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FILE NO: 64929.000002

June 2, 2004

BY HAND

Mr. Geoff Griffis
Chair, Board of Zoning Adjustment
441 - 4th Street, NW, Room 210
Washington, DC 20001

Re: BZA Case No. 17085
Appeal of Larry and Louise Smith and
Mary Ann Snow and James Marsh
206-210 D Street, SE
Square 763, Lots 26-28

Dear Chairperson Griffis and Fellow Board Members:

Pursuant to the Board's request on May 18, 2004, for a brief on the timeliness of the Neighbors' Side Yard Appeal in this case, please see the attached.

Sincerely,

Richard L. Aguglia

Richard L. Aguglia
RLA/csg

Attachment

cc: Richard Nettler, Esq. (by hand)
Jeannine Rustad, Esq. (by hand)

BZA
Case No. 17085
Exhibit No. 51

Board of Zoning Adjustment
District of Columbia
CASE NO. 17085
EXHIBIT NO. 51

By Mail:

Office of Planning
c/o Jennifer Steingasser and
Joel Lawson

ANC 6B
c/o Julie Olson and
David Sheldon, Esq.

DCRA General Counsel's Office
c/o Lisa Bell, Esq.

Chris Doerfler
Alger Stoneburner
Folger Park North, LLC

Sherry Glazer, Esq.
Office of Corporation Counsel

BRIEF OF INTERVENOR
FOLGER PARK NORTH, LLC (FOLGER PARK)
IN SUPPORT OF THE PROPOSITION THAT
THE NEIGHBORS' NEW SIDE YARD APPEAL SHOULD BE DISMISSED

Counsel for Folger Park submits the following for the proposition that the Neighbors' New Side Yard Appeal in BZA Case 17085 should be dismissed:

1. The Neighbors' September 2003 appeal was itself untimely and subsequently moot by the actions of DCRA. Accordingly, the new side yard appeal made by the Neighbors in May 2004 is also untimely and moot.

2. Assuming the Neighbors September 2003 Appeal is timely, the new side yard Appeal made in May 2004 is not timely as it was filed beyond the 60 day appeal period which is jurisdictional, as well as beyond the 10 day under roof rule.

3. Under the circumstances of this case, the Neighbors are estopped from bringing the new side yard appeal.

PERTINENT FACTS

DATE:

June, 2002:	1.	Folger Park North, LLC (Folger Park) purchased subject property at 206-210 D Street, S.E. for development of 3 flats/row houses on 3 lots (Lots 26-28).
Summer, 2002:	2.	Folger Park posted a sign on the property depicting the construction of 3 flats/row houses on the subject property, without any side yard.
February 11, 2003:	3.	At the ANC meeting to discuss the HPRB design construction of the 3 new flats/row houses, Folger Park representatives gave the Neighbors a complete set of plans which included a site plan indicating that the 3 flats would be built on the existing 3 lots with no side yard. There is no dispute as to this fact.[1] There were no lot "fill" changes in these plans from that ANC meeting to the granting of building permits for the foundations in May of 2003 and the commencement of construction in June of 2003.

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[1] "Mr. Marsh [one of the Neighbors]: In February of 2003, as mentioned, my wife and I attended our local ANC meeting at which Mr. Stoneburner displayed some drawings of the buildings planned for the site. At the end of the meeting he gave us a copy of one set of the drawings." BZA Case No. 17108, Transcript of February 24, 2004 at 238.

May 23, 2003:	4.	DCRA issues foundation building permits to Folger Park for the 3 flats/row houses to be built on the subject property without side yards.
Mid June, 2003:	5.	Construction of the foundations pursuant to the permits begins.
End of July/ early August, 2003:	6.	DCRA issues first stop work order to Folger Park based upon false accusations from Neighbors that work had commenced without a permit.
End of July/ early August, 2003:	7.	DCRA rescinds stop work order since Folger Park had requisite permits.
August 25, 2003:	8.	DCRA issues balance of construction permits to Folger Park to complete construction of 3 flats/row houses on 3 lots with no side yards.
September 12, 2003:	9.	Neighbors file an appeal of DCRA's issuance of permits to Folger Park with BZA based on lack of alleged lot size and lot width but not for alleged lack of side yard for the corner/end lots, Lots 26 and 28.
September 15, 2003:	10.	DCRA issues second stop work order.
September 16, 2003:	11.	Folger Park files an appeal of the second stop work order with DCRA.
September 30, 2003:	12.	DCRA advises Folger Park representatives by letter that their appeal is denied and that they need to seek a lot size and lot width variance from the BZA.
October, 2003:	13.	DCRA proposes an indemnity agreement to Folger Park to continue construction on the subject property pending an application to the BZA for lot size and width variances.
November 7, 2003:	14.	Folger Park files an application with the BZA for a variance from the lot size and width requirements of the zoning regulations.
End of January, 2004:	15.	The 3 flats/row houses are under roof. See attached affidavit of Alger Stoneburner. (Exhibit A.)
January 27, 2004:	16.	The BZA denies the Neighbors' request to consolidate their Appeal and Folger Park's Application for a variance, indicating that the cases will be heard separately, the first hearing is on Folger Park's Application, Case No. 17108, and the second on the Neighbors' Appeal, Case No. 17085.

