BEFORE THE BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF ADVISORY NEIGHBORHOOD COMMISSION 1C AND KALORAMA CITIZENS ASSOCIATION IN RESPONSE TO THE BOARD'S REQUEST FOR SUPPLEMENTAL BRIEFING OF THE EXTERIOR WALL ISSUE

Introductory note: The Board has requested further information on the question of "whether a side wall of a building should or should not be considered an exterior wall if the adjacent property shares a party wall or may lawfully construct a shared party wall between the buildings." The Board has also invited comment on "the ramifications of the Board's decision on future residential and commercial development in the District, as well as whether the Board may consider those ramifications."

The "exterior walls" issue has been extensively discussed in testimony and written submissions in this case, as well as in the closely related special exception case filed by Montrose LLC (BZA No. 17221). The total of such material in both records is quite voluminous. Consequently, in the present submission, in the interest of succinctness and brevity, ANC 1C and KCA have made reference as appropriate to documents in the record of both proceedings, but with one exception have not set this material out at length, relying instead on the Board to refer back to these documents as needed for a fuller elaboration of the points made and authorities cited.

I. THE HEIGHT OF BUILDINGS ACT PROVIDES NO BASIS FOR EXEMPTING ANY SIDE WALLS FROM THE REQUIREMENTS FOR ROOF STRUCTURE SETBACK FROM EXTERIOR WALLS.

A. The plain language of the Act requires that <u>every</u> exterior wall be treated as such for purposes of the setback regulations; it draws no distinction between front, side or rear walls, walls facing streets, face-on-line walls, walls that one day might become party walls, or exterior walls that the Zoning Administrator arbitrarily labels as party walls.

The question posed by the Board is relevant to the present case because of the requirement in the 1910 Height of Buildings Act ("Height Act") that certain roof structures be

set back from "exterior walls" by a specified distance.[1] This plain language, in and of itself, sufficiently answers the question posed: The setback requirement applies to any wall that separates the interior spaces of the building from the spaces outside the building, for that is what constitutes an exterior wall. If a wall functions in this fashion, whether it is a party wall or (as is the case with the side walls of 1819 Belmont Road) a face-on-line wall is irrelevant. Indeed, a "party wall" is "a wall built next to, or astride, a boundary line and designed to serve simultaneously as the *exterior* wall of two adjacent structures."[2] The only building walls to which the term "exterior walls" does not apply are those that separate one space inside the building from another – i.e., interior walls.

The term "exterior walls" in the Height Act is not ambiguous, equivocal, qualified or given some special technical meaning. The Zoning Commission, in fact, specifically inveighed against treating it as such in its 1986 Order adopting the present roof structure regulations and making clear its intention that they be consistent with the Height Act. The Commission said:

> To the Commission, the reference of the Height Act to "exterior walls" is clear, *and leaves no room for amendment by administrative construction.* The Commission intends that its use of the phase *[sic]* "exterior walls" not be subject to exceptions under any circumstances.[3]

In these circumstances, it is well settled that the plain meaning of the statute governs.[4] While the Board and DCRA are ordinarily entitled to some deference in the interpretation of ambiguous Zoning Regulations or District statutes, the law at issue here is a Congressional

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[1] D.C. Code § 6-601.05(h). The Zoning Regulations have identical requirements for various zone districts, including, for residence districts, 11 DCMR § 400.7(b).

[2] 9 POWELL ON REAL PROPERTY § 61.01 (2000) (emphasis added), cited in *Appellant Kalorama Citizens Association's Memorandum of Law on the Height of Buildings Act* (filed Mar. 9, 2004), at p. 8.

[3] Z.C. Order No. 84-10, June 9, 1986, p. 7 (emphasis added).

[4] *In re Estate of Johnson*, 820 A.2d 535 (D.C. 2003); *Richard Milburn Public Charter. v. Cafritz*, 798 A.2d 531 (D.C. 2001); *Motor Vehicles Mfrs. Ass'n of U.S. v. E.P.A*, 768 F.2d 385 (D.C. Cir. 1985); *Connecticut v. Schweiker*, 684 F.2d 979 (D.C. Cir. 1982), and cases cited in each of the foregoing.

enactment as to which there is no ambiguity. Both agencies and the courts "must reject administrative constructions which are contrary to clear congressional intent."[5]

The only evidence placed in the record by DCRA on this point was the testimony of Zoning Review Branch Chief Faye Ogunneye on March 16, 2004. That testimony is internally contradictory as it applies to the particulars of this structure and reveals DCRA's own ignorance of both the law and its history. Given the opportunity on cross-examination to explain the legal basis for her conclusory statement that the sidewalls of a row house building are not considered exterior walls because "from a zoning standpoint" they are classified by DCRA as "party walls," Ms. Ogunneye could only cite section 405.3 of the Zoning Regulations, pertaining to side yard requirements. In response to the ANC's insistence that Ms. Ogunneye's interpretation was not what section 405.3 actually says, Chairperson Griffis was compelled to acknowledge, "I would agree with that. I'm not sure 405.3 answers the question directly."[6]

Again on cross-examination, when asked "how old is the interpretation based upon 405.3 that allows DCRA to conclude that they're not required to – that there is not required to be a setback from the sidewalls of – of a – of a row house building," Ms. Ogunneye testified that the interpretation was "[a]s old as 1958 except for whatever amendments that might have been done since then."[7] The next exchange is particularly instructive:

> MR. ROTH: Are you familiar with Zoning Commission Order Number 476?
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> CHAIRPERSON GRIFFIS: What is it?
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> MS. OGUNNEYE: There's so many orders –

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[5] *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 843 n.9 (1984).

