Appeal No. 17109 of Kalorama Citizens Association, pursuant to 11 DCMR § 3100 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 an apartment building in the R-5-D District at 1819 Belmont Road, N.W., Washington, D.C. and from the issuance of the original Building Permit No. B449218, dated March 11, 2003.

HEARING DATES: February 17, March 9 and 16, April 6 and 20, 2004
DECISION DATES: June 22, 2004, December 7, 2004 and February 1, 2005

ORDER

INTRODUCTION

The Kalorama Citizens Association ("KCA") filed this appeal with the Board of Zoning Adjustment ("Board") initially challenging the decision of the Director of the Department of Consumer and Regulatory Affairs ("DCRA") to issue Building Permit Nos. B455571 and B455876 ("Revised Permits"), dated October 6 and 16, 2003, respectively, to Montrose, LLC ("Montrose"). The permits authorized Montrose to adjust the building height to 70 feet and to revise penthouse roof structure plans for a five-story apartment building ("Project") in the R-5-D District at 1819 Belmont Road, N.W., Washington, D.C. Montrose sought the Revised Permits after DCRA issued a stop work order on the Building Permit No. 449218 ("Original Permit").

KCA alleged DCRA erred in issuing the Revised Permits because the Project exceeded the maximum height and set back requirements of the Act to Regulate Height of Buildings in the District of Columbia, approved June 1, 1910 (36 Stat. 452, D.C. Official Code §§ 6-601.01 to 6-601.09 (2001) ("the Height Act"), and the applicable FAR and roof structure set back requirements of the Zoning Regulations. Prior to the hearing on the appeal, the Board granted KCA's motion to amend the appeal to include appeal of the Zoning Administrator's decision to issue the original building permit.

For the reasons stated below, the Board concludes that the Zoning Administrator erred in approving the building permits in the following respect:

The height of the building, with the roof deck, exceeds the height limitations set forth in the Height Act.

The Board also concludes that the Zoning Administrator properly determined that the building's floor area ratio was within the matter of right limit and that the penthouse structure was properly set back according to the Height Act and 11 DCMR §§ 411 & 400.7(b).

PRELIMINARY AND PROCEDURAL MATTERS

Parties. The parties to the proceeding are the KCA, Advisory Neighborhood Commission 1C ("ANC"), and Montrose LLC. The ANC was an automatic party pursuant to 11 DCMR § 3199.1. Montrose LLC owns the property, also making it an automatic party pursuant to 11 DCMR § 3199.1.

Notice of Hearing. The Office of Zoning provided notice of the hearing on the appeal to the parties, including Montrose, and to the ANC. The Office of Zoning advertised the hearing notice in the *D.C. Register* at 50 D.C. Reg. 11060 (Dec. 26, 2003).

Motion to Dismiss. Montrose moved to dismiss the appeal on jurisdictional and equitable grounds. The Board denied the Motion for the reasons discussed below.

Motion to Amend. KCA moved to amend its appeal to include the decision to issue the Original Permit. The Board granted the motion for the reasons discussed below.

Further Proceedings: At its regularly scheduled meeting of June 8, 2004, the Board voted to grant the appeal with respect to Appellant's allegations regarding set back and height and denied the appeal with respect to the measurement of FAR. On December 7, 2004 the Board on its own motion reopened the record to reconsider and receive more evidence on the set back issue. After reviewing the materials submitted, the Board, at its regularly scheduled public meeting held February 1, 2005, denied the portion of the appeal that challenged the legality of the penthouse setback under the Height Act. The remainder of its earlier decision was left intact.

FINDINGS OF FACT

A. Description of the Property

1. The property that is the subject of this appeal ("Subject Property") is located at 1819 Belmont Road, N.W., Washington, D.C., in the R-5-D District.

2. The Subject Property is improved with a multiple story townhouse.

3. The width of the 1800 block of Belmont Road, N.W., measured from building line to building line, is 80 feet.

4. Montrose LLC owns the Subject Property.

B. Issuance of the Original and Revised Building Permits and KCA's Investigation

5. On December 12, 2002, Montrose applied for a building permit to alter and repair the existing building on the Subject Property, construct an addition at the rear of the building, and add two floors and an attic (the "Project").