April 6, 2004: 17. BZA grants Folger Park's request for lot size and lot width variances in Case No. 17108.

May 6, 2004: 18. In Appeal No. 17085, the Neighbors raise for the first time in that separate appeal the alleged need for a side yard variance, some 9 months after filing their initial Appeal in September, 2003, (without service to any of the other parties involved) and almost one year after the foundation permits which prescribed lot "fill" were issued. The side yard "amendment" is also some 3 months after the property is under roof, and less than 14 days from the hearing date of May 18, as required by the Board's rules.

May 18, 2004: 19. The Neighbors drop all objections raised in their initial appeal filed in September, seeking relief only on the so-called new side yard objection filed on May 6, 2004. Folger Park requested that the Board dismiss the new side yard objection as untimely and moot over the Neighbors' objection. The Board asks the parties to brief the issue of timeliness of the Neighbors' May 2004 side yard objection.

ARGUMENTS

Since the September 2003 Appeal is untimely, the amendment is untimely

The Board's rules (amended in February 2003) provide for a 60 day appeal period from a decision of DCRA implementing the zoning regulations. The period to appeal starts when the Neighbors knew or should have reasonably known of the decision complained of. § 3112.2. It is undisputed that the Neighbors knew of Folger Park's plans to construct 3 flats on 3 lots with no side yard: (1) in the summer of 2002, when the sign depicting the 3 flats/row houses was posted on the property, (2) when they were given the actual plans after the ANC meeting in February of 2003 showing no side yard, and (3) again when the foundations were being constructed in mid-June 2003, with no evidence of a side yard. As such, not only is the new side yard appeal untimely, but so is the original Appeal filed on September 12, 2003, more than 60 days after the issuance of the foundation permits on May 23, 2003. Accordingly, the Board does not need to reach the question as to whether the Neighbors can legally amend the September 2003 Appeal by the May 2004 filing.

The court case directly on point supporting dismissal as untimely is *Woodley Park Comm. Ass'n v. D.C.*, 490 A.2d 628 (D.C. 1985) attached for convenience as Exhibit B. In that case, plans as to issues of height, setback and use were presented to the neighbors regarding the proposed hotel construction in December 1976 and January 1977. The permit was issued in October 1978 with no substantial change in the original plans regarding those issues. The neighbors filed an appeal in October 1979, one year later, after construction work on the hotel was commenced and substantially completed. The court held that as to these issues, the filing of the appeal was not

reasonable. The same is true in this case where the Neighbors knew in mid June of 2003 when construction commenced, that there were no side yards.[2]

Assuming the September 2003 Appeal is timely, the amendment is not timely

Assuming the Board finds that the September Appeal was timely, it must be noted that the 60 day time limit under § 3112.2 to appeal is jurisdictional. *See Waste Mgt. of Md. v. DC BZA*, 775 A.2d 1117 (D.C. 2001), attached for convenience as Exhibit C.

In that case, the court stated that if an appeal was not timely filed, this Board was without power to consider it. 775 A.2d 1121. The court also noted the rationale behind such a rule:

> "A rule designating a period after which the order, requirement, decision, or determination of the administrative officer is no longer subject to review is a salutary one. It provides a period after which the permittee knows that he may proceed safely in accordance with the permit." 775 A.2d 1122, fn. 6.

See also BZA Appeal No. 16990 of American Towers, Inc. where the Board indicated that it lacks the power to consider an untimely appeal.

The same is true here. If the Board grants such an amendment beyond the 60 days allowed by rule, it will lead to an endless stream of new appeals disguised as amendments to the original appeal. This would defeat the purpose of having an appeal deadline and place a permittee at a disadvantage as here, where 9 months after the original appeal, an alleged "amendment" is made, and the flats are near substantial completion. This new and late filing also prejudices the Applicant/permittee, as well as the Board, since if the side yard issue had been raised in September of 2003, it could have been heard as part of Applicant's variance case.

