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)	)	

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

Advisory Neighborhood Commission 1C (ANC 1C) and Kalorama Citizens Association (KCA) present this statement in opposition to the Application for Special Exception filed by Montrose, LLC ("Montrose" or "Applicant") in the above-captioned case.

At the October 12, 2004 hearing on the Application, the Board requested that the parties brief the issues raised in the Motion to Dismiss previously submitted by ANC 1C and KCA. In the interests of convenience and efficiency, we have presented in this single statement arguments relating both to the Motion to Dismiss (grounds I.A through I.D below) and to the merits of the Application (grounds II.A through II.C below).

The property involved in Montrose's Application for a special exception is the same property addressed in the *Appeal of Kalorama Citizens Association* case (BZA Appeal No. 17109) ("*KCA Appeal*"). In its oral discussion and vote on the *KCA Appeal* at a special public meeting on June 22, 2004, the Board of Zoning Adjustment ("Board") by a unanimous 5-0 vote granted the appeal in part and denied it in part. Specifically, as to issues relevant in this special exception case, the Board decided that it had jurisdiction to hear and decide issues arising under

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the 1910 Height of Buildings Act (36 Stat. 452 (1910), D.C. Code § 6-601) ("Height Act"), and that the roof structure violated the Height Act in that it failed to meet the Act's setback requirements. The Board also ruled that the roof deck at the property violated the Act's height limits and sustained the Appeal on that ground as well.[1] No written order on that decision has yet been issued by the Board in the *KCA Appeal.* This Statement refers to a limited number of documents in the record of that Appeal, which we respectfully request be incorporated into the record of the current Application. (See Appendix A to this Statement.)

SUMMARY OF ARGUMENT

The arguments in support of ANC 1C's and KCA's joint Motion to Dismiss Montrose's current Application, and in opposition to the Application itself, are summarized as follows:

I. The Application should be dismissed forthwith for these reasons:

A. 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;

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

C. Administrative collateral estoppel (also known as "issue preclusion"), as well as basic notions of procedural fairness and due process, prevent Montrose from using a special exception application to reverse the Board's prior determination that the roof structure here violates the Height Act; and

[1] The Board denied the Appeal as to issues relating to floor area ratio (FAR). These FAR issues are not relevant to the special exception case.

D. The Application is an attempt to obtain reconsideration of the *KCA Appeal* as to the issue of the lawfulness of the roof structure, without meeting the requirements for such reconsideration set out in 11 DCMR § 3126, Motion for Rehearing and Reconsideration; it fails to meet those requirements, and therefore should be dismissed.

II. The Application does not meet the Zoning Regulations' requirements for a special exception, because:

A. Full compliance with the roof structure regulations would not be unduly restrictive, prohibitively costly, or unreasonable, as required by 11 DCMR § 411.11;

B. The proposed special exception would conflict with the purpose and intent of the Zoning Regulations, contrary to the requirements of 11 DCMR §§ 411.11 and 3104.1; and

C. Retaining the existing roof structure would adversely affect the use of adjacent and neighboring properties as regards light, air, view and other amenities, contrary to the requirements of the two provisions just cited.

I. THE APPLICATION SHOULD BE DISMISSED FORTHWITH

A. 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.

It should first be noted that, in the brief discussion of this issue before the Board on October 12, 2004, KCA and ANC 1C argued that the Board does not have such jurisdiction, and

Counsel for Montrose agreed that it does not. (Instead, Montrose argued – notwithstanding the Board's decision on June 22, 2004 that the roof structure violates the Height Act – that the roof structure does not violate that Act). Accordingly, it appears that the parties are agreed that the Board lacks jurisdiction to grant relief in violation of the Height Act.

The reason for this agreement is simple and straightforward. 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. With respect to 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 following description of the Board's jurisdiction contained in the Zoning Regulations, 11 DCMR § 3104, was adopted pursuant to that provision:

> "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 D.C. 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 violates 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 these provisions 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." (Emphasis added). 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 in 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]." D.C. Code § 1-206.02(a)(6).

If the Board has no jurisdiction to "hear and decide" a request for permission to erect or maintain a structure that violates the Height Act, D.C. Code § 6-641.07(g)(2), then *a fortiori* it has no authority actually to grant that permission. Such action would be barred not only by D.C.

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." Moreover, in view of that provision and others in the Zoning Regulations demanding compliance with the Height Act, it would contravene the requirement of 11 DCMR § 3104.1 that special exceptions "be in harmony with the general purpose and intent of the Zoning Regulations."

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,"[2] which would correct the Height Act problems just mentioned, but later proposed less

[2] 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.[3] 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.*[4] 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*[5] 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."[6]

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

[4] 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."

[5] 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.

[6] 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)."[7]

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."[8]

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."[9]

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

[8] *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."

[9] 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.[10]

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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[10] 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[11] 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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[11] *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.[12] 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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[12] 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.[13] 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.[14] 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.[15]

C. Administrative collateral estoppel (also known as "issue preclusion"), as well as basic notions of procedural fairness and due process, prevent Montrose from using a special

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

[14] *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.

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

exception application to reverse the Board's prior determination that the roof structure here violates the Height Act.

Montrose now seeks through a special exception application to obtain a result contrary to that in the *KCA Appeal*, even though Montrose had every opportunity to litigate all relevant issues in that case and cannot demonstrate any changed facts or circumstances to justify asking the Board to reverse itself. The doctrine of collateral estoppel (also known as "issue preclusion") prevents Montrose from obtaining such relief. Moreover, in the absence of a long-awaited written decision and order issued by the Board in the *KCA Appeal*, a decision in Montrose's favor on this special exception application – which would require the Board, of necessity, to reverse its vote in the prior case – would deny KCA and ANC 1C basic procedural fairness and due process.

"Collateral estoppel 'restricts a party in certain circumstances from relitigating issues or facts actually litigated and necessarily decided in an earlier proceeding.' . . . This principle 'applies not only to judicial adjudications, but also to determinations made by agencies other than courts, when such agencies are acting in a judicial capacity." *Kovach v. District of Columbia,* 805 A.2d 957, 962 (D.C. 2002) *(*quoting *Ringgold v. District of Columbia Dep't of Employment Services,* 531 A.2d 241, 243 n.3 (D.C. 1987), and *Hogue v. Hopper,* 728 A.2d 611, 614 (D.C. 1999)) (other citations omitted); *see Wilson v. Hart,* 829 A.2d 511, 514 (D.C. 2003). The policy underlying the doctrine is that "a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise." *Swineford v. Snyder County, Pa.,* 15 F.3d 1258, 1266 (3d Cir. 1994) (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 104, 106 (1991)).

"'The threshold inquiry [in such a case] is whether the earlier proceeding is the essential equivalent of a judicial proceeding.'" *City Wide Learning Center, Inc. v. William C. Smith & Co.,* 488 A.2d 1310, 1313 (D.C. 1985) (quoting *William J. Davis, Inc. v. Young,* 412 A.2d 1187, 1994 (D.C. 1980)). Here, there can be no question that the Board's processes in the *KCA Appeal* case met that test. The applicable statute and regulations not only confer adjudicative functions on the Board, but the Zoning Regulations confer on all parties the essential rights of a judicial proceeding – a neutral decision maker, representation by counsel, presentation of testimony and evidence, cross-examination of witnesses, submissions of written briefs and oral argument on significant issues, and a written decision supported by the record in the case. Montrose had every conceivable opportunity to brief, argue, and present evidence with respect to the central issues now before the Board in this special exception case: that is, whether the Board has jurisdiction to decide violations of the 1910 Height Act, and whether the roof structure at issue here indeed violated the Height Act because of its failure to comply with the Act's setback requirements. Plainly, this case meets the threshold test above for the application of collateral estoppel.

Before applying the doctrine to the administrative case before it, the D.C. Court of Appeals in *Wilson* identified four elements that have typically been required to invoke collateral estoppel against a party in a judicial context: "(1) the issue was actually litigated; (2) was determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the party; (4) under circumstances where the determination was essential to the judgment." *Id.* at 514. In the Montrose special exception application currently before the Board, the first, third, and fourth elements are certainly present. As a result of the Board's delay in issuing a written decision and order in the *KCA Appeal*, KCA and ANC 1C concede that the

second element is not yet present. However, this does not mean that *administrative* collateral estoppel, as distinguished from the *judicial* form, has no application. On the contrary, because of the inherent distinctions between agency and judicial processes, "[t]he concepts of collateral estoppel and res judicata must be applied more flexibly in an administrative context than in judicial proceedings." C. Koch, 2 Administrative Law and Practice § 5.72, at 279 (2d ed. 1997).

That flexibility could easily be applied in this case. If the Board were not inclined to dismiss the Application outright on the basis of the June 22nd vote in the *KCA Appeal*, it would be perfectly appropriate for the Board to postpone any hearing or vote on Montrose's special exception until after a written decision and order is issued in the *KCA Appeal*, and to allow any time for reconsideration, rehearing, or appeal to run. Assuming no reversal in *that* case, the Board should then dismiss the Montrose special exception application on collateral estoppel grounds.