[6] *Transcript of March 16, 2004 Public Hearing,* BZA Case No. 17109, at p. 229.

[7] *Id.* at 229-30.

> MR. ROTH: A 1986 decision that's been submitted for the record I believe previously with regard to the Zoning Commission's conclusions about the – the definition of what setbacks are required. . . .
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> [The Order is then found and identified as Exhibit 1 to KCA's previously submitted memorandum of law on the Height Act.]
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> CHAIRPERSON GRIFFIS: Got ya. So, let's get to the pertinent parts.
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> MR. ROTH: The pertinent part is is she familiar with that?
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> CHAIRPERSON GRIFFIS: Obviously not.
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> MR. ROTH: And so, Ms. Ogunneye, I take it what you're telling me is the interpretation you've given us of 405.3 has never been reviewed or reconsidered in light of that Zoning Commission order. Is that correct?
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> MS. OGUNNEYE: I would need to review the Zoning Commission order to answer that question.[8]

Not only was DCRA's expert and only witness on the subject unable to explain how the agency's twisted interpretation of section 405.3 could be squared with the most pertinent Zoning Commission Order on the issue; she quite obviously was not even familiar with the Order's existence, much less its contents. There can be no better demonstration of DCRA's utter disregard for the statute and for the Zoning Commission's intentions than this testimony from the Chief of DCRA's Zoning Review Branch.

Fortunately, the Board exists in part to correct errors like this on the part of DCRA. And the Board's first obligation as the agency responsible for adjudicating questions arising under the District's zoning law and regulations is to respect their plain meaning – even if it believes that they might have been better if written otherwise. As to the present issue, the Board's proper role is thus a fairly simple one: to inform itself as to the physical characteristics and function of the walls in question, and to apply the law on that basis alone.

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[8] *Id.* at 230-32.

B. More specifically, there is no basis in the language of the Act, in the legislative history, or in the implementation of the Zoning Regulations, for exempting side walls from the setback requirement on the basis of a prediction as to what abutting owners might do, or be entitled to do, in the future—for example, build a party or face-on-line wall.

Congress could easily have made this provision's applicability turn on this or some other future contingency, but it did not do so, and the Board would be exceeding its authority to do so now. (Similarly, there is no basis in the language of the Act for excluding walls that do not face a street – urged by Montrose as an alternative to the "party wall" argument – a proviso that could also readily have been adopted had the Congress wished to do so.)

Montrose has repeatedly sought to transmute various rejected proposals or mistaken assertions into a decision by the Zoning Commission adopting them.[9] But the question of regulating the height of buildings, and ancillary issues such as the treatment of functional roof structures, were well understood in the Congress by the time the Height Act was adopted in 1910. There is no hint anywhere in the legislative history that the reference to exterior walls was to be interpreted so as to limit the concept in any way.[10] And in the most recent iteration of the setback provision in the Zoning Regulations, in 1984-86, the NCPC and the Zoning Commission took pains to ensure that the regulations would be fully consistent with the Height Act. For this reason the Commission rejected proposals that the regulations limit the setback provisions to only some walls around the perimeter of a building, and required setback from "all exterior walls"— as KCA and ANC 1C have repeatedly shown. There is a lengthy administrative history leading up to the Commission's 1986 Order – too lengthy to recount in this summary statement but detailed in full at pages 7-14 of the *Statement of Advisory Neighborhood Commission 1C and*

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[9] See *Applicant's Memorandum of Points and Authorities on Board's Authority to Hear Argument on the 1910 Height Act,* BZA Case. No. 17221, at pp. 3-7 (filed Oct. 12, 2004) [hereinafter *Applicant's Memorandum*].

[10] The history of the Height Act is discussed at pp. 3-4 of *Appellant KCA's Memorandum of Law on the Height of Buildings Act,* submitted in this case.

Kalorama Citizens Association in Opposition to Application for Special Exception, BZA Case No. 17221 (filed Nov. 19, 2004) [hereinafter *Opposition to Special Exception*]. Those pages are attached here as Exhibit A, and the discussion there responds to all of Montrose's misconstructions and misstatements about the meaning of "exterior walls" as used in the Height Act and the setback regulations.

C. There are no legal precedents for exempting side walls in Height Act cases for the reason mentioned above or for other reasons.

Montrose has cited instances in which the setback requirements of the Height Act or Zoning Regulations have not been met as to side walls. A number of these buildings have been the subject of BZA cases. Montrose asserts that these instances constitute precedents for excluding side walls from the scope of these requirements. Montrose has not cited any valid order addressing this issue or rendering a decision on it, either by the Board or the Zoning Commission. The orders that it has cited make no mention of the Height Act setback issue or give any clue that the issue was raised, let alone addressed and decided. Consequently, under established principles of *stare decisis* these orders are totally without precedential value. *See Exhibit A*, p. 11-14. Indeed, in the present Appeal case and in Montrose's subsequent request for special exception (BZA Case No. 17221), Montrose can cite only one case in which the issue was even raised -- the 1993-94 GWU/WETA PUD case.[11] Montrose goes on in vain to try characterizing the aborted and legally null order in that case as precedent.[12]

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[11] Z.C. Order No. 749-A, in Z.C. Case No. 93-9C (Apr. 11, 1994).