6. The plans submitted with the building permit application showed the following:

- the height of the building as measured from the curb opposite the middle of the building would increase the existing building height to 71 feet, 3 inches;
- a penthouse would be constructed on top of the attic story at a height of 10 feet, 4 inches;
- the penthouse would be set back from the front and rear building walls a distance greater than 10 feet, 4 inches;
- the penthouse would be set back six feet on the west wall and flush with the wall along the east property line;
- the roof deck and railing were shown to be several feet above the roof line;
- without including the railing, the roof deck was less than four feet in height;
- the overall density of the Project was listed as 3.49 FAR;
- the building was to be connected to the adjacent buildings by a party wall that ended short of the building's height, leaving a portion of the building's side walls exposed.

7. On March 11, 2003, DCRA issued Building Permit No. B449218 authorizing construction of the Project (the "Original Permit").

8. The Original Permit stated it was for, "Alteration and repair of exist. Bldg. Addition in rear, add 2 floors plus attic; retaining wall & stair at rear." The Original Permit also had a notation indicating 5 stories plus basement.

9. In the late spring and summer of 2003, the existing row house was demolished except for the façade, and a new building constructed from the ground up.

10. On September 10, 2003, and again on September 15, 2003, KCA wrote to Denzil Noble, Administrator of the Building and Land Regulation Administration of DCRA, alleging that the Project exceeded the allowable height under the 1910 Height Act and might exceed the maximum allowable Floor Area Ratio.

11. DCRA issued a stop work order for the Project on September 12, 2003. DCRA determined that the third party inspector for zoning only analyzed the Project's compliance with building height under the R-5-D provisions, which permit a height of 90 feet, while the Height Act limits the Project's height to 70 feet.

12. Montrose began displaying the Original Permit in a location visible from the street after the stop work order was issued on September 12, 2003.

13. On September 22, 2003, KCA submitted a Freedom of Information Act request to DCRA seeking the plans associated with the Original Permit.

14. On September 29, 2003, DCRA wrote to KCA requesting assurance that KCA would pay the cost of providing the documents sought in its FOIA request, and stating that the statutory 10 day deadline for responding to the request was "suspended until all processing issues are resolved."

15. On October 1, 2003, a Montrose representative appeared at an ANC meeting. After the meeting, KCA representative Ann Hargrove requested copies of the plans associated with the Original Permit. Montrose did not provide the plans to KCA.

16. On October 6, 2003, DCRA issued Building Permit No. B455571 (the "First Revision Permit") to Montrose to revise the Original Permit "to adjust the height of the building to 70'-0" [and] clarify FAR calculations, as per attached drawings." The drawings depicted:

- a section drawing through the east elevation showing the original height at the roof of the building;
- a section drawing through the east elevation showing the revised height at the roof of the building;
- a drawing showing the area of each level included in the FAR calculations; and
- the FAR calculations (the overall density remained 3.49 FAR).

17. The drawings did not depict the roof deck and railing, or the set back of the roof structure. Those details were provided only in the plans approved by the Original Permit.

18. The plans attached to the First Revision Permit show the Project's parapet 69 feet, 9 and 3/8ths inches from the top of the curb at the midpoint of the lot.

19. On October 16, 2003, DCRA issued Building Permit No. 445873 (the "Second Revision Permit") to "revise penthouse roof structure per DC request and per attached drawings." The drawing submitted with the Second Revision Permit showed the rear half of the roof structure gable removed. No other changes were made to the penthouse, the penthouse set backs along the interior lot lines remained as shown in the Original Permit, and no other changes were made to the Project.

20. On October 16, 2003, KCA representative Ann Hargrove met with ANC Commissioners Alan Roth and Bryan Weaver, and Councilmember Jim Graham in Mr. Graham's office. In the course of the meeting, in speakerphone conversation with DCRA officials, including Denzil Noble, Mr. Graham requested that DCRA provide the plans associated with the Original Permit to KCA.

21. On October 17, 2003, KCA received from DCRA copies of the plans, minus a certification of the actual height of the re-positioned roof, and initial FAR worksheets for the original and revised plans.

22. On November 10, 2003, KCA filed its appeal with the Board challenging the issuance of the First and Second Revision Permits.

23. On February 8, 2004, KCA filed a motion with the Board requesting that DCRA supply KCA with the documents listed in its FOIA request but not provided by DCRA.

24. On February 12, and 16, 2004, DCRA supplied the missing plan documents, minus the FAR worksheets.

25. On March 2, 2004, KCA moved to amend its appeal to include the Original Permit.

C. Height and Set Back of Roof Structures

26. The plans available to the Zoning Administrator depicted a penthouse on top of the attic story at a height of 10 feet, 4 inches from the roof.