Judicial precedent supports such an exercise of administrative economy and discretion here. In *Stevens v. Stover,* 702 F. Supp. 302 (D.D.C. 1988), the defendants in a lawsuit brought by a terminated police officer filed a motion for leave to amend their Answer in order to assert new defenses, including collateral estoppel. The motion was premised on a decision against the plaintiff by the Metropolitan Police Department's Adverse Action Panel (AAP) following an administrative trial. The plaintiff opposed the motion for leave to amend, as well as a subsequently filed motion to dismiss, arguing that "the District of Columbia courts would not give the findings of the AAP preclusive effect because the Office of Employee Appeals ("OEA") is conducting a *de novo* review of the findings of the AAP." *Id.* at 305. The court, however, "[found] the defendants' issue preclusion arguments persuasive" and granted them leave to amend their Answer to add the defenses of collateral estoppel and res judicata. *Id.* at 303, 306-

07. In light of the pendency of the OEA appeal, the court followed the D.C. Circuit's recommendation in a similar case to "'defer consideration of the preclusion question until the appellate proceedings [before the OEA] are concluded.'" *Id.* at 306 (quoting *Martin v. Malhoyt,* 830 F.2d 237, 265 (D.C. Cir. 1987)). The court then gave the plaintiff 90 days to obtain a final determination from OEA and in the meantime stayed further proceedings. *Id.* at 307.

If the Board on December 7th reaches the same conclusion with regard to Montrose's roof structure as it reached in the *KCA Appeal* without requiring further evidence and testimony – namely, that the roof structure violates the Height Act's setback requirements and that the Board has no jurisdiction to hear or grant a special exception to those requirements – then obviously no postponement or stay of further proceedings would be necessary. Montrose's application can simply be dismissed. However, in the absence of such a conclusion at the December 7th hearing, it would be grossly unfair to the parties who prevailed on this issue in the *KCA Appeal* – not to mention an undue waste of the Board's limited time and resources – to proceed with a full-blown evidentiary hearing at that time. The unavailability of the obvious defense of collateral estoppel under those circumstances would be due solely to the Board's own failure to issue a final decision in a case voted on nearly 6 months earlier. If confronted with that procedural situation, KCA and ANC 1C intend again to seek a stay of further proceedings in this special exception case until after any decision in the *KCA Appeal* case becomes final.

Such a motion, in addition to being supported by the *Stevens* case in the District of Columbia, is also supported by zoning cases in numerous other jurisdictions. While we have found no District of Columbia case on point, other jurisdictions typically refuse to consider new applications with respect to the same property or part thereof absent a change of circumstances or conditions to justify a different decision. *See, e.g., Fisher v. City of Dover,* 412 A.2d 1024,

1027 (N.H. 1980); *Tyrie v. Baltimore County,* 215 Md. 135, 137 A.2d 156 (1957); *Kollock v. Sussex County Board of Adjustment,* 526 A.2d 569, 572 (Del. Super. 1987). As the New Hampshire Supreme Court has explained persuasively:

> "When a material change of circumstances affecting the merits of the application has not occurred or the application is not for a use that materially differs in nature and degree from its predecessor, the board of adjustment may not lawfully reach the merits of the petition. If it were otherwise, there would be no finality to proceedings before the board of adjustment, the integrity of the zoning plan would be threatened, and an undue burden would be placed on property owners seeking to uphold the zoning plan.
>
> "The burden of proving a material change of circumstances before the board of adjustment lies on the party seeking the variance. . . . The applicant will have easier access to evidence of changed circumstances and to place the burden on opponents to the application would leave them open to harassment."

Fisher v. City of Dover, supra, 412 A.2d at 1027 (citations omitted).

Denying KCA and ANC 1C the opportunity to assert collateral estoppel in this special exception case as a by-product of the Board's failure, even at this late date, to issue a final decision in the *KCA Appeal* would also appear to deny procedural due process under the Fifth Amendment. The Board should avoid that unfair and inefficient result, either by rejecting Montrose's petition on collateral estoppel grounds immediately or by deferring further proceedings in this special exception case until after a written decision and order in the *KCA Appeal* has been issued and any judicial appeals from that decision have become final.

D. ***The Application in the present case is an attempt to obtain reconsideration of the KCA Appeal as to the issue of the lawfulness of the roof structure, without meeting the requirements for such reconsideration set out in 11 DCMR § 3126, Motion for Rehearing and Reconsideration; it fails to meet to meet those requirements and therefore should be dismissed.***

The Zoning Regulations themselves provide an additional reason why the present Application should be dismissed. As already noted, at the June 22nd special public meeting on the *KCA Appeal*, the Board supported the Appellant's position with respect to the illegal roof structure – specifically, that the roof structure was in violation of the Height Act's setback requirements. Notwithstanding this determination by the Board, Montrose has sought to use its Application for Special Exception as a vehicle for re-arguing the issue of the Height Act's setback requirements, thus circumventing and contravening the requirements of the Zoning Regulations regarding Motions for Reconsideration and Rehearing. As the Office of Zoning has already pointed out to Montrose in rejecting a previous attempt to obtain reconsideration, such efforts are premature in the absence of a written decision and order from the Board. In the apparent hope of inducing the Board to reverse its position (even as the written order is being prepared), Montrose has devoted an entire section of its Statement to re-arguing 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.*

Under the Zoning Regulations, trying to induce the Board to reverse a previous position is to be done by a Motion for Reconsideration or Rehearing. Therefore, the various requirements governing Motions for Reconsideration or Rehearing, set out in 11 DCMR § 3126, must be applied as to the issue of the lawfulness of the roof structure, 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 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)

In its *Motion for Partial Reconsideration* submitted in the *KCA Appeal* on July 14, 2004, which the Board declined to consider in the absence of a final order, Montrose acknowledged that a party may seek reconsideration or rehearing only after the final written order has been issued. Yet it now attempts to repackage the same old wine in a new bottle.

Second, the Application fails to meet the equally important 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, essentially 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 of the evidence presented on this issue in the earlier Appeal, much less 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. In the absence of any such new evidence, it is not surprising that Montrose would wish to circumvent this requirement by pursuing a *de facto* Reconsideration under the guise of an Application for Special Exception.

Third, there has been no notice of rehearing as required by § 3126.6, which provides that "[i]f a rehearing is granted, notice shall be given as in the case of an original hearing." Until

such notice of a rehearing on the prior appeal has been given, the Board 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 and important purpose – quite similar to the interests of judicial and administrative economy and fairness that underlie collateral estoppel – is to avoid wasting the Board's time and to avoid subjecting parties in cases before the Board to the outrageous burden of apparently endless re-argument of issues already decided, where no new facts not reasonably available previously can be adduced. Therefore, the Application for Special Exception should be immediately dismissed.

II. THE APPLICATION DOES NOT MEET THE ZONING REGULATIONS' REQUIREMENTS FOR A SPECIAL EXCEPTION.

Even if the Height Act were not involved, the Application would still have to meet the requirements for a special exception set out in the Zoning Regulations. It cannot do so, for the following reasons:

A. Full compliance with the roof structure regulations would not be unduly restrictive, prohibitively costly, or unreasonable, as required by 11 DCMR § 411.11;

It is apparent, as Montrose indicates at p. 5 of its Application, that the building can readily be brought into full compliance with the roof structure regulations by simply removing the roof structure. The only question is whether removal would be "unduly restrictive, prohibitively costly or unreasonable." It would not be unduly restrictive or unreasonable, since, contrary to Applicant's assertion *(Statement of the Applicant, p.5)*, the roof structure is not "necessary to provide access for repairs and maintenance." A roof hatch, which would have no visual impact on the surrounding neighborhood, can be substituted in accordance with the BOCA

Building Code.[16] Additional, or alternative, access could be provided by way of a scuttle ladder to the top roof from the rear roof deck immediately below at the level of the top floor (the so-called "attic"). Nor is the existing roof structure needed for access to the front roof deck, which the Board has determined to be in violation of the Height Act and which therefore must be removed, and which in any event would be accessible only to the top apartment, not to any other residents of the building. These reconfigurations would be of relatively minor cost once the existing unlawful structure is removed. Special exceptions typically involve some genuine and demonstrable compelling necessity, such as inability otherwise to serve the functional needs of a large office building, accommodating to the demands of an historic district or landmark, and the like. There is no such compelling necessity here, and such functional need as is present—namely, access to the roof for maintenance—can readily be met without the offending roof structure.

From the very beginning, Montrose had full knowledge of the constraints that would be posed by placing a stairway penthouse over 11 feet high on a rowhouse less than 17 feet wide. Montrose argues that the difficulties it now confronts are not self-inflicted, but rather grew out of "conflicting interpretations of the Zoning Regulations by DCRA and the Board, not the Applicant," which "proceeded with construction under validly issued permits." *Statement of the Applicant, p. 5.* On the contrary, Montrose's present problems were not caused by some internal dispute between the Board and DCRA about the Zoning Regulations, of which Montrose was the unwitting victim; rather, they were caused by the failure of Montrose, its agent in the permitting process, and DCRA to take the Height Act into account from the outset.[17] Consequently the

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[16] BOCA Construction Code, §1027.1.