[12] See *Applicant's Memorandum, supra*, at p. 3-7. KCA and ANC 1C objected in the Special Exception case to Montrose's representing this remanded order as legally authoritative. *Objection of Advisory Neighborhood Commission 1C and Kalorama Citizens Association to Material Misrepresentation by Montrose, LLC,* BZA Case No. 17221, at pp. 1-2 (filed Dec. 3, 2004) [hereinafter *ANC 1C/KCA Objection*]. Montrose asserted in reply that the order was remanded for only technical reasons. See *Applicant's Motion to Strike and Reply to Objection Filed December 3, 2004 by KCA and ANC 1C,* BZA Case No. 17221, at pp. 1-2 (filed Dec. 7, 2004). In fact, however, the order was remanded for failing to meet the requirements of D.C. law, specifically because, among other reasons, it

Montrose has also argued in its Special Exception case, and may do so here again, that "established principles of *stare decisis* require that any change in long-standing interpretation of Zoning Regulations is to be made prospective only,"[13] not in the case before it. Montrose cites *Smith v. Board of Zoning Adjustment,* 342 A.2d 356, 359 (D.C. 1975) for that proposition. This is an unpardonable misrepresentation of the holding in the *Smith* case, which says no such thing. In fact, in that case, the petitioners *argued* the very same point Montrose argues now. The D.C. Court of Appeals did not uphold that argument; it merely held that the Board had erred in that "it should have considered *this contention.*" *Id.* at 359 (emphasis added). The Court's holding in that case was extremely narrow: "We view the findings of fact and conclusions of law to be so inadequate as to preclude meaningful review of the case for this court, and we accordingly reverse the order and remand the case for further consideration by the Board." *Id.* at 358. In the nearly 30 years since the *Smith* case was decided, it has *never* been cited by *any* court for the proposition put forth by Montrose here. Indeed, in the very same sentence as it instructed the Board to consider the appellants' "contention" about *stare decisis,* the court also stated that "the Board is of course not bound for all time by its prior positions." *Id.* at 359. As we have pointed out in the Special Exception case, the Court of Appeals has repeatedly held that an agency may depart from its prior interpretations so long as it presents a reasoned explanation for the change.[14]

D. Even if the possible future actions of abutting property owners were relevant under the Height Act, this would not support claims such as those made by Intervenor Montrose in the present case.

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failed to address the very issue on which Montrose now invokes it as authoritative. No valid order was ever issued on the substantive questions in that case.

[13] *Applicant's Memorandum, supra,* at pp. 7-8 (emphasis added).

[14] *ANC 1C/KCA Objection, supra,* at p. 2, citing *Springer v. District of Columbia Dep't of Employment Services,* 743 A.2d 1213, 1221-22 (D.C. 1999) and cases cited therein.

Montrose argues that its side walls should be exempted since the regulations give a next-door neighbor the right to build an abutting wall to the same height. But the regulations equally give an abutting owner the right to construct (or in the present case retain) a building at a lower height and in any one of a variety of configurations as to such factors as lot occupancy, floor area ratio, and rear yard. If any of these future contingencies are to be taken into account, all of them must be, and be given equal weight—with the result that they would tend to cancel each other out and render the whole process of speculating on possible future developments pointless. Consideration of the effects of a building project under existing conditions, rather than under some conceivable set of future conditions, is a characteristic function of the Board, particularly in variance and special exception cases. This function is rooted in the Board's mandate under the Zoning Act and Regulations, and lies at the heart of much of what it does. By contrast, trying to decide a case by speculating on what a project's effects might be under a variety of unknowable future circumstances would be, for the Board, uncharacteristic and anomalous, as well as unworkable.

This point has special relevance, and importance, in situations like that of the present case. As KCA has pointed out,[15] the R-5 zone districts allow a wide variety of structures, built to a wide range of heights, and their present built configuration exhibits this wide variety. They may include rowhouses that vary greatly among themselves in height, width and gross floor area, as well as detached and semi-detached buildings and large and small apartment buildings. It would be unfair to deny the owners of neighboring and lawfully existing buildings the protection of the setback provisions just because they might be legally entitled to match the abutting building's height. There is something fundamentally wrong about saying to neighboring

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[15] See Testimony of Ann Hughes Hargrove, *Transcript of April 20, 2004 Public Hearing,* BZA Case No. 17109, at pp. 296-99.

property owners, much less to the community at large whose interests are protected by the Height Act, that their only answer to an egregiously intrusive building or roof structure is to build more of the same themselves.

II. EVEN ASSUMING, ARGUENDO, THAT THERE MAY BE SOME INSTANCES IN WHICH SIDE WALLS SHOULD NOT BE REGARDED AS "EXTERIOR" FOR PURPOSES OF THE SETBACK REQUIREMENTS, THE SIDE WALLS OF 1819 BELMONT CANNOT RATIONALLY BE DESCRIBED AS ANYTHING BUT EXTERIOR WALLS.