The purpose of the Board's amended rules of practice and procedure is to "effectuate improvements in . . . BZA procedures in the interests of effective and timely hearings and decisions." See Exhibit D. The Neighbors' request to amend an appeal filed 9 months earlier defeats that purpose. Dismissal of this last objection is especially warranted in light of the fact that the Neighbors have withdrawn all previous objections in the September 2003 Appeal.

Nevertheless, since the appeal period is jurisdictional, the Neighbors have no legal authority to amend their Appeal, if indeed filed timely, after the 60 day period has run. In analogous case law, the U.S. Supreme Court held that an appeal from the District Court to the U.S. Court of Appeals under Rule 4 of the Federal Rules of Appellate Procedure, must be made within the time periods set by that rule (60 days for an agency appeal and 30 days for a lower court appeal) since compliance with the rule was jurisdictional. In the *Torres* case, the petitioner's name was not included with the list of names that were part of the timely appeal, and his attempt to add his name to the list beyond the appeal period was denied. *See Torres v. Oakland Scavenger Co.*

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[2] "Mr. Marsh: When excavation of the site began in late June and early July, we watched obviously with careful interest . . ." *Id.*, Transcript at 239.

case, 487 U.S. 312 (1988) attached for convenience, as Exhibit E. By analogy, the Neighbors' attempt to add a new grounds for appeal must be similarly denied.

The Board should also note that the amendment is filed some 3 months after the property is under roof, contrary to § 3112.2(b). See Exhibit A.

In conclusion, since the original appeal is late, the amendment is also untimely. In the alternative, the amendment must be filed within the 60 day appeal period because that is a jurisdictional requirement.

We note that the Neighbors' reliance on the *Sisson* case is misplaced, as the facts there are inapposite. *See Sisson v. DCBZA*, 805 A.2d 964 (D.C. 2002) attached for convenience as Exhibit F. *Sisson* disguised the plans for development, done in stages and often without a permit. In this case, the Neighbors had full knowledge of the site plans no later than February of 2003. There was no change in those plans as they related to lack of a side yard when construction commenced in mid June 2003 pursuant to the May 2003 permits.

Estoppel

Because the Neighbors knew for more than one year before filing the new side yard appeal that the Applicant would not include side yards in its development and the three flats/row houses are now substantially complete, the Neighbors are estopped from filing such an appeal.

In addition, had the Neighbors raised the new side yard issue in September of 2003 with DCRA or the Board, the Applicant would have had the option to include a request for a side yard variance in its Application in November of 2003, heard by the Board in February of 2004.[3] For all the reasons that the Board granted the lot size and lot width variances (seven approvals by DCRA officials over 13 months that the project was matter of right), it would have granted the side yard appeal if necessary.

The elements of estoppel set forth in the Woodley Park case cited above are present in this case. Folger Park acted in good faith, on affirmative acts of DCRA, made expensive and permanent improvements in reliance thereon, and the equities strongly favor Folger Park. See 490 A.2d at 639, Exhibit B hereto.

The Project Currently Provides Sufficient Light and Air and Privacy

We also draw to the Board's attention that the reasons for a side yard requirement – light and air and privacy – are achieved in this project. See BZA Appeal No. 16811 of Pritchard at page 10, purpose of side yard requirements. The Neighbors' new side yard appeal relates only to Lots 26 and 28 as Lot 27 is an interior lot with common division walls on each side. Lot 28 abuts an

[3] The zoning regulations are in apparent conflict on this point and DCRA took a position adverse to the Board in the Pritchard case on the need for a side yard in a similar situation. OP's report in this case indicated that the issue was confusing and that a possible variance for the side yard would be supportable due to hardship from the small lot sizes. See OP Report of February 17, 2004 at 1, 2 (Paragraph III, Executive Summary).

alley which is 15 feet in width. Lot 26 abuts a four foot right of way and is about another 26 feet from the Neighbors' houses. See pictures attached as Exhibit G showing the light, air and privacy provided by the subject and samples of similar neighboring properties. As such, the practical reason for needing a side yard for either lot has never been an issue. See BZA Appeal Case 14553 (May 4, 1988 at 4) where the Board found that a distance of 12 feet between structures will provide adequate light and air to both dwellings.

Mootness

Finally, once DCRA granted the Neighbors' Appeal by issuing the second stop work order, and required the Applicant to file for variances, the Appeal was moot. Thus, an amendment to a moot appeal is void. Compare BZA Case No. 16735, Appeal of Comcast Cablevision where Director Kress indicated there is no need to appeal if DCRA has acknowledged that the permit was issued incorrectly. October 9, 2001, Tr. at 35.