[17] *Declaration of Alan J. Roth,* and *Declaration of Ann Hughes Hargrove and John Lawrence Hargrove,* submitted in BZA Appeal No. 17109.

permits were *not* validly issued as to the roof structure, as the Board—the decisionmaking authority in this matter—has determined. It is not unreasonable, within the meaning of 11 DCMR § 411.11, that Montrose should be required to bear the burden of removing the present and unlawful structure, which is the result not only of its own absurd design but its repeated (and, regrettably, largely successful) efforts to conceal from the community what it was doing.[18]

Moreover, even after Montrose had clear notice of community concerns about the framing for the roof structure that sprouted from this monstrosity after Labor Day 2003, even after its representatives' explanations were rejected by ANC 1C at the October 1, 2003 ANC meeting, and even after it became aware that an appeal of its building permits was being prepared, Montrose continued to build out, enclose, and finish the roof structure, both internally and externally. While Montrose cites cases holding that if an applicant for a special exception meets its burden of proof on the elements specified in the Zoning Regulations – which, we submit, Montrose does not – "the Board must ordinarily grant the application," Montrose conveniently glosses over the word "ordinarily," which appears in all of the opinions on this point. Clearly, the courts have contemplated the possibility that extraordinary factors may intervene to justify denial of a special exception, and if ever there were a case out of the ordinary, this Belmont Tower case is it. If it becomes necessary to go through an evidentiary hearing, ANC 1C and KCA will submit as part of our proposed Findings of Fact and Conclusions of Law an array of jurisprudence on the equitable principles of estoppel, unclean hands, and related doctrines demonstrating that the Applicant is not entitled to any form of zoning relief in this case, even if it could meet its burden on all elements in the Regulations.

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[18] *Id.; Declaration of Bryan Weaver,* submitted in BZA Appeal No. 17109; Testimony of Bryan Weaver in BZA Appeal No. 17109, Transcript of April 6, 2004, pages 159-163 and pages 170-171.

B. Such a special exception would be in conflict with the purpose and intent of the Zoning Regulations, contrary to the requirements of 11 DCMR §§ 411.11 and 3104.1.

Section 411.11 of the Zoning Regulations requires that the intent and purpose of the Zoning Regulations and Chapter 400 thereof not be "materially impaired" by a special exception. Section 3104.1 requires that a special exception "be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps". Neither of these requirements can be met by the special exception now requested, because it seeks to maintain a structure that the Board has determined to be in violation of the Height Act, and such a violation is prohibited by the Zoning Regulations.

The Zoning Act of 1938, the enabling statute for both the Zoning Commission and the Board of Zoning Adjustment, from which the authority to promulgate Zoning Regulations emanates, contained the basic provision requiring compliance with the Height Act that is now carried forward in D.C. 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]."

In implementation of this statutory provision, the Zoning Regulations contain a number of provisions making it explicit that no deviation from the requirements of the Height Act may be permitted. The most general of these 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." Additionally, § 411.11 requires specifically that roof structures not conflict with the Height Act.

C. Retaining the existing roof structure would adversely affect the use of adjacent and neighboring properties as regards light, air, view and other amenities, contrary to the requirements of 11 DCMR §§ 411.11 and 3104.1.

Section 411.11 requires that light and air of adjacent buildings not be adversely affected by a special exception from the roof structure requirements, and § 3104.1 requires, more broadly, that special exceptions "not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps." For the following reasons, the special exception now requested cannot meet these requirements.

(1) The existing roof structure adversely affects light and air available to adjacent and neighboring properties. Applicant has submitted solar studies purporting to show that the roof structure does not increase shadows cast on "abutting properties." We are not in a position to attest to the accuracy of these graphic representations for the dates they purport to represent. If accurate, they are of course relevant, but certainly not dispositive of the issue of adverse effects on light. It should be noted first that the properties entitled to protection from adverse effects are not just "abutting"—i.e., the two next-door neighbors of 1819 Belmont—but also "adjacent" and "neighboring" properties. ("Neighboring" clearly extends to properties in the immediate neighborhood, especially, in the present case, those located on Belmont Road and Columbia Road as well as those on 18th Street. "Adjacent" is not defined in the Zoning Regulations, but the primary definition in Webster's Unabridged Dictionary as maintained by the Office of Zoning, which is controlling under 11 DCMR §§ 199.2(g), is: "*not distant or far off* <the city square and the ~ streets>: *nearby but not touching* <the islands and the ~ mainland coast>." Consequently, in the present case all nearby or neighboring properties, including the two

abutting properties, are entitled to protection. The map at *Exhibit 7* shows structures in a portion of the immediate neighborhood.

A number of nearby adjacent and neighboring properties are adversely affected as to light. For example, the roof structure casts shadow directly on 1823, 1827 and 1831 Belmont, lying to the west of 1819, at various times in the morning. A word of explanation about the former two properties is in order. 1827 Belmont is a large 100-year-old, three-story plus basement row house, which faces sideways, to the east, with a large columned front porch and garden area. 1823 Belmont was constructed in 1989, replacing a row house that had burned down many years before. At the time the zoning was R-5-C.[19] The young architect, Geoffrey Gilbert (now deceased), who developed 1823, conceived of the two properties as complementary, and designed 1823 as two structures placed at the front and rear of the lot respectively, joined by a staircase and open court in the center as a counterpart to the garden on the 1827 side of the shared party wall. *See plat and photographs at Exhibit 8, and map at Exhibit 7.* Each property was to enhance the aesthetic amenities of the other, with the open court providing light from the east to both properties, as well as to 1832, a five story apartment building zoned R-5-B next to 1827. It is deeply regrettable that the same sort of sensitivity to and respect for the built environment in the surrounding neighborhood was not present in the design of the project at 1819 Belmont, where the building ultimately destroyed was one of a matched set of three turreted rowhouses.

The first photographs, at Exhibit 8, show the relationship of 1823 and 1827, and show why the 11-foot roof structure at 1819, capping a 70-foot building, diminishes the direct sunlight

[19] R-5-C now has a 60 foot limit with a 3.0 FAR in contrast with the new R-5-D, which has a 90 foot limit with 3.5 FAR.

and the ambient light of the sky for all three properties. The next photographs, taken in September or October of this year, show:

- the sun just emerging from behind the roof structure, as viewed from the second floor deck of the rear structure of 1823;
- the sun just emerging from behind the roof structure as viewed from the garden of 1827;
- the sun just emerging from behind the roof structure as viewed from the roof deck level of 1827, and
- the shadow of the roof structure cast on apartment windows on the east wall of 1831.

Other neighboring properties that suffer from having a big chunk of sky blocked by the 70-foot structure at 1819 find that adverse effect exacerbated by the roof structure, which is obviously the worst part of the building from the point of view of blockage of light. (*See further photographs at Exhibit 9.)*

Some of these properties, and especially those lying to the west of 1819 Belmont, suffer a similar adverse effect on air. The substantial blockage of any easterly breezes to those properties by the towering main structure at 1819 Belmont can only be exacerbated by the roof structure.

(2) The roof structure is visually highly intrusive and, in plain language, ugly. It is an ungainly jutting appendage fully deserving of the epithet employed by one member of the Board -- "obnoxious" -- in one session during the earlier *KCA Appeal*. It is clearly visible from its front at street level on Belmont Road, and from considerable distances around the Adams Morgan neighborhood . (*See further photographs at Exhibit, including one of the roof structure as viewed from 18th Street, the main commercial thoroughfare of the Adams Morgan neighborhood.)* It is not hard to understand why this visual effect is so acute: First, Washington rowhouses, and especially rowhouses as narrow as this, are ill designed to accommodate roof structures that are not properly set back as the regulations require, without severely compromising their aesthetic

and architectural integrity. 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, this roof structure, which would be unattractive at any altitude, is, after all, perched on top of a skinny structure that towers several stories above most of its neighbors, and thus unavoidably imposes itself on the field of vision of anyone viewing it from any angle.

The net result is an aesthetic degradation of the streetscape, and diminution of the aesthetic amenities of nearby and neighboring properties—adverse effects of like importance to that of the diminution of light and air. All are directly relevant in determining the existence and extent of adverse effects on adjacent and neighboring properties under the Zoning Regulations.