The Board is required to decide only this case, not every conceivable future case, and each case must be addressed on its individual merits. What are the characteristics of the side walls in this case? Of course they separate the interior spaces of the building from the outside every bit as much as its front and rear walls, as exterior walls necessarily do. They rise several stories above their abutting neighbors on either side. They comprise an estimated 4,000 square feet, and would appear to constitute substantially more than half of the total area of the building's exterior surface or skin. They are constructed and finished to withstand the outside elements and meet exterior wall code requirements. Even though Montrose has stated that "[u]nder the Building Code, no widows *[sic]* for light or ventilation may be placed on a side wall. Light and ventilation is required to be taken from one's own property. . . ,"[16] the side walls of 1819 Belmont have numerous windows providing exterior light and views to the interior of the building, and for this reason alone are by definition exterior walls. As the photographs attached as Exhibit B plainly show, there is no reasonable basis for describing them otherwise.[17]

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[16] *Applicant's Memorandum, supra,* at p. 7.

[17] Notwithstanding all this, DCRA's permitting authorities saw no reason to require submission of elevations for these walls. For discussion of their character as exterior walls, see *Supplemental Report of Don A. Hawkins, Architect: Submission of Appellant Kalorama Citizens Association*, pp. 2-3, and Exhibits 2 and 4 thereof. See also testimony of Don A. Hawkins, *Transcript of March 9, 2004 Public Hearing,* BZA Case 17109, at pp. 252-53.

III. THE SIGNIFICANT ADVERSE RAMIFICATIONS OF *DEPARTING* FROM THE HEIGHT ACT'S PLAIN LANGUAGE IS A STRONG REASON TO REFRAIN FROM DOING SO, BUT THE BOARD MAY NOT USURP THE LEGISLATIVE POWER IN ORDER TO ADDRESS THE CLAIMED ADVERSE EFFECTS OF APPLYING THAT PLAIN LANGUAGE.

1. The alleged adverse consequences of treating side walls as exterior walls are grossly overstated and, in any event, would be a matter for legislative bodies to address, not the Board.

Montrose has conjured up various fanciful adverse consequences of requiring setback from side walls, including the claimed elimination of "consistency in the developing urban scene"[18] and the rendering of a number of buildings nonconforming that have been erected in violation of the setback requirements.[19] As to the former claim, it would appear that such consistency, to the extent that it even exists or is affected by zoning at all, has nothing to do with the roof structure setback requirements, but a great deal to do with the lawful and consistent application of regulations from one case to another. As to the latter claim, as we have previously noted, if there are such newly non-conforming buildings, they would merely join the thousands of buildings in the booming D.C. real estate pool – including many in the immediate neighborhood of 1819 Belmont Road, N.W. – that have been rendered non-conforming by prior zoning actions without any noticeable economic ill effect. As to future large-scale commercial projects, planned or underway, one consequence — not necessarily adverse — is likely to be that developers who have been accustomed to evading the Height Act setback requirements will be compelled to exercise greater care, perhaps at modestly greater expense, to design within those requirements.

The relevant point for present purposes, however, is that even if the Board perceived undesirable consequences from treating side walls as exterior walls, it has no authority to depart

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[18] *Applicant's Memorandum, supra,* at p. 7.

[19] See *id.* at 8, and downtown office buildings listed in *Statement of the Applicant*, BZA Case No. 17221, at pp. 8-9 (filed Sept. 28, 2004).

from the language of the Height Act in order to forestall those consequences. That is entirely a legislative function, which the Board has no authority to usurp.

2. The adverse consequences to Washington rowhouse neighborhoods of exempting side walls from the setback requirements are severe and can easily be avoided by applying the plain language of the Height Act in this case.

In contrast to Montrose's effort to induce the Board to twist or stretch the plain language of the law, it is entirely appropriate for the Board to consider the harmful consequences of exempting side walls from the setback requirements as a further inducement to respect that plain language. Those consequences are significant. Across the board, in both commercial and residential development, such an exemption by definition would make it easier for builders to erect visually intrusive roof structures and diminish the need to avoid such intrusions in their designs.

The consequences of such a decision in this particular case for predominantly rowhouse neighborhoods promise to be particularly severe for two reasons. *First*, Washington rowhouses typically are ill-designed to accommodate roof structures that are not properly set back, without severely compromising their aesthetic and architectural integrity, because the mass of the roof structure in relation to the mass of the building is much greater in the case of a rowhouse than is likely to be the case for even a much larger roof structure on a large commercial development.

Second, as pointed out above, one is hard put to conceive of walls that more clearly qualify as "exterior" than the side walls of the building at issue in this case. If the Board refuses to treat the side walls as exterior in so egregious and extreme a case as this, then considerations of consistency and equal protection would effectively bar it from treating *any* side walls as exterior, regardless of the adverse consequences. Over time the result could be extensive swaths

of Washington's vast rowhouse neighborhoods – among the crown jewels of the District's architectural heritage – littered with jarringly incongruous and unsightly roof structures (not unlike the one at issue in the present case).

In gauging the visual impact of such a development, it is important to recognize the heterogeneous character of structures comprising these neighborhoods in R-5 districts across the city, already noted above. It is a mistake to think of the typical block in the R-5 rowhouse districts as necessarily a collection of virtually identical buildings collectively comprising a monolithic mass that would at least to some extent obscure roof structures from view. This prototype is neither required by the zoning nor reflected in the built environment—as the neighborhood affected by 1819 Belmont Road illustrates.