Conclusion

For these reasons, the Neighbors' new side yard appeal should be dismissed.

Respectfully submitted,

Hunton & Williams

By: Richard L. Aguglia
Richard L. Aguglia

A

AFFIDAVIT OF ALGER E. STONEBURNER

First being duly sworn under oath, affiant states the following:

1. My name is Alger E. Stoneburner and I am a citizen of the U.S. of sound mind and body over the age of 21.

2. I am a principal in Capitol City Development, LLC, which in turn, is a member of Folger Park North, LLC. Folger Park North, LLC is the developer of 3 flats on real property known as 206-208-210 D Street, S.E., Washington, D.C.

3. To the best of my information and belief, and after consultation with my builder at the subject site, the 3 flats were under roof, that is, the main roof structure was in place on all 3 units, by the end of January, 2004.

Further affiant sayeth not.

Alger Stoneburner

Subscribed to and sworn before me this 27th day of May, 2004.

Notary Public, D.C.

My Commission expires: 4.30.07

B

to create an easement in favor of Pearce. This was based on three factors. First, the 1913 deed is very specific in describing the easement and its beneficiaries. Second, the boundaries of the easement are clearly defined and easily found on the property. Third, the walkway had been used by Pearce and her predecessors for over 180 years. *Pearce v. Katkish*, 112 Wash.D.L. Rptr. 433, 436 (March 5, 1984).

Katkish argues that the words "subject to" are words of qualification and thus are insufficient to create an easement. For support he points us to *Procacci v. Zacco*, 324 So.2d 180 (Fla.Dist.Ct.App.1976). The trial judge found that *Procacci* was distinguishable.

[1, 2] There are no particular words of art necessary to create an easement by express grant. 3 *Powell on Real Property* ¶ 407 (1984). Therefore, we must determine the meaning of the deed by looking at its plain language and the surrounding circumstances. *See* 26 C.J.S. *Deeds* § 86 (1956). Looking at the language and the circumstances, we agree with the trial judge that the important factors are: (1) the specificity of the intent of the deed to create an easement for the benefit of the Pearce property; (2) the boundaries of the easement were spelled out in detail and easily found, and (3) the actions of the parties in interest prior to and subsequent to the conveyance. We agree that the 1913 deed created an easement in favor of the Pearce property. *See Jakobson v. Chestnut Hill*, 106 Misc.2d 918, 436 N.Y.S.2d 806 (1981).

[3] We also reject the argument that a grantor cannot, by one and the same conveyance, grant a fee simple estate to one party while reserving an easement to a third person. *See Baltic Investment Co. v. Perkins*, 154 U.S.App.D.C. 380, 475 F.2d 964 (1973). We adopt what we believe to be the more enlightened view that "by a single instrument of conveyance, there may be created an estate in land in one person and an easement in another." *Restatement of Property* § 472 comment b (1944). *See also Willard v. First Church of Christ, Scientist*, 7 Cal.3d 473, 476, 498 P.2d 987, 989, 102 Cal.Rptr. 739, 741 (1972) (rejecting the old rule as "clearly an inapposite feudal shackle"); *Townsend v. Cable*, 378 S.W.2d 806, 808 (Ky.1964) ("We have no hesitancy in abandoning this archaic and technical rule. It is entirely inconsistent with the basic principle followed in the construction of deeds, which is to determine the intention of the grantor."); and *Garza v. Grayson*, 255 Or. 413, 467 P.2d 960, 961 (1970) (rejecting the old rule as being "narrow and highly technical").*

Affirmed.



WOODLEY PARK COMMUNITY ASSOCIATION, Petitioner,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, Respondent.

Washington-Sheraton Corporation, Intervenor.

WASHINGTON-SHERATON CORPORATION, Petitioner,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, Respondent.

Nos. 83-1276, 84-10.

District of Columbia Court of Appeals.
Argued Dec. 12, 1984.
Decided April 11, 1985.