APPENDIX A

ANC 1C and KCA respectfully request that the following items mentioned in their foregoing Statement and previously made part of the Record in the *Appeal of Kalorama Citizens Association* (BZA Case No. 17109) be incorporated into the Record of the above-captioned special exception case:

- Testimony/Statement of George Oberlander (attached hereto as Exhibit 5)
- Transcript of April 6, 2004 – pages 157-171 (includes testimony of Bryan Weaver at pages 159-163 and pages 170-171, as well as adoption under oath by Bryan Weaver and Alan J. Roth of their respective Declarations, separately identified below, filed in response to Montrose's Motion to Dismiss)
- Transcript of April 20, 2004 – pages 331-333
- Appellant's Supplemental Memorandum of Law on the Height of Buildings Act
- Appellee's Submission to the Board Regarding Jurisdiction of the Board of Zoning Adjustment to Decide Issues Involving the Height Act
- Response of Intervenor Montrose, LLC to Question of BZA's Jurisdiction over 1910 Height Act
- Declarations of Ann Hughes Hargrove and John Lawrence Hargrove
- Declaration of Alan J. Roth
- Declaration of Bryan Weaver

For all of the reasons stated above, ANC 1C and KCA respectfully request that the Application for Special Exception be denied.

Respectfully submitted,

Advisory Neighborhood Commission 1C

By: _____

Alan J. Roth, Chairperson
P.O. Box 21652
Washington, DC 20009

Kalorama Citizens Association

By: _____

Ann Hughes Hargrove
Zoning Chair
1827 Belmont Road, NW
Washington, DC 20009

Dated: November 19, 2004

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Postponement of Hearing was sent to Mary Carolyn Brown, Esquire, counsel for the Applicant, on this 19th day of November, 2004, by United States mail, postage prepaid.

_____

Alan J. Roth

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Government of the District of Columbia

ZONING COMMISSION

ZONING COMMISSION ORDER NO. 476
Case No. 84-10
(Penthouse - Text Amendment)
June 9, 1986

Pursuant to notice, a public hearing was held by the District of Columbia Zoning Commission on October 22 and 25, 1984. At those hearing sessions, the Zoning Commission considered proposed amendments to the penthouse and antenna provisions of the District of Columbia Zoning Regulations, pursuant to Section 9101. The public hearing was conducted in accordance with the provision of Chapter 5 of the Rules of Practice and Procedure before the Zoning Commission.

From time to time during recents years, members of the Zoning Commission had expressed concerns regarding the appearance of the roof structures of various projects that were before the Commission for zoning consideration.

Roof structures originally consisted primarily of spires, towers, domes and other architectural solutions to roof design as well as chimneys essential to the heating of buildings. Modern buildings, however, in response to an emphasis on functionalism and to the ever-growing number and sophistication of building systems (heating, ventilating, air conditioning, and electrical), have tended to be designed with flat roofs supporting an increasing quantity of equipment. With the exterior design focus on the facade of the building, the roof became an efficient collection area for equipment, sometimes hidden from the ground, separate from leasable or otherwise occupiable space and often above the general building height limit. As this use of the roof increased, the chaotic development where the building meets the sky became more obvious, leading to regulations designed to control, minimize or camouflage the clutter of rooftop equipment.

The District of Columbia Office of Planning, by memorandum dated August 11, 1983, reported that the solution to roof structure clutter that the regulations support is the penthouse. Penthouses, while they have improved the roofscape by collecting and hiding much of the clutter of rooftop buildings themselves, appear as additional blocks resting on top of the roofs. While the required 1:1 setback minimizes their visual impact from the adjacent streets,

they are often visible from a distance against the sky, from the windows of other buildings and from rooftop terraces and observation towers. Thus, the Zoning Commission requested the Office of Planning to review the situation and recommend changes to the existing regulations which would result in an improvement in the appearance of roof structures.

On July 9, 1984, at its regular monthly meeting, and subsequent to the consideration of status memoranda from the OP dated February 3, May 16, and July 2, 1984, the Zoning Commission authorized a public hearing to consider amendments to the Zoning Regulations that would regulate penthouses, satellite dishes, antennas, and heliports.

The Commission subsequently determined that it would not consider proposed amendments to regulate heliports. As a result of that action the proceeding in this case began to fall into two distinct issues; namely penthouses, and antennas, which included satellite dishes. The first hearing session generally focused on issues related to regulating penthouses and the second hearing session, on issues related to antennas.

The Office of Planning, by memorandum dated October 12, 1984, evaluated three basic, but not mutually exclusive, approaches to address the problem of roof structure design and to improve the appearance of the roof area. They are as follows:

1. Reducing the visibility of the penthouse;

2. Improving the appearance of the roof and penthouse; and

3. Integrating the penthouse into the overall design of the building and its roof.

The Office of Planning believes that reducing the area and height of the penthouse, or increasing penthouse setbacks would be extremely difficult and, on balance, probably not desirable because it would tend to reduce energy efficiency, increase operating costs, not accommodate certain rooftop equipment, and could facilitate the continued location of transformers vaults and grates in public space, adversely affecting landscaping and pedestrian circulation.

The Office of Planning indicated that the typical roof and penthouse could be improved in appearance by allowing greater flexibility in the choice of materials and/or by encouraging the introduction of landscaping and other decorative elements on the roof. Temporary restaurants, scenic overlooks, exercise facilities or employee lunch areas would bring users to the roof. The necessary railing,

which would be permitted an exception to the height limit, could be designed to act as an architectural embellishment in helping to provide a visual cap for the building.

Active use of the roof would increase the demands on the penthouse with the need to accommodate public restrooms and corridor access from the elevator to the roof. The major problem would be to provide the elevator access to the roof which would not only enhance use of the roof but would be required by the D.C. Architectural Barriers Act. Elevator access to the roof would require an additional elevator override height of approximately ten feet which would need to "pop up" above the normal penthouse. Under the current Zoning Regulations, the developer would have to seek an area variance for the added height and hope to justify it on the basis of the unusual circumstances and requirements of the project. If the Regulations treated an increase in penthouse height for the purpose of gaining access to active rooftop use as a special exception, the BZA would only require the developer to show that the impact of the added height would not bring with it any significant adverse impacts.

The Office of Planning indicated that the integration of a penthouse into the overall design of the building and its roof could be achieved the following ways:

1. A sloped setback at a forty-five degree angle from the building face could achieve essentially the same visual setback that exists in the current regulations, as seen from the street level;

2. A cornice or architectural embellished parapet wall extending no more than five feet above the roof would strenghten the visual cap of the building, reduce the sight lines to the penthouse and tend to divert the viewer's attention from the penthouse; and

3. Increasing the roof height would essentially be comparable to a twenty-foot high parapet wall. It would provide more flexibility in the design and integration of the roof and penthouse, and increase an opportunity to pursue the Comprehensive Plan policy for Downtown by utilizing architectural embellishments and other means to visually strengthen the roof.

The Office of Planning, by that same memorandum, identified the three types of telecommunications antennas; namely local communications, satellite earth stations, and microwave

terrestrial. The OP gave examples of how each type is typically used including physical features associated with them; namely, size, mounting height, mounting locations, etc.

The proposal required that all penthouses be setback to a 1:1 ratio from the perimeter of the structure (2:1 ratio in the C-3-C and C-4 Districts), that the height of penthouses not exceed 18 feet 6 inches, that no mechanical equipment exceed that height limit, that an elevator penthouse be permitted to exceed 18 feet 6 inches as a special exception to permit rooftop access, that more than one mechanical equipment enclosure be permitted in certain conditions, that the character, material and color of all penthouse enclosures be essentially the same as the structure, and that the height increase of parapet walls be permitted for architectural embellishments as a special exception.

The proposal also defined antenna, permitted dish antennas to be mounted no more than seven feet in height under certain conditions in the R-1 through R-5-A Districts (no more than nineteen feet in height in the R-5-B District), permitted telecommunications antenna as an accessory structure in any required yard to exceed a four foot height limit, required that roof-mounted telecommunications antennas meet certain conditions, and permitted telecommunications antennas to exceed permitted height limits.

At the public hearing, the Commission heard testimony from representatives of various architectural firms regarding penthouses, and received considerable testimony from various representatives of the communications industry.

Representatives from the architectural community opposed the setback proposal for roof structures because it would in their opinion, stifle the opportunity for creative design solutions; e.g., infill buildings and unusually shaped lots, intended illusion of height, or intended design relief in a continuous facade. They supported the retention of the current setback provisions of the Zoning Regulations.

Various architects, by testimony presented at the public hearing, supported permitting more than one penthouse as well as rooftop access by permitting elevator penthouses to exceed 18 feet 6 inches. They believed that the ability to construct buildings in stages would be improved and that more functional uses of rooftops could be made.

Architects also supported the concept of encouraging architectural embellishments at the roofline and would encourage some streamlining of the six-month process before the Board of Zoning Adjustment (BZA).

A registered mechanical engineer, by testimony presented at the public hearing, recommended that the height limit for mechanical equipment enclosures be increased to 19 feet - 6 inches to 20 feet because it would provide for the most efficient operation of cooling towers.

The Zoning Commission heard testimony from representatives of the C & P Telephone Company, the Columbia Broadcasting System, the MCI Telecommunications, Inc., the GTE Communications Corp., the Direct Satellite Television, Inc., and several individuals, all of whom expressed grave concerns about the incompleteness of, problems and technological constraints associated with, and loop-holes in the proposal.

