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BEFORE THE BOARD OF ZONING ADJUSTMENT
DISTRICT OF COLUMBIA

Appeal of	)	
	)	
KALORAMA CITIZENS ASSOCIATION	)	
	)	BZA Appeal No. 17335
From the issuance of permit no. B46999 for	)	ANC 1C
the erection of a structure comprising a roof	)	
deck and railing on a 5-unit apartment	)	
building at 1819 Belmont Road, N.W.	)	
in the R-5 D district (Square 2551, Lot 45)	)	

JOINT PREHEARING STATEMENT OF
APPELLANT KALORAMA CITIZENS ASSOCIATION
AND ADVISORY NEIGHBORHOOD COMMIMSSION 1C

Kalorama Citizens Association (KCA) and Advisory Neighborhood Commission 1C (ANC 1C) present this statement in support of KCA's Appeal in the above-captioned case. This Appeal seeks review under 11 DCMR §§ 3100 and 3112.2 of the decision of the Zoning Administrator to issue Permit No. B46999 for the construction of a structure comprising a roof deck and railing on the existing building at 1819 Belmont Road, N.W., on the grounds that the permit purports to authorize the addition of a structure for human occupancy that will cause the building to exceed the maximum height allowed by the Height of Buildings Act (36 Stat. 452 (1910), D.C. Code § 6-601) ("the Height Act"), in violation of that Act and §2510.1 of the Zoning Regulations.

The property involved in the present Appeal is the same property addressed in the *Appeal of Kalorama Citizens Association* case (BZA Appeal No. 17109) ("*KCA I*"). In its oral discussion and vote on the first *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 the present Appeal, the Board decided that it had jurisdiction to hear and decide issues arising under the Height Act, and that the roof deck

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structure exceeded the 70-foot height limitation of the Height Act and the Zoning Regulations.[1] No written order has yet been issued by the Board in *KCA I.* This Prehearing 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.)

On February 25, 2005, following the Board's last oral decisions on *KCA I*, Montrose LLC applied for a permit to amend the earlier permit authorizing construction of the roof deck structure that the Board had found to exceed the Height Act's height limitation. The application for the amended permit sought to "revise" that structure. Instead of a deck surface supported by its own joists, with a 36" railing, the accompanying drawings called for a deck surface (dubbed "patio surface") consisting of 5/4" boards resting on 5/4" sleepers resting on the roof surface, and a 36" railing (see drawings at Attachment 2 to this Appeal). After the issuance of the permit, the original roof deck structure was demolished and a new structure erected in its place near the front of the top roof of the building.

Most or all of the now demolished roof deck structure authorized by the original permit exceeded the 70-foot height limit imposed by the Height Act. In the present case neither the permit application, the accompanying drawings, nor the permit itself indicate what portions, if any, of the "revised" deck structure fall below the 70-foot limit (nor is there any indication in these documents that the height restrictions were considered in review of the permit application). Since, however, the gently sloped roof is almost exactly 70 feet in height at the front of the building, it is clear that some portions of the "revised" structure, both as envisaged by the permit and as constructed, do exceed 70 feet, and that therefore the permit was issued, and the new structure erected, in violation of the Height Act and Zoning Regulations.

Both the Height Act (in § 6-601.05(h))[2] and the Zoning Regulations (in 11 DCMR § 400.3, 400.4 and 400.8) do allow certain structures and embellishments to be erected on a roof,

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[1] The Board denied the Appeal as to issues relating to floor area ratio (FAR), and granted the Appeal as to issues relating to compliance with roof structure setback requirements. The Board later reversed itself and denied the Appeal with respect to the roof structure setback as well. These FAR and setback issues are not addressed in the present Appeal.

[2] § 6-601.05(h) provides, in relevant part: "Spires, towers, domes, minarets, pinnacles, penthouses over elevator shafts, ventilation shafts, chimneys, smokestacks, and fire sprinkler tanks may be erected to a greater height than any limit prescribed in this subchapter when and as the same may be approved by the Mayor of the District of Columbia; provided, however, that such structures when above such limit of height shall be fireproof, and *no floor or compartment thereof shall be constructed or used for human occupancy* above the top story of the building upon which such structures are placed . . . ." (emphasis added).

under certain conditions, in excess of the applicable height limit. However, neither roof decks (with or without railings) nor roof railings (with or without decks) are among the structures enumerated. Had the Congress intended initially or at any time thereafter to include such structures in the list it could have done so. It did not, and neither the Zoning Administrator, this Board nor the Zoning Commission has authority to do so. Indeed, the Board concluded in *KCA I* that roof decks were not among the structures exempted by Congress from the Height Act's limitations and that, in this case, the deck structure would have to comply with the 70-foot limit.

It may be that DCRA or Montrose will seek to establish that the floor of the new structure is at or below 70 feet in elevation and will claim that therefore the Board should ignore the portions of the structure that exceed the Height Limit and allow the whole structure, perhaps in the interest of safety. The Board would have no legal basis for doing so: The Height Act makes clear that any portion of a building that extends above the allowable limit – as is indisputably the case here – is prohibited unless enumerated on the list of exceptions. Moreover, the Board's authority is limited to applying existing law and regulations: It obviously has no power to make new rules, whether for reasons of safety or any other policy consideration, and certainly not new rules that contravene an Act of Congress.

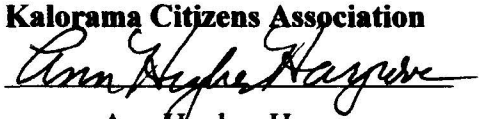
The Zoning Regulations do allow penthouses for "mechanical equipment" in general (see 11 DCMR § 400.8), in addition to the Height Act's list of roof structures that may exceed the applicable height limit (which includes penthouses for elevator equipment). This addition in the Regulations of penthouses for other types of mechanical equipment was supported by a 1953 Corporation Counsel opinion, a copy of which is attached. That opinion reasoned that penthouses housing various types of mechanical equipment are *necessary to the functioning of the building and are not intended for human occupancy*, and are therefore consistent with the Height Act, which by its terms already enumerates certain mechanical equipment penthouses (namely, those housing elevator equipment) that were in use in 1910, and which *bars any structure constructed or used for human occupancy.* As the rationale of the 1953 Corporation Counsel opinion itself makes clear, this provides no basis for making such an exception for rooftop structures of the sort at issue in the present Appeal, whether by interpretation of existing law and regulations or as a new regulation, since they are not necessary for building functioning and are clearly intended for human occupancy.

Finally, it is worth noting that in *KCA I*, counsel for DCRA argued that the roof deck in that case was permitted under § 411.17 of the Zoning Regulations because the floor structure alone was not more than four feet higher than the surface of the roof. That argument may be readily dismissed in the present case (as it was by the Board in the previous case) because the Height Act contains no exceptions for roof structures less than four feet tall, and the Zoning Regulations cannot override this Act of Congress. Similarly, another argument attempted in *KCA I* – that the roof railing height should not be included in calculating height for purposes of the Height Act, because 11 DCMR § 2503.2 does not count the height of railings – is utterly irrelevant. Not only would the Height Act control over any conflicting zoning regulation, but the particular provision in question relates expressly and exclusively to railings on structures on the ground – not on a roof. Clearly, as section 411 of the Zoning Regulations demonstrates, the Zoning Commission was perfectly capable of dealing with specific provisions and exemptions for roof decks when it chose to.

For all of the reasons stated above, KCA respectfully requests that, in exercise of the powers conferred upon it by D.C. Code § 6-641.07(g), the Board revoke Permit No. B46999 and order the unlawful structure purportedly authorized by the permit removed.

Respectfully submitted,

Kalorama Citizens Association

By: 

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

Advisory Neighborhood Commission 1C

By: 

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

Dated: October 4, 2005

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Prehearing Statement was hand-delivered to Patrick Canavan, Director, Department of Consumer and Regulatory Affairs, at 941 North Capitol St., NE, Washington, DC 20002, and to Mary Carolyn Brown, Esquire, counsel for Montrose, LLC, at Holland & Knight, 2099 Pennsylvania Ave., NW, Washington, DC 20006 on this 4th day of October, 2005.

Ann Hughes Hargrove

APPENDIX A

KCA respectfully requests that the following items 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 Appeal:

- Appellant KCA's Memorandum of Law on the Height of Buildings Act

ATTACHMENT

Corporation Counsel opinion of July 24, 1953 on Height Act provisions regarding roof structures

C
O
P
I

GF.5-112

Jul.27, 1953

TO: THE COMMISSIONERS

IN RE: Whether penthouses may be constructed above the height limits established by the Act of Congress approved June 1, 1910, regulating the height of buildings, for purposes other than to cover elevator shafts; and whether the presence of an operating engineer in such penthouses constitutes "human occupancy" within the meaning of such Act.