27. If the height of the penthouse is added, the building's height, if measured in accordance with the Height Act, exceeds 70 feet.

28. The penthouse is set back from the front and rear building walls a distance greater than 10 feet, 4 inches.

29. The penthouse is set back six feet from the building's west wall, and flush with the wall along the building's east property line.

30. The roof deck and railing are several feet above the roofline, and are over 70 feet in height.

D. FAR Calculations

31. The plans depict an attic space less than 6 feet 6 inches in height from the floor level of the attic space to the underside of collar ties that form the ceiling of the attic.

32. The collar ties shown in the plans work to brace the building against racking in a north-south direction.

33. When calculating the Floor Area Ration ("FAR") attributable to partial basements, the Zoning Administrator uses either the "perimeter wall method" or the "grade plane method".

34. For this building, the Zoning Administrator used the perimeter wall method to calculate FAR.

35. Under the perimeter wall method, FAR is determined by establishing a ratio between the linear square footage of the portion perimeter wall with more than 4 feet out of grade and the total square footage of the lower level.

36. Under the "grade plane" method, a plane is established between the grade at the front of the building and the grade at the rear of the building. The point at which this plane

intersects at a four foot level, any portion that exceeds that plane counts toward FAR and any portion that does not is considered a cellar.

37. Using the perimeter wall method, the amount of basement gross floor area assignable to FAR is 147.3 square feet, which results in a total FAR that is within the matter of right 3.5 limitation.

CONCLUSIONS OF LAW

1. Amendment to Include Original Permit

KCA initially appealed only the First and Second Revised Permits, and did not appeal the Original Permit. Prior to the Board's initial hearing in this matter, KCA moved to amend its appeal to include DCRA's decision to issue the Original Permit.

The Board has broad discretion to allow amendments to appeals, derived from its power to control its docket. The Board concludes that because the same errors alleged in the appeal (height of the roof deck and railing, set back of the penthouse, and bulk of the Project) are encompassed in the Original Permit and appeal of the original permit is timely pursuant to the Board's discussion below, it is appropriate to include the decision to issue the Original Permit in the appeal.

2. Timeliness of the Appeal

Montrose moved to dismiss the appeal as untimely. The District of Columbia Court of Appeals has held that "[t]he timely filing of an appeal with the Board is mandatory and jurisdictional." *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994). The Board's Rules of Practice and Procedure (11 DCMR, Chapter 31) require that all appeals be filed within 60 days of the date the person filing the appeal had notice or knew of the decision complained of, or reasonably should have had notice or known of the decision complained of, whichever is earlier. 11 DCMR § 3112.2(a). This 60-day time limit may be extended only if the appellant shows that: (1) there are exceptional circumstances that are outside the appellant's control and could not have been reasonably anticipated that substantially impaired the appellant's ability to file an appeal to the Board; and (2) the extension of time will not prejudice the parties to the appeal. 11 DCMR § 3112.2(d).

The "decision" at issue in this case with respect to timeliness is the Original Permit. The height, FAR, and penthouse set back were depicted on the original plans. Neither of the subsequent revisions changed these aspects of the building's designs. The Board must therefore first determine when the Appellant knew or should have known that the permit was issued.

Whether or not the permit was visible prior to September 2003 is irrelevant since construction was visible to the public by at least the summer of 2003, and KCA knew enough about the project on September 10th to write to DCRA concerning potential height and FAR violations. (Findings of Fact 10 and 11). It is unnecessary in these circumstances to pinpoint a precise date

when the appellant knew or should have known that a permit had been issued. It is clear that whatever that date might have been, this appeal was filed more than 60 days from that time.

Nevertheless, the Board concludes that exceptional circumstances outside the KCA's control substantially impaired its ability to file a good faith appeal, and that in light of these circumstances, an extension should be granted. KCA could not file a good faith appeal until it had some reason to believe the Zoning Regulations were violated. Given these facts, KCA did not have reason to believe the Project was problematic until the framing of the structure was completed in mid September 2003. Even then, it could not tell the precise height and bulk of the Project without access to the plans supporting the permit application. Although its September 10, 2003 letter indicates some level of concern, DCRA's resistance to providing the necessary information made the filing of a timely appeal impossible.

