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)	)	

HEARING STATEMENT OF KALORAMA CITIZENS ASSOCIATION
October 18, 2005

The facts are these: Pursuant to earlier permits, Montrose LLC erected a rooftop structure near the front of the roof of the building at 1819 Belmont. That structure consisted of a floor surface resting on rafters resting on the roof surface, and a three-foot railing. Portions of this structure exceed the applicable 70-foot limit under the Height Act (although some portions apparently did not, because of the grade of the gently sloping roof from front to rear). Accordingly, on June 22,2004, in the earlier appeal involving this property (Appeal No. 17109 (" KCA 1"), the Board decided that the structure was in violation of the Height Act, since such structures are not included in the list of structures that may be erected on a roof in excess of the Height Act limits. Montrose subsequently obtained a permit to substitute a different structure in the same location, and did so. That structure consists of a floor surface resting on sleepers that in turn rest on the roof surface, and a three-foot railing. Some portions of this structure, like its predecessor, exceed the Height Act limit and, according to Montrose, some portions, some portions, including the floor surface, do not. KCA, supported by ANC 1C, is appealing that permit.

1. This case is governed exclusively by the Height Act; the Board has determined in KCA 1 that roof deck structures may not exceed the Height

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Act limits, and there is no basis in the Act for distinguishing the new roof deck structure from the structure in KCA 1

So: we have two structures, identical in the material respects just mentioned. The Board has determined Structure 1 to be in violation in the Height Act. So the burden is on the developer and DCRA to come up with some legal basis in the Height Act –for this is the governing law of the case – for concluding that Structure 2 is any different.

There is none.The Height Act makes no distinction between rooftop structures of which only some portion exceeds the height limit and those of which all portions exceed the limit. Subparagraph (c) of the Act (DC Code §6-601.05) states the basic prohibition on exceeding a stated height limit on residential streets. As an exception to the basic prohibition, Subparagraph (h) provides the exclusive list of types of structures that "may be erected to a greater height". It does not say that only the top six inches or six feet or 50% or some other portion may exceed the limit, and it is clear that a structure on the permitted list would be allowed if every part of it exceeded the limit. Conversely, a type of structure that extends above the limit but is *not* on the permitted list is not exempted simply because the bottom six inches or six feet or some other portion is *below* the limit – as appears to be the case with both Structure 1 and Structure 2 in the present case. The Congress could have built such refinements into the legislation had it wished, but it did not.

2 . In any event this rooftop structure is barred because it is constructed for human occupancy

Even if the Congress has drafted the Act in this way, Subparagraph (h) of the Height Act makes clear that structures that *are* on the permitted list may not be constructed or used for human occupancy, and it is beyond question that the structure now at issue is constructed and intended to be used for human occupancy. (Montrose suggests, absurdly, that even if the floor of the structure is for human occupancy, its railing is not. *Opposition of Intervenor Montrose LLC*, p. 8) This human occupancy provision is not a mere technical add-on: the Congressional drafters apparently realized that if they permitted rooftop structures to be used for living purposes rather than just to serve the functional needs of the building, the whole purpose of building height limits

would be compromised – as indeed seems to be the case, from some of Montrose's photographs.

Montrose's argument (at p. 7) that a roof deck constructed for use by the occupants of a building is nevertheless not "used for human occupancy" under the Height Act, on the basis of the 1953 Corporation Counsel opinion is a logical fallacy. Montrose bases this conclusion on a statement in that opinion that the Act "was intended to prevent the use of enclosed space above the height limit for residential, office or business purposes . . . .." This statement is hardly surprising, since the issue addressed in the opinion concerned the permissible uses only of enclosed space, namely, rooftop penthouses. But this statement does not imply that only enclosed space is barred. Neither the opinion nor the Act itself it any way implies, let alone asserts, that the Height Act *permits* human occupancy of rooftop structures that are *not* enclosed. The structure at issue here was constructed for human occupancy within the meaning of the Act.

3. There is no string of precedents that roof deck railings may exceed the Height Act limits; the Board has already rejected the argument that the mere existence of non-complying buildings can constitute legal precedent

There being no support in the language of the Act itself, Montrose presents a list of existing buildings that, it says, have roof decks and railings exceeding the applicable Height Act limit. This may well be true, for as we have pointed out in the earlier appeal, unfortunately it appears that, in way or another, over the years developers have been able to put up a number of buildings, including large commercial projects, in violation of various provisions of the Height Act. What is not true is that the mere fact of the existence of these buildings can, by some sort of legal alchemy, be transmuted into interpretations of the Height Act constituting legal precedent. The Board has already rejected this very argument in KCA I, in finding that the structure in that case violated the Height Act. Montrose would have us believe that that even if, as the Board concluded, the existence of these buildings constitutes no precedent under the Height Act for allowing the *floor* of the structure to exceed the height limit, maybe it somehow is a precedent for allowing its railing alone. But as court decisions have made clear, the

existence of these buildings is without value or effect as legal precedent for allowing roof deck structures in whole or in part or for any other purpose. To constitute precedent, there must be a decision articulated by an authorized tribunal on an issue raised before it and considered by it. In place of such decisions, Montrose offers photographs of the buildings. The reason why no accompanying BZA or Zoning Commission proceedings are cited would appear to be that, for those projects as to which such proceedings exist, the orders contain no mention of the Height Act, or in any event give no indication that the issue of the lawfulness of the railing exceeding the Height Act was presented to, raised by, or considered by the Board or Commission. That is certainly the case for the one building for which we have thus far been able to locate a BZA order – No.16881, June 24, 2002, relating to the building at 400 Massachusetts Avenue, N.W.

Montrose's argument in effect is this: in the case of these buildings, there must have been plans indicating a railing that in fact would exceed the height limit; therefore the Board must be assumed to have been, however unwittingly, interpreting the Height Act to allow the railing in giving approval to the overall project. This simply is not the way legal precedent is made in our system. 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. Again, 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.

Unable to present any BZA decision that the Height Act allows railings to exceed the height limit, Montrose asserts that at least the Zoning Administrator (at p. 5) has had "longstanding interpretation" to that effect and "has consistently defended it". *Opposition*, p. 5. But we have before us no record of any case in which the question has even been posed to or by the Zoning Administrator, let alone one in which he or she was required to defend a position on it. The Zoning Administrator cannot now retroactively infer such determinations by pointing to the existence of non-complying buildings. If anything, the evidence indicates a pattern in more recent years of paying no attention to the Height Act unless the issue is so obvious as to be unavoidable, in the permitting process as well as BZA proceedings:

- the plans on the basis of which the presents permit was issued do not disclose the elevation of any portion of the structure, nor does the record of the permit give any indication that either the elevation of the structure or its consistency with the Height Act was considered in approving the permit;
- the Board will recall that in the approval of the original permits in KCA I a former Zoning Administrator ignored the Height Act altogether;
- even after the decisions on June 22, 2004 in KCA 1 a case (No.17109, July 14, 2004) was presented to the Board by counsel in the present case in which the Height Act issue was not raised or even mentioned;
- as just noted, in BZA proceedings regarding the buildings listed by Montrose, there is apparently no mention of the very issue in support of which this list is adduced.

It is in this context that the Board, which after all has a custodial responsibility for the proper application of the Height Act as well as the Zoning Regulations, should evaluate these claims to be able to discover so-called "longstanding interpretations" or "precedents" on Height Act issues.

4. Since there is no collection of precedents that railings may exceed the Height Act, the question of whether *stare decisis* requires the Board to apply a "new" position only prospectively does not arise; in any event, the *Smith* case does not hold that Board would be so required, and the Board would not be.

Montrose then argues that "even if the Board in the present case determines that this consistent, historical interpretation is in error," *stare decisis* requires the Board to apply its new interpretation only prospectively, citing *Smith v. District of Columbia Board of Zoning Adjustment*, 342 A.2d 356 (D.C. 1975). There are three things wrong with this argument. *First*, as just pointed out, there *is* no longstanding historical interpretation or string of BZA decisions constituting precedent for the proposition that railings are exempt from Height Act limits, and observing after the fact that some developers have managed to put up some buildings without regard to Height Act limitations create one. So the principle of *stare decisis* does not come into play. Secondly, even if there were longstanding precedent, the *Smith* case does not stand for the proposition Montrose cites it for – that a contrary rule must be applied only prospectively. This was a case in which a homeowner *asserted* that proposition; the Board failed to consider it; and the Court held merely that the Board *should* have considered it – noting, however, that the Board was not "bound for all time by its prior decisions". Barring some very recent decision doing so, in three decades, the *Smith* case has never been cited for the proposition attributed to it by Montrose. *Finally*, the Court of Appeals has repeatedly held that an agency may depart from prior interpretations so long as it presents a reasoned explanation for the change. *Springer v. District of Columbia Dep't of Transportation*, 743 A.2d 1213, 1221-22 (D.C. 1999), and cases cited therein.

5. The Height Act does not include safety devices in the list of structures that may exceed the Height Act, and the Board has no authority to legislate new rules implementing such a policy

Finally, there is the argument that since the floor of the new structure is below 70 feet in elevation, the Board should simply pay no attention to the portions of the

structure that exceed the Height Limit and allow the whole structure to remain, in the interest of safety -- particularly since under the Construction Codes a roof deck cannot be built without a railing. If the Board were the legislature, perhaps it might want to enact new rules to this effect. Not being the legislature, however, the Board would have no legal basis for doing so: the argument that it should do so is based purely on policy, not law. It has even been suggested -- as it happens by the Chairman, at a hearing on KCA 1 on February 1, 2005 -- that, since the Height Act was designed to address safety concerns – namely, fire safety – it would be "absurd" to invoke the Height Act as a bar to a safety feature such as a railing. (Let me note that, contrary to Montrose's assertion at *Opposition*, p.2, "the Board" did not "clarify[y] its previous oral decision on the height of the roof deck and railing issues". What did happen was that a member of the Board, the Chairman, volunteered an opinion on a hypothetical issue not before the Board and on which the parties had had no opportunity to be heard, and the Board then proceeded on with the issues that were before it.) Nonetheless, the suggestion was made that the safety concerns addressed by the Height Act – exclulsively concerns about fire safety -- prevent subjecting any safety feature to the Act's height lilmits . The principles of statutory interpretation compel precisely the opposite conclusion. The fact that the drafters were keenly cognizant of safety concerns, that in the Act they did enumerate exceptions to the Act's height limits, but that they did not include any safety devices or structures in that enumeration (which they could readily have done by simply extending the list), makes it even clearer that they had no intention of permitting any exceptions based on safety considerations. And at the same time they made *explicit* their intention not to permit exceptions for rooftop structures for human occupancy.

So: the Height Act makes clear that a 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, and is prohibited in any event if it is for human occupancy. The Board's authority is limited to applying this existing law and existing 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.

Conclusion: If property owners wish to have rooftop recreational facilities, they must design their buildings so as to be able to do it lawfully; the permit for the present structure should be revoked.

Thus, the existing law is: if you can't build a roof deck *without* a railing without violating the Construction Code, don't build it; and if you can't put up a roof deck *with* a railing without violating the Height Act, likewise don't build it – or else lower your roof.This points to what is the real issue in this case: whether developers who want to install these wonderful rooftop recreational facilities—facilities that are officially sanctioned in some zoning districts for all residents – but who are unwilling to give up three or four feet of height in order to do it lawfully, will be required to do so; or whether, as with the terribly unfortunate project in this case, they will be allowed to cram every possible foot of marketably occupiable space onto the lot up to the height limit and then cram more occupiable space onto the roof. The permit in the present case purported to authohrize a structure that violates the Height Act; it should be revoked, and the structure removed.