1978 in Case No. 76-21, the Zoning Commission set out guidelines for further development of the Planned Unit Development. As hereinafter found and subject to the conditions imposed herein, the applicant has met, through testimony and evidence the requirements of Section 7501.4 and has followed the guidelines, conditions and standards set forth in Zoning Commission Order No. 218.

10. As required by Paragraphs 7501.41a-f the applicant has submitted plans for the project consisting of thirty seven sheets labeled D-1 through D-14 and A-1 through A-23 and dated September 22, 1978 and designated Exhibit 23. For comparison purposes, the applicant also submitted the plans approved by the Zoning Commission and dated March 6, 1978 as Exhibit 22 in these proceedings (Exhibit 41 in Zoning Commission Case No. 76-21).

11. As permitted in Paragraphs 7501.43 and 7501.44, it is the duty and responsibility of this Board to implement the Planned Unit Development subject to authority to amend the approved Planned Unit Development under the restrictions set forth in said paragraphs. In brief, the changes requested by the applicant, all minor in nature are as follows:

a. The Zoning Commission approved a total of 450 units for Lot 815 consisting of 100 single-family townhouses and 350 units. Applicant proposed to decrease the total number of units by eight, providing ten fewer townhouses and two more apartment units.

b. The Zoning Commission approved the Planned Unit Development with a lot occupancy of 19.1 percent and a gross floor area of approximately 446,000 square feet. The applicant has requested a slightly lower lot occupancy of nineteen percent and a slight increase in gross floor area to approximately 449,433 square feet or a 0.76 percent increase as it relates to Lot 815.

c. The Zoning Commission approved off-street parking of 388 spaces to serve the apartment house and 125 spaces to serve the townhouses. Applicant requests increase in the parking to serve the townhouses to 133 and will provide 388 spaces for the apartment house.

d. Under the Zoning Commission approval, the buildings were located as shown on Exhibit 22 herein. However, the Zoning Commission provided that,as approved by the Board of Zoning Adjustment, the buildings could be changed as to location and arrangement. Applicant's site plan, Sheet D-1 of Exhibit 23, has relocated the townhouses to provide a mews concept and in accordance with the results of negotiations with abutting property owners. The apartment house has remained essentially as it was approved.

e. The Zoning Commission's approval of landscaping was shown generally in Sheet D-1 of Exhibit 22. The applicant's proposed landscaping, which has been worked out with abutting property owners with a full provision made for plantings, berms and fences, is submitted to the Board as required by paragraphs one, seven and twelve of the conditions of the Zoning Commission Order.

f. While not representing a change in the plans from previous approval by the Zoning Commission, the applicant also seeks approval of roof structures as provided in Paragraph 7501.46 of the Regulations.

12. The changes requested by the applicant as described in paragraph five above have been reached after careful and detailed study by the applicant, its consultants, abutting property owners and the various agencies and departments concerned including Department of Environmental Services, Department of Transportation, National Park Service and Municipal Planning Office. The Board finds that the proposed development, including the changes requested by the applicant, is in harmony with the objectives of the Article 75 and in accord with the intent of the Zoning Commission's approving Order. The applicant meets the guidelines, conditions and standards set forth in Zoning Commission Order No. 218, which are specifically incorporated herein by reference, with the changes herein approved as follows:

a. The maximum number of units proposed in this further processing is eight fewer than approved by the Zoning Commission. The single family townhouses are reduced from 100 to ninety and the maximum number of apartment units is increased from 350 to 352.

The zoning calculations are shown on the plans, Sheet D-1. The gross floor area of the development of the townhouses and apartment house will comply with the measurements and the methods of measurement permitted under the Zoning Regulations and previous Order of the Zoning Commission as shown on the plans submitted in Exhibit 23.