Subsequent to the conclusion of the public hearing, the Zoning Commission determined that the issues raised by the communications industry and others were so vast and complex that the proposal regarding the definition and treatment of antennas required further consideration. Consequently, on June 10, 1985, at its regular monthly meeting, the Zoning Commission took proposed action to amend the penthouse provisions of the Zoning Regulations, only, and to consider the antenna provisions of the Zoning Regulations at a later time.

A notice of proposed rulemaking was published in the D.C. Register on August 2, 1985 (32 DCR 4506). No comments were received related to the substance of the proposal, as a result of the publication of that notice of proposed rulemaking.

There were no Advisory Neighborhood Commissions that expressed their concerns relative to this case.

On January 13, 1986, at its regular monthly meeting, the Zoning Commission authorized the scheduling of an additional public hearing on the antenna provisions of the Zoning Regulations.

As to the concerns regarding penthouse height limits, the Commission believes that the lack of any strong interest of the architectural and mechanical engineering communities to increase the height limit, indicates that the existing height limit apparently works well.

As to the concern regarding penthouse setback requirements, the Zoning Commission is not pursuaded at this time that the current provisions of the Zoning Regulations requiring setbacks to be measured from the lot line, in lieu of the perimeter of the structure, should be changed.

As to the concern regarding the prohibition against more than one penthouse enclosure, the Zoning Commission believes that this prohibition is unreasonable because of changing

technology in roof-mounted equipment (e.g. satellite dish antennas and certain mechanical equipment), the building designs that include more than one mechanical core, and the need for greater flexibility in the phasing of construction.

As to the concern regarding increasing the height of parapet walls, the Zoning Commission believes that building and roofscape designs could be improved by permitting such increase. The Commission, however, is not prepared to permit such increase in the low or medium density zone districts.

As to the concern regarding increasing the height of elevator penthouses to allow rooftop access, the Zoning Commission believes that through creative design techniques, such objectives can be realized via the current regulations and this action of the Zoning Commission.

The proposed action of the Zoning Commission to amend the Zoning Regulations was referred to the National Capital Planning Commission (NCPC), under the terms of the District of Columbia Self Government and Governmental Reorganization Act. The NCPC, by report dated August 1, 1985, found that the proposed action of the Zoning Commission would neither adversely affect the Federal Establishment or other Federal interests in the National Capital nor be inconsistent with the Comprehensive Plan for the National Capital. The NCPC requested the Zoning Commission to consider adopting the proposed text of the advertised public notice for this case requiring penthouse setbacks to be measured from exterior walls in keeping with the Height of Buildings Act of 1910.

On May 8, 1986, at a special meeting and subsequent to review of the NCPC report, the Zoning Commission determined that it would request the NCPC to provide the Zoning Commission with information that expanded on the request of the NCPC. The NCPC, by response dated June 3, 1986, indicated 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 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)."

On June 9, 1986, at its regular monthly meeting and at the request of the Chairperson, the Zoning Commission considered a memorandum from the Zoning Secretariat dated June 6, 1986, which noted a history of administrative construction of the penthouse setback requirements of the Height Act and Zoning Regulations. The Zoning Secretariat recommended the following proposed language to ensure that the various provisions of the Zoning Regulations, which govern setback requirements for roof structures, do not operate in conflict with the 1910 Height Act:

"No roof structure shall be erected in a manner which would violate the setback proviso contained in section 5 of the Act of June 1, 1910 (36 Stat. 454)."

The Commission concludes that this language is unacceptably ambiguous. 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 "exterior walls" not be subject to exceptions under any circumstance.

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.

The Zoning Commission believes that the proposed amendments to the Zoning Regulations are in the best interests of the District of Columbia, are consistent with the intent and purpose of the Zoning Regulations and Zoning Act, and are not inconsistent with the Comprehensive Plan of the District of Columbia.

In consideration of the reasons set forth herein, the Zoning Commission hereby orders APPROVAL of amendments to the Zoning Regulations regarding the treatment of penthouses.

The text amendments set forth below reference the format and numbering system of the December, 1985 edition of the District of Columbia Municipal Regulations (DCMR) Title 11. The numbers contained in the brackets reference the numbering system of the Provisional Edition of DCMR Title 11, dated August, 1983. The specific amendments to DCMR Title 11 (the Zoning Regulations) are as follows:

1. In an R District, control housing for mechanical equipment, a stairway or elevator penthouse constructed at any height, and prevent equipment from extending above the penthouse height limit by deleting existing §400.8 and adding new §§400.8 and 400.9 as follows:

400.8 [3201.26] If housing for mechanical equipment, a stairway or elevator penthouse is provided on the roof of a building or structure, it shall be erected or enlarged as follows:

(a) It shall meet the requirements of §411 [3308];

(b) It shall be set back from all exterior walls a distance at least equal to its

height above the roof upon which it is located; and

(c) It shall not exceed eighteen feet, six inches (18', 6") in height above the roof upon which it is located. Mechanical equipment shall not extend above the permitted eighteen foot, six inch (18', 6") height of the housing.

400.9 [3201.27] Housing for mechanical equipment, a stairway or elevator penthouse may be erected to a height in excess of that authorized in the district in which located.

Renumber existing §§400.9 through 400.12 to 400.10 through 400.13 [3201.27 through 3201.29 to 3201.28 through 3201.210].

2. In an SP District, control housing for mechanical equipment, a stairway or elevator penthouse constructed at any height, and prevent equipment from extending above the penthouse height limit by deleting existing §530.5 and adding new §§530.5 and 530.6 as follows:

530.5 [4201.22] If housing for mechanical equipment, a stairway or elevator penthouse is provided on the roof of a building or structure, it shall be erected or enlarged as follows:

(a) It shall meet the requirements of §411 [3308];

(b) It shall be set back from all exterior walls a distance at least equal to its height above the roof upon which it is located; and

(c) It shall not exceed eighteen feet, six inches (18', 6") in height above the roof upon which it is located. Mechanical equipment shall not extend above the permitted eighteen foot, six inch (18', 6") height of the housing.

530.6 [4201.23] Housing for mechanical equipment, a stairway or elevator penthouse may be erected to a height in excess of that authorized in the district in which located.

Renumber existing §530.6 to §530.7.

3. In a W District, control housing for mechanical equipment, a stairway or elevator penthouse constructed at any height, and prevent equipment from extending above the penthouse height limit and conform the height requirements to the same method of measurement as other districts by deleting existing §§930.2 and 930.4, by renumbering existing §930.3 to §930.2 and by adding new §§930.3 and 930.4, as follows:

930.3 [4403.3] If housing for mechanical equipment, a stairway or elevator penthouse is provided on the roof of a building or structure, it shall be erected or enlarged as follows:

(a) It shall meet the requirements of §411 [3308];

(b) It shall be set back from all exterior walls a distance at least equal to its height above the roof upon which it is located; and

(c) It shall not exceed eighteen feet, six inches (18', 6") in height above the roof upon which it is located. Mechanical equipment shall not extend above the permitted eighteen foot, six inch (18', 6") height of the housing.

930.4 [4403.4] Housing for mechanical equipment, a stairway or elevator penthouse may be erected to a height in excess of that authorized in the district in which located.

4. In a CR District, control housing for mechanical equipment, a stairway or elevator penthouse constructed at any height, and prevent equipment from extending above the penthouse height limit and conform the height requirements to the same method of measurements as other districts by deleting existing §§630.3, 630.5 and 630.6, by renumbering existing §630.4 to 630.3 and by adding new §§630.4 and 630.5 as follows:

630.4 [4503.4] If housing for mechanical equipment, a stairway or elevator penthouse is provided on the roof of a building or structure, it shall be erected or enlarged as follows:

(a) It shall meet the requirements of §411;

(b) It shall be set back from all exterior walls a distance at least equal to its height above the roof upon which it is located; and

(c) It shall not exceed eighteen feet, six inches (18', 6") in height above the roof upon which it is located. Mechanical equipment shall not extend above the permitted eighteen foot, six inch (18', 6") height of the housing.

630.5 [4503.5] Housing for mechanical equipment, a stairway or elevator penthouse may be erected to a height in excess of that authorized in the district in which located.

5. In a C District, control housing for mechanical equipment, a stairway or elevator penthouse constructed at any height, and prevent equipment from extending anove the penthouse height limit by replacing existing §§770.7 and 770.8 with the following:

770.7 [5201.24] If housing for mechanical equipment, a stairway or elevator penthouse is provided on the roof of a building or structure, it shall be erected or enlarged as follows:

(a) It shall meet the requirements of §411;

(b) It shall be set back from all exterior walls a distance at least equal to its height above the roof upon which it is located;

(c) In the C-5(PAD) District, it shall be set back from that portion of the perimeter of the roof fronting on a street a minimum distance equal to twice the height of the roof structure above the roof upon which it is located; and

(d) It shall not exceed eighteen feet, six inches (18', 6") in height above the roof upon which it is located. Mechanical equipment shall not extend above the permitted eighteen foot, six inch (18', 6") height of the housing.

