BEFORE THE BOARD OF ZONING ADJUSTMENT
DISTRICT OF COLUMBIA

Application of	)	
	)	
MONTROSE, LLC	)	
	)	BZA Case No. 17221
For a Special Exception in the	)	ANC 1C
R-5-D District at 1819 Belmont	)	
Road, NW (Square 2551, Lot 45)	)	

MOTION OF ADVISORY NEIGHBORHOOD COMMISSION 1C AND KALORAMA CITIZENS ASSOCIATION TO DISMISS APPLICATION FOR SPECIAL EXCEPTION

Advisory Neighborhood Commission 1C (ANC 1C) and Kalorama Citizens Association (KCA) hereby move for dismissal of the Application for Special Exception filed by Montrose, LLC in the above-captioned case, on the grounds that (1) the Application in the present case seeks permission to maintain a structure that the Board has already determined to be in violation of the 1910 Height of Buildings Act (36 Stat. 452 (1910), D.C. Code § 6-601), and the Board has neither jurisdiction to hear and decide applications for permission to erect or maintain a structure that violates the Height Act or authority to grant any such permission; and (2) the Application in the present case is in effect a Motion for Reconsideration and Rehearing of the *Appeal of Kalorama Citizens Association* case (BZA Appeal No. 17109), and fails to meet the requirements of 11 DCMR § 3126 for such a motion.

The property involved in Montrose LLC's application here for a special exception is the same property addressed in the *Appeal of Kalorama Citizens Association* case. In its oral discussion and vote on the *Appeal of Kalorama Citizens Association* at a special public meeting on June 22, 2004, the Board by a unanimous 5-0 vote granted the appeal in part and denied it in part. No written order or decision has yet been issued by the Board in that *Appeal.* In the

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present case, ANC 1C has submitted a report to the Board pursuant to 11 DCMR § 3115, and KCA has requested party status pursuant to 11 DCMR § 3106.

In support of their motion, ANC 1C and KCA state as follows:

(1) The Application in the present case seeks permission to maintain a structure that the Board has already determined to be in violation of the 1910 Height of Buildings Act (36 Stat. 452 (1910), D.C. Code § 6-601), and the Board has neither jurisdiction to hear and decide applications for permission to erect or maintain a structure that violates the Height Act, nor authority to grant any such permission.

In *Appeal of Kalorama Citizens Association* case (BZA Appeal No. 17109), the Board determined at its June 22, 2004 special public meeting that the Board had jurisdiction to determine issues arising under the 1910 Height Act, that the existing roof deck was in violation of the Height Act, that Montrose was required to comply with the roof structure setback requirements in the Height Act, and that the existing roof structure did not comply with those requirements. The present Application seeks permission, by way of special exception, to retain the roof structure.

The Board of Zoning Adjustment is a creature of federal statute (Act of June 20, 1938, 52 Stat. 797, as amended, known as the Zoning Act), the relevant provisions of which are carried forward in D.C. Code § 6-641.07, and has no jurisdiction other than that authorized by statute. In respect of requests for special exceptions, that jurisdiction is conferred by D.C.Code § 6-641.07(g)(2), which provides:

> "Upon appeals the Board of Adjustment shall have the following powers: . . .
> (2) To hear and decide, *in accordance with the provisions of the regulations adopted by the Zoning Commission,* requests for special exceptions or map interpretations or for decisions upon other special questions upon which such Board *is required or authorized by the regulations* to pass . . .." *(emphasis added)*

The description of the Board's jurisdiction contained in the Zoning Regulations, 11 DCMR § 3104, was adopted pursuant to that provision; it provides:

> "The Board is authorized under . . . D.C. Official Code § 6-641.07(g)(2) . . . to grant special exceptions, as provided in this title, where, in the judgment of the Board, the special exceptions 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 accordance with the Zoning Regulations and Zoning Maps, subject in each case to the special conditions specified in this title . . . ." *(emphasis added)*

The Zoning Act, the enabling statute for both the Zoning Commission and the Board of Zoning Adjustment, itself contained the provision requiring compliance with the Height Act that is now carried forward in DC Code § 6-641.06, as follows:

> "The permissible height of buildings in any district shall not exceed the maximum height of buildings now authorized upon any street in any part of the District of Columbia by Subchapter I of this chapter, regulating the height of buildings in the District of Columbia [i.e., the Height Act]."