The height of the apartment building is precisely as previously approved by the Zoning Commission with setbacks virtually identical also. The location and arrangement of the buildings have been changed in order to provide more open space in a useable fashion for the benefit of the owners of units within the project and also to provide more open space at the edges of the project benefiting surrounding property owners. The height of the townhouses is as previously approved.

b. The setbacks for the apartment building are in accordance with the 1910 Height Act and are generally as shown on the site plans submitted as Sheet D-1, Exhibit 23.

c. Parking for the project meets all the conditions of sub-paragraph three and the off-street parking has been increased by eight spaces. The applicant will require all apartment tenants, regardless of whether or not they own a vehicle, to lease a parking space. Each townhouse shall be assigned its own individual parking spaces and there shall be an additional twenty-five percent of spaces for guest parking.

d. The areas of the apartment units as well as the townhouses will comply with paragraph four. A minimum of sixty percent of the units will be for sale and the remainining will be for rent or for sale. The apartment building will be a maximum of ten stories from the point of measurement as established in accordance with the 1910 Height Act.

e. Access to the property will be from Massachusetts Avenue and New Mexico Avenue as shown in the site plan submitted as Exhibit 41. The access to Massachusetts Avenue will be by way of a private driveway with right-turn-only onto and off Massachusetts Avenue during peak rush hours. As shown in the plans submitted with the application, the Foxhall East Administration Building accessory to the Foxhall East Condominium will be altered and reconstructed at applicant's expense to provide a caretaker apartment and other accessory uses, substantially as previously approved.

f. By separate agreement, the applicant has conveyed to Foxhall East, Inc. land to eliminate the claimed encroachment. The landscape plan has been worked out mutually with Foxhall East.

g. Fencing, berms and similar landscaping elements have been negotiated and worked out with abutting property owners; namely, the National Park Service and Foxhall East. See Exhibit 23, Sheets D-12 through D-14. The applicant has worked with the National Park Service and the final fencing is subject to National Park Service and this Board's approval as provided in the conditions herein. The National Park Service has indicated to applicant that approval of any fence should await the completion of installation of other grading and landscaping.

h. Regarding storm drainage, the applicant is not tying into the storm water system of Foxhall East, Inc. The applicant has worked with the National Park Service to include information necessary for an environmental assessment in cooperation with the Park Service and the Park Service has indicated, by letter dated September 26, 1978, that it will approve the storm drainage plan.

i. The applicant in its plans has made an effort to preserve as many mature trees as can reasonably be retained on the site and a substantial amount of additional trees will be provided on the landscape plan, Sheets D-12 through D-14.

j. The applicant will cause to be placed at entrances to the project signs indicating that the driveway is a private driveway for the use of the occupants, guests and business invitees only and will maintain the said driveway as a private facility.

k. The applicant has coordinated with the District of Columbia Department of Transportation with regard to encouraging public transportation by providing a walkway to the property and by placing impediments in the driveways in an effort to deter through traffic. The design of the driveway by virtue of its curve radii and signs prescribed above has made an effort to deter through traffic. No substantial increase in parking has been requested.

l. The provisions of paragraph twelve relate to final landscape plan and grading and drainage plan. These plans have been coordinated with the abutting property owners, including the National Park Service. Plans indicating the location of buildings, roads, through traffic impediments, sidewalks, water and sewer lines, inlets and basins, proposed connection to water lines, sanitary and storm sewers as well as proposed

erosion control measures have all been shown on the plans submitted as Exhibit 23.

m. The applicant has stated that it will comply with all other applicable codes and ordinances of the District of Columbia.

n. The applicant has indicated that it will record an appropriate amendment to the Article 75 Covenant pursuant to Sub-section 7501.2.

13. Pursuant to Paragraph 7501.46, this Board has authority to approve roof structures proposed by the applicant under Section 3308. The roof structures for the project are shown on Sheets A-18 and A-21 of Exhibit 23. All roof structures, with the exception of the center portion of the roof structure above the elevators, comply in all respects with the Zoning Regulations, Section 3308 as a matter-of-right. The roof structures consist of mechanical and elevator penthouse with a stairwell, as indicated on Sheet A-18. The uses shown on A-18 within the penthouse will not be implemented because of the restrictions of the 1910 Height Act. The swimming pool will be sunk into the building and safety fences will be provided as shown on Sheet A-21.