Community group appealed a permit granted to hotel developer for additional

* We find no merit to Katkish's contention that there were material facts still in dispute. *See Nader v. de Toledano*, 408 A.2d 31 (D.C.1979); Super.Ct.Civ.R. 12-I(k), 56(c).

construction. The board of zoning adjustment rejected claims as to height, setback, accessory use, and accessibility of parking spaces but did accept contention that the number of parking spaces was insufficient. Community group petitioned for review of findings on height, setback and accessory use, and parking and developer cross petitioned, renewing motion to dismiss. The Court of Appeals, Pryor, C.J., held that: (1) appeals by community group to all issues except number of parking spaces were not timely; (2) claims of community group were not barred by laches or estoppel; (3) evidence was sufficient to support determination that only 60 units of hotel were exempt from parking provisions of zoning regulations as having existed since 1958; and (4) conclusion that prior zoning order was unenforceable because building to which it applied no longer existed was supported by substantial evidence.

Denial of motion to dismiss as to height, setback, and accessory use reversed; otherwise affirmed.

1. Zoning and Planning ⇐354

Question of timeliness of appeal of decision concerning zoning regulations is jurisdictional; board of zoning adjustment is without power to consider appeals not timely made.

2. Zoning and Planning ⇐358

In absence of statutory appeal period, standard of reasonableness is applied in determining whether appeal to board of zoning adjustment is timely.

3. Zoning and Planning ⇐358

In determining reasonableness in filing appeal to board of zoning adjustment, to determine whether appeal was timely filed, courts have consistently held that time for filing appeal commences when party appealing is chargeable with notice or knowledge of decision complained of.

4. Zoning and Planning ⇐605

In reviewing a determination of board of zoning adjustment that appeal was proper, Court of Appeals accords great deference to agency's interpretation of its own administrative regulations and will uphold that construction unless clearly erroneous or inconsistent with the regulations.

5. Zoning and Planning ⇐442

Appeal by community group to board of zoning adjustment of decision to grant permits for hotel construction, made one year after issuance of building permit, was not reasonable, and therefore not timely even if developer had been less than fully candid in negotiations by misrepresenting its plans, since hotel developer's behavior did not eliminate community group's responsibility for negotiating choices it made, where it continued to negotiate with developer rather than appealing.

6. Equity ⇐72(1)

In order to make a claim for laches, party must establish omission to assert a right for an unreasonable and unsatisfactorily explained length of time under circumstances prejudicial to party asserting laches.

7. Zoning and Planning ⇐442

Appeal by community group building permit granted for hotel, on grounds of inadequate parking, was not barred by laches where appeal was filed only one month after group was chargeable with notice of zoning administrator's recomputation of parking requirements and party developing hotel was not prejudiced by delay.

8. Zoning and Planning ⇐24

Elements required to establish estoppel to challenge zoning decision are: party acting in good faith, on affirmative acts of municipal corporation, who makes expensive and permanent improvements realized thereon, and equities strongly favor party invoking the doctrine.

9. Zoning and Planning ⇐440

Community group was not estopped from appealing grant of building permit to hotel developer, on grounds of inadequate parking, where hotel developer did not establish expensive and permanent improve-

ments made in reliance on zoning administrator's recomputation of parking requirements and the calculations and approvals were subject in any event to board of zoning adjustment review and possible modification.

10. Zoning and Planning ⇐435

Board of zoning adjustment's conclusion that hotel had 60 permanent residential units in 1958, at time zoning regulations on parking became effective, thus exempting those units, was supported by sufficient evidence in light of testimony by individual who sought to have building declared landmark that he believed it had that many units, given absence of contrary evidence.

11. Zoning and Planning ⇐703

In reviewing board of zoning adjustment's findings, Court of Appeals applies the substantial-evidence test which requires: there must be findings of each contested issue of facts, decision must rationally follow from the facts, and there must be sufficient evidence supporting each finding. D.C.Code 1981, § 1–1509(e).

12. Zoning and Planning ⇐435

Board of zoning adjustment's conclusion that prior order had not required hotel to construct a particular number of parking spaces and was also unenforceable was supported by substantial evidence in light of testimony that only statements included as conditions to variances are enforceable, reference to parking was in a finding of fact and was vague and that evidence main portion of previous building, to which order had referred, had been demolished.

William H. Carroll, Charlestown, Mass., for Woodley Park Community Ass'n.

Richard B. Nettler, Asst. Corp. Counsel, Washington, D.C., with whom Inez Smith Reid, Corp. Counsel, John H. Suda, Principal Deputy Corp. Counsel, Charles L. Reischel, Deputy Corp. Counsel, and Lutz Alexander Prager, Asst. Corp. Counsel, Washington, D.C., were on the brief, for respondent.

Whayne S. Quin, Washington, D.C., with whom Norman M. Glasgow, Jr., Larry B. Blackwood, Thomas G. McGarry, James Bruce Davis and Hershel Shanks, Washington, D.C., were on the briefs, for Washington-Sheraton Corp.