Beginning in mid-September, KCA demonstrated considerable diligence in its efforts to acquire information about Montrose's permit and construction plans from DCRA, but these efforts were thwarted. DCRA did not provide the plans attached to the Original Permit until October 17, 2003. Meanwhile, Montrose had changed the design of the Project, seeking the Revised Permits in October 2003. This meant that KCA needed to determine whether their concerns had been ameliorated.

The Board concludes the extension will not prejudice the parties to the appeal. Montrose was on notice that the appellant had serious concerns with the project and was seeking information concerning project details. As late as October 3, 2003, a Montrose representative refused KCA's request for such information. (Finding of Fact 16). Since Montrose contributed to KCA's inability to discern the true nature of the project, it cannot be heard to claim prejudice from a delay of its own making.

3. Laches and Estoppel

Montrose also moved to dismiss the appeal as barred by laches and estoppel. The defenses of laches and estoppel are disfavored in the zoning context because of the public interest in the enforcement of the zoning laws. *Sisson v. District of Columbia Board of Zoning Adjustment*, 805 A.2d 964, 972 (D.C. 2002) (quoting *Beins v. District of Columbia Bd. of Zoning Adjustment*, 572 A.2d 122, 126 (D.C. 1990). Application of estoppel is limited to situations where the equities are strongly in favor of the party invoking the doctrine. *Wieck v. District of Columbia Bd. of Zoning Adjustment*, 383 A.2d 7, 11 (D.C. 1978). To make a case of estoppel, Montrose must show that it: (1) acted in good faith; (2) on the affirmative acts of a municipal corporation; (3) made expensive and permanent improvements in reliance thereon; and (4) the equities strongly favor the party invoking the doctrine. *Sisson*, 805 A.2d at 971.

The Board notes that Montrose seeks to invoke the doctrine of estoppel against the Appellant, a private party, and not the government. The affirmative acts upon which Montrose is claiming reliance, namely the issuance of the building permits, were all taken by DCRA, not the appellant. The Board has previously taken the position that estoppel should not bar a neighboring property owner (as distinct from the District) from asserting rights under the Zoning Regulations. *See Appeal of Advisory Neighborhood Commission* 5B, BZA No. 16998 (August 26, 2004); *see also Beins v. D.C. Board of Zoning Adjustment*, 572 A.2d 122, 125 (D.C. 1990). As noted by the

Board in the *Appeal of Advisory Neighborhood Commission 5B*, "estoppel should not be used to preclude an innocent non-government appellant from seeking to eliminate a zoning violation."

Finally, laches is an equitable defense and may only be sought by a person with clean hands. The refusal of Montrose to provide KCA with project documentation contributed to the very delay it now complains of. Equity is not available under these circumstances.

Laches is rarely applied in the zoning context except in the clearest and most convincing circumstances. *Sisson*, 805 A.2d at 971-972. To determine the validity of a laches defense, the Board must look at the entire course of events. Laches will not provide a valid defense, unless two tests are met: the defendant has been prejudiced by the delay and that delay was unreasonable. In the absence of an analogous statute of limitations, the party asserting the defense has the burden of establishing both elements. *Id.*

Montrose did not carry its burden of establishing that KCA unreasonably delayed in bringing its appeal. Montrose claims that KCA was on constructive notice of the original permit in March, 2003 when it was available to the ANC, was published in the D.C. Register, and when Montrose met with the ANC's transportation committee. However, one cannot conclude that an Advisory Neighborhood Commission's knowledge of a permit is timely communicated to every person or association that may be affected. Similarly, persons and associations cannot be expected to subscribe to the D.C. Register to learn of construction activities that may impact them. As part of its discussion of the timeliness issue, the Board concluded that KCA was chargeable with notice of DCRA's decision when the new construction became visible in the late spring and early summer of 2003. However, the Board, in that same discussion, also found that exceptional circumstances prevented KCA from filing this appeal within the 60-day period set forth in the Board's rules of procedure. The same factors that justified extension of the 60 day time period also warrant a finding that there was not unreasonable delay in bringing the appeal.

4. Authority of the Board to hear appeals alleging errors in interpreting the Height Act

The Board now turns to a jurisdictional question raised as to its authority to hear an appeal based on alleged errors made in decisions interpreting the Height Act. KCA asserts the Project's penthouse, roof deck and railing exceed the maximum height permitted by the Height Act. In addition, KCA alleges that the set back of the penthouse violates both the Zoning Regulations and the Height Act. Montrose argues to the contrary that the Board lacks jurisdiction to hear appeals of administrative decisions interpreting the Height Act. DCRA concurs with Appellant that the Board does have authority and jurisdiction to interpret the requirements of the Height Act as they are incorporated in the zoning regulations.