That small portion of the penthouse above the elevators exceeds the height of 18'6" permitted by the Zoning Regulations by approximately seven to nine feet. This height is necessary in order to permit the elevator to open at the roof level providing access to the 352 unit occupants. Without the approval of this Board, as a variance, it would be unduly burdensome and a practical difficulty on the occupants utilizing the accessory swimming pool since the occupants would have to get off the elevators at the next floor below the swimming pool and walk up to and down from the swimming pool level on the roof through a separate stairwell that would have to be provided. Moreover, this small portion of the roof structure that exceeds the 18'6" limitation is substantially removed, not only from all property lines but from any other property that would be improved for residential or commercial use. To preclude the elevator from reaching the roof level does not serve any purpose expressed in Section 3308, especially in light of the fact that the area that exceeds the height limit is small and is substantially removed from all abutting properties. On the other hand, provision of an elevator access to the roof will be in keeping with a fine quality residential development.

14. By report dated October 2, 1978, the Municipal Planning Office recommended the approve of the roof structure on the grounds that MPO has encouraged the use of roof tops especially for recreational purposes.

The MPO reported that, given the height of this building and the number of units (352), elevator service to the roof top swimming pool and deck is a reasonable requirement. MPO also noted that the area of the entire roof structure is well below that allowed as a matter-of-right and that the location of the roof structure will cause no adverse affects on neighboring property nor will it encroach upon sight lines from the Foxhall East Condominium building to the north. The Board so finds.

15. By report dated September 26, 1978, the Municipal Planning Office recommended the approval of the application subject to the following conditions; (1)that the sauna, toilets and lounge be eliminated from the roof of the apartment building (Drawing No. A-18) (2)the maximum gross floor area be limited to a maximum of 449,433 square feet; (3)that applicant shall receive approval of fencing and/or landscaping elements to be constructed adjacent to Glover-Archbold Park from the National Park Service (4) that construction of the proposed development proceed in accordance with the documentation submitted to the Board of Zoning Adjustment in Case No. 12760.

16. The National Park Service by letter dated September 26, 1978 indicated that the proposed grading, drainage and storm water systems are acceptable. The Park Service wished to reserve its approval on the fencing and landscaping adjacent to Glover-Archbold Park until the proposed apartment building is actually under construction.

17. The Advisory Neighborhood Commission 3-D, was in favor of the application and recommended its approval.

18. The Spring Valley-Wesley Heights Citizens Association, Foxhall East, Inc. and Fohall Community Services Company had no objection to the further processing of the application and recommended its approval.

CONCLUSIONS OF LAW AND OPINION

Based on the above Findings of Fact, the Board concludes that BZA Application No. 12760 complies with the provisions of Zoning Commission Order No. 218 except as specifically approved herein under Paragraph 7501.43 and 7501.44. The changes are well within the restrictions imposed by Paragraph 7501.43 and 7501.44 and are in harmony with the objective of Article 75 and the intent of the Zoning Commission's approving Order.

Accordingly, it is ORDERED that the application is GRANTED subject to the following CONDITIONS:

1. The applicant shall comply with all the conditions of Zoning Commission Order No. 218, dated May 11, 1978.

2. Development shall occur in accordance with the plans submitted to and approved by the Board, marked as Exhibit 23 of the record, as those plans are modified in conditions 3 and 4 below.

3. The roof structures as shown on Sheet A-18 of Exhibit 23 shall be modified to delete the toilets, party room and sauna which are not permitted under the Act of 1910.

4. As provided in paragraph 7 in the conditions of Zoning Commission Order No. 218, an appropriate fence along the property line adjacent to park land owned by the National Park Service shall be provided. Such fence shall be provided or constructed at the time acceptable to the National Park Service and must furthermore be approved by the National Park Service and this Board. Upon approval of proposed fence by the National Park Service, the fence must be submitted to the Board for approval. No Certificate of Occupancy shall be issued until the fence is approved by both the Park Service and the Board.