Before PRYOR, Chief Judge, and NEBEKER and MACK, Associate Judges.

PRYOR, Chief Judge:

In this case, the Woodley Park Community Association ("WPCA") petitions for review of the District of Columbia Board of Zoning Adjustment's denial, in part, of its challenge to permits issued to the Washington-Sheraton Corporation ("WSC") for construction and occupancy of the Washington Sheraton Hotel.[1] In a consolidated appeal, WSC, intervenor below, cross-petitions for review of the denial by the Board of Zoning Adjustment ("BZA") of its motion to dismiss WPCA's appeal; in addition, it challenges the BZA's ruling respecting the number of required parking spaces.

In its presentation to the BZA, WPCA challenged permits issued to the WSC by the Zoning Administrator claiming that the building and roof structures of the hotel violate the height and setback requirements of the residential district in which it is located, the convention center use of the hotel is not an accessory use, the number of parking spaces provided is less than the number required, no valid parking plan was submitted, and the parking spaces are not reasonably accessible and convenient to users. WSC moved to dismiss WPCA's appeal, asserting that the appeal was both untimely filed, and also barred by the doctrines of laches and estoppel.

In its order, the BZA denied WSC's motion to dismiss the appeal, finding it timely and not barred by laches or estoppel. On the merits, the BZA rejected WPCA's claim as to height, setback, accessory use, and

1. Prior to renovation in 1979, the name of the hotel was the Sheraton-Park Hotel.

inaccessibility of parking spaces. The BZA did accept WPCA's contention that the number of parking spaces required by the Zoning Administrator was incorrect, and ordered an increase of seventy spaces, to a total of 649. Because the projected number of parking spaces was deemed incorrect, the BZA concluded that the parking plan was defective.[2]

In this court, WPCA challenges the BZA's findings on height, setback, accessory use, and parking; in a similar fashion, WSC renews its motion to dismiss. While supporting the BZA's other findings on the merits, WSC challenges the BZA's calculation of the required number of parking spaces as not based on substantial evidence in the record.

For the reasons stated herein, we find the challenge before the BZA on the issues of height, setback, and accessory use to be untimely. Therefore, as to these issues, we reverse the BZA's denial of WSC's motion to dismiss. We find WPCA's appeal on parking to be timely, and we further hold that consideration of this issue is not barred by laches or estoppel. On the merits of the parking issue, we conclude that substantial evidence in the record supports the BZA's calculation of the required number of spaces at the Washington Sheraton Hotel, and we therefore affirm this aspect of the BZA order.

I

In the early part of December 1976, Mr. Leslie Norden Schwiebert, Managing Director of the Sheraton-Park Hotel, met with representatives of WPCA to inform them of plans for reconstruction of the hotel. The reconstruction program, anticipated to cost $45 million, contemplated the construction of a new hotel building behind the then-existing main building, and expansion of exhibit and conference facilities. At the meeting, Schwiebert stated that WSC wanted to avoid a BZA appeal by WPCA as had occurred with a 1973 rebuilding plan. He also stated that he knew that the "doubling" of convention space would be of concern to the community, but he thought that existing garage parking supplemented by a surface lot would adequately handle traffic generated by the additional convention use. Finally, Schwiebert sought WPCA's assistance in providing for a unified review of WSC's rebuilding plans by community organizations and individuals.

In response to this request, a Task Force on the Rebuilding of the Sheraton-Park Hotel ("Task Force") was organized.[3] A series of meetings between Task Force members and WSC representatives was held in late December 1976, and in early January 1977. At these meetings, WSC representatives presented drawings and outlined plans for the rebuilding program.

Central to these discussions was a drawing of the completed project prepared by the architectural firm retained by WSC. This drawing depicted a final hotel structure set back from Woodley Road and preserving the parklike front of the hotel. In connection with the building and grounds depicted in the drawing, WSC representatives advised the Task Force that there would be 900 off-street parking spaces and parking for 35 to 40 buses at the hotel and an inner loop that would allow traffic to enter the hotel site on 24th Street, N.W., and to exit via Calvert Street or Woodley Road. They also represented that an additional 150 to 200 parking spaces could be

2. The BZA ordered WSC to submit revised plans to the Zoning Administrator, within 60 days, showing where and how the required 649 spaces would be provided. The BZA further ordered that if a suitable plan for 649 spaces was not submitted, appropriate action would be taken "to see that the Sheraton shall not operate or occupy more rooms or suites of rooms than the number for which it has provided sufficient parking...." WSC has complied with the BZA order that 649 spaces be provided.