For the following reasons, the Board concludes that the Zoning Act and the Zoning Regulations authorize the Board to interpret the Height Act in consideration of an appeal regarding an alleged violation of the Height Act.

Section 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799)("Zoning Act"), delineates the scope of the Board's appellate jurisdiction. It authorizes the Board to hear and

decide appeals based on errors made by District officials in enforcing the Zoning Regulations. Section 8 of the Zoning Act provides in relevant part that:

> Appeals to the Board of Adjustment may be taken by any person aggrieved ... by any decision ... based in whole or in part upon any zoning regulation or map adopted under this Act.

Section 8 of the Zoning Act further authorizes the BZA:

> To hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal made by the Inspector of Buildings or the Commissioners of the District of Columbia or any other administrative officer or body in the carrying out or enforcement of any regulation adopted pursuant to this Act.

The Board concludes it has jurisdiction over all height and set back aspects of the appeal because the Height Act is incorporated throughout the Zoning Regulations that the Board is entrusted to interpret in hearing and deciding appeals. Of particular note is 11 DCMR § 2510.1 which expressly provides that all buildings or other structures shall comply with the height limitations of the Height Act. It reads:

> In addition to any controls established in this title, all buildings or other structures shall comply with the Act to Regulate the Height of Buildings in the District of Columbia, approved June 1, 1910 (36 Stat. 452, as amended; D.C. Official Code §§ 6-601.01 to 6-601.09 (2001) (formerly codified at D.C. Code §§ 5-401 to 5-409 (1994 Repl. and 1999 Supp.))).

11 DCMR § 2510.1.

In addition, 11 DCMR § 411.1 Roof Structures, requires that roof structures not be in conflict with the Height Act. See also § 400.1, which establishes height limits in Residence zone districts. That section provides that the heights set out in a table that follows apply, "except as specified ... in chapter[s] 20 thorough 25." Chapter 25 incorporates the Height Act's restrictions. Thus, the Zoning Regulation that establishes the maximum height permitted in Residence zone districts provides that the height limits in the zone district are circumscribed by the limitations of the Height Act.

Accordingly, the Board finds that it must interpret the Height Act in order to determine whether the Zoning Administrator erred with respect to his determinations regarding the height and set back issues. [1]

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[1] This conclusion is consistent with the BZA's decision in *Howard University*, BZA Appeal No. 15568 (October 21, 1991). In the *Howard University* case, the Zoning Administrator denied a building permit on grounds that the height of a proposed dormitory building violated the height limitations of the Zoning Regulations and the Height Act. The BZA affirmed the Zoning Administrator's determination, concluding that, "[t]he height of buildings in the District of

Montrose argues that the Height Act vests exclusive enforcement authority in the D.C. Attorney General's Office, and that the Board is therefore precluded from enforcing the Height Act's limits, citing the case *Techworld Development Corporation v. D.C. Preservation League*, 648 F. Supp. 106 (D.D.C. 1986). Montrose is correct that the Board has no enforcement responsibilities with respect to the Height Act. But the same is true with respect to the Zoning Regulations. Section 11 of the Zoning Act gives that responsibility to the Mayor of the District of Columbia. D.C. Official Code § 6-641.01 (a) (2001). The Board is not an enforcement body. It is, in this context, an appellate body that hears and decides allegations of errors made in the carrying out or enforcement of any regulation adopted under the Zoning Act. The incorporation of the Height Act into the Zoning Regulations makes decisions made under that Act reviewable by this Board. The Board is therefore not persuaded by Montrose's argument.

5. Merits of the Appeal

A. Height of the Building with Roof Structures

The maximum height permitted in an R-5-D district is 90 feet. 11 DCMR § 400.1. However, as discussed in section 3 above, the Zoning Regulations incorporate the height limitations of the Height Act into the height restrictions in every zone district. The Height Act limits the height of a building on a residential street to the width of the street diminished by ten feet. Height Act § 5, D.C. Official Code § 6-601.05 (c). The width of the 1800 block of Belmont Road, N.W., is 80 feet, yielding a maximum permitted building height of 70 feet.