Most of Washington's rowhouses are 100 years old or more, relatively low-rise, congruent with their immediate neighbors, and located in neighborhoods that by and large are residential in character. They are often associated in the minds of residents and visitors alike with the very essence of life in Washington, both now and in our historic past. Yet it is evident to any observer of the current development scene that many owners of these graceful structures increasingly seek to expand by building upward. To the extent such construction complies with existing height and density regulations and any applicable historic preservation requirements, there is no legal basis on which to interfere with the addition of one or two genuine floors of living space. But to allow – and undoubtedly to encourage – visually obtrusive *and wholly unnecessary* roof structures such as the one at issue in this case would not only send the wrong message to owners and developers, it would threaten to destroy altogether the charm, character, and attraction of Washington's beautiful rowhouse neighborhoods.[20]

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[20] This problem is by no means limited only to rowhouses in R-5-D districts such as the one at issue here. See *Transcript of April 6, 2004,* BZA Case No. 17109, at pp. 180-82 (submission to the record in this case of a letter to

If any "ramifications" are to be considered at all in this case, KCA and ANC 1C believe that the BZA ought to be most concerned with the likely effect of its decision on the living environment of tens of thousands of residents in communities like the one in which this particular offensive structure is located – not on a small handful of downtown office building developers whose attorneys have spent years obscuring (if not actually hiding) this very issue from the Board's view.

DCRA from homeowners in Kalorama Triangle, an R-5-B district, complaining of injury from neighbor's failure to set back roof structure from party walls). Given the current building boom even in these rowhouse neighborhoods, sustaining DCRA's illogical and unsupportable view that the side walls of 1819 Belmont are not "exterior" will set off a chain reaction of roof structures being built out to the full width of the additional stories already being constructed atop existing rowhouses – and many unpleasant wars between neighbors as a result.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing submission was served by United States Mail, postage prepaid, this 11th day of January, 2005 upon the following:

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Ann Hughes Hargrove

BEFORE THE BOARD OF ZONING ADJUSTMENT
DISTRICT OF COLUMBIA

Application of	)	
	)	
MONTROSE, LLC	)	
	)	BZA Case No. 17221
For a Special Exception in the	)	
R-5-D District at 1819 Belmont	)	
Road, NW (Square 2551, Lot 45)	)	

STATEMENT OF ADVISORY NEIGHBORHOOD COMMISSION 1C
AND KALORAMA CITIZENS ASSOCIATION
IN OPPOSITION TO APPLICATION FOR SPECIAL EXCEPTION

[EXCERPT, pp. 6-15]

B. ***The Board's determination in the KCA Appeal that the roof structure violates the Height Act was correct.***

The Height Act permits certain roof structures to exceed the maximum height allowed for a building, but only if certain conditions are met, one of which is that such an excessively high roof structure be set back from the exterior walls of the building by a distance at least equal to its height above the roof. In the *KCA Appeal*, the Board decided that the existing roof structure did not meet that condition. Montrose attempts to evade the fact that the Board has no jurisdiction to allow such a non-complying roof structure by arguing that this roof structure does not violate the Height Act, in an attempt to re-litigate an issue already decided in the earlier Appeal. *Statement of the Applicant, p. 7-9; Applicant's Opposition to Motions to Postpone the Hearing and to Dismiss the Application.* Thus, ANC 1C and KCA are compelled to point out once again why the Board was correct in concluding that the Height Act requires that a roof structure be set back from all exterior walls of this roof, including the side walls, and that this roof structure therefore violates the Act.

In its present Application, Montrose no longer contends, as it did in the earlier Appeal, that the side walls of 1819 Belmont are not legally or physically "exterior"—an unsustainable

position in view of the obvious construction and function of these walls as the outside walls of several stories of the building. Rather, Montrose now seeks only to persuade the Board that in 1910, when the Congress said "exterior walls," it somehow really meant "exterior walls fronting on a street."

The first and insurmountable obstacle for Montrose is the plain language of the statute. There is nothing in the language or legislative history to indicate ambiguity in congressional intent, or that Congress meant anything other than what it said. Had Congress wished to limit or qualify the setback requirement in some additional way, or to apply another criterion altogether to the setback of roof structures, or none at all, it could have done so in 1910 or at any time thereafter. It did not do so, and the language requiring setback simply from the "exterior walls" has remained unchanged for almost a century.

There is nevertheless a history, extending over several decades, of efforts by some to construe the Height Act so as to permit developers to evade the setback requirements from non-street-facing walls when it was more convenient or profitable to do so, as well as a history of counter-efforts by certain District officials to keep the District's regulations in close conformity with the Height Act. Montrose consistently misconstrues that history in the most curious and misleading ways, essentially by citing, as if authoritative, statements over the years from various sources asserting or merely commenting on the "street-facing-walls-only" view of the Act, while ignoring the authoritative decisions of the Zoning Commission to the contrary.