3. The Task Force included representatives of Advisory Neighborhood Commission 3C, the Cleveland Park Citizens Association, the Saint Thomas Apostle Parish Council, and WPCA.

provided in lieu of grass in the northwest corner of the property.[4]

Members of the Task Force were sharply divided on the question of whether to pursue negotiations with WSC. The rebuilding plans were presented to the Woodley Park community at a town meeting on January 27, 1977.[5] Based on WSC's representations, the community urged the Task Force to attempt resolution of community concerns over the rebuilding through negotiation and mutual agreement with WSC.

On February 21, 1977, the Task Force sent a report on the rebuilding to WSC. The cover letter to this report succinctly stated the Task Force's awareness of the choice it had made in pursuing negotiations:

> While we continue to hold the view that the Sheraton Convention Hotel complex is a "non-conforming structure" as well as a "non-conforming use", the community is generally supportive of your plans. Our report is an outline for resolving the community's concerns by agreement with the Sheraton Corporation.

The report addressed Task Force concerns in three areas: perceived benefits to the community, perceived losses to the community, and matters requiring "additional review ... and continued dialogue...." Topics addressed included traffic (pedestrian and vehicular), parking, landscaping and environment, recreation and amenities, and construction. As reflected in the report, the Task Force was not concerned exclusively with issues such as parking and traffic posing a threat to the quality of community life: the Task Force sought also to maximize benefits to the Woodley Park community offered by the project.[6]

During the negotiations, the Task Force report evolved into a proposed WSC and Task Force Joint Statement on Rebuilding Project ("Joint Statement"). The goal of the negotiations was to reach agreement on the Joint Statement and have the document signed by both parties. From February 21, 1977 through May 18, 1979, nine drafts of the Task Force report and Joint Statement were exchanged. The Joint Statement, however, was never signed.

As negotiations between WSC and the Task Force proceeded, they focused increasingly on the issue of parking.[7] Be-

4. The Task Force was also informed by Mr. William Middleton, a member of the Municipal Planning Office, that the proposed plans did not appear to violate any zoning regulations.

5. The meeting was attended by approximately 135 Woodley Park residents.

6. For example, while concerns about parking and traffic are discussed prominently in the report, also mentioned are "recreation and amenities." Among the concerns listed under the latter topic are the following:

> A. Perceived Benefits to the Community
>
> * * * * * *
>
> 18. There will be two permanent swimming pools (and additional wading pools) available for neighborhood membership.
>
> 19. The new hotel will have a full range of entertainment, recreation, health and shopping facilities for which neighborhood access will be encouraged.
>
> * * * * * *
>
> C. Matters Requiring Additional Review by Hotel and Continued Dialogue with Community
>
> * * * * * *
>
> 29. Provide year-round swimming facilities.
>
> 30. Provide ice-skating rink.
>
> 31. Provide tennis facilities.
>
> 32. Provide for roof top restaurant.

7. A comparison of early drafts of the Joint Statement shows that the two sides sharply disagreed on the number of parking spaces to be provided. According to WPCA, WSC's initial representation was that the development plans for the hotel included 900 off-street parking spaces. By February 21, 1977, the Task Force apparently believed that WSC planned to provide 980 off-street parking spaces. Thus, their February 21, 1977 report requested that WSC, "increase the planned overnight 980 parking spaces by 220 to provide a total of 1200 parking spaces...." WSC's response on March 18, 1977, however, contained no specific representation as to the number of off-street parking spaces to be provided. In fact, at no time did a WSC draft of the Joint Statement contain a commitment to provide a specific number of parking spaces. In their November 2, 1977 draft of the Joint Statement, for example, WSC stated only that

cause parking and traffic were a primary concern, in March 1977, WSC agreed to undertake a traffic study to evaluate existing problems as well as new problems posed by the development.[8]

In August 1977, WSC applied to the District of Columbia for a building permit to start the new construction. As part of the application, WSC submitted building plans which included 798 parking spaces. On April 27, 1978, the Chief of the Zoning Review Board approved WSC's application for a full building permit, including the 798 parking spaces. As part of the permit review process, employees of the Zoning Office prepared an internal memorandum called a "calculation sheet," which indicated that to meet the requirements of the zoning regulations, WSC would have to provide 751 parking spaces.[9] This calculation sheet, however, was not made a part of the building permit which was issued on October 6, 1977.[10]

In early December 1977, while WSC's building permit application was pending, Task Force members met with Mr. James J. Fahey, Zoning Administrator, to discuss their concerns about the proposed building plans. At the meeting, Mr. Fahey informed Task Force members that, while he had not completed review of WSC's building plans, his preliminary opinion was that they did comply with the zoning regulations.