It is clear, therefore, that the Board's jurisdiction, conferred by this same act, cannot extend to hearing a request for permission to erect or maintain a structure that is in violation of the Height Act, for jurisdiction implies the power either to grant or refuse the request—a power the Board does not possess.

Additionally, in implementation of the statutory provision just cited, the Zoning Regulations contain several provisions making it explicit that no deviation from the requirements of the Height Act is permitted, the most general of which is 11 DCMR § 2510.1, which provides that "in addition to any controls established in this title, all buildings or other structures shall comply with the Act to Regulate the Height of Buildings in the District of Columbia . . . ." Necessarily, therefore, permission to maintain a structure that deviates from the requirements of the Height Act is not "in accordance with the provisions of the Zoning Regulations" or "required or authorized by the regulations." Accordingly, a request for such permission cannot be within the Board's jurisdiction as set out the Zoning Regulations, 11 DCMR § 3104.

Further, the Council of the District of Columbia is without power to confer any such jurisdiction: the Council is specifically prohibited, by the Home Rule Act, from enacting "any act, resolution, or rule which permits the building of any structure within the District of Columbia in excess of the height limitations contained in § 6-601.05 [the Height Act]." *DC Code § 1-206.02(a)(6)*. Therefore, the Council could not have enacted any law that would have enabled the Zoning Commission to issue zoning regulations to permit the building of any structure in contravention to the Height Act; and likewise, the Council could not confer jurisdiction on the BZA to do indirectly what the Zoning Commission could not do directly.

If the Board has no jurisdiction to hear a request for permission to erect or maintain a structure that violates the Height Act, *a fortiori* it has no authority actually to grant that permission. Such action would be barred not only by DC Code § 6-641.06, requiring that all buildings comply with the Height Act, but also by the parallel requirement of 11 DCMR § 2510.1 that "all buildings or other structures shall comply with the Act to Regulate the Height of Buildings". The absence of BZA authority to grant a special exception in this case is further borne out by section 101.4 of the Zoning Regulations, which states:

> "The provisions of any statute . . . shall govern whenever they:
> (a) Require larger yards, courts, or other open spaces;
> (b) Require a lower height or bulk of buildings or a smaller number of stories;
> (c) Require a greater percentage of the lot to be unoccupied; or
> (d) Impose higher standards than are required by this title."

Clearly, under this important rule of precedence, no special exception issued under the Zoning Regulations could contravene the Height Act's requirements in this case for a larger open space, a lower bulk of building, and a higher standard than 11 DCMR § 411.11 might permit in a non-Height Act case. Moreover, in view of these provisions and others in the Zoning Regulations demanding compliance with the Height Act, Montrose could never satisfy the requirement of 11

DCMR § 3104.1 that special exceptions "be in harmony with the general purpose and intent of the Zoning Regulations."

Finally, as to the Mayor, it is apparent from the text of the Height Act in section 6-601.05(h) that while Congress gave certain discretion to the Mayor to permit the erection of spires, towers, penthouses, etc. to greater heights than those specified in the Act, that discretion was confined by the following statutory proviso in the same sentence: "And provided, that penthouses . . . shall be set back from the exterior walls distances equal to their respective heights above the adjacent roof."

(2) The Application in the present case is in effect a Motion for Reconsideration and Rehearing of the Appeal of Kalorama Citizens Association case (BZA Appeal No. 17109), and fails to meet the requirements of 11 DCMR §3126 for such a motion.