5. The Order of the Board shall be valid for a period of eighteen months. Within such period the plans therefore shall be filed for the purpose of securing a building permit.

6. The Board shall retain jurisdiction to interpret and apply the terms and conditions of this Order and to make plan corrections and minor modifications of such plans.

7. Prior to the issuance of any building permit, in accordance with the requirements of Sub-section 7501.2 and Paragraph 7501.52, the owner of the property shall record a covenant in the land record of the District of Columbia, acceptable to the Zoning Regulations Division and the Office of the Corporation Counsel.

VOTE:

5-0 (Walter B. Lewis, Charles R. Norris, Chloethiel Woodard Smith, William F. McIntosh and Leonard L. McCants to grant)

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

ATTESTED By: Steven E. Sher
STEVEN E. SHER
Executive Director

FINAL DATE OF ORDER: 8 NOV 1978

THAT THE ORDER OF THE BOARD IS VALID FOR A PERIOD OF SIX MONTHS ONLY UNLESS APPLICATION FOR A BUILDING AND/OR OCCUPANCY PERMIT IS FILED WITH THE DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT WITHIN A PERIOD OF SIX MONTHS AFTER THE EFFECTIVE DATE OF THIS ORDER.

such as the one in which the property in the instant case is located in 20 feet.

n4 Zoning Regulations § 7107.2. That Section provides:

> Enlargements or additions may be made to a *nonconforming structure* devoted to a conforming use, provided:
> 7107.21 Such structure conforms with the height of building, percentage of lot occupancy, and floor area ratio limitations for the district in which located;
> 7107.22 All yard and court requirements adjacent to such enlargement or addition are complied with; and,
> 7107.23 No such enlargement or addition shall cause a structure to exceed the height of building, percentage of lot occupancy, or floor area ratio limitations for the district in which located.

Petitioners' residence is nonconforming in lot size, percentage of lot occupancy, and size of rear yard. **[**3]**

n5 The Board's findings of fact and conclusions of law read as follows:

> FINDINGS OF FACT:
>
> 1. The property is located in an R-3 District.
>
> 2. The area of the structure located on the subject property below the surface of the sun deck is cut off from light and air by the sun deck structure.
>
> 3. The use of the sun deck structure restricts the privacy of the adjoining property owner's bedroom.
>
> 4. The sun deck does not restrict the light and air from the other adjoining property owner.
>
> 5. The sun deck and railing are of the same structure.
>
> 6. The sun deck is located above the first floor joists.
>
> 7. The appellants filed this appeal May 4, 1972, seven (7) months after the Zoning Administrator's action, and four (4) months after the sun deck structure was constructed.
> CONCLUSIONS OF LAW:
>
> Based upon the findings of fact, we are of the opinion that the sun deck structure obstructs light and air from the subject property, and pursuant to Section 8206.1 of the Zoning Regulations, we find that the Zoning Administrator was in error in issuing a permit to build the sun deck. We are of the opinion that the railing and sun deck are part of the entire structure which is above the first floor joists placing the structure in violation of Section 3304.1 and 7107.2 of the regulations.

[4]**

Petitioners urge in this court four alleged errors on the part of the Board:

1) The refusal of the Board to dismiss on the ground of laches and estoppel the intervenor's appeal of the Zoning Administrator's grant of the permit;

2) Failure of the Board to follow past precedent in interpreting the Zoning Regulations at issue here;

3) The Board's interpretation of the applicable Zoning Regulations; and,

4) The inadequacy of the Board's findings of fact and conclusions of law. n6

> n6 Petitioners also claim that the Board deliberated on and decided the instant case in executive session in violation of Section 8202.4 of the Zoning Regulations. Our disposition of the other issues raised on this appeal makes it unnecessary for us to address this contention.

