BEFORE THE BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

APPLICATION OF MONTROSE, LLC	)	
PURSUANT TO 11 DCMR § 3104.1 FOR A SPECIAL	)	
EXCEPTION FROM THE ROOF STRUCTURE	)	**BZA CASE NO. 17221**
SET-BACK PROVISIONS UNDER §§ 411.11 AND	)	**ANC 1C**
400.7(b), FOR AN EXISTING FIVE-STORY	)	
RESIDENTIAL CONDOMINIUM IN THE R-5-D	)	**HEARING: OCTOBER 12, 2004**
DISTRICT AT 1819 BELMONT RD., NW	)	
(SQUARE 2551, LOT 45)	)	

APPLICANT'S OPPOSITION TO MOTIONS TO POSTPONE THE HEARING AND TO DISMISS THE APPLICATION

I. INTRODUCTION

Montrose, LLC, the applicant in the above-referenced case (the "Applicant"), hereby opposes the motions filed by Advisory Neighborhood Commission 1C ("ANC") and the Kalorama Citizens Association ("KCA") (collectively the "Parties in Opposition" or "Opposition") to postpone the hearing on this matter and to dismiss the application. The ANC and KCA mischaracterize the oral vote of the Board of Zoning Adjustment ("BZA" or "Board") taken June 22, 2004, in Appeal No. 17109, as evidenced by the Board's more recent July 14, 2004, ruling in BZA Case No. 17186. There, the Board granted special exception relief from the setback requirements under the Height of Buildings Act of 1910 (the "1910 Height Act"), the same relief requested in the instant application. There is nothing that prevents the Board from considering the instant special exception request, or any other application requesting relief from the setback provisions. Thus, the motions for postponement and dismissal submitted by the Opponents are without merit and should be dismissed.

BZA
Case No. 17221
Exhibit No. 37

Board of Zoning Adjustment
District of Columbia
CASE NO. 17221
EXHIBIT NO. 37

II.
SUBSEQUENT BZA ORDER CLEARLY DEMONSTRATES BOARD'S INTERPRETATION OF THE SETBACK PROVISIONS OF THE 1910 HEIGHT ACT.

The Opponents argue that the Board cannot proceed with consideration of the special exception request in Case No. 17221 because (i) the Board previously ruled that it does not have the authority to grant relief from the setback requirements of the 1910 Height Act along side elevations; or (ii) the case must be delayed until issuance of the Board's written order in Appeal No. 17109 (the "Belmont Appeal Case") to determine whether Board actually ruled that it does not have the authority to grant relief from the setback requirements of the 1910 Height Act along side elevations.

Although the Board has not yet issued a written order in the Belmont Appeal Case, a subsequent written decision of the Board clearly demonstrates that the Board does not, in fact, believe that it is prohibited from granting relief from the setback provisions along side elevations of a building. On July 14, 2004, the Board granted relief from the setback provisions for a commercial office and retail building at 777 6th Street, N.W., in BZA Case No. 17186. There, the project proposed the construction of a building consisting of eleven stories for a total height of 120 feet, the maximum height permitted under the 1910 Height Act. Sixth Street, from which the building measures its height, is 100 feet in width. *See* Schedule of Street Widths, District of Columbia Office of the Surveyor, undated, attached as Exhibit 1. Based on the 1910 Height Act, a building along a commercial street such as 6th Street can achieve a maximum height of 20 feet greater than the street width, or 120 feet. As shown on Sheet No. A2-02 included in the architectural drawings submitted as Exhibit D to the pre-hearing statement in that case, the proposed building is being constructed to the maximum height of 120 feet. The Board granted relief from the one-to-one ratio setback provisions requested by the applicant along the rear and

side elevations, implicitly holding that it had authority to grant such relief under the 1910 Height Act. Because the Board's decision is captured in a Summary Order, however, there is no written finding on this issue.

Nevertheless, it is clear from this subsequent ruling that the Board did not find that the 1910 Height Act prohibited it from granting setback relief. That is, the Board implicitly held in its subsequent July 14, 2004, order that the 1910 Height Act setback provisions apply only to street elevations and not to side elevations. Consequently, the Board could only have reached the same conclusion in the Belmont Appeal Case. To find otherwise, as the Opponents suggest, would lead to inconsistent, arbitrary and capricious decisions by the Board.

IV.
NOVEL RATIONALE ADVANCED BY OPPOSITION CONTRADICTS CONSISTENT PAST HOLDINGS OF THE BOARD.

For at least the past 45 years, the Board, the Zoning Commission, the Zoning Administrator and the National Capital Planning Commission have all consistently interpreted the setback provisions of the 1910 Height Act to apply only to street elevations of buildings. As set forth in the Applicant's pre-hearing statement and associated exhibits in support of its special exception request, the term "exterior walls" under the 1910 Height Act has historically been interpreted to mean exterior walls fronting on streets. Consistent with this interpretation, both the Board and the Zoning Commission have granted relief from the setback provisions along interior walls in over twenty cases. These cases include:

- BZA Case No. BZA Order No. 11917 (1627 K Street)
- BZA Order No. 12798 (1100 15th Street)
- BZA Order No. 13061 (2301 Washington Circle)
- BZA Order No. 13124 (1811 L Street)
- BZA Order No. 13187 (1801 L Street)
- BZA Order No. 13449 (1819 L Street)
- BZA Order No. 13528 (801 18th Street)
- BZA Order No. 13716 (1023 15th Street)

- BZA Order No. 13788 (1111 14th Street)
- BZA Order No. 14176 (816 Connecticut Avenue)
- BZA Order No. 15159 (555 11th Street)
- BZA Order No. 15169 (1430 K Street)
- BZA Order No. 17186 (777 6th Street)
- BZA Order No. 16681 (Square 456)
- BZA Order No. 16641 (1210-16 Massachusetts Avenue)
- BZA Order No. 17030 (911-19 E Street)
- BZA Order No. 16778 (1108 K Street)
- BZA Order No. 16700 (300 Massachusetts Avenue)
- ZC Order No. 961 (1700 K Street, N.W.)
- ZC Order No. 594 (1111 20th Street, N.W.)

If the Opponent's argument were accepted, it would mean that the Board abandoned over 45 years of precedent in one single appeal case, and then returned to its previous holdings in a subsequent decision. If true, the Board would have made what amounts to an arbitrary and capricious decision that would be legally indefensible given its subsequent ruling. Even if the Board wanted to change its long-standing interpretation, the principle of *stare decisis* would preclude the retroactive application of that decision to permits already approved and issued, as in the Belmont Appeal Case. *See Smith v. District of Columbia Board of Zoning Adjustment*, 342 A.2d 356 (D.C. 1975).

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

> the Board made no findings relevant to petitioners' claim that the Zoning Administrator's approval of the deck was given pursuant to a long-standing interpretation of the Zoning Regulations which had been approved in the past by the Board, so that established principles of *stare decisis* require any change in that interpretation to be made prospective only. While the Board is of course not

> bound for all time by its prior positions, we think it should have considered this contention, not only in connection with its decision of the merits of the case, but also as it relates to petitioners' claim of estoppel.

Smith, 342 A.2d at 359.

Similarly, the Board cannot decide to reinterpret the long-standing interpretation of "exterior walls" under the 1910 Height Act with respect to the Belmont Appeal Case retroactively where the Zoning Administrator's approval of the roof structure was given pursuant to that long-standing interpretation.

V.
CONCLUSION

The two motions filed by Opponents are nothing more than calculated attempts by the Opponents to delay the Applicant's continuing good faith efforts to come into full compliance with the differing interpretations of the Zoning Regulations advanced by the Zoning Administrator and the Board. The Board has clearly held that it has the authority to grant relief from the setback provisions along side elevations, even where a building is constructed to the maximum height permitted under the 1910 Height Act. Accordingly, for the reasons stated herein, the Opponents Motion to Dismiss and Motion to Postpone should be denied.

Respectfully submitted,

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Table Showing the Widths of the Streets and Avenues in the City of Washington

The streets running East and West, are designated by letters of the alphabet, and by the word North or South, according as they are situated North or South of the Capitol, which is the dividing point; as, A street north, which is the first street north of the Capitol.

The streets running North and South are designated numerically, and by the word East or West, according to their positions with respect to the Capitol; as First street east and First street west.

STREETS	A	B	C	D	E	F	G	H	I	K	L	M	N	O	P	Q	R	S	T	U	V	W									
North	90	90	80	70	90	100	90	90	90	147.67	90	90	80	90	90	90	90	90	90	90	80	80									
South	90	90	80	90	90	70	100	80	90	80	90	90	90	85	85	85	85	85	85	80	80	40									
STREETS	½	1	2	3	4	4	5	6	7	8	9	10	11	12	13	13½	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28
East	80	110	90	90	85	S.W.	100	85	90	100	90	80	90	112	90	-	100	90	80	100	80	80	100	80	80	80	80	-	-	-	-
West	80	90	90	110	80	110	80	100	85	100	85	85	111.42	85	110	70	110	110	160	110	90	110	90	90	90	100	90	90	80	70	80

North and South Capitol Streets, each 130 feet wide; East Capitol Street 160; Half Streets, east and west, 80; Thirteenth and a Half Street, 70; Water Street, between South Capitol and W Streets, 60 feet wide, elsewhere, 80 feet; Boundary Street, 80 feet wide. The streets on the East and West sides of Lafayette Square are 90 feet wide; from F Street North to the Canal, the width of 8th St. West is 85'8". The width of D Street northwest of 17th Street West, is 80 feet, elsewhere, 70 feet.

WIDTHS of the AVENUES

AVENUES	WIDTHS	COURSES	AVENUES	WIDTHS	COURSES	AVENUES	WIDTHS	COURSES
Delaware- - - - - -	160 Ft.	N15-44-00E	Pennsylvania, White Ho. to Rock Creek- - -	130 Ft	S66-00-00E	New Hampshire- - -	120 Ft	N36-09-11E
New Jersey - - - - -	160 "	N15-44-00W	Pennsylvania, Capitol to E'rn Branch- - -	160 "	S62-27-00E	Massachusetts, West of N.J. Ave.- - -	160 "	S66-03-00E
Maryland, East of Capitol	160 "	N62-25-00E	Kentucky- - - - - -	120 "	S33-00-00E	Massachusetts, East of N.J. Ave.- - -	160 "	S62-26-08E
Maryland, West of Capitol	160 "	N70-22-09E	Tennessee- - - - - -	120 "	N32-25-00E	Ohio- - - - - -	160 "	S70-18-00E
North Carolina- - -	160 "	N62-30-00E	New York,East of WH. Ho.-	130 "	N66-09-00E	Louisiana- - - -	160 "	S70-21-36E
South Carolina- - -	160 "	N71-13-54E	New York,West of Wh. Ho.-	160 "	N70-27-00E	Indiana- - - -	160 "	S70-23-30E
Georgia (Potomac)- - -	160 "	N62-30-00E	Vermont- - - - - -	130 "	N24-31-30E	Missouri- - - -	85 "	S70-33-30E
Virginia, Mall to E'rn Br	160 "	S70-18-05E	Connecticut- - - -	130 "	N24-31-30W	Maine- - - - - -	85 "	N70-22-09E
Virginia, R.C. to Pot. R.	120 "	S55-20-00E	Rhode Island- - - -	130 "	N66-00-00E			
Pennslyvania, White Ho. to U.S. Cap.- - -	160 "	S70-33-30E						

The distance on an East and West line from the West side of Square No. 1 to the West side of 24th Street East,=24,140.8 feet, or 4.572 miles. The distance on a North and South line from the South side W Street South, along 11th Street West to the North side of Boundary Street is 19,954.0 feet, or 3.779 miles.

Refer to Record Map #2806. Copy by W.B.G. May 17, 1960. Compared by E.G.M. and P.H.M.

EXHIBIT 1