First, for example, Montrose cites a 1958 Report of the Zoning Advisory Council (ZAC), at a time when the Zoning Commission was considering proposed amendments to the setback provisions of the Zoning Regulations that would have required setback from "all lot lines of the lot"—thus requiring setback from side walls of attached structures. *Statement of the Applicant,*

p. 7 and Exhibit F. In that report the ZAC asserted that under prior regulations the Zoning Commission had construed the Height Act to require setback from street sides only, describing that approach as one of several possible alternatives to the "all lot lines" proposal. But the ZAC itself rejected this approach, and endorsed the "all lot lines" proposal as one that would "*more closely follow the intent of the 1910 Act* and assure adequate light and air for adjoining properties under all conceivable circumstances, whereas adoption of one of the other methods might in some instances adversely affect adjoining structures" [emphasis added]—clearly rejecting the "street-facing-walls-only" approach as inconsistent with the Height Act. *Statement of the Applicant, Exhibit F, p. 2.* With this recommendation before it, the Zoning Commission, one week later, on July 22, 1958, adopted the "all lot lines" proposal.

The "all lot lines" rule of course required setback from side walls of attached structures such as the one now at issue, whether party or face-on-line walls, as well as from the front wall in many structures, and in this respect did indeed "more closely follow" the Height Act. But for any walls located some distance away from the lot line the rule might require little or no setback—a result clearly inconsistent with the Act's intent. Thus, in a mid-1980s case (Zoning Commission Case No. 84-10, *Exhibit 1*) that led to the issuance of Z.C. Order No. 476, the Zoning Commission extensively considered possible changes in the regulations governing roof structures. The issue of ensuring conformity with the Height Act figured prominently in the deliberations. As to setback, the Zoning Commission initially had proposed, in the advertisement of the case, new language requiring setback measurement from "the perimeter of the roof,"[1] which would correct the Height Act problems just mentioned, but later proposed less

[1] Exhibit 2: letter of June 3, 1986 from NCPC, Reginald W. Griffith, to Zoning Secretariat, Cecil B. Tucker, p. 2.

restrictive amendments that would retain "lot lines" as the point of measurement.[2] In comments to the Zoning Commission, both the Office of Planning and the National Capital Planning Commission (NCPC) refer to a reported Corporation Counsel opinion to the effect that the Height Act imposes a still less restrictive requirement, namely, penthouse setback only from the *lot line on the side facing a street.*[3] In its present Application, Montrose has cited these references to this memorandum apparently as indicating support by these agencies for the "street-facing-walls-only" approach. *Statement of the Applicant, p. 8, and Exhibits G and H.*

In fact, however, as the testimony of George Oberlander submitted in the *KCA Appeal*[4] establishes, the NCPC *opposed* this interpretation, and advised the Zoning Commission to reject the "all lot lines of the lot" language, in favor of "exterior walls." Noting the policy on building height limitation stated in the Comprehensive Plan for the National Capital, aimed at protection of the horizontal character of the city by limiting building heights, the NCPC stated:

> "*Setbacks measured from the exterior walls* should be included in the regulations in keeping with the Heights [sic] Act, the intent of the Act to hide penthouses and other rooftop structures as much as possible and the above policy to protect this city's horizontal character."[5]

Asked by the Zoning Commission for further comment, the NCPC replied:

> "We believe that the 1910 Height Act's requirement of penthouse setback from exterior walls is clearly intended to hide or screen penthouses from street views. Penthouse

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[2] See Exhibit 3: letter of June 28, 1985 from Steven E. Sher, Zoning Secretariat, to NCPC.

[3] Exhibit 2: letter of June 3, 1986 from NCPC, Reginald W. Griffith, to Zoning Secretariat, Cecil B. Tucker, p. 2.; Exhibit 4: excerpt from memorandum of February 3, 1984 from John McKoy, OP, to Zoning Commission, at p. 6. *See also* memorandum of May 16, 1984 from John McKoy, OP, to Zoning Commission, making recommendations for certain changes in the setback and other roof structure requirements, and again expresses the view, at p. 3, that "The 1910 Height Act requires 1:1 setback only from exterior building walls fronting on adjacent street."

[4] Exhibit 5. ANC 1C and KCA request that this Oberlander statement, and the other documents of record specified in Appendix A, be incorporated into the record of the present case.

[5] Exhibit 6, Report of NCPC to the Zoning Commission on Amendments to the Zoning Regulations of the District of Columbia Relating to Penthouses, August 1,1985, at pp. 4-5 (emphasis added); Exhibit 1: Zoning Commission Order No. 476, June 9, 1986, p. 6.

> setbacks from lot lines do not provide this screening effect (unless the building line, perimeter of roof, and lot line are in the same vertical plane)."[6]

Noting that the Zoning Commission had first advertised a provision requiring setback from "the perimeter of the roof," the NCPC stated that it believed "that provision to be in keeping with the Height of Buildings Act which uses the term 'exterior walls.'" Indeed, in the record of Order No. 476, both the NCPC and the Zoning Commission sometimes used the term "perimeter of the roof," which necessarily implies a setback from all sides, interchangeably with the term "exterior walls."[7]

In the end, the Commission acceded to the NCPC, unequivocally rejecting the less restrictive setback formulations and interpretations that had been discussed, and making clear its intent to conform the Zoning Regulations to the Height Act. It adopted the present regulations on setback, and provided, in accordance with the Height Act requirements, that penthouses be set back from "*all* exterior walls." 11 DCMR § 400.7(b) (emphasis added). In the most succinct statement of the law at the heart of this case, the Commission stated:

> "To the Commission, the reference of the Height Act to "exterior walls" is clear, and leaves no room for amendment by administrative construction. *The Commission intends that its use of the phrase "exterior walls" not be subject to exceptions under any circumstances.* As to the concern regarding that penthouse setback requirements not be in conflict with the 1910 Height Act, the Zoning Commission believes that its decision in this case lawfully and appropriately addresses the matter."[8]

Thus in 1986, as in 1958, in an effort to ensure that the regulations conformed to the Height Act, the Commission rejected the arguments of those who sought less restrictive setback

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[6] Exhibit 2: letter of June 3, 1986 from NCPC, Reginald W. Griffith, to Zoning Secretariat, Cecil B. Tucker, p. 2.

[7] *Id.;* and Exhibit 1: Zoning Commission Order No. 476, June 9, 1986, p. 6, both referring to the Zoning Commission's advertised proposal, which spoke of measurement from the "perimeter of the roof," as requiring setback to be measured from "exterior walls."

[8] Exhibit 1: Zoning Commission Order No. 476 of June 9, 1986, at p. 6 (emphasis added).

requirements, including those who argued for setback only from street-facing walls, in favor of the plain language of the Act.

Montrose has cited an instance in which the street-facing-walls-only view reared its head again in the 1993 GWU/WETA case, in the form of an internal memorandum from then-Zoning Administrator, Joseph Bottner, to the Zoning Office, stating that "The setback requirements of a roof structure under provisions of the Act of 1910 have always been interpreted as being required to set back from the property line which adjoins a street." *Statement of the Applicant, p. 8 and Exhibit G.* In that case, which generated much public controversy, there was also extensive and explicit argument on behalf of the applicants that the Height Act, as distinguished from the Zoning Regulations, did not require setback from walls not fronting on a street—rendering that case highly unusual and perhaps unique, save for the current 1819 Belmont case. It is sufficient to say that neither the position advocated by Mr. Bottner with regard to roof structures, which suggests a total ignorance of the Zoning Commission's deliberations and order in the 1984-86 case, nor that advocated by the applicants, was adopted by any Zoning Commission action in that case.[9]

Finally, Montrose's counsel lists a number of projects where the Board or the Zoning Commission allegedly approved roof structures that exceeded the Height Act height limit but did not meet all the rear or side wall setback requirements. *Statement of the Applicant, p. 8, and Exhibit I.* Montrose characterizes these projects and the Board's order's thereon as constituting

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[9] Given the voluminous number of irrelevant cases that Montrose reproduces in full in the Appendix to its pre-hearing Statement, one would think their Appendix would also have included the full text of the Zoning Commission's decision and order in the GWU/WETA case if it truly supported Montrose's or Mr. Bottner's position. The fact that the decision and order were omitted completely is telling. Suffice it to say that in reviewing the 17-page Z.C. Order 749-A (Apr. 11, 1994), we found no reference whatsoever to the "street-facing walls" theory of the Height Act. Mr. Bottner's stated position is especially odd in its effort to import the "lot lines" or "property lines" standard into the Height Act, in view of the fact that the Act itself speaks only of "exterior walls," and the "lot lines" standard had been dropped from the Zoning Regulations seven years earlier as not fully consistent with the Height Act.

"over 45 years of precedent," and invokes the principle of *stare decisis* as a bar to the Board's applying the Height Act's requirement of setback from side walls in the present case. *Applicant's Opposition to Motions to Postpone the Hearing and to Dismiss the Application*, pp. 2-4.

This argument is utterly frivolous. There is no body of precedent in which the Board has interpreted and applied the Height Act setback requirements in the manner alleged by the Applicant. In order to constitute precedent on a point of law, that point must be properly raised before the tribunal, and then specifically and explicitly addressed in its opinion. As the Court of Appeals has repeatedly stated, "the rule of stare decisis is never properly invoked unless in the decision put forward as precedent the judicial mind has been applied to and passed upon the precise question." *J.C. & Associates v. Board of Appeals and Review,* 778 A.2d 296, 303 n.3 (D.C. 2001); *McDaniels v. Brown*, 740 A.2d 551, 555 n.4 (D.C. 1999); *Mushroom Transportation v. District of Columbia Department of Employment Services,* 698 A.2d 430, 433, *appeal after remand on other grounds,* 761 A.2d 840 (D.C. 1997); *Traudt v. Potomac Elec. Power Co.*, 692 A.2d 1326, 1336 (D.C. 1997); *Hobson v. District of Columbia,* 686 A.2d 194, 198 (D.C. 1996); *District of Columbia v. Sierra Club,* 670 A.2d 354, 360 (D.C. 1996). That being the case, "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall,* 266 U.S. 507, 511 (1925), *quoted in McDaniels v. Brown, supra,* 740 A.2d at 555 n.4, *and District of Columbia v. Sierra Club, supra,* 670 A.2d at 360.

It is clear, then, that the Orders cited by Applicant Montrose do not constitute decisions of the Board under the Height Act—even if, as alleged, the roof structures in each case exceeded the Height Act's height limit. While these orders fully set out the Board's conclusions as to the

requirements of the applicable D.C. Zoning Regulations, they contain no mention of the Height Act—a Federal statute. These orders give no indication that any Height Act roof structure setback question was raised, or that the Board had any awareness of a Height Act issue or any intention to decide it in issuing the order, much less of interpreting the Act so as to permit such a structure to avoid the Act's setback requirements.