We view the findings of fact and conclusions of law to be so inadequate as to preclude meaningful review of the case by this court, and we accordingly reverse the order and remand the case for further consideration by the Board.

This court has stressed on several **[**5]** occasions the responsibility of the Board to make findings on each

contested issue of fact, *Dietrich v. Board of Zoning Adjustment, D.C.App., 293 A.2d 470 (1972); Palmer v. Board of Zoning Adjustment, D.C.App., 287 A.2d 535 (1972),* and determinations in which "the facts adduced and found . . . flow rationally from the evidence presented and in turn the conclusions of law . . . reasonably and rationally [are] drawn from such findings." *A.L.W., Inc. v. Board of Zoning Adjustment, D.C.App., 338 A.2d 428, 430 (1975).* The Board's order before us in this case does not meet that standard.

First, the Board made no findings whatever concerning one of the issues **[*359]** raised by petitioners. They asserted that because of the long delay between the construction of the deck and the filing of the appeal with the Board, the lack of complaints by neighbors while construction was in progress, and petitioners' good faith reliance on the building permit issued by the Administrator, the appeal should be dismissed on the ground of laches and estoppel.

Intervenor Fawcett denies that laches bars his appeal. He claims that he made several complaints about the deck to petitioners and **[**6]** to city authorities during and after its construction, and that the delay in taking the appeal was justifiable. n7 Thus is presented a clear-cut factual dispute having direct bearing on the outcome of the case which should have been and must now be resolved by the Board.

n7 Fawcett stated that the appeal was delayed on the advice of officials of the Bureau of Building, Housing and Zoning in order to allow petitioners to seek a variance after they were notified by the Chief of the Bureau that the deck was in violation of the Zoning Regulations.

A substantial legal issue has been raised by petitioners' claim that the city can be estopped from enforcing its Zoning Regulations where a citizen takes action in reliance on an order subsequently invalidated. *See Nathanson v. Board of Zoning Adjustment, D.C.App., 289 A.2d 881, 884 (1972); District of Columbia v. Cahill, 60 App.D.C. 342, 54 F.2d 453 (1931).* We cannot reach that issue unless we are provided with an adequate and concrete factual context in which **[**7]** to render our decision. For this reason the Board must make findings as to (a) whether there was reasonable and good faith reliance by petitioners on the issuance of the building permit and (b) the extent to which they were on notice that the deck might violate the Zoning Regulations. n8

n8 We cannot agree with the Board's contention that petitioners' claim of estoppel and laches is prematurely raised in this action since the only issue currently before the Board and this court is whether the deck violates the Regulation and no immediate enforcement action is contemplated. Even if petitioners could seek a variance to preserve the deck if it is declared unlawful, as the Board suggests, a proposition about which we express no opinion, we think it in the interest of judicial economy that this court not be compelled to reach the merits of this case if petitioners will prevail in their defense of laches and estoppel.

Second, the Board made no findings relevant to petitioners' claim that the Zoning Administrator's **[**8]** approval of the deck was given pursuant to a long-standing interpretation of the Zoning Regulations which had been approved in the past by the Board, n9 so that established principles of stare decisis require any change in that interpretation to be made prospective only. While the Board is of course not bound for all time by its prior positions, we think it should have considered this contention, not only in connection with its decision of the merits of the case, but also as it relates to petitioners' claim of estoppel.

n9 The Zoning Administrator testified in petitioners' behalf that "hundreds" of similar decks had been approved by the city under the construction of the Regulations utilized by him in granting the permit in the instant case. Petitioners also rely on *Smith v. Board of Zoning Adjustment*, C.A. No. 3061-62 (D.D.C., Nov. 22, 1963), in which an issue similar to that raised here was resolved by both the Board and the court in favor of the landowner. The Board did not indicate whether it considered that precedent in the decision of this case.