As ANC 1C and KCA have pointed out in their separate Motion to Postpone Hearing, in the *Appeal of Kalorama Citizens Association*, the Board supported the Appellant's interpretation of the Height Act at the June 22nd special public meeting with respect to the illegal roof structure, specifically, that the roof structure was in violation of the Height Act's setback requirements. We noted that the Application for Special Exception was yet another, repackaged effort by Montrose to obtain reconsideration of that determination without waiting for a written final order as required by 11 DCMR §3126.2. As noted in the Motion to Postpone Hearing, Montrose has devoted an entire section of its statement to rearguing the previously decided issue of whether the Height Act's requirement of setback from exterior walls applies only to walls fronting on a street, and has promised extensive testimony on the issue. *Statement of the Applicant, pp. 7-9, and Exhibit J.*

Therefore, should the Board choose not to postpone the hearing, the various requirements governing Motions for Reconsideration or Rehearing, set out in 11 DCMR §3126, must be applied, and the Application dismissed for failure to meet those requirements, as follows:

First, as noted, the Application fails to meet the requirement of §3126.2 that a final written order must have been issued by the Board. That section provides:

> "Any party may file a motion for reconsideration or rehearing of any decision of the Board, *provided that the motion is filed with the Director within ten (10) days from the date of issuance of a final written order by the Board.*" (emphasis added)

Montrose acknowledged that a party may seek reconsideration or rehearing only after the final written order has been issued, in its *Motion for Partial Reconsideration* submitted in Appeal No. 17109 on July 14, 2004, which the Board declined to consider in the absence of a final order, yet now presents the same motion in another guise.

Second, the Application fails to meet the requirement respecting new evidence set out in §3126.6, which provides in part:

> "No request for rehearing shall be considered by the Board *unless new evidence is submitted that could not reasonably have been presented at the original hearing.* " (emphasis added)

Montrose devotes an entire section of its application, and most of an attached four-page outline of proposed testimony by Steven Sher, to the roof structure setback issue. This material consists exclusively of legal argument, largely identical to that presented in the earlier Appeal, citing as legally authoritative various government memoranda and Zoning Commission and Board cases. There is no mention even of the evidence presented on this issue in the earlier Appeal, even less of any new evidence, and certainly no mention of, or offer to present, "new evidence that could not reasonably have been presented at the original hearing", as §3126.6 plainly requires.

Third, there has been no notice of rehearing as required by §3126.6, which provides:

"If a rehearing is granted, notice shall be given as in the case of an original hearing."

Therefore, unless the Board chooses to postpone the scheduled hearing on Montrose's present application, giving proper notice of a rehearing on the prior appeal, it cannot properly hear Montrose's re-argumentation of the roof structure setback issue.

These requirements of §3126, which Montrose seeks to circumvent, are clear and strict. Their obvious purpose is to avoid wasting the Board's time, and to avoid subjecting parties to cases before the Board to the outrageous burden of apparently endless reargument of issues already decided, where no new facts not reasonably available previously can be adduced.

Conclusion. The Board has neither jurisdiction to hear the application for special exception, nor authority to grant it. Further, the application is in effect a motion for reconsideration and rehearing, and fails to meet the requirements of 11 DCMR §§3126.2 and 3126.6 for such motions. Therefore ANC 1C and KCA respectfully request that the application be dismissed.

Respectfully submitted,

Advisory Neighborhood Commission 1C

By: _____

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Kalorama Citizens Association

By: _____

Ann Hughes Hargrove
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Dated: October 8, 2004

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Postponement of Hearing was hand-delivered to Mary Carolyn Brown, Esquire at the offices of Holland & Knight, counsel for the Applicant, 2099 Pennsylvania Avenue, NW, Suite 100, Washington, DC 20006 on this 8th day of October, 2004.



Ann Hughes Hargrove

Dated: October 8, 2004