The Board's order in the July 2004 case cited by Montrose[10] is no exception. Montrose asserts that by this order – which, like the others, is completely silent on the Height Act – the Board "implicitly" held that the "Height Act setback provisions apply only to street elevations and not to side elevations." *Applicant's Opposition to Motions to Postpone the Hearing and to Dismiss the Application, p. 3.* This claim is without merit. The issue of the Height Act's setback requirement was not raised before the Board. The Applicant's Preliminary Statement of Compliance with Burden of Proof and the Statement of the Applicant make no mention of the Height Act, nor does the transcript. Even if they had, the Board's order does not mention the Height Act, and as the Court of Appeals has stated, a "point of law merely assumed in the opinion, not discussed, is not authoritative." *Mushroom Transportation v. District of Columbia Department of Employment Services, supra,* 698 A.2d at 433; *Traudt v. Potomac Elec. Power Co., supra,* 692 A.2d at 1336; *Hobson v. District of Columbia, supra,* 686 A.2d at 198; *District of Columbia v. Sierra Club, supra,* 670 A.2d at 360.

This July 2004 order, No. 17186, dealt with the same property as Order No. 17078 of November 25, 2003, also listed by Montrose as a precedent on the Height Act. (The 2003 Order had granted a roof structure setback special exception, but the project had to be revised because

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[10] *Mid Atlantic Development, Inc. on behalf of Avalon Bay Communities, Inc. and 777 6th LLC* (BZA Case No. 17186), July 14, 2004; *Statement of the Applicant, Exhibit I; Applicant's Opposition to Motions to Postpone the Hearing and to Dismiss the Application,* pp. 2-3.

of the subsequent filing of a landmark application, resulting in the second case and the 2004 order.) In the 2003 case, the applicant had similarly refrained from raising any Height Act roof structure setback issue in its pleadings before the Board (mentioning the Height Act only for purposes of reciting the maximum height allowed by the Act). The only reference to the Height Act in the transcript occurred when, in response to a question about the proposed height of the building, a witness for the applicant in that case and in this one, Mr. Steven Sher, noted the maximum height allowed by the Act and volunteered his opinion that the Height Act "requires setback from the street frontage." *BZA Case No. 17078, Transcript, November 25, 2003, p. 119.* As with all the other orders cited by Montrose, the order itself in this case is silent as to the Height Act.

As we pointed out in the earlier *KCA Appeal*, in connection with a similar string of projects involving roof decks, it unfortunately appears that, one way or another, over the years developers have been able to put up a number of buildings in violation of the Height Act.[11] But to conclude from this that Montrose should be allowed to retain its roof structure in violation of the Act is tantamount to saying that running a red light is not against the law just because others haven't been caught doing it before or—more to the point—been given a ticket by the cop who watched it happen. The strategy in these cases, including the 2003 and 2004 cases, seems to have been to *avoid* raising and having the Board address and explicitly decide the Height Act issue, thereby also avoiding the risk of an unfavorable decision on the Height Act. And from the developers' point of view, this strategy seems to have worked fairly well. But as the court decisions cited above make clear, such cases are without value or effect as legal precedent as to the requirements of the Height Act.

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[11] BZA Appeal No. 17109, *Transcript*, April 20, 2004, p. 332.

ANC 1C and KCA made precisely this point in the earlier appeal, in which a decision was rendered on June 22, 2004.[12] Thus, it seems remarkable that just one week later, on June 29, 2004, when the Applicant's Statement in Case No. 17186 was filed with the Board, counsel for Montrose would again have proceeded in a case involving a structure that exceeded the Height Act setback requirement without raising the issue or otherwise seeing to it that the Board explicitly addressed it. It is similarly troubling that counsel would now cite that case as one in which the Board's order, which is utterly silent on the Height Act, somehow unwittingly established a legal precedent regarding the Act's requirements.

It should be recalled that, far from having established "over 45 years of precedent" through repeated interpretations of the Height Act setback requirements, as claimed by Montrose, the Board decided only quite recently, in the *KCA Appeal* itself, that it had jurisdiction to hear and decide Height Act issues at all. It was not even Montrose that raised the issue in that case; rather, the Board itself asked for argument and briefing on the question. ANC 1C and KCA, parties to the present case, together with DCRA, argued that the Board did have jurisdiction to hear and decide Height Act issues.[13] Montrose, by contrast, argued strenuously that it did not – making no mention of these various Board orders that it now suddenly claims to constitute a long line of decisions on the Height Act's setback requirements.[14]

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[12] BZA Appeal No. 17109, *Transcript*, April 20, 2004, p. 331-333.

[13] *Appellant's Supplemental Memorandum of Law on the Height of Buildings Act*, and *Appellee's Submission to the Board Regarding Jurisdiction of the Board of Zoning Adjustment to Decide Issues Involving the Height Act*, submitted in BZA Appeal No. 17109.

[14] *Response of Intervenor Montrose LLC to Question of BZA's Jurisdiction over 1910 Height Act*, submitted in BZA Appeal No. 17109.