Building height for both Height Act and zoning purposes is measured from the level of the curb opposite the middle of the front of the building to the highest point of the roof or parapet. Height Act § 7, D.C. Official Code § 6-601.07; 11 DCMR § 199.1 (Feb. 2003) ("Building, height of"). The height of the building to the highest point of the roof is 69 feet 9 and 3/8 inches. The revised plans depict a roof deck and railing at the front of the building extending several feet above the roof. Although the plans do not indicate a precise height of these structures, the Zoning Administrator should have known that the additional height depicted, if measured from the opposite curb, would cause the building to exceed the two and five eighth inches remaining in lawful height. The Board therefore concludes that the roof deck exceeds the maximum height permitted by the Height Act.

Montrose argues that the roof deck's height should not be counted because it is less than four feet in height. This argument relies upon § 411.17, which provides that:

> Roof structures less than four feet (4 ft.) in height above a roof or parapet wall shall not be subject to the requirements of *this section*. (Emphasis added).

Columbia is governed by both the 11 DCMR Zoning Regulations and the Act to Regulate the Height of Buildings in D.C. June 10, 1910. When determining the allowable height of a structure, the more restrictive of the two laws must apply." *Howard* at 3.

The flaw in Montrose's argument is that the 'section' being referred to in the italicized language is § 411, which governs the height and location of roof structures under DCMR 11, however no provision in this section, or any of the Zoning Regulations, can authorize a structure to exceed the height limitations imposed by the Height Act under any circumstances not authorized in the Act itself.

Section 5 of the Height Act permitted the Commissioners, now the Mayor, to waive its height restriction for certain types of structures. D.C. Official Code § 6-601.05 (h).[2] As documented in this appeal, the Board finds that this specific deck is a structure and that this roof deck is not among the enumerated structures exempted under § 5 of the Height Act, neither is it one that can be construed to be included in that provision. See n.4, *infra.*

Accordingly, the Board concludes that the Zoning Administrator erred in issuing the Original Permit, and the Revised Permits, based upon plans depicting a roof deck that would have exceeded the 70 foot height limit imposed by the Height Act. And thus, the Board concludes that this roof deck must comply with the height limitations of the Height Act.

Because the roof deck exceeds the limitations of the Height Act and the railings are attendant to the deck, the Board need not reach the issue of whether safety rails alone may be exempt under the Act if they are attendant to a compliant deck.

B. Penthouse Set back

Elevator penthouses are listed among the enumerated structures specifically exempt from the Height Act pursuant to D.C. Official Code § 6-601.05(h). While the Height Act permits such penthouses, to receive height waivers it also requires that they "be set back from exterior walls distances equal to their respective heights above the adjacent roof." D.C. Code § 6-601.05(h).[3]

The Zoning Regulations subject roof structures to conditions not in conflict with the Height Act, including the requirement that an elevator penthouse "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). § 400. 1 and § 400.2. This requirement applies to all elevator penthouses, including those that are within matter of right zoning height, regardless of whether the penthouse is "located below, at the same roof level with, or above the top story of any building or structure." 11 DCMR § 411.2.

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[2] The record is silent with respect to whether a waiver was ever sought or granted in accordance with this provision for any roof structure in excess of the height limitations under the Act Appellants did not allege any error related thereto. While such waiver is required under the Act, the Board need not resolve this factual issue in light of its finding that the Zoning Administrator erred in issuing the building permit on other grounds.

[3] The Board concurs with the 1953 Office of the Corporation Counsel Opinion that the phrase "penthouses over elevator shafts" set forth in D.C. Official Code § 6-601.05(h) may be construed to include penthouses over stairways. See opinion of Vernon E. West, Corporation Counsel, D.C., July 27, 1953, at 4, attached as Exhibit 1 to Appellant's Supplemental Memo on Historical Treatment by Corporation Counsel and Zoning Authorities of Roof Structure and Basement FAR issues.

Accordingly, with respect to the set back requirement, the provisions of 11 DCMR § 400.7 (b) are similar, but not identical to § 5 of the Height Act, D.C. Official Code § 6-601.05 (h) (2001).

Appellants argue that the penthouse is not set back from all exterior walls in compliance with the Act or the Zoning Regulations because it is not set back the required distance from the two side walls. There is no dispute that the penthouse is properly set back from the front and back The side walls are partially exposed to the outside where they extend above the rooflines of the adjacent buildings,. Matter of right development on adjacent properties would allow the walls to be covered in the future.