[9]**

Finally, the Board's order, in our view, fails to articulate the relationship between the findings of fact and conclusions of law as this court has mandated it must. The facts are stated and then the ultimate conclusion, but we are unable to determine from the order the manner in which the Board construed its regulations in arriving at its conclusion that "the structure" violates the Regulations. This court can perform its function of insuring that the Board's decisions are consistent with the Regulations and are not arbitrary and capricious, *Salsbery v. Board of Zoning*

Adjustment, **[*360]** *D.C.App., 318 A.2d 894, 896 (1974),* only if the Board sets out at least the outlines of the reasoning process it followed in arriving at those decisions.

The Board's decision in this case was apparently based on its construction of the definition of "building area" contained in Section 1202 of the Zoning Regulations:

> *Building area*: the maximum horizontal projected area of a *building* and its accessory *buildings* . . . . Except for outside balconies this term shall not include any projections into open spaces authorized elsewhere in these regulations nor shall it include **[**10]** portions of a *building* which do not extend above the level of the *main floor* of the main *building* is so placed as not to obstruct light and ventilation of main *building* or of *buildings* on adjoining property.

Petitioners contend, and the Board apparently agreed, that if the deck was (1) built below the level of the main floor of petitioners' house and (2) did not obstruct light and ventilation of buildings either on the subject or adjoining property, then the deck would not be included in the building area and would be exempt from the regulations pertaining to rear yard requirements n10 and to additions to nonconforming structures. n11 Where the Board erred, petitioners' assert, was in holding (1) that the required safety railing around the deck was a part of the "same structure" as the deck floor and that the whole of the deck was therefore located above the level of the main floor of the house, n12 and (2) that the deck cuts off "light and air" to the building below the deck. n13

n10 Zoning Regulations § 3304.1.

n11 *Id.* § 7107.2.

n12 The floor of the deck is built several inches below the first floor joists of petitioners' home. The railing rises several feet above that level. **[**11]**

n13 We agree with petitioners that the Board's finding that the deck cuts off "light and air" to the property below the surface of the deck is inadequate. Section 1202 excepts from the definition of building area that part of a building which does not obstruct "light and *ventilation* to the main building". The Board's finding referring to "light and air" is thus not responsive to the regulatory standard of "light and ventilation". Moreover, the Board gave no indication of the criteria it used to judge what constituted an obstruction of light and ventilation. This omission is particularly crucial in view of the testimony of Mr. Buote, a Housing Inspector, that the deck did not interfere with light and ventilation required by the Housing Code so long as the petitioners' basement was not used as habitable space.

An explication of the Board's interpretation of the Zoning Regulations applicable here is particularly necessary in light of the persuasive argument advanced by intervenor Fawcett. He argues in this court, as he did before the Board, that the Regulations' definition of building area **[**12]** is used only as a measure of percentage of lot occupancy, and in no way constitutes an exception to the minimum rear yard requirement or to the restrictions on additions to nonconforming structures. n14

n14 Fawcett also argues that accepting the Board's interpretation of building area its decision is still correct, both on the two grounds it relied upon and for two other reasons: That the deck is an outside balcony and thus explicitly included in the building area, and that it is a part of the building area because it is a "structure" (§ 1202) rather than "a portion of a building". *See Citizens Assoc. of Georgetown v. Board of Zoning Adjustment, D.C.App., 337 A.2d 495, 497 (1975).*

We are bound by the Board's construction of its regulations unless plainly erroneous or inconsistent with the regulations. *Dietrich v. Board of Zoning Adjustment, D.C.App., 320 A.2d 282, 286 (1974).* We will not lightly overturn the Board's decision. Nonetheless, we are of opinion that both petitioners and intervenor have **[**13]** raised substantial questions concerning the correctness of the Board's decision in this case. Until the Board makes clear the basis of its reasoning in reaching the result challenged here we cannot meaningfully review its order. The order is reversed **[*361]** and the case remanded with directions that the Board reconsider, rule upon, and make findings of fact appropriate to the arguments of all parties to this case.

So ordered.