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)	)	

OBJECTION OF ADVISORY NEIGHBORHOOD COMMISSION 1C AND KALORAMA CITIZENS ASSOCIATION TO MATERIAL MISREPRESENTATION BY MONTROSE, LLC

I. Contrary to Montrose's representation, the order issued by the Zoning Commission in the GWU/WETA PUD case is without legal force or effect and has no precedential value.

Having alluded in prior pleadings to Zoning Commission Case No. 93-9C without citing any of the Zoning Commission orders that emanated from that case, in its submission of October 12, 2004 Montrose for the first time invoked one of them, No. 749-A, representing it to be a valid order in which the Commission "found that the setback provisions of the 1910 Height Act only apply to exterior walls fronting on a street".[1] In fact, as we have previously pointed out,[2] the Commission "found" nothing on the setback issue in that Order, failing even to mention it. More importantly, however, what Montrose failed to disclose to the Board is that, upon appeal of that Order to the Court of Appeals, the Court remanded it along with the entire case and record to the Zoning Commission, after various parties complained that (as we have pointed out with respect to the setback issue) it failed to address issues raised in the case explicitly and

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[1] *Applicant's Memorandum on Points and Authorities on Board's Authority to Hear Argument on the 1910 Height Act ("Applicant's Memorandum")*, p. 3.

[2] *Statement of Advisory Neighborhood Commission 1C and Kalorama Citizens Association in Opposition to Application for Special Exception*, p. 11, note 1

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precisely. [3] Thereafter, no valid order was ever issued in the case, in which co-counsel for Montrose participated as counsel; the project was dropped and the PUD lapsed. The remanded order has no precedential bearing on the present application or on any other case. It should not have been represented otherwise, and certainly should not have been cited without full disclosure of its legal status.

The Board should note in this connection that, just as the Zoning Commission declined to address the Height Act setback issue in its order, the NCPC, in its two-sentence report to the Zoning Commission on the WETA case cited by Montrose,[4] could not bring itself even to mention that issue, much less articulate a position on it (contrary to Montrose's assertion[5]) – despite the fact that the issue had been extensively briefed and discussed before both bodies and that both wished to approve the project.

II. In the same vein, Montrose has misled the Board on other issues bearing on the Motion to Dismiss submitted by ANC 1C and KCA. Montrose conjures all sorts of evil consequences if the Board fails to grant the requested special exception:

(1) *Applicant will be unconstitutionally denied equal protection.*[6] That assertion rests on the false premise that the Board would be departing from a long line of BZA and Zoning Commission precedents (which Montrose claims to exist despite being unable to cite any order by either body even mentioning the Height Act setback issue). Even if there were such BZA precedents, the Court of Appeals has repeatedly held that an agency may depart from its prior interpretation if it presents a reasoned explanation for the change.[7]

(2) *"Dozens, if not hundreds" of buildings will be rendered non-conforming.*[8] This seems unlikely, since Montrose has been able to cite only a handful of such projects. Indeed, the NCPC staff itself, in the 1994 statement cited by Montrose, stated: "In the

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[3] *Swift v. D.C. Zoning Commission*, D.C. Court of Appeals No. 94-AA-935, Orders of February 23, 1995 and December 1, 1995

[4] *Applicant's Memorandum*, p. 5-6, and Exhibit D

[5] *Id.*, p. 6

[6] *Applicant's Memorandum*, pp 10-11

[7] See *Springer v. District of Columbia Department of Employment Services*, 743 A.2d 1213, 1221-22 (D.C. 1999), and cases cited therein

[8] *Applicant's Memorandum*, p. 8

staffs *[sic]* experience (since 1967), all public and private buildings reviewed by the Commission, that required penthouses, have had those penthouses setback from all exterior walls in accordance with the Height Act."[9] Even if Montrose's assertion were accurate, these newly non-conforming structures can join the thousands of buildings in the booming D.C. real estate pool -- including many in the immediate neighborhood of 1819 Belmont Road, N.W. -- that have been rendered non-conforming by prior zoning actions without the slightest economic ill effect.

(3) *The BZA will be derelict in failing to consult the Office of the Attorney General -- in which Montrose says the Height Act vests "sole enforcement authority" -- before making its "new" interpretation.*[10] The Board has already decided, in the *KCA Appeal* involving these premises, that it has authority to hear and decide issues arising under the Height Act, and this authority is in no way constrained or limited by the specialized enforcement role conferred on the OAG by the Act.

(4) *A "new" BZA interpretation can be applied only prospectively.* [11] Even if the BZA were adopting a new interpretation, which it is not, there is no general rule regarding retrospective vs. prospective application. The Court of Appeals has laid out four criteria on the basis of which the determination should be made, and noted further that "rules created during agency adjudication – in contrast with regulations adopted through administrative rulemaking – traditionally apply retroactively, at least to the immediate parties to the dispute."[12]

Therefore, ANC 1C and KCA respectfully object to the Applicant's misrepresentation regarding the Zoning Commission's action in the GWU/WETA case, and its other efforts to mislead the Board, and renew their request that the Board dismiss the Application for Special Exception

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[9] NCPC staff draft report in the GWU/WETA case, p. 9, attached at Exhibit D of *Applicant's Memorandum.*

[10] *Applicant's Memorandum*, p. 8

[11] *Applicant's Memorandum*, p. 7-8

[12] See *Reichley v. Dept. Of Employment Services*, 531 A.2d 244, 249-251 (D.C. App. 1987).

Respectfully submitted,

Advisory Neighborhood Commission 1C

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Dated: December 3, 2004

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was sent to Mary Carolyn Brown, Esquire, counsel for the Applicant, at the offices of Holland & Knight, 2099 Pennsylvania Avenue, NW, Suite 100, Washington, DC 20006 on this 3rd day of December, 2004, by United States mail, postage prepaid.

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Ann Hughes Hargrove