Following the meeting, the Task Force sent Fahey a letter dated December 5, 1977, summarizing its concerns. According to the Task Force, the proposed convention hotel complex did not comply with the setback or rear yard requirements of the zoning regulations, exceeded the height permitted in the R–5–B Zone, and would "result in a structure that continues a nonconforming use ...," that is, the convention use would be another primary use rather than an accessory use.[11] The letter forthrightly stated the Task Force's opinion as follows: "we do not believe the proposed new building meets fundamental requirements of the zoning regulations...."

In the letter, the Task Force articulated the difficult choice it faced between continuing negotiations and pursuing an administrative challenge to the building permit:

> We are hopeful that these discussions (with WSC) ... will enable the community and Sheraton to achieve their respective objectives. However, many intangible aspects of this process ... compel the community to avoid sleeping on its rights and to seek further assurance that its concerns will be alleviated.

At this point, the Task Force chose to continue negotiations rather than to file an appeal.[12]

> [t]he hotel recognizes that we have not provided the requested 1200 spaces. We will do everything possible to get maximum use out of our parking facilities and to minimize street parking.

8. In June 1977, Barton-Aschman Associates, Inc. was retained by WSC to conduct a study to develop recommendations for minimizing the impact of hotel-generated traffic on residential areas of Woodley Park. General agreement on the study elements was reached in August 1977, and a draft of the Barton-Aschman study was delivered to WSC and the Task Force on February 5, 1979.

9. 11 DCMR § 7202.1 (1977) requires that hotels provide one parking space for every two sleeping rooms or suites. WSC's building permit application represented that the completed structure would contain 1502 units. Thus, the zoning office calculated that 751 parking spaces would be required at the new hotel.

10. It is clear, therefore, that in negotiations with WSC, the Task Force sought to have WSC provide parking spaces in excess of the number required under the zoning regulations.

11. As a nonconforming primary use, the convention facilities at the hotel would not be permitted as a matter of right under zoning regulations.

12. Among the factors that influenced the Task Force's decision to continue negotiations, according to WPCA, were the following: WSC's replacement of its November 7, 1977 letter with a new response dated December 8, 1977; agreement by WSC representatives to document rep-

During 1978, negotiations between WSC and the Task Force continued. On January 27, 1978, the Task Force sent WSC a response to their December 8, 1977 draft of the Joint Statement. In April 1978, WSC responded, with a draft containing important changes in its representations. First, as to the parking issue, WSC's draft dropped all mention of a specific number of spaces.[13] Second, WSC's draft dramatically weakened the representation as to the on-site traffic loop, a major concern of the Task Force.[14]

On September 13, 1978, the Task Force responded to WSC's April draft. This response recognized the weakened position as to the traffic loop and objected to it. More importantly, the Task Force recognized the parties' inability to agree on the parking issue and returned a draft of the Joint Statement that reflected a willingness to complete negotiations on the document despite sharp differences on parking.[15]

In September 1978, therefore, the Task Force again directly confronted the difficult choice of continuing negotiations or pursuing an administrative appeal. The Task Force articulated the dimensions of this choice in the cover letter to WSC accompanying their September 13, 1978 draft of the Joint Statement:

> [G]iven the complexity of the issue ... it is extremely unlikely that the Hotel owners and the community could ever come to agreement on a precise number of parking spaces that the Hotel should provide.
>
> This places us in somewhat of a quandary. In its entirety, the joint statement is a pretty good document, reflecting diligence, perseverance, and good-faith efforts by both parties to resolve differing perspectives. Yet parking is so important, the question has to be asked,—what good is agreement on the other points if the community is going to get hurt on the parking issue. After somewhat intense deliberations we decided to pursue the joint statement for several reasons. While of a lesser magnitude than parking spaces, the other issues are important to area residents. And, while we can't mutually define the needed number of spaces, the Hotel and community are in accord on the principle of the Hotel's maximizing off-street parking.

Thus, despite the fact that the Task Force had full knowledge both that sharp differences on the parking issue existed and that problems had emerged regarding the traffic loop, it decided to continue negotiations.

On October 6, 1978, a building permit for the hotel was issued.[16] Construction work began immediately.

resentations in a formalized "Joint Statement;" a promise by WSC to include its representations to the community as a condition of any sale of the property; and impending completion of the Barton-Aschman Traffic study. Also militating against an appