BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPEAL OF:	)	
	)	
KALORAMA CITIZENS ASSOCIATION	)	**BZA Appeal No. 17335**
	)	**ANC 1C**
From the Issuance of Permit No. B46999 for 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)	)	**Hearing Date: October 18, 2005**

RECEIVED
D.C. OFFICE OF ZONING
2005 OCT 13 PM 2:37

OPPOSITION OF INTERVENOR MONTROSE, L.L.C.

I.
INTRODUCTION

Montrose, L.L.C., through undersigned counsel, hereby opposes the appeal of Kalorama Citizens Association ("KCA") in the above-referenced case. Contrary to the allegations of KCA, the as-built roof patio surface does not exceed the maximum height allowed by the Height of Buildings Act, D.C. Code § 6-601 (2001 ed) ("1910 Height Act" or "Height Act"), and is not used for "human occupancy." Thus, the Zoning Administrator did not commit error in the issuance of Building Permit No. B46999 and the appeal should be denied.

II.
BACKGROUND

Montrose, L.L.C. ("Montrose") is an owner of the property for which this appeal is filed and is an automatic party to this proceeding pursuant to 11 DCMR § 3199.1 (2003). Over two years ago, KCA appealed building permits issued to Montrose for a two-story addition plus attic to the property at 1819 Belmont Road, N.W. *See* BZA Appeal Case No. 17109. KCA argued that (i) the building exceeded the permitted floor area ratio ("FAR") for the R-5-D District; (ii)

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17335
EXHIBIT NO. 21

Board of Zoning Adjustment
District of Columbia
CASE NO. 17335
EXHIBIT NO. 21

the penthouse was not properly set back from the exterior walls of the building; and (iii) the roof deck and railing exceeded the permitted 70-foot height under the 1910 Height Act. At its June 22, 2004 special public meeting, the Board orally voted to deny the appeal with respect to FAR, and sustained the appeal with respect to roof structure setbacks and height. *See* BZA Transcript (Tr.), June 22, 2004, at 43-46. Six months later, and prior to its issuance of any written order in the case, the Board reopened the record and requested additional briefing on the roof structure setback issue. *See* Tr., December 7, 2004, at 109-118.

On February 1, 2005, the Board reversed its previous oral decision on the roof structure setback and denied the appeal on that issue. *See* Tr., February 1, 2005. Additionally, the Board clarified its oral decision sustaining the appeal on the height of the roof deck and railing issue. The Board explained that because the roof deck as originally constructed was raised above the roof surface, it exceeded the maximum permitted height under the Height Act. If, however, the walking surface of the deck rested directly on the roof membrane and did not exceed the maximum permitted height, the Board stated that the deck would be compliant. Further, the Board clarified that a guardrail is permitted to exceed the maximum permitted height under the 1910 Height Act, based on long-standing interpretation. The following excerpt from the February 1, 2005, BZA transcript describes the clarification:

> CHAIRPERSON GRIFFIS: ... in the discussions of the appeal, we had another element on the roof and I think that in my opinion, and I obviously hope that it's correct, but I strongly feel that in our discussion deliberation that we were finding, and I certainly find, that it's reasonable for the Zoning Administrator to interpret permitting a guardrail on a compliant structure. Meaning, the roof, if it was established, was compliant for the Height Act and also our regulation. A guardrail on top of that would be within the Zoning Administrator's purview to allow for that safety rail. That is, of course, not the case in this specific appeal, because this Board has found that the roof deck rises above what was allowable. Therefore, the connection of the rail is attendant to that of the deck, but not the rail itself.

You know, I can argue this even more if we need to, but it seems to be firm not only in the reading but in the absolute intent of the Height Act. I mean, if we really look, I know we have looked at substantially the Height Act, a lot of it, well, most of the attention was on the building itself, the structure and how that was to be regulated. And it really was an outgrowth of life safety issue and that of fire proofing. And to say that the Height Act somehow would preclude a life safety issue of a guardrail seems to be absurd.

Clearly, words and details that were drafted in 1910 and adopted have gone through a little bit of interpretation. We have, obviously, interpreted stair enclosures and elevators and we have kind of moved away from water tanks on top of towers. We don't see a lot of cases for exceptions to those these days. My point being that things have to have some sort of life beyond the instant that they are written and there is a difference today than from 1910. I think the guardrails reasonably fall within that interpretation from the Zoning Administrator and certainly the prescriptive nature of the Height Act. Ms. Miller?

VICE CHAIR MILLER: Mr. Chairman, it's my understanding that this reconsideration just goes to the question of the set-back of the penthouses and not to the roof deck and railings, and that we should just rule on the question of exterior walls and how that affects that one area in dispute in the appeal whether the Zoning Administrator made an error with respect to the set-back question.

CHAIRPERSON GRIFFIS: I tend to agree.

VICE CHAIR MILLER: Okay.

CHAIRPERSON GRIFFIS: But for clarification, what I have done is just lay out what I think is my clear intention, but what the entire appeal was as we have a piece of that. We now have action that's being asked of the Board and so in order to clarify that, what I'm saying is that we have not revisited nor therefore changed the aspect that the roof deck, that actual element, on that was found by this Board to not be compliant with the Height Act. I was just clarifying the railing of that which is attached to it which, therefore, is part of that noncompliance, if that railing was, in fact, on the roof, which is found to be in compliance, it would be appropriate under the Height Act. Good. So let's move on then....

Tr., February 1, 2005, at 24-27. A portion of the February 1, 2005, transcript is attached as Exhibit A.

Based on this discussion, Montrose sought and obtained a revision permit to eliminate the existing roof deck and install a patio on the roof so that the walking surface of the patio is no

higher than 70 feet, the maximum permitted height for this building under the Height Act. A three-foot guardrail required under the D.C. Construction Codes surrounds the patio and rises above the 70-foot height limit. A copy of the building permit and associated drawings are attached to KCA's appeal application dated March 30, 2005. Shortly after issuance of the building permit, KCA filed the instant appeal.

III.
ARGUMENT

A. The Walking Surface of the Roof Patio Does Not Exceed the Height Limitations Under the 1910 Height Act.

The height of the rooftop patio surface is one-half inch lower than the maximum permitted height of 70 feet, as shown on the attached "as-built" drawings prepared by the project architect October 11-12, 2005, in response to this appeal. See Exhibit B. Thus, contrary to allegations of KCA, the roof deck patio is in full compliance with the provisions of the 1910 Height Act and the appeal should fail on this basis.

B. Long-Standing Interpretation of the 1910 Height Act Permits the Installation of Safety Railings on a Roof.

Similarly, the safety railing that surrounds the rooftop patio likewise does not violate the provisions of the 1910 Height Act. While the Height Act does not list guardrails among the exceptions that may exceed the applicable height limits, long-standing administrative interpretations have permitted railings to extend above the height limits. As noted in the 1953 Corporation Counsel opinion, in construing the statute, it is necessary to consider any such long-standing interpretations "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.'" Opinion of the

Office of Corporation Counsel, Whether Penthouses May Be Constructed Above the Height Limits, July 27, 1953, at 2 ("OCC Opinion"), *quoting* Sutherland, Statutory Construction, sec. 5103. Here, such railings have long been deemed necessary life safety measures for anyone accessing a roof for any number of reasons, including recreational purposes. Thus, buildings with rooftop decks or pools constructed to the applicable height limit under the Height Act have been permitted to include safety fencing above the height limit. Some examples include: (i) residential building at 400 Massachusetts Ave., N.W. (roof patio and pergola); (ii) The Avalon at Gallery Place, 770 5th Street, N.W. (pergola and roof patio with railing); (iii) apartment building at 5th Street and Massachusetts Avenue, N.W. (roof patio with railing); (iv) office building at 2099 Pennsylvania Avenue, N.W. (roof patio with railing); (v) the Ritz Carlton, 22nd and M Streets, N.W. (roof patio with railing); (vi) Concord Apartments, 22nd Street, N.W., (rooftop pool and fence); (vii) residential building at 2500 K Street, N.W. (rooftop pool and fence); and (vii) residential building 2414 K Street, N.W. (rooftop pool and fence). Photographs of these structures are attached as Exhibit C.

KCA may argue that these precedents only demonstrate other instances of non-compliance with the Height Act, that these buildings had somehow "slipped under the radar screen" and were not a result of any long-standing interpretation by the Zoning Administrator or other governmental bodies. This argument only makes sense, however, if the Zoning Administrator also concluded that the permits for these buildings had been issued in error. Instead, however, the Zoning Administrator has consistently defended his long-standing interpretation that safety railings are permitted to extend above the applicable limits of the 1910 Height Act, and he did not abuse his discretion in following these precedents.

C. Principle of *Stare Decisis* Precludes the Board from Applying any New Interpretation Retroactively to Montrose.

Even if the Board in the present case determines that this consistent, historical interpretation is in error, the Board should apply its new interpretation retroactively to building permits already issued. Under the principle of *stare decisis*, an agency's change in a long-standing interpretation of a rule can only apply prospectively, not retroactively. *See Smith v. District of Columbia Board of Zoning Adjustment*, 342 A.2d 356 (D.C. 1975); *see also Springer v. Department of Employment Services,* 743 A.2d 1213 (D.C. 1999) ("'agencies, like courts, must and do favor a policy of *stare decisis* unless unusual circumstances intervene'") (internal citations omitted).

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

> the Board made no findings relevant to petitioners' claim that the Zoning Administrator's approval of the deck was given pursuant to a long-standing interpretation of the Zoning Regulations which had been approved in the past by the Board, so that established principles of *stare decisis* require any change in that interpretation to be made prospective only. While the Board is of course not bound for all time by its prior positions, we think it should have considered this contention, not only in connection with its decision of the merits of the case, but also as it relates to petitioners' claim of estoppel.

Smith, 342 A.2d at 359.

Here, the Zoning Administrator approved the roof patio and railing pursuant to a long-standing interpretation of the Zoning Regulations by the Zoning Administrator's office, the

Board itself, and the Zoning Commission. Consistent with the findings of *Smith*, if the Board now wishes to change that long-standing interpretation, it may only apply that new interpretation prospectively. Thus, under the principle of *stare decisis,* the Board is precluded from retroactively requiring Montrose to eliminate the code-required safety railing in order to comply with this new interpretation.

D. Interpretations that Lead to Illogical Consequences are to be Avoided.

An interpretation that would allow roof access for repairs or recreational purposes under the Height Act but not permit the concomitant safety fencing or railings would lead to illogical and absurd consequences, which are to be avoided. Courts have consistently held that agencies should "not wallow in literalism where the plain language of a statute would lead to absurd consequences which the legislature could not have intended." *Parreco v. District of Columbia Rental Housing Commission,* 567 A.2d 43, 46 (D.C. 1989), *citing United States v. Brown*, 333 U.S. 18, 27, 92 L.Ed. 442, 68 S. Ct. 376 (1948); *Holt v. United States,* 565 A.2d 970, slip op. at 4 (D.C. 1989) (*en banc).*

Here, if the Height Act were interpreted to prohibit safety fencing, as argued by KCA, the entire rationale for the Height Act would be undermined. As noted in the 1953 Corporation Counsel Opinion, one of the primary objectives of the Height Act was fireproofing for safety purposes. *See* OCC Opinion, at 3. Thus, it would be irrational to prohibit safety fencing on a roof, particularly when such railings or fences are well below the height of a permitted penthouse.

E. Roof Patio is Not Used for "Human Occupancy" Under the 1910 Height Act.

KCA also attempts to argue that the roof deck with railing is used for "human occupancy" above the height limits and thus violates the Height Act. KCA is wrong. According

to the 1953 OCC Opinion, "the prohibition of 'human occupancy' in the last paragraph of section 4 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...." OCC Opinion at 4 (emphasis added). An open roof deck with a safety railing, or a rooftop pool, simply cannot meet the definition of enclosed space. They are open to the sky and do not provide any shelter for residential, office or business purposes. They simply provide *unenclosed* recreational space for building occupants. Further, in the instant case, the roof deck is below the permitted height so the question of "human occupancy" would only pertain to the safety railing, the only component that extends above the height limit. Clearly, however, a safety railing cannot be construed to be used for human occupancy. Thus, KCA's argument must fail.

IV.
CONCLUSION

As set forth in detail above, the roof deck and safety railing at 1819 Belmont Road, N.W., as authorized under Building Permit No. B46999, are in full compliance with the provisions of the 1910 Height Act. Accordingly, the Board should deny the appeal in Case No. 17335.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: 
Mary Carolyn Brown

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Opposition of Interventor Montrose LLC was served this 13th day of October, 2005, by hand-delivery, or first-class mail postage prepaid, on the following:

Alan J. Roth
Chair, Advisory Neighborhood Commission 1C
1845 Vernon Street, N.W.
Washington, D.C. 20009

Kalorama Citizens Association
c/o Anne Hughes Hargrove
1827 Belmont Road, N.W.
Washington, D.C. 20009

Julie Lee, Esq.
Office of General Counsel, DCRA
941 North Capitol St., N.E., Suite 9400
Washington, D.C. 20001

Mr. William Crews
Zoning Administrator
D.C. Department of Consumer & Regulatory Affairs
941 North Capitol Street, N.E., Second Floor
Washington, D.C. 20001



3294629_v1

A

EXHIBIT A

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

+ + + + +

BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC MEETING

+ + + + +

TUESDAY,

FEBRUARY 1, 2005

+ + + + +

The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:30 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
RUTHANNE G. MILLER	Vice Chairperson
CURTIS L. ETHERLY, JR.	Board Member
JOHN A. MANN, II	Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

JOHN G. PARSONS	Commissioner

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Deputy Secretary
BEVERLEY BAILEY	Zoning Specialist
JOHN NYARKU	Zoning Specialist

OFFICE OF PLANNING STAFF PRESENT:

ARTHUR JACKSON	Office of Planning
STEPHEN MORDFIN	Office of Planning

This transcript constitutes the minutes from the Public Meeting held on February 1, 2005.

AGENDA ITEM PAGE

WELCOME/OPENING REMARKS:
Geoffrey Griffis 3

KALORAMA CITIZEN'S ASSOCIATION
APPEAL OF APPLICATION NO. 17109: 4
Motion to Deny Appeal 27
Vote to Deny Appeal 29

2224 R STREET, LLC
APPLICATION NO. 17260: 29
Motion to Approve Application 36
Vote to Approve Application 37

THOMAS AND KATHRYN TOGGAS
APPLICATION NO. 17270: 37
Reopen for Specifically Requested Material 46
Action Taken 59

IDS-DC, INC.
APPLICATION NO. 17290: 60
Motion to Approve Application 63
Vote to Approve Application 63

ADJOURN:
Geoffrey Griffis 65

P-R-O-C-E-E-D-I-N-G-S

10:14 a.m.

CHAIRPERSON GRIFFIS: Good morning, ladies and gentlemen. Let me call to order the 1st of February 2005 Public Meeting of the Board of Zoning Adjustment of the District of Columbia. I am Chairman Geoff Griffis. Joining me today is Vice Chair Ms. Miller and also Mr. Etherly, our Board Member. Representing the National Capital Planning Commission is Mr. Mann and representing the Zoning Commission with us on several cases through the day is Mr. Parsons.

Copies of today's agenda are available for you. They are located where you entered into the hearing room. As I have indicated off the record, we are staying with the chronology as published on our schedule. Please, be advised of several things. Of course, in our Public Meetings, this is the time to let the Board go through its own public deliberation and decisions on cases. The record to this point is closed on all of these cases and they are ready to proceed to decision.

There is not opportunity for any sort of additional testimony or for addressing the Board. We certainly are glad that people are here to hear us in

person, but we will not be calling anyone to present before the Board this morning. I would also ask that people just turn off their cell phones and beepers, so that we don't disrupt the transmission as we are also being transmitted live on the Office of Zoning's website and, of course, the Court Reporter is creating the official transcript for all of our deliberations.

Let me say a very good morning to the Office of Zoning Staff with us, Ms. Bailey, also Mr. Moy and see if they have any preliminary matters for the Board's attention for this morning.

MR. MOY: Good morning, Mr. Chair and Members of the Board. There is no preliminary matters in general.

CHAIRPERSON GRIFFIS: Excellent. Then let us move ahead.

MR. MOY: The first case for decision concerns the Appeal of Application No. 17109 of Kalorama Citizen's Association, pursuant to 11 DCMR 3100 and 3112, from the Administrative decision of David Clarke, Director, Department of Consumer and Regulatory Affairs from the issuance of Building Permit Nos. B455571 and B455873, dated October 6, 2003 and October 16, 2003, respectively, to Montrose,

LLC, to adjust the building height to 70 feet and to revise penthouse roof structure plans to construct a five story apartment house in the R-5-D District.

The appellant alleges that the under construction building is in violation of the building height, floor area ratio and roof structure set-back requirements of the Zoning Regulations. The subject property is located at 1819 Belmont Road, N.W., and that's in Square 2551, Lot 45. At a Special Public Meeting on June 22, 2004, the Board made its decision to grant in part and to deny in part this appeal.

At its Public Meeting on December 7, 2004, the Board reopened the record and requested all parties to respond to the question of whether a sidewall of the building should or should not be considered an exterior wall if the adjacent property shares a party wall or may lawfully construct a shared party wall between the buildings. The Board also invited parties to address the ramification of the Board's decision on future residential and commercial development in the District, as well as whether the Board may consider those ramifications.

The first set of filings were submitted on January 11, 2005, first from ANC-1C and the Kalorama Citizen's Association as a whole, and that

is identified in your case folders as Exhibit 86. The second filing is from Montrose, LLC, the intervenor in this appeal case, that is identified as Exhibit 87. And a filing from the appellee in the case, DCRA, that is identified as Exhibit 88.

The final set of submissions were in reply to the submissions, submitted on January 25, 2005. The first from ANC-1C and the Kalorama Citizen's Association, that is identified as Exhibit 89. And finally, a submission from Montrose, LLC, that is identified as Exhibit 90. And I think with that, the Staff will complete its briefing, Mr. Chair.

CHAIRPERSON GRIFFIS: Good. Thank you very much, Mr. Moy. Let me first start out and say, obviously, the Board has spent a great deal of time looking at this and I think it's appropriate that this Board, in terms of its review and also looking at writing and issuing an order, re-review the record and the details on it. I do believe that it's appropriate and the Board has, in this case, taken up a reconsideration of our deliberation, based on the facts and the filings in this case.

It's a difficult position to take always. The Board, of course, would be happy for us to say

we were right and we're always right. However, it is, I think, one of the strengths of this Board that is able to say perhaps we need to reinvestigate or further the record in our own deliberation, and that is where we have found ourselves today. It's a complex issue and, I think, it is complex for numerous reasons. The base reason, I believe, is perhaps not the clarity in the regulations and also not the clarity in terms of the past informing documents on the issues that are before us today.

This Board takes very seriously all of the decisions before us and we have looked at this as having extending impact and that is to the individual properties, but also to the City as a whole, not indicating that we set policy or precedent and certainly in reviewing special exceptions and variances, we do not. However, in appeals, an appeal is a different animal before the Board. An appeal that we're trying to decide is whether an error was produced be it through the Zoning Administrator's decision or not.

In those errors there is clearly larger issues than that just relate to a specific property. There are questions and issues of process, interpretation and I think it is well-worth our

endeavor to spend the adequate time and get things hopefully in the end absolutely correct.

What we're looking at in terms of Belmont here, I think, is also the complexity of the specific property. I think we have heard a great deal from the community about the appropriateness of the size and the massing of what was constructed to date. We obviously have photographic evidence of that. I think the Board appropriately has put aside our own design opinions of what was done. And really I'm stuck on the fact, in my individual opinion, that the problem has been brought before us in many respects that is not necessarily ours, meaning, not the BZA's, but rather that when the Zoning Commission actually zoned this area of the property, perhaps it made logical sense in terms of the map and adjacencies of what the Zoned District should be and what it would allow, but in the specifics of this block did not make sense.

My meaning is this, the Zoning Commission designated the R-5 Zone District on this block which would allow in our regulations 90 feet of height. Whether that is, in fact, within context or appropriate to this block is not an issue that is before us today. We, obviously, are well-aware that

this case brought forth the Height of Buildings Act of 1910 and its controlling aspect that began, rather that limited the building height to 70 feet.

There is numerous opinions and testimony in the record indicating that this is inappropriate for the block. Again, it's not an issue that we are to take up, but rather perhaps the Zoning Commission will look at again in terms of what the appropriateness for the Zoned District should be on that particular block.

Now, going to the substance of what actually is before us. It really goes to the fact of looking at the Zoning Administrator and how they dealt with this case in looking at the penthouse and where the penthouse set-backs would be. I think what has arisen in our discussion deliberation, and my own particular, is that there needed to be a fleshing out of the distinction and differences and similarities between how the Building Height Act of 1910 set forth the required set-backs of penthouses and how our own regulations under differing sections are referred to through 411 also deal with penthouse set-backs.

When looking at that, I have found, in reading numerous now times more than I thought I ever would the Height of Buildings Act and our own

regulations, that there is great consistency and similarities, but there is also a difference. The Height of Buildings Act of 1910, I believe, lays out the fact that set-backs for the penthouse structure are to be from the front and the rear of buildings. That is the exterior wall that fronts the street and the rear portion of the building.

The Zoning Regulations set up, as I have looked at it, actually are more restrictive requirements and that is not only would one be set-back from the front and the rear of buildings, but it would also be set-back from those walls which were exposed to open areas. Meaning, public alleys, side yards, rear yards, open spaces. It blends itself. My logic is followed with the fact that are Zoning Regulations then incorporate some sort of relief and that is the special exception from those areas which would be more restrictive than the Height of Buildings Act of 1910.

So it goes down into this particular, is that how do you establish for the Zoning Regulation purposes, in this particular case, what the penthouse set-back would actually require? And what we would look at is putting ourselves in the shoes of the Zoning Administrator and indicating if these plans

were brought before us, how would we assess this situation and what sort of requirements we would put. Therefore, we would look at, obviously, the side that is of issue, and that is the party wall side on the east elevation.

And when we look at it, the Zoning Administrator would have to indicate, in reading the regulations, whether that wall was exterior or not. Now, throughout this it has always been a difficulty of mine in saying if you are a person walking down the street, there is one way to look at this, and that might seem very logical, exterior or not exterior. But I think there is a distinct difference that we rise to in looking at the Zoning Regulations of how things are classified and how they are actually dealt with.

And I think that is reinforced often in cases before this Board that there may well be a difference between how a Building Code indicates a certain issue and how zoning deals with that same word, but regulates and perhaps regulates differently. My meaning is this, how would the Zoning Administrator have established whether that wall was an exterior wall or a not exterior wall in order for it to be either required a set-back or not

required a set-back under our regulations?

I think in looking at this, the Zoning Administrator must be able to make decisions on a single rule of interpretation. Meaning, things would not change depending on numerous situations or specifically depending on what was there currently on adjacent properties or what may well have been there or could be there or what was in process of being there. There has to be a logical process of administrative ease.

One decision, you look at something and it should be clear. It's one way or it isn't. And so I believe that the Zoning Administrator looked at this in assessing whether it was an exterior wall or not and took it as not exterior, based on its legal potential. Meaning, the legal potential of the adjacent property would be to build according to the zoning designation by the Zoning Commission would be able to build all the way to 70 feet creating an entire enclosed party wall.

I think one might say walking down the street again that this issue of exterior wall and looking at what I have just stated seems to point to exterior being an ambiguous kind of definition. I do not believe for the Zoning Regulations and the Zoning

Administrator's interpretation that exterior and exterior wall is ambiguous. I believe it is unambiguous and it is very clear. It is as clear as if the adjacent property had a flush part of the wall against that which has now been constructed. Meaning, a full party wall.

And the Zoning Administrator, in my opinion in looking at, and we'll get into a lot of these documentations, I imagine, in looking at the past procedure and process and looking at the exact letter of those regulations and law, the interpretation was looked at as what could be and that is that the adjacent wall has the legal ability and the legal potential to be totally enclosed. And I believe that that was reasonable.

But let me open it up to others and we'll hear from other Board Members. Mr. Parsons?

COMMISSIONER PARSONS: I have been struggling with this like you have for many months now, almost a year, I guess, and I don't think anybody would disagree that this is an aesthetic nuisance in this community. But I have to agree with your opening remarks. Certainly, nobody would disagree that the first four floors of this building is a party wall on each side, because it's abutting

another property. How is it then that this wall becomes something different when it leaves the roof?

We can blame the Zoning Commission. I suppose we could do that.

CHAIRPERSON GRIFFIS: That's always easy.

COMMISSIONER PARSONS: And I don't mean that in jest, that's the problem, that's what you opened up with here is the zoning would allow something much more obnoxious than is actually before us. But I think what has been the problem throughout this whole case is because this wall is exposed, it somehow becomes exterior. And I don't think we can have a wall that is exposed and potentially obnoxious that somehow becomes an exterior wall in the short-term.

Hopefully, none of these buildings will come to this height over time. But I can't come to any other conclusion that this is other than a party wall. Even though it has windows in it, it's windows at their risk. I think the classic example of this is the Lincoln Building across from Ford's Theatre, that very narrow building.

CHAIRPERSON GRIFFIS: Yes.

COMMISSIONER PARSONS: That now has a mural on the side. It was considered very obnoxious

when it was built. Now, has historic preservation, of course, would have a different view if we made a move to tear it down. I don't mean this is the case here. I think the most obnoxious part about this is its design. I would hope that can be improved, but that's beyond our jurisdiction. So I must concur with you, Mr. Chairman.

But reflecting on this, we're now looking at the Zoning Commission at a community called Forest Hills, which I'm sure you're all familiar with, where we've been struggling with an R-1-A Zoning where people have a matter-of-right to build something that is much larger than is on the site now. And a community that has come to the Zoning Commission trying to preserve that. That is the R-1-A was not built out originally, and now people are doing that and some people call them McMansions or whatever, but I'm wondering if we shouldn't be looking at some of these other zones.

Is this block of Belmont Street a fluke or are there other row houses, communities in this City that could have an equally intrusive addition, if you will? So with that, Mr. Chairman, I will rest.

CHAIRPERSON GRIFFIS: Thank you very

much. I think it's absolutely true what you say in all respects and to continue on a little, well, let me leave that for closing. Let me open it up to others. Go ahead.

VICE CHAIR MILLER: First, I would like to compliment the parties on their briefings. I think they were incredibly thorough and very helpful and brought to light all the legislative history with respect to at least the Zoning Commission's actions and the Zoning Administrator's interpretations and Corp Counsel's interpretations. So I think we're not looking at this in a vacuum though, I don't think that the BZA has ever actually adjudicated on it.

I think I would agree with my fellow Board Members who have just spoken. At first blush, it looked like exterior meant exposed to the outside, at least to me, and the top of this building certainly was and perhaps our inquiry could end there based on plain meaning of exterior. However, looking beyond that it seems that exterior walls is not defined in the Federal Height Act and it's not defined in our regulations. We look then to the legislative history, at least I did, and a long period in which the Zoning Administrators determined that that really applies to the streets under the

Federal Height Act.

So I think we have over 40 or 50 years of that interpretation. And I think that that interpretation is logical based on what has been said by my colleagues here that the Zoning Administrator does not necessarily look at that as a moment in time exterior, but by what is allowed as a matter-of-right on the sides.

So I think that's very logical and I also looked to the legislative history to see could I find any guidance from the Zoning Commission. And I think that there is some guidance to be found in the WTA's GWU case, which is Zoning Commission Order No. 749-A and I'm very aware that that did go to court and then was remanded and disappeared. But during those proceedings I found it persuasive that the Zoning Commission said that they concurred with the Zoning Administrator that the project, as modified, did not violate the Height of Buildings Act of 1910 and they were relying on a letter from the Zoning Administrator that said that the set-back requirements of roof structure under provisions of the Act of 1910 have always been interpreted by the Zoning Division as being required to set-back from the property line which adjoins the street.

CHAIRPERSON GRIFFIS: Can I just interrupt and cite that?

VICE CHAIR MILLER: Yes.

CHAIRPERSON GRIFFIS: Because I think that is incredibly controlling and it was from Joseph Bottner. Is that correct, 1993?

VICE CHAIR MILLER: Yes.

CHAIRPERSON GRIFFIS: November 24.

VICE CHAIR MILLER: I think it might be 1993.

CHAIRPERSON GRIFFIS: 1993.

VICE CHAIR MILLER: November 24, 1993.

CHAIRPERSON GRIFFIS: I'm looking at '93 and saying '94. Right, 1993.

VICE CHAIR MILLER: And that's Exhibit 92, Case No. 93-9C, which is the Zoning Commission case. So it just appears to me that that's the way the Zoning Commission has interpreted it and that there is this whole history behind that and I don't see a good reason at this point to deviate from that. And it doesn't go against what the Height Act was protecting, which is it seems to be the light and air. So those are my initial comments.

CHAIRPERSON GRIFFIS: Good. Thank you. Others?

BOARD MEMBER ETHERLY: Mr. Chair, I'm in agreement with everything that has been said. There is not a need to kind of plow ground that has already been tilled. I think both you, my colleagues, Mrs. Miller and Mr. Parsons, have all kind of hit on, I think, the point that has been a point of struggle throughout this case. And Mr. Parsons, I think, hit it right on the head in that there may indeed be something that feels untoward or out of place about this structure, but our struggle often times is to ensure that those feelings are processed through the prism of the Zoning Regulations and the Height Act, which are at issue here.

I think the interpretation, I think, result is a right one. All along as we have entered into this phase of this particular case and this experience with this particular property, it has just been a struggle for me. I was very concerned about kind of moving down this road, reviving it, if you will, but I think we've come to the right direction. The thing that I've always struggled with and I believe I said as much on the record earlier was trying to gather an understanding of what we're talking about.

Because I think where we are is where

we're at. We're at a nexus between trying to interpret what the law, what the regulations, what the Height Act requires and what is happening in terms of practical application of the regs. And what I struggled with was understanding what the practical application was. I think as Mrs. Miller alluded to, the briefing on both sides, especially as we came down the home stretch here, was absolutely top flight and helped to illuminate for me what I think is the practical import of the question that is in front of us.

What I wanted to ask as a way of inviting some conversation with particular attention to the briefing that has been offered by KCA, because I think that briefing raised some very important questions, some very important points, and I think it would be helpful for the Board to speak a little bit to what I think is kind of the underlying question here regarding what type of situation would result, in the minds of any of my colleagues, and once again I'm inviting this not because I am on the fence here, I agree with the points that have been made and I'm ready to go forward, but I think it's important to address some of the questions that have been raised by KCA.

In particular, a portion of their briefing, once again which was very solid, at Exhibit B illuminated a number of buildings where KCA endeavored to point out what it believed or what it interpreted to be perhaps different outcomes, which refuted the point that it alleged was being raised, refuted the point that it believed was being raised by Montrose and that is well, if you do this, there are a number of other buildings that wouldn't get built or couldn't get built or there are a number of other buildings which would all of a sudden become noncompliant.

And I think it's an important question to raise, so I wanted to invite a little bit of discussion from my colleagues or perhaps from the Chair with respect to what would necessarily change, in your mind, the outcome here regarding this property? Say, for example, if the property were adjacent to an alley or adjacent to a street on the relevant side, would there be a different outcome or would there be a different requirement, in your mind, as relates to the set-back requirement?

CHAIRPERSON GRIFFIS: Good. And I appreciate that. It actually goes directly to a point that I think we need to assess, because as

you've indicated that Montrose has submitted documentation and we did open up the question, although I think we're all very well-aware of how far we can go into what the impact will be. But we opened the question and invited it and actually from also the ANC in their submission, which is Exhibit 89, Tab B, they provided also an aerial photograph of numerous buildings that they said, in fact, supported their claim that penthouses are always set-back.

I'll get perhaps a little indirectly, because I want to assess this looking at what has happened and going to Ms. Miller's discussion, if you look at the photograph by the ANC, what is fascinating, to me, is in the largest and at the lowest point of the photograph, which is the largest, most close buildings, you see the first three buildings in there, I think are evidence of what our discussion is today.

You have penthouses that are flush to the party walls. And whether that is definitive or not, whether we have full documentation on it or not, it was informative to me to look at the fact of how this has impacted. Going directly to your question is well, you know, what's the difference? How could this have been different? And I would say this, our

Zoning Regulations are actually more restrictive in terms of the set-back than the Height of Buildings Act of 1910. And there are several aspects to that.

If you look at 411, we require more numerous things. The one that bring to mind is a single enclosure and single height. I mean, we talk about going further in terms of the design aspects of penthouses. In the same respects, in our regulations being more restrictive, we also allow for a relief. We allow a special exception to be applied for in order to get relief from those.

I would say that the Zoning Regulations require that penthouses be set-back from the exterior line of a building where it is exposed to an open area. So the difference would be if this had another alley, a public alley or if it was set on a side yard or perhaps, well, it would be a side yard, a rear yard would be taken into. So in an open area, and I think that's where our regulations go above what the requirements of the building Height Act is. And those are the elements that are also able to be granted relief if successfully argued before this Board.

BOARD MEMBER MANN: I would also add just in response to Mr. Etherly's question, perhaps

somewhat more theoretically, that if history is prolonged, this has simply not been an issue in residential neighborhoods, although hypothetically and speculatively this could become an issue. But it seems more on point with what, I believe, either Mr. Parsons or the Chairman said that in most of these residential neighborhoods the controlling aspect seems to be the actual underlying zoning. And perhaps that's the reason why we haven't come across this problem prior to this.

CHAIRPERSON GRIFFIS: Good point. Okay. Anything else, other issues? Then let's bring it up to fruition on this and I think if I can somewhat recap, it looks as though we should have a motion that we can make it, how do we make it? It appears that the Board's opinion is the fact that we have not found that this penthouse is in violation or that there was an error issued by the Zoning Administrator in granting the permit to build this penthouse.

But it then goes to the entire appeal and what is it that would maintain it or do we throw out the entire appeal and deny it? I think, as I recall and I know we've looked at this very limitedly, but in the discussions of the appeal, we had another element on the roof and I think that in my opinion,

and I obviously hope that it's correct, but I strongly feel that in our discussion deliberation that we were finding, and I certainly find, that it's reasonable for the Zoning Administrator to interpret permitting a guardrail on a compliant structure.

Meaning, the roof, if it was established, was compliant for the Height Act and also our regulation. A guardrail on top of that would be within the Zoning Administrator's purview to allow for that safety rail. That is, of course, not the case in this specific appeal, because this Board has found that the roof deck rises above what was allowable. Therefore, the connection of the rail is attendant to that of the deck, but not the rail itself.

You know, I can argue this even more if we need to, but it seems to be firm not only in the reading but in the absolute intent of the Height Act. I mean, if we really look, I know we have looked at substantially the Height Act, a lot of it, well, most of the attention was on the building itself, the structure and how that was to be regulated. And it really was an outgrowth of life safety issue and that of fire proofing. And to say that the Height Act somehow would preclude a life safety issue of a

guardrail seems to be absurd.

Clearly, words and details that were drafted in 1910 and adopted have gone through a little bit of interpretation. We have, obviously, interpreted stair enclosures and elevators and we have kind of moved away from water tanks on top of towers. We don't see a lot of cases for exceptions to those these days. My point being that things have to have some sort of life beyond the instant that they are written and there is a difference today than from 1910.

I think the guardrails reasonably fall within that interpretation from the Zoning Administrator and certainly the prescriptive nature of the Height Act. Ms. Miller?

VICE CHAIR MILLER: Mr. Chairman, it's my understanding that this reconsideration just goes to the question of the set-back of the penthouses and not to the roof deck and railings, and that we should just rule on the question of exterior walls and how that affects that one area in dispute in the appeal whether the Zoning Administrator made an error with respect to the set-back question.

CHAIRPERSON GRIFFIS: I tend to agree.

VICE CHAIR MILLER: Okay.

CHAIRPERSON GRIFFIS: But for clarification, what I have done is just lay out what I think is my clear intention, but what the entire appeal was as we have a piece of that. We now have action that's being asked of the Board and so in order to clarify that, what I'm saying is that we have not revisited nor therefore changed the aspect that the roof deck, that actual element, on that was found by this Board to not be compliant with the Height Act.

I was just clarifying the railing of that which is attached to it which, therefore, is part of that noncompliance, if that railing was, in fact, on the roof, which is found to be in compliance. It would be appropriate under the Height Act. Good. So let's move on then. Is there a motion? Would you like to make a motion? Anybody?

VICE CHAIR MILLER: Okay. I would move, well, I think we have already decided to reconsider the question of whether the Zoning Administrator erred. Okay. And in finding that the set-back was in compliance with the Height Act. Okay. So I would move, at this time, to deny that aspect of the appeal that alleges that the Zoning Administrator erred in his determination that the set-back of the penthouse

was in accordance with the Federal Height Act.

CHAIRPERSON GRIFFIS: Is there a second?

BOARD MEMBER MANN: Second.

CHAIRPERSON GRIFFIS: Thank you, Mr. Mann. Further discussion? Let me say two last very brief things, and I think it is appropriate to look at it as we have, and that is that there is one rule of application. And just to fill it out a little bit, I think it would be illogical for the Zoning Administrator to have to look at this and say well, you know, are there permits being pulled from the adjacent? Is there anticipation of or what is there exactly now?

But rather it needs to have one clear and distinct avenue for, frankly, administrative ease, but also administrative clarity. There needs to be one set of rules, and I think the rules which the Zoning Administrator had relied on was that of the legal potential. And I think that's appropriate.

And lastly, just to summarize I think what we have all touched on is that it's difficult to say for me, because it would be easier in some respects to come out and be popular and to take a route that was of ease with people that look at this and have interpreted not as we are being required to

decide this. And I think that's probably one of the most difficult things that we are faced with on this Board is how do you balance those aspects? We certainly listen and look, but we have to at the end of the day filter all and look at the base facts and that of what we have actually been charged and the responsibility and the jurisdiction that we have.

And so I guess it's one way of saying we may not be popular with an awful lot of people with this, but I think it's actually the correct and responsible way. And again, as I say, that's why we have been given this great honor to be able to serve in these types of capacities. So with that, I'll open it up to any others. We do have a motion before us and it has been seconded.

Then let me ask for all those in favor of the motion to signify by saying aye.

ALL: Aye.

CHAIRPERSON GRIFFIS: And opposed? Abstaining?

MR. MOY: Staff would record the vote as 5-0-0. This is on the motion of Ms. Miller, the Vice Chair, seconded by Mr. Mann, the motion to deny that part of the appeal that alleges that the ZA erred in the set-back penthouse requirements. Also in support

of the motion is Mr. Griffis, the Chair, Mr. Etherly and Mr. John Parsons.

CHAIRPERSON GRIFFIS: Thank you, Mr. Moy. Why don't we move on?

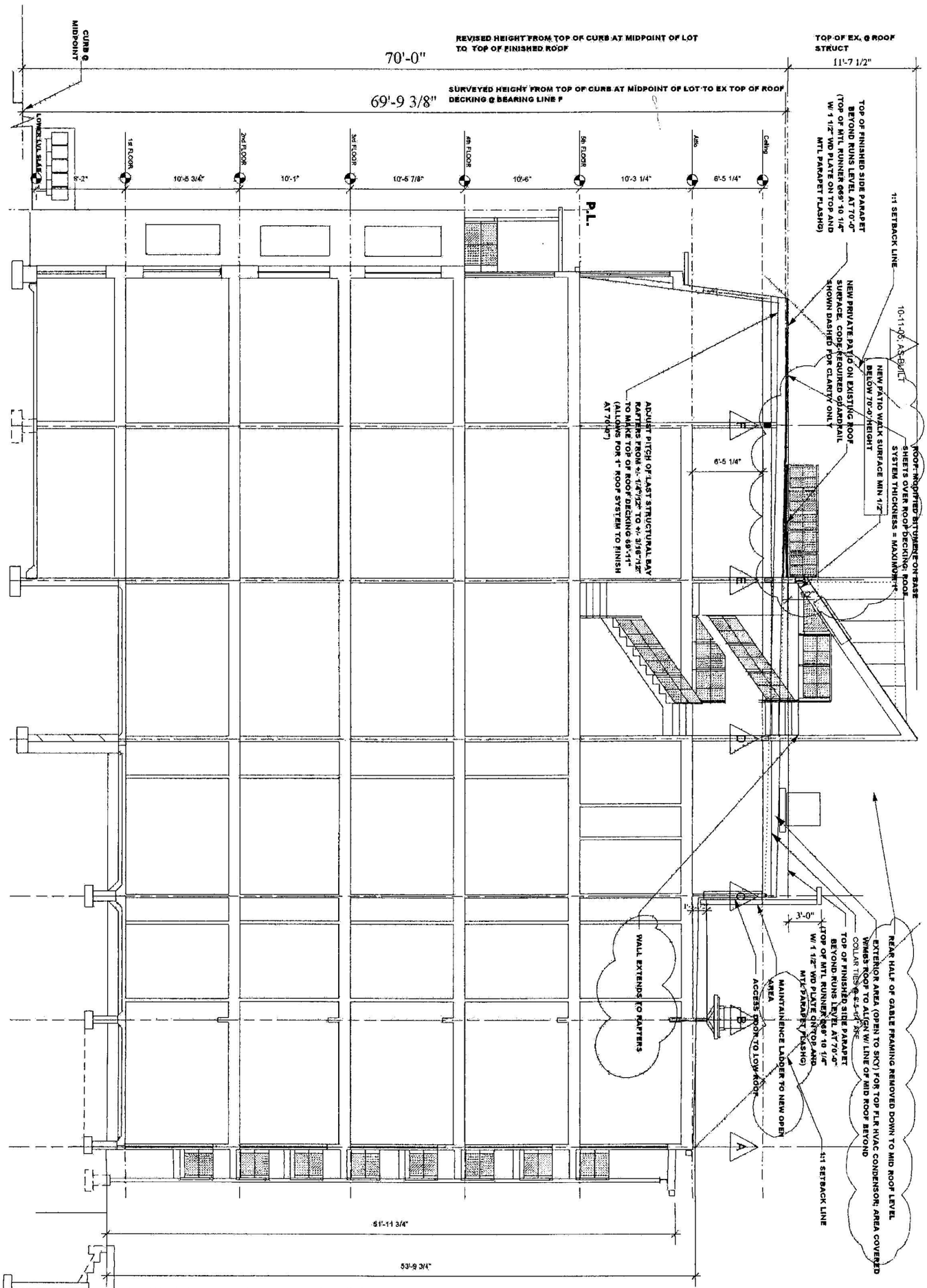
MR. MOY: The next case for decision is Application No. 17260 of 2224 R Street, LLC, pursuant to 11 DCMR 3104.1, for a special exception to establish a 10 room bed and breakfast as a home occupation under subsection 203.10, and modification under subsection 203.10(b), to allow 10 sleeping rooms subsection 203.8(c)(1), and to allow more than eight clients/customers on the premises in any one-hour period subsection 203.4(m), in the D/R-3 District at premises 2224 R Street, N.W., that's in Square 2512, Lot 13.

On January 4, 2005, the Board completed public testimony on the application and scheduled its decision on February 1, 2005. The Board requested or allowed the Embassy of Greece to submit to the record any relevant information from the U.S. Department of State concerning the issue of security. The Office of Zoning has received no filings.

As a preliminary matter, Mr. Chair, the Board has received from the applicant a letter requesting a waiver to accept into the record an

B

EXHIBIT B



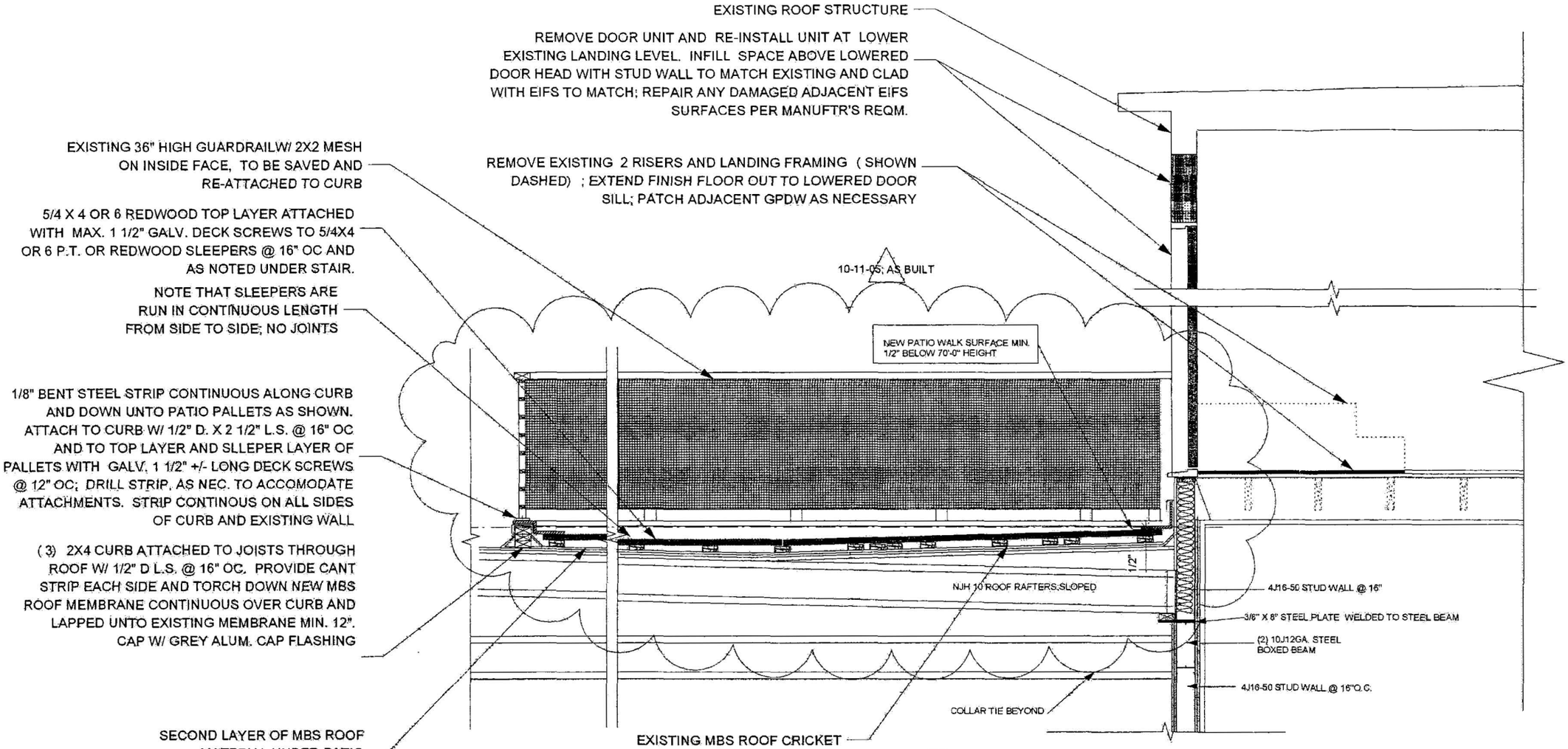
1819 BELMONT RD., NW 10-14-03

NORMAN SMITH ARCHITECTURE 202.462.5886

SCHEMATIC BUILDING SECTION

Scale: 1/8" = 1'-0"

SECTION SHOWING REVISED PARAPET AND BUILDING HEIGHT WITH ROOF STRUCTURE REVISED



1/A2 DETAIL @ REVISED ROOF PATIO

Scale: 1/2" = 1'-0"

A-2

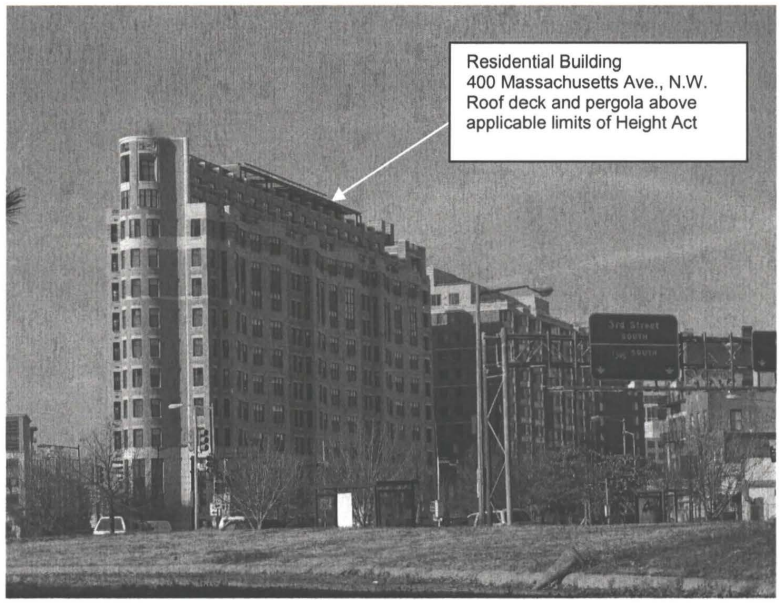
1819 BELMONT RD., N.W.
WASHINGTON, DC 20009

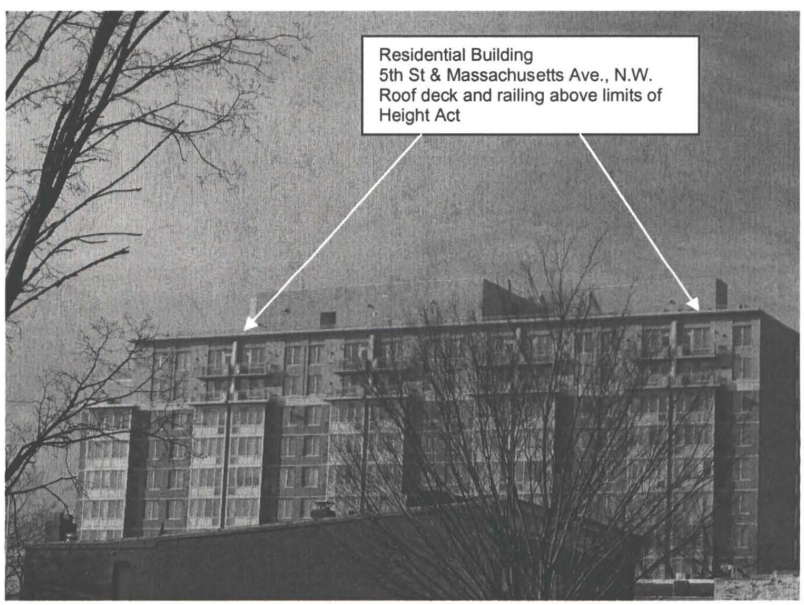
REVISION TO PERMIT (S) AS NOTED
02-16-05

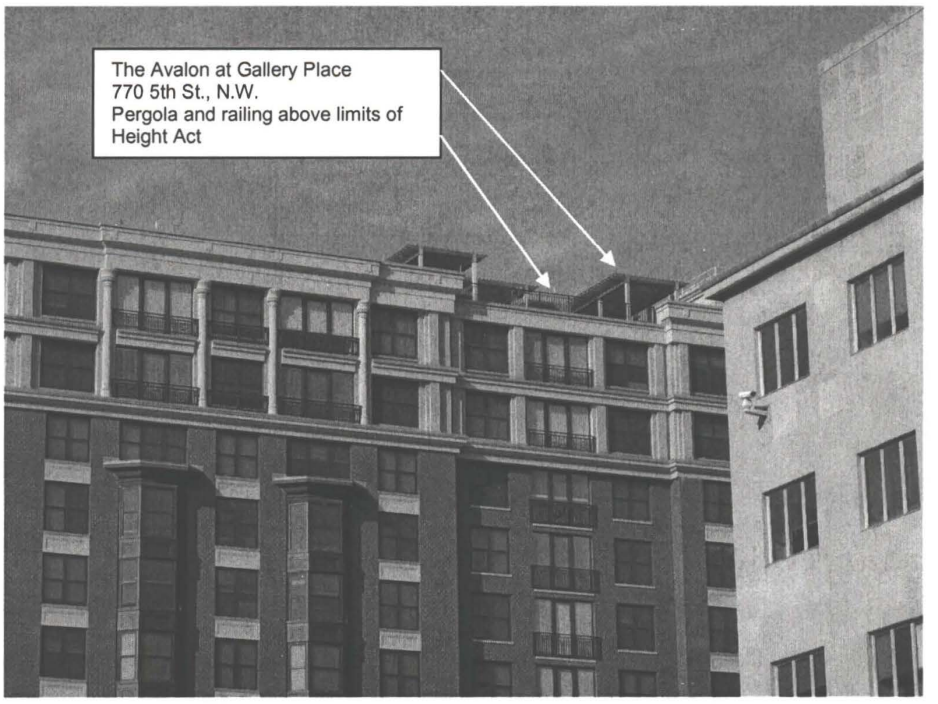
NORMAN SMITH ARCHITECTURE
202.462.5886

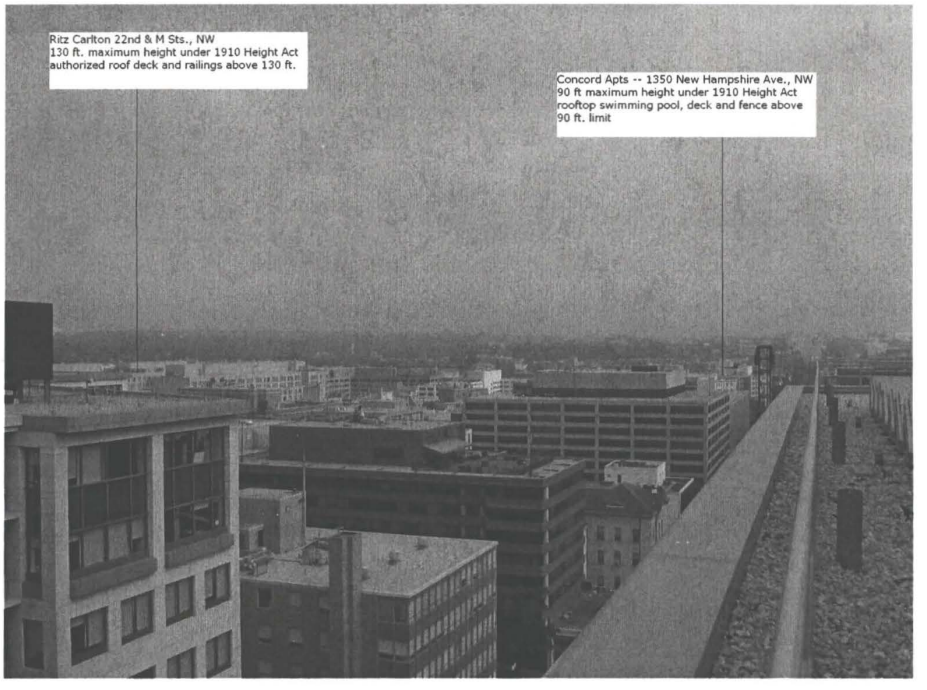
C

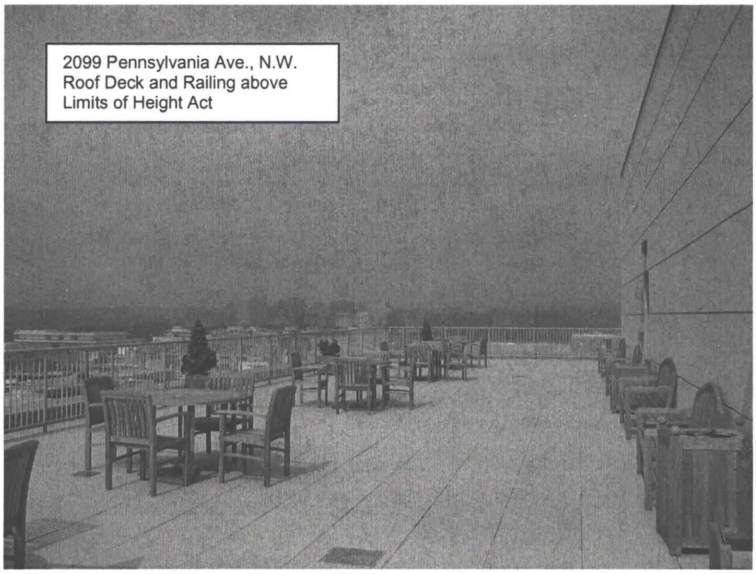
EXHIBIT C

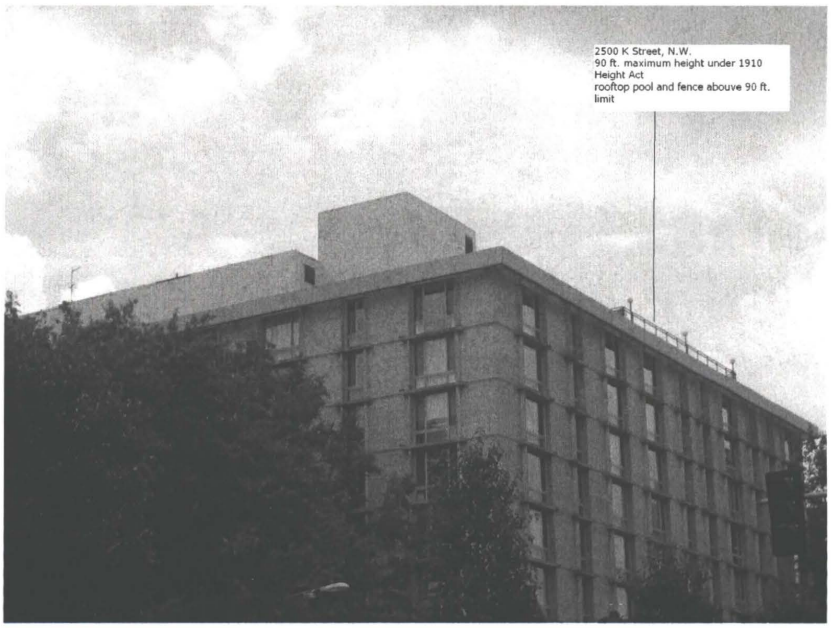

Residential Building
400 Massachusetts Ave., N.W.
Roof deck and pergola above
applicable limits of Height Act

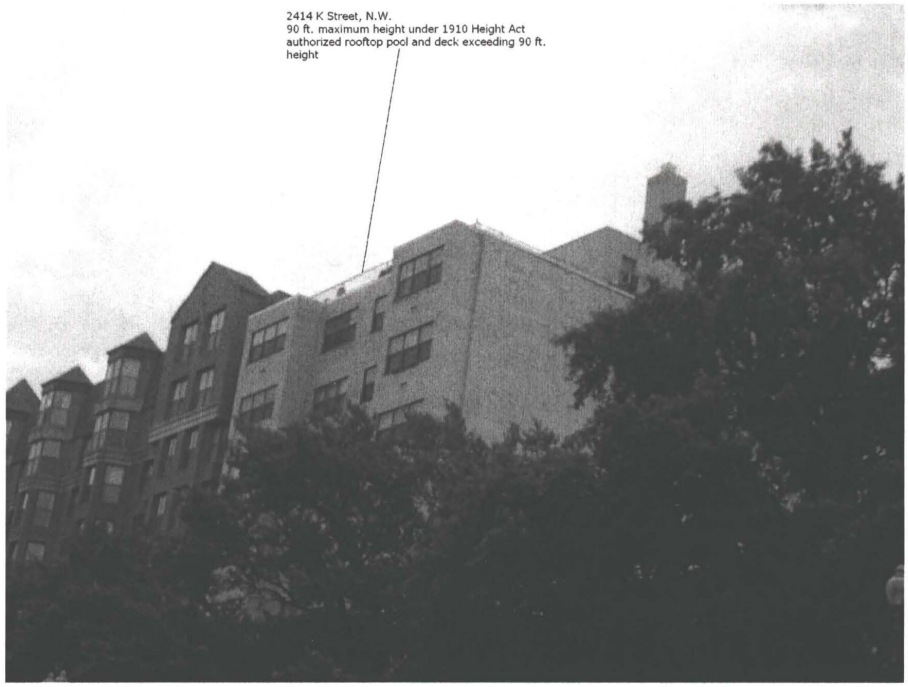

Residential Building
5th St & Massachusetts Ave., N.W.
Roof deck and railing above limits of
Height Act


The Avalon at Gallery Place
770 5th St., N.W.
Pergola and railing above limits of
Height Act


Ritz Carlton 22nd & M Sts., NW
130 ft. maximum height under 1910 Height Act
authorized roof deck and railings above 130 ft.
Concord Apts -- 1350 New Hampshire Ave., NW
90 ft maximum height under 1910 Height Act
rooftop swimming pool, deck and fence above
90 ft. limit


2099 Pennsylvania Ave., N.W.
Roof Deck and Railing above
Limits of Height Act


2500 K Street, N.W.
90 ft. maximum height under 1910
Height Act
rooftop pool and fence abouve 90 ft.
limit


2414 K Street, N.W.
90 ft. maximum height under 1910 Height Act
authorized rooftop pool and deck exceeding 90 ft.
height

3298417_v1