There have been referred to this office for an opinion certain questions which have been raised by the Chief Engineer of the Department of Inspection, relating to the permissible use of penthouses constructed above the height limits established by section 5 of the Act of Congress approved June 1, 1910 (36 Stat. 452, as amended; sec. 5-405, D. C. Code, 1951 ed.). These questions may be expressed briefly as follows:

1. May the Act of June 1, 1910, permitting the construction of "penthouses over elevator shafts" to a greater height than any limit set by the Act, be construed to permit the construction of penthouses for the purpose of housing air-conditioning equipment, heating equipment, and perhaps other kinds of equipment which ordinarily might be located within a building?

2. Does the phrase "human occupancy" as used in the Act of June 1, 1910, in connection with the construction or use of penthouses, preclude the presence of an operating engineer in penthouses containing air-conditioning or heating equipment, including boilers?

The answers to the foregoing questions depend upon an interpretation of the last paragraph of Section 5 of the Act of June 1, 1910, the pertinent part of which reads as follows:

"Spires, towers, domes, minarets, pinnacles, pent houses over elevator shafts, ventilation shafts, chimneys, smokestacks, and fire sprinkler tanks may be erected to a

greater height than any limit prescribed in the Act when and as the same may be approved by the Commissioners of the District of Columbia: Provided, however, That such structures when above such limit of height shall be fireproof, and no floor or compartment thereof shall be constructed or used for human occupancy above the top story of the building upon which such structures are placed: And provided, That pent houses, ventilation shafts, and tanks shall be set back from the exterior walls distances equal to their respective heights above the adjacent roof: * * * *."

In connection with the first of the above questions, however, it is also necessary, in construing the statute, to consider any long-standing administrative interpretations of the statute with respect to the construction of penthouses for other uses than "over elevator shafts", inasmuch as the "long-continued contemporaneous and practical interpretation of a statute by the executive officers charged with its administration * * * * * constitutes an invaluable aid in determining the meaning of a doubtful statute." Sutherland, Statutory Construction, sec. 5103. It might be said that the phrase "penthouses over elevator shafts" is plain and unambiguous, permitting the construction of penthouses only over elevator shafts, and that therefore there is not need for administrative construction of this phrase. But it may hardly be said that Congress, by the use of this phrase, intended, for example, to prohibit the construction of penthouses over stairways leading to the roof of a building, as is commonly the practice in the construction of buildings, and as was the practice at the time the Act of June 1, 1910 was enacted, according to persons in the Department of Inspection having knowledge of the construction practices at that time.

It would appear, therefore, that the phrase "penthouses over elevator shafts", rather than being plain and unambiguous, has required interpretation by the officials of the District of Columbia charged with the administration of the statute containing the phrase. The Director of Inspection over the years has interpreted the statute as permitting the construction over the height limit of penthouses to provide shelter for air-conditioning equipment such as water towers, evaporative condensers, and air-conditioning fans. The question now arises, however, in the light of changed construction practices, whether the Director's interpretation of the statute may extend to permitting the construction of penthouses to shelter heating equipment including boilers. Much of the air-conditioning and heating equipment in use today requires the services of operating engineers, and the presence of operating engineers in penthouses constructed above the permissible height limit also involves an interpretation of the meaning of the phrase "human occupancy", as used in the Act of June 1, 1910.

In connection with the consideration of both of the questions discussed in this opinion, it is of interest to consider the intent of the

Congress in enacting the Act of June 1, 1910. Strangely enough, although it is commonly believed that the purpose of the Act was to preserve the skyline of the city and to prevent the overshadowing of the Capitol by excessively tall buildings, it would not appear that the Congress, at the time it was considering the bill that later became the Act of June 1, 1910, had such a purpose in mind. Rather, according to a statement by one of the sponsors of the bill during debate in the House of Representatives, the principal concern of the Congress involved the lack of fireproofing on the "upper or mansard stories" of buildings then constructed, and the sponsor stated "this act is for the purpose of requiring that buildings of a certain height shall be of fireproof material throughout." Congressional Record, Vol. 45, p. 4535.

Another consideration of the Congress during its debate on what later became the Act of June 1, 1910, would appear to relate to matters of light and ventilation, as the following exchange during the debate would indicate:

> "MR. CAMPBELL (a sponsor of the bill) The buildings on Pennsylvania avenue would be limited to the height provided for in this bill (160 feet).
>
> "MR. SIMS. Now, why should they be permitted to be, say 30 feet higher on Pennsylvania avenue than any other business street or otherwise in the city?
>
> "MR. CAMPBELL. It is the widest street in the city.
>
> "MR. SIMS. Is not New York avenue fully as wide?
>
> "MR. CAMPBELL. No; Pennsylvania Avenue is the wider.
>
> "MR. SIMS. Is it the object and purpose of regulating the height of buildings in the District of Columbia that the height of buildings should be regulated on each street in reference to the width of that particular street?
>
> "MR. CAMPBELL. We are far below the limit of height that could be provided for on Pennsylvania Avenue when we provide for 160 feet." (Cong. Record, Vol. 45, p. 6799; parenthetical notations added)

Accordingly, it would seem that the last paragraph of section 5 of the Act of June 1, 1910, should be construed in the light of the intent of the Congress in enacting the Act; i.e., in terms of fireproofing and of light and ventilation.

On this basis, therefore, it would appear that the 61st Congress, insofar as penthouses were involved, was not concerned so much with the

use to which such penthouses would be put as with the fireproofing of such penthouses, and it would seem there was no objection on the part of Congress to the construction of fireproof penthouses above the height limit, just so such penthouses were (1) set back from the exterior walls, apparently for reasons of light and ventilation, and (2) were not constructed or used for human occupancy.

The term "human occupancy" moreover, perhaps should be construed in the light of the intent of the Congress in enacting the Act. The Congress, in specifically recognizing the necessity for elevator machinery above the height limit, obviously did not intend that no elevator machinery repairman could enter the penthouse over such machinery for the purpose of repairing it. Yet in one sense this is "human occupancy" of such a penthouse.

The term "occupancy" means, to quote Webster's New International Dictionary, 2nd Edition, the "act of taking or holding possession". An "occupant", to quote the same authority, is "one who occupies or takes possession; one who has the actual use or possession of a thing"; "occupy" means "to take or enter upon possession of; to hold possession of, to hold or keep for use; to use"; while "occupation" means "actual possession or control". I am of the view, therefore, that the prohibition of "human occupancy", in the last paragraph of section 5 of the Act of June 1, 1910 was intended by the Congress to prevent the use of enclosed space above the height limit for residential, office or business purposes, either by the owner of a building or by any tenant holding under him, but was not intended to preclude the use of such space in connection with the maintenance of such building and the operation of its utilities. I am of the view, therefore, that the last paragraph of section 5 of the Act of June 1, 1910, does not prohibit the presence of building maintenance personnel in fireproof structures constructed above the permissible height limit.

In summation, I caused a study to be made of the Act approved June 1, 1910, and the legislative history of such Act, with particular reference to the last paragraph of section 5 of such Act, as a result of which I have concluded that the phrase in such paragraph, "penthouses over elevator shafts", may be construed to include penthouses over stairways leading to the roof and penthouses over other utilities necessary in connection with the operation of a building, but not to include penthouses to be used for residential, office or business purposes. Further, I have concluded that the term "human occupancy" as it is used in such paragraph should be construed to preclude the construction or use of penthouses for residential, office or business purposes, but not to preclude the presence in such penthouses of building maintenance personnel charged with the operation and maintenance of the building's utilities.

The memorandum of the Chief Engineer of the Department of Inspection also refers to paragraph numbered 1 of Section XIII of the Zoning Regulations of the District of Columbia, as amended, which reads as follows:

"1. The provisions of the Act of June 1, 1910, as to spires, towers, domes pinnacles (sic), penthouses over elevator shafts, ventilation shafts, chimneys, smoke stacks, and fire-sprinkler tanks shall continue in full force and effect, except that on buildings hereafter erected the Commissioners of the District of Columbia shall not approve the construction of fire-sprinkler tanks, water towers, or housing for air conditioning to a height in excess of 130 feet measured from the level of the curb opposite the middle of the front of the building. Fire sprinkler tanks, water towers, or housing for air conditioning equipment may be erected or enlarged on buildings existing prior to December 1, 1944 as provided under Section XXIII of these regulations. (As amended Dec. 1, 1944 and Feb. 25, 1948.)"

This regulation of the Zoning Commission, as has been pointed out in the memorandum of the Chief Engineer of the Department of Inspection, would appear to have a double effect. First, it imposes a limitation on the Act of June 1, 1910, since it prohibits the construction of fire-sprinkler tanks and water towers above 130 feet, although the June 1, 1910, Act specifically permits fire-sprinkler tanks above the 130-foot height limit, and may be construed to permit water towers above that limit. But more important, the regulation would appear to delimit the Act of June 1, 1910, by impliedly authorizing the construction of housing for air conditioning equipment above any height limit established by the June 1, 1910, Act, with the exception of the 130-foot height limit. It would appear, therefore, that the Zoning Commission, like the Director of Inspections, has construed the phrase "penthouses over elevator shafts" to permit the construction of housing for air-conditioning equipment above all height limits except the 130-foot height limit.

The Zoning Regulations of the District of Columbia, as amended, have been promulgated by the Zoning Commission of the District of Columbia under the authority contained in the Act approved June 20, 1938 (52 Stat. 797, as amended; Title 5, sections 413 through 428, D. C. Code, 1951 ed.). Among other things, such Act empowers the Zoning Commission to regulate the height of buildings, except the permissible height of any building shall not exceed the maximum height of buildings authorized by the Act of June 1, 1910, supra. Further, section 12 of the Act of June 20, 1938 (Section 5-424, D. C. Code, 1951 ed.) provides:

"Sec. 12. Wherever the regulations made under the authority of this Act require a greater width or size of yards, courts, or other open spaces, or require a lower height of buildings or smaller number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required in or under any other statute or municipal regulations, the regulations made under authority of this Act shall govern. * * *." (Underscoring supplied)

Accordingly, I am of the opinion that although the Act of June 1, 1910, may be construed to permit the construction, above the maximum height limits established by such Act, of penthouses sheltering building utilities, providing such penthouses meet the other requirements of such Act, nevertheless paragraph 1 of Section XIII of the Zoning Regulations of the District of Columbia has the effect of prohibiting the construction of such penthouses above the 130 foot height limit, although impliedly permitting the construction of penthouses for air conditioning equipment above the lower height limits established by the June 1, 1910, Act.

The Chief Engineer of the Department of Inspection concludes his memorandum of June 16, 1953, with the following paragraphs:

"It is apparent that a situation difficult both for this office and for the architects, owners, and mechanical engineers will continue to exist until both the Act of 1910 and the Zoning Regulations are clarified and a consistent and equitable policy established for both.

"It seems to me that the intent and limitation of the Act of 1910 should be established by Commissioners directive, and that thereafter the Zoning Regulations be clarified in order to be consistent with such directive.

"It is recommended that such directive clearly establish what equipment may be in a 'penthouse' above the height limit as established by the Act of 1910, that there be a limiting size to such pent-house based on a percentage of roof area, and that the Zoning Commission establish regulations consistent therewith, also for such pent-houses as exceed the zoning height limits but are not above the limits established by the Act of June 1, 1910."

Inasmuch as in my view, the Act of June 1, 1910, may be construed to permit the construction, above the various height limits established by such Act, of penthouses to house utilities necessary in the operation of buildings, and to permit the presence in such penthouses of personnel required to operate such utilities, the only action required of the Commissioners with respect to establishing "the intent and limitation of the Act of 1910" would be to direct their Secretary to forward a copy of this opinion to the Director of Inspection for his information and guidance.

But as has been pointed out earlier, the construction of the Act of June 1, 1910, is not all that is required to furnish the "clarification" recommended by the Chief Engineer. Since the Zoning regulations prohibit the construction of fire-sprinkler tanks, water towers, or housing, for air-conditioning equipment above 130 feet, such regulations effectively establish, for all buildings, an extreme height of 130 feet, not including spires, domes, pinnacles, penthouses over elevator shafts, ventilation shafts, chimneys, and smokestacks.

RECOMMENDATIONS:

1. That although the Act of June 1, 1910, regulating the height of buildings, may be construed to permit the construction, above the various height limits established by such Act, of penthouses to shelter building utilities of all kinds, and to permit the presence in such penthouses of building maintenance personnel, paragraph 1 of section XIII of the Zoning Regulations prohibits the construction above a height of 130 feet of fire-sprinkler tanks, water towers, and penthouses for air conditioning equipment.

2. That should the Commissioners desire to authorize the Director of Inspection to approve plans for the construction, above the maximum height limits established by the Act of June 1, 1910, of penthouses to shelter building utilities, it would appear necessary that there first be a change in the Zoning Regulations of the District of Columbia, which are controlling.

3. That the Commissioners forward a copy of this opinion to (1) the Director of Inspection, D. C., and (2) the D. C. Building Code Advisory Committee, for appropriate recommendation relating to the desirability of amending the Zoning Regulations of the District of Columbia so as to clarify the present uncertainty regarding the construction, above certain height limits, of penthouses to shelter building utilities.

/s/ VERNON E. WEST,
Corporation Counsel, D. C.

RFK:hs
7/24/53