770.8 [5201.25) Housing for mechanical equipment, a stairway or elevator penthouse may be erected to a height in excess of that authorized in the district in which located.

6. In a C-M or M District, control housing for mechanical equipment, a stairway or elevator penthouse constructed at any height, and prevent equipment from extending above the penthouse height limit by deleting existing §840.2(b) and adding new §§840.3 and 840.4 as follows:

840.3 [6201.22] If housing for mechanical equipment, a stairway or elevator penthouse is provided on the roof of a building or structure, it shall be erected or enlarged as follows:

(a) It shall meet the requirements of §411;

(b) It shall be set back from all exterior walls a distance at least equal to its height above the roof upon which it is located; and

(c) It shall not exceed eighteen feet, six inches (18' 6") in height above the roof upon which it is located. Mechanical equipment shall not extend above the permitted eighteen foot, six inch (18' 6") height of the housing.

840.4 [6201.23] Housing for mechanical equipment, a stairway or elevator penthouse may be erected to a height in excess of that authorized in the district in which located.

Renumber existing §840.3 to §840.5.

7. Allow more than one enclosure for penthouses and mechanical equipment under certain conditions by adding a new §411.4 as follows:

411.4 [3308.12] When roof levels vary by one (1) floor or more or when separate elevator cores are required, there may be one (1) enclosure for each elevator core and at each roof level.

Renumber existing §§411.4 through 411.16 to 411.5 through 411.17. Renumber section references accordingly.

8. Permit increased height to allow parapet walls designed to improve the roofscape in districts where the permitted height is ninety feet or greater by adding to the definition of "Building, height of" in §199 the following:

8. Permit increased height to allow parapet walls designed to improve the roofscape in districts where the permitted height is ninety feet or greater by adding to the definition of "Building, height of" in §199 the following:

In those districts in which the height of building is permitted to be ninety feet (90') or greater, the height of buildings shall be measured to the highest point of the roof excluding parapets not exceeding three feet (3) in height.

Vote of the Zoning Commission taken at the public meeting on June 10, 1985: 4-0 (George M. White, Patricia N. Mathews, John G. Parsons, and Lindsley Williams, to approve - Maybelle T. Bennett, not present not voting).

This order was adopted by the Zoning Commission at its regular public meeting on June 9, 1986 by a vote of 4-0 (John G. Parsons, George M. White and Patricia N. Mathews to adopt as amended and Lindsley Williams, by absentee vote to adopt, - Maybelle T. Bennett, not present, not voting).

In accordance with Section 4.5 of the Rules of Practice and Procedure before the Zoning Commission of the District of Columbia, this order is final upon publication in the D.C. Register, and will take effect sixty days after publication in the D.C. Register, specifically on 04 JUL 1986.

Patricia N. Mathews
PATRICIA N. MATHEWS
Chairperson
Zoning Commission

EDWARD L. CURRY
Acting Executive Director
Zoning Secretariat

zcorder#476/LJPQ

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In Reply Refer To:
MAC File No. Z.C. 84-10

JUN 3 1986

Mr. Cecil D. Tucker
Zoning Secretariat
District Building, Room 11
1350 Pennsylvania Avenue, NW.
Washington, D. C. 20004

Dear Mr. Tucker:

In your letter of May 13, 1986, you requested that the Commission provide the Zoning Commission with rationale as to why the proposed amendment to the Zoning Regulations relating to penthouse setback requirement is "not in keeping with the 1910 Height Act."

The setback requirement for penthouse structures is addressed in Section 5 of the Act to Regulate Height of Buildings in the District of Columbia (Act of June 1, 1910, 36 Stat. 452, D.C. Code, sec. 5-401 et seq.) and reads as follows:

> "And provided, That penthouses, ventilation shafts, and tanks shall be set back from exterior walls distances equal to their respective height along the adjacent roof." (Emphasis added)

This provision of the 1910 Height Act is similar to the proposed change included in the October 22, 1984 Public Notice on Z.C. 84-10 requiring that penthouse setbacks be measured "from the perimeter of the roof rather than the lot line..."

It is our understanding that the current Regulations are based on a Corporation Counsel opinion measuring penthouse setbacks from the lot line on the frontage facing the street. For example, the present measuring point (except in the C-5 district) for penthouses has been the existing lot lines. The setback requirement for penthouses in C-5 zone districts mandate a setback twice the height of the penthouse from the perimeter of the roof fronting on a street (this provision is similar but more restrictive than the 1910 Act).

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 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).

In its August 1, 1985 report (Case No. 84-10), the Planning Commission requested that the Zoning Commission consider adopting the October 22, 1984 advertised provision requiring penthouse setbacks to be measured from "the perimeter of the roof." The Commission believes that provision to be in keeping with the Height of Building Act which uses the term "exterior walls."

We hope this elaboration on the Commission's recommendations regarding setbacks for penthouse structures clarifies our report.

Sincerely,

(Sgd. Reginald W. Griffith)

Reginald W. Griffith
Executive Director

bc: Fred L. Greene, Director
D.C. Office of Planning

bcc: G.H.F. Oberlander
R.E. Gresham
Central File - Z.C. 84-10
Reading File

GHFOberlander:hdw:6/2/86

3

Government of the District of Columbia
ZONING COMMISSION

N.C.P.C.
'85 JUN 28 P2:31

June 28, 1985

National Capital Planning
Commission
1325 G Street, N.W. (tenth floor)
Washington, D.C. 20576

re: Z.C. Case No. 84-10
(Text Amendment - Penthouse)

Members of the Planning Commission:

At the public meeting held on June 10, 1985, the District of Columbia Zoning Commission proposed to amend the D.C. Zoning Regulations relative to the treatment of penthouses as follows. The Zoning Commission will consider the treatment of antennas at a later time.

(see attachment)

The proposed amendment is referred to the National Capital Planning Commission for comment and review pursuant to the Zoning Act, as amended, by the District of Columbia Self-Government and Governmental Reorganization Act, as set forth in Section 5-417 of the D.C. Code, 1981 Ed.

To assist in your review of this proposed action, I am attaching copies of the Office of Planning report(s) related to this case.

Please acknowledge receipt of this referral by signing and returning the enclosed copy of this letter.

Very truly yours,

Steven E. Sher

STEVEN E. SHER
Executive Director
Zoning Secretariat

ncpcreferral/BOOTHR

Proposed Amendments regarding Penthouses

The text amendments set forth below reference the format and numbering system of the May, 1984, edition of the District of Columbia Municipal Regulations (DCMR) Title 11. The numbers contained in the brackets reference the numbering system of the Provisional Edition of DCMR Title 11, dated August, 1983. The specific amendments to DCMR Title 11 (the Zoning Regulations) are as follows:

1. Control housing for mechanical equipment, a stairway or elevator penthouse constructed at any height and prevent equipment from extending above the penthouse height limit in an R District by replacing existing §400.8 [Paragraph 3201.26] with the following:

400.8 [3201.26] If housing for mechanical equipment, a stairway or elevator penthouse is provided on the roof of a building or structure, it shall be erected or enlarged as follows:

(a) [3201.261] It shall meet the requirements of §411 [Section 3308];

(b) [3201.262] It shall be set back from all lot lines of the lot upon which the structure is located a distance at least equal to its height above the roof upon which it is located; and

(c) [3201.263] It shall not exceed eighteen feet, six inches (18', 6") in height above the roof upon which it is located. Mechanical equipment shall not extend above the permitted eighteen foot, six inch (18', 6") height.

400.9 [3201.27] Housing for mechanical equipment, a stairway or elevator penthouse may be erected to a height in excess of that authorized in the district in which located.

Renumber existing §§400.9 through 400.12 to 400.10 through 400.13 [Paragraphs 3201.27 through 3201.29 to 3201.28 through 3201.210], respectively.

2. Control housing for mechanical equipment, a stairway or elevator penthouse constructed at any height and prevent equipment from extending above the penthouse height limit in an SP District by replacing existing §530.5 [Paragraph 4201.22] with the following:

530.5 [4201.22] If housing for mechanical equipment, a stairway or elevator penthouse is provided on the roof of a building or structure, it shall be erected or enlarged as follows:

(a) [4201.221] It shall meet the requirements of §411 [Section 3308];

(b) [4201.222] It shall be set back from all lot lines of the lot upon which the structure is located a distance at least equal to its height above the roof upon which it is located; and

(c) [4201.223] It shall not exceed eighteen feet, six inches (18', 6") in height above the roof upon which it is located. Mechanical equipment shall not extend above the permitted eighteen foot, six inch (18', 6") height.

530.6 [4201.23] Housing for mechanical equipment, a stairway or elevator penthouse may be erected to a height in excess of that authorized in the district in which located.

Renumber existing §530.6 to §530.7.

3. Control housing for mechanical equipment, a stairway or elevator penthouse constructed at any height and prevent equipment from extending above the penthouse height limit in a W District by replacing existing §930.4 [Sub-section 4403.3] with the following:

930.3 [4403.3] If housing for mechanical equipment, a stairway or elevator penthouse is provided on the roof of a building or structure, it shall be erected or enlarged as follows:

(a) [4403.31] It shall meet the requirements of §411 [Section 3308];

(b) [4403.32] It shall be set back from all lot lines of the lot upon which the structure is located a distance at least equal to its height above the roof upon which it is located; and

(c) [4403.33] It shall not exceed eighteen feet, six inches (18', 6") in height above the roof upon which it is located. Mechanical equipment shall not extend above the permitted eighteen foot, six inch (18', 6") height.

930.4 [4403.4] Housing for mechanical equipment, a stairway or elevator penthouse may be erected to a height in excess of that authorized in the district in which located.

4. Control housing for mechanical equipment, a stairway or elevator penthouse constructed at any height and prevent equipment from extending above the penthouse height limit in a CR District by replacing existing §§630.5 and 630.6 [Sub-section 4503.5] with the following:

630.4 [4503.4] If housing for mechanical equipment, a stairway or elevator penthouse is provided on the roof of a building or structure, it shall be erected or enlarged as follows:

(a) [4503.51] It shall meet the requirements of §411 [Section 3308];

(b) [4503.52] It shall be set back from all lot lines of the lot upon which the structure is located a distance at least equal to its height above the roof upon which it is located; and

(c) [4503.53] It shall not exceed eighteen feet, six inches (18', 6") in height above the roof upon which it is located. Mechanical equipment shall not extend above the permitted eighteen foot, six inch (18', 6") height.

630.5 [4503.5] Housing for mechanical equipment, a stairway or elevator penthouse may be erected to a height in excess of that authorized in the district in which located.

5. Control housing for mechanical equipment, a stairway or elevator penthouse constructed at any height and prevent equipment from extending above the penthouse height limit in a C District by replacing existing §§770.7 and 770.8 [Paragraph 5201.24] with the following:

770.7 [5201.24] If housing for mechanical equipment, a stairway or elevator penthouse is provided on the roof of a building or structure, it shall be erected or enlarged as follows:

(a) [5201.241] It shall meet the requirements of §411 [Section 3308];

(b) [5201.242] It shall be set back from all lot lines of the lot upon which the structure is located a distance at least equal to its height above the roof upon which it is located;

(c) [5201.243] In the C-5(PAD) District, it shall be set back from that portion of the perimeter of the roof fronting on a street a minimum distance equal to twice the height of the roof structure above the roof upon which it is located; and

(d) [5201.244] It shall not exceed eighteen feet, six inches (18', 6") in height above the roof upon which it is located. Mechanical equipment shall not extend above the permitted eighteen foot, six inch (18', 6") height.

770.8 [5201.25] Housing for mechanical equipment, a stairway or elevator penthouse may be erected to a height in excess of that authorized in the district in which located.

6. Control housing for mechanical equipment, a stairway or elevator penthouse constructed at any height and prevent equipment from extending above the penthouse height limit in a C-M or M District by replacing existing §840.2(b) [Paragraph 6201.22] with the following:

840.3 [6201.22] If housing for mechanical equipment, a stairway or elevator penthouse is provided on the roof of a building or structure, it shall be erected or enlarged as follows:

(a) [6201.221] It shall meet the requirements of §411 [Section 3308];

(b) [6201.222] It shall be set back from all lot lines of the lot upon which the structure is located a distance at least equal to its height above the roof upon which it is located; and

(c) [6201.223] It shall not exceed eighteen feet, six inches (18', 6") in height above the roof upon which it is located. Mechanical equipment shall not extend above the permitted eighteen foot, six inch (18', 6") height.

840.4 [6201.23] Housing for mechanical equipment, a stairway or elevator penthouse may be erected to a height in excess of that authorized in the district in which located.

Renumber existing §840.3 to §840.5.

7. Allow more than one enclosure for penthouses and mechanical equipment under certain conditions by adding a new §411.4 as follows [the following sentence to the end of existing Paragraph 3308.12]:

411.4 When roof levels vary by one (1) floor or more or when separate elevator cores are required, there may be one (1) enclosure for each elevator core and at each roof level.

Renumber existing §§411.4 through 411.16 to 411.5 through 411.17, respectively. Renumber section references accordingly.

8. Permit increased height to allow parapet walls designed to improve the roofscape in districts where the permitted height is ninety feet or greater by adding to the definition of "Building, height of" in §199 [Section 1202] the following:

In those districts in which the height of building is permitted to be ninety feet (90') or greater, the height of buildings shall be measured to the highest point of the roof excluding parapets not exceeding three feet in height.

9. Conform the height requirements in the W Districts to the same method of measurement as other districts by deleting existing §930.2 as follows [from existing Sub-section 4403.1 the following]:

930.2 In the Waterfront District, the height of buildings and structures shall be measured as provided in §199 [Section 1202] (definition of "building, height of"), except that height shall be measured to the highest point of roof, excluding parapets not exceeding five feet (5') high [in height].

Renumber existing §930.3 to §930.2.

10. Conform the height requirements in the CR District to the same method of measurement as other districts by deleting existing §630.3 [Sub-section 4503.3], which reads as follows:

630.3 [4503.3] In the CR District, the height of buildings and structures shall be measured as provided elsewhere in these Regulations, except that height shall be measured to the highest point of the roof, excluding parapets not exceeding five feet (5') in height.

Renumber existing §630.4 to §630.3 [Sub-section 4503.4 to 4503.3].

roofstructuretext/SES2

4

D.C.-44
APRIL 1980

Memorandum ● Government of the District of Columbia

TO: Zoning Commission

Department, Agency, Office: Office of Planning

FROM: John H. McKoy, Director
Office of Planning

Date: February 3, 1984

SUBJECT: Roof Structures Text Amendment

Background

Roof structures originally consisted primarily of spires, towers, domes and other architectural solutions to roof design as well as chimneys essential to the heating of buildings. Modern buildings, however, in response to an emphasis on functionalism and to the ever growing number and sophistication of building systems (heating, ventilating, air conditioning, and electrical), have tended to be designed with flat roofs supporting an increasing quantity of equipment. With the exterior design focus on the facade of the building, the roof became an efficient collection area for equipment, generally hidden from the ground, separate from leasable or otherwise occupiable space and usually above the building height limit. As this use of the roof increased, the chaotic development where the building meets the sky became more obvious, leading to regulations designed to control, minimize or camouflage the clutter of rooftop equipment.

The solution to roof structure clutter that the regulations support is the penthouse. Penthouses, while they have improved the roofscape by collecting and hiding much of the clutter of rooftop equipment, are generally not architecturally enhancing to the buildings themselves, appearing as additive and unarticulated blocks resting on top of the roofs. And, while the required 1:1 setback minimizes their visual impact from the adjacent streets, they are often visible from a distance against the sky, from the windows of other buildings and from rooftop terraces and observation towers. Thus, the Zoning Commission has requested the Office of Planning to review the situation and recommend changes to the existing regulations which would result in an improvement in the appearance of roof structures.

In looking at the various alternatives for improving rooftop design, it became very clear that each alternative brings with it a mixture of positive and negative results. While the objectives are laudable and the alternatives not at all unreasonable, the constraints are real and the cure often appears more onerous than the original problem. Thus, the following process of seeking appropriate alternatives is one in which it is essential to carefully weigh the trade-offs involved.

History

The 1910 Height Act was written to bring together various existing laws and building regulations and to limit the construction of combustible buildings, encouraging the construction of fire proof buildings. The 130 foot height limit was originally set in 1897 (after a disastrous fire that destroyed 22 buildings) and followed the example of Boston and Chicago which had limits of 125 and 130 feet respectively at that time. In 1956, the Lewis Study noted that the Height Act also provided for adequate light and air on the streets and achieved an 'even cornice line and subordination of the building mass of the city to major public buildings so characteristic of European cities'. Today, it is clear that the Act has produced a special character for Washington, D.C., a horizontal city with a low profile skyline.

Controls Prior to 1958 - The 1910 Height Act permits buildings on commercial streets to a height equivalent to the street width plus 20 feet up to a 130 foot limit (160 feet along the north side of Pennsylvania Avenue between the White House and the Capitol). On residential streets less than 60 feet wide the building height is equal to the street width; 60 feet is permitted on streets 60 to 65 feet wide; and a height equal to the street width less 10 feet (up to 90 feet) is permitted on streets wider than 65 feet. Exceptions include buildings fronting on Union Station and buildings on blocks immediately adjacent to public buildings, which must conform to a schedule which is more restrictive. Congress has permitted a few specific buildings, including the National Press Building, to exceed the Height Act limits.