A threshold issue is whether the Zoning Administrator, in applying the set back requirement for the stairway penthouse, looks to the current height of the roofs on adjacent lots to determine whether an exterior wall will result from the plans being reviewed, or to the potential height to which those rooflines may be brought as a matter of right. The Zoning Administrator's current practice when examining roof structure plans is to assume that adjacent structures are built to the maximum dimensions permitted by the zoning regulations

The Board finds that the Zoning Administrator must look at the potential height as a matter of right. To find otherwise, would be almost impossible for the Zoning Administrator to administer, would result in inconsistent application, and would regulate zoning based upon the whim of third parties. With respect to the subject property, since the connected buildings on the adjacent lots could reach the same maximum height of 70 feet and thereby cover the exposed portions of the walls, the Zoning Administrator did not err in considering the side walls to be interior.

This conclusion is in accord with the historical treatment of the term "exterior walls under the Zoning Regulations and the Height Act. While there have been differing opinions regarding the correct interpretation of exterior walls under the Height Act, the Zoning Commission has adopted the view that the Height Act requires set back only from a property line which abuts a street. See Zoning Commission Order No. 749–A, Case No.93-9C (1994) at 12, wherein the Zoning Commission concurred with the conclusion of the Zoning Administrator that the project did not violate the Height of Buildings Act. In that case the Zoning Administrator submitted a memorandum to the Zoning Commission stating that the setbacks of a roof structure under the provisions of the Height Act "have always been interpreted by the Zoning Division as being required to set back from the property line which adjoins a street." Memorandum to Madeleine H. Robinson, Acting Director, Office of Zoning from Joseph F. Bottner, Jr., Zoning Administrator, Subject: Commission Case No. 93-9C, (PUD and Map Amendment at 21st and H Streets, N.W. –GWU/WETA (hereinafter "Bottner Memorandum"). In accord, Note to George Oberlander, National Capital Planning Commission, from Sandra Shapiro, dated February 17, 1994; Report of the Zoning Advisory Council on Proposed Amendments to the Zoning Regulations, July 15, 1958. In that same memorandum, the Zoning Administrator advised that the Zoning Commission, under a Planned Unit Development Review, does have authority to "waive the setback of a roof structure from a property line that does not adjoin a street." Bottner Memorandum, supra, at 2.

The different interpretation under the Height Act and the Zoning Regulations of the term "exterior walls" may be explained by the fact that the term "exterior walls" is not defined in either the Act or the regulations, and the Act and the regulations governing the set back of penthouses serve different, if complementary, purposes. Under the regulations deviation from the set back provisions is allowed by special exception. Accordingly, the focus of analysis under the regulations is broader - whether the deviation will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property. In contrast, the Height Act is prohibitive, allowing no flexibility or exception, and the focus is on the protection of views from the street or alley.

While the term "exterior walls" has been interpreted more broadly under the Zoning Regulations to include a wall set back from the property line that abuts a yard or court, as opposed to a street or alley, it has not been interpreted to apply to a side wall constructed to the lot line of an abutting property. This type of wall has been considered a "party wall" or "common division wall", not subject to the set back requirements. See testimony of Faye Ogunneye, Chief Zoning Review Branch, DCRA (March 16, 2005 Transcript at 169 -71, 191-93; and 222). Accordingly, what distinguishes an exterior wall for zoning purposes is not whether it is exposed to the elements, but whether it is set back from a property line.

The Court of Appeals has stated that while the Board is not bound by past decisions, it must consider in its deliberations long-standing interpretations of the Zoning Regulations which have had precedential effect. *Smith v. District of Columbia Board of Zoning Adjustment,* 342 A.2d 356 (1975). In light of the fact that "exterior walls" is neither defined in the Height Act nor the regulations, but has a history of interpretation by the Zoning Commission, the Zoning Administrator, NCPC, and this Board, and that the historical interpretations referenced above support the stated purpose of the Act and the regulations, respectively, this Board concludes that these interpretations should apply.

Accordingly, in this case, the two walls from which the penthouse is not set back at a distance equal to its height are not exterior walls because they are built to the property line and abut the adjacent properties. For these reasons, the Board finds that pursuant to the Height Act and the Zoning Regulations the subject property has two exterior walls, at its front and back, and that the stairway penthouse was properly set back from both.

C. FAR Calculations

The Appellant asserts the Zoning Administrator committed two errors in calculating the FAR in the building permit. First, the area counted as attic space should have been included in the gross floor area of the Project. Second, the basement floor area was incorrectly calculated using the "perimeter wall method" instead of the "grade plane method."

All structures within the R-5-D Districts are limited to a maximum Floor Area Ratio ("FAR") of 3.5. 11 DCMR § 402.4. FAR is defined as "a figure that expresses the total gross floor area as a multiple of the area of the lot. This figure is determined by dividing the gross floor area of all buildings on a lot by the area of that lot." 11 DCMR § 199.1 ("Floor Area Ratio"). The term "Gross Floor Area" includes basements and attic space, whether or not a floor has actually been

laid, providing structural headroom of six feet, six inches or more. 11 DCMR § 199.1 ("Gross Floor Area").

Turning first to the attic issue, the Appellant contended that the plans showed that the attic's ceiling was not "structural" and therefore should not have been used to limit the height of the attic space. If the ceiling is not counted as "structural headroom" then the height would exceed six feet six inches and the space would be included in the Gross Floor Area, and the building would exceed 3.5 FAR.

The term "structural" is not defined in the Zoning Regulations, accordingly the definition for zoning purposes is provided by Webster's Unabridged Dictionary pursuant to 11 DCMR § 199. The dictionary defines "structural" as "of or relating to the load bearing members or scheme of a building, as opposed to the screening or ornamental elements."

The Board credits the testimony of the architect of record for the Project that because the building is framed from front to back, rather than relying on the adjacent walls of the abutting townhouses for support, the collar ties forming the attic ceiling were not ornamental, but served as structural members necessary to help brace the building against racking in a north-south direction. The Board therefore concludes that the collar ties created structural headroom of less than six feet, six inches, and thus the space was properly excluded from FAR calculations.

With respect to the basement issue, KCA argued that the Zoning Administrator failed to include more of its square footage to the building's FAR. Under the Zoning Regulations, a story that has a ceiling four feet or less out of grade is considered a cellar and does not count toward FAR. *See* 11 DCMR § 199.1 ("cellar"). Conversely, if a lower story has a ceiling height of more than four feet out of grade, it is considered a basement and the area must be included in the density calculations of the building. *See* 11 DCMR § 199.1 ("basement"). The difficulty arises when the lower level is partially above and partially below that four-foot plane, and when the adjacent grade cannot be determined. Such is the case here where the Project is bounded on either side by row dwellings and the finished grade is not apparent.

The Zoning Regulations provide no guidance on how to calculate the FAR of partial basements and partial cellars. The Zoning Administrator's office has employed at least two methods for calculating lower level FAR: the grade plane method and the perimeter wall method. In this instance, the Zoning Administrator utilized the latter. KCA asserted the "grade plane" method was the appropriate means to calculate partial basements/cellars.

Under the "perimeter wall" method, the FAR is determined by establishing a ratio between the linear footage of the portion perimeter wall with more than four feet out of grade and the total square footage of the lower level. Under the "grade plane" method, a plane is established between the grade at the front of the building and the grade at the rear of the building. The point at which this plane intersects at a four foot level, any portion that exceeds that plane counts toward FAR and any portion that does not is considered a cellar.

Both methods appear reasonable and the choice of which is most appropriate is within the Zoning Administrator's discretion.

The Board concludes the floor space in the basement was correctly calculated using the perimeter wall method in the plans submitted by Montrose. At most, only 147.3 square feet of space on the lower level is a basement, which counts toward FAR. The Project thus complies with the density limitation of 3.5 FAR for the R-5-D District.

6. Great weight given to ANC issues and concerns

The Board is required under § 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21, as amended; D.C. Official Code Ann § 1-309.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC's written recommendation. In this case, the ANC joined with KCA in the above arguments that the Board has fully considered and addressed above.

Accordingly, it is therefore **ORDERED** that the appeal is **DENIED** in part and **GRANTED** in part. The Appeal is **DENIED** with respect to the penthouse set back requirements under the Height Act and the Zoning Regulations, and as to the FAR calculations. The Appeal is **GRANTED** on the grounds that the height of the building with the roof deck exceeded the height limitations of the Height Act.

VOTE: **5-0-0** (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann, II and John G. Parsons to grant in part and deny in part).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring Board member approved the issuance of this order.

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

FINAL DATE OF ORDER: NOV 0 8 2005

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

BZA APPEAL NO. 17109

As Director of the Office of Zoning, I hereby certify and attest that on NOV 0 8 2005, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY: _____
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Director, Office of Zoning

TWR