The Height Act permits roof structures, when approved by the D.C. Commissioners, to exceed the height limits, including spires, towers, domes, minarets, pinnacles, chimneys and smokestacks. Penthouses over elevator shafts, ventilation shafts and fire sprinkler tanks are also excepted if set back an amount equal to their height from the adjacent roof.

The Zoning Regulations prior to 1958 allowed roof structures above the height limit if consistent with the 1910 Height Act, but were somewhat more restrictive in not permitting sprinkler tanks, water towers and A/C equipment to exceed the 130 foot height limit. The overall result is that penthouse structures were built up to 30 feet tall and rooftop equipment was generally scattered and exposed. The 1958 Lewis Plan noted that this was particularly offensive on low buildings along F and G Streets east of 14th Street.

1958 Zoning Regulations - The 1910 Height Act roof structure exceptions/controls were incorporated into the 1958 Zoning Regulations with TV towers added to the list of exceptions. Penthouses over elevator shafts, vent shafts and fire sprinkler tanks all requiring a 1:1 setback and not permitted to exceed the 130 foot maximum height in

the Height Act were included in the 1958 Zoning Regulations as elevator or stairway penthouses with the same setback requirements but without having to be held below the 130 foot maximum height limit. With essentially the same controls as previously existed under the 1910 Height Act, there was no change in the resulting treatment of the rooftop, with equipment scattered and exposed and penthouses built to any height desired.

1960 Amendment - At the urging of the Commission of Fine Arts, the regulations were amended in 1960 to require BZA review of roof structure applications, finally gaining control of the appearance of roof structures. FAR credits of .12 and .25 were added (.37 total) to offset the cost to the developer of the review process and the cost of architectural treatment to be recommended by the BZA. The result has been the collection of rooftop equipment into one large penthouse structure which, while set back from the exterior walls of the building and constructed of materials visually compatible with those used in the exterior of the building, is usually visible from various vantage points and appears generally as a additive and unarticulated block resting on top of the roof.

1976 Amendment - In order to reduce the BZA workload and shorten the development process, the Zoning Regulations were amended in 1976 to permit roof structures as a matter-of-right (with administrative review by the Zoning Administrator and OP) provided the structures met the criteria previously utilized by the BZA in their review and which were now codified in the Regulations. A height limit was placed on penthouses for the first time (18 feet 6 inches), roof coverage was limited to one-third in all districts having a story limit, and the two previous FAR credits were added into one (.37 FAR). Because the controls changed very little, the results have not been substantially different from those that occurred prior to the 1976 amendment.

Three Basic Approaches to a Solution

The visual problem of the clutter of equipment scattered about the roof, while it still exists on older buildings, has given way on new buildings to the monolithic penthouse block which appears from various vantage points as an afterthought that the building roof is barely able to accommodate.

There appear to be three basic but not mutually exclusive approaches that might be taken to address the problem of roof structure design and to improve the appearance of the roof area. They are 1) to reduce the visibility of the penthouse; 2) to improve the appearance of the roof and penthouse; and 3) to integrate the penthouse into the overall design of the building and its roof. In addition, it may be necessary to modify the regulations in order to gain more control over the increasing use of antennas and satellite dishes resulting from the growth of the telecommunications industry.

1. Minimize Visibility of Penthouse - The visibility of the penthouse could be minimized by reducing the area or height of the penthouse or by shifting the penthouse back further from the edge of the roof. It should be noted, however, that even under the existing regulations the objective of minimizing visibility occasionally forces solutions which are probably unnecessarily rigid and nonfunctional.

- Reduce Area of Penthouse - Generally the architect designs the building giving the penthouse a preliminary size and shape based on the location of the core. Usually the resulting penthouse is an 18 foot 6 inch high structure setback 1:1 from all building walls (and on a large building it is generally built to an FAR of .37). The mechanical engineer then works within that framework, sizing equipment accordingly, notifying the architect of the potential tradeoffs between smaller equipment and higher operating costs and coordinating with the electrical and plumbing trades. During that process the penthouse rarely shrinks but can expand (depending on the circumstances), requiring BZA approval. The resulting penthouse is usually packed with equipment which barely fits, is often more inefficient (and expensive) to operate than larger, more energy efficient equipment would be, provides poor access for operation and maintenance and occasionally requires structural modification of columns to permit the equipment to fit.

  Why is this so? Will the trend continue? Since the late 1960's and particularly affected by the Energy Act of 1973, there has been a substantial increase in energy conservation systems for buildings, increasing the size and amount of penthouse equipment by 20 to 25 percent. In addition, during this same period of time, the regulations have come to require that most garages exhaust through the penthouse and that penthouses contain restrooms. Also, Streetscape Committee guidelines for public space currently encourage transformer vaults (not uncommonly 1500 square feet) and accompanying grates to be located outside of public space, adding yet another candidate for the penthouse.

  Additional growth of penthouse equipment cannot be predicted. In fact, it is possible that most of the growth may already have occurred, at least in response to energy conservation. As for the potential to reduce the amount and size of equipment in the future, most miniaturization has been in the area of electronics which plays only a small part in mechanical systems. The movement of large quantities of air is subject to the laws of physics, requiring large ducts and fans. The

smaller the ducts, the higher the velocity of air and the more energy is required to move a given quantity of heated or chilled air. One former solution, the stacking of some equipment, which was possible prior to the adoption of the 18 foot 6 inch height limit, is no longer an option. Finally, individual mechanical rooms on each floor, while they reduce the amount of equipment that must be accommodated in the penthouse, are not nearly as energy and cost efficient as central systems, and thus although popular now, are probably not the wave of the future.

In conclusion, it is apparent that reducing the area of the penthouse would be extremely difficult and, on balance, probably not desirable. It would tend to reduce energy efficiency and increase operating costs, and it could play a role in the continued location of transformer vaults and grates in public space, impacting landscaping and pedestrian circulation.

° Reduce Height of Penthouse - The maximum allowed penthouse height of 18 feet 6 inches was set as the minimum height to accommodate a normal elevator override. In fact, the elevator cab is restricted by the penthouse height limit to nine feet (rather than ten feet) when using high speed gearless elevators which are often used in 130 foot high buildings. This can cause problems in transporting furniture and equipment and creates maintenance problems as well. Thus, it could be argued that the penthouse height limit should actually be increased rather than decreased. However, raising the penthouse height limit to 19 feet 6 inches, while it would eliminate some problems, would not appear to be necessary. High speed elevators are an amenity in the District more than they are essential equipment, given the limited height of buildings, and those elevators can be installed and are functioning now with a nine foot high cab. No matter what the height limit, there will always be some reason that it should be increased.

The elevator is not the only piece of equipment that bumps up against the penthouse height limit. Given the physical requirements of moving large quantities of air, the air intake fans barely fit within the 18 foot 6 inch limit. The same is true of the cooling tower which can, and often does, stick up slightly above the penthouse roof. Raising the maximum height limit to 20 feet would permit larger fans but would have little effect on reducing the area of the penthouse, even recognizing that some equipment could be stacked within that height. Lowering the maximum height limit would only be feasible (to about 12 feet) if "pop ups" were allowed for the elevator

override and intake fans. While there might be some merit in this idea, at least on a case by case basis, it could lead to a greater clutter of rooftop forms. A 12 foot high penthouse (not including "pop ups") set back 18 feet 6 inches would result in a 1:1.5 setback which would, in a typical Downtown situation, increase the height at which that part of the penthouse would first be observable from the adjacent street (or building) by approximately three floors. On balance, just gaining those three floors would probably not be worth the disorder that would result from the varied configurations caused by "pop ups" for elevator override and intake fans.

° Increase Penthouse Setback - Both the 1910 Height Act and the Zoning Regulations require a minimum setback of 1:1 for a penthouse that exceeds the maximum building height limit. The intent of the setback is to insure the integrity of the height limit, maintaining the horizontal city character of Washington, D.C., and to improve the appearance of buildings by minimizing the view of the penthouse from the adjacent streets. While the regulations generally accomplish this, the penthouse is usually still visible from a distance at street level and from the windows of nearby buildings.

One possible means of further minimizing the visibility of the penthouse would be to shift it back on the building toward the center of the square. This could be achieved by requiring a 2:1 setback from the edge of the building facing a public street and not requiring any setback on the opposing edge. According to the Zoning Administrator, there is a Corporation Counsel opinion to the effect that the 1910 Height Act requires a penthouse setback only from the lot line on the frontage facing the street. In a typical Downtown situation, a 2:1 setback would increase the height at which the penthouse would first be observed from the adjacent street (or building) by 60 feet. However, such a solution would not be without its drawbacks. Shifting the penthouse to the rear lot line or building face would make it highly visible above a lower historic structure or group of low buildings that might be located on the street bordering the opposite side of the square. Buildings on corner lots could also present problems, where what is a rear lot line from one perspective is a side lot line from another. Thus, requiring a shift in the penthouse location would be a gamble which would probably pay off in most built up situations but fail where the full building envelope was not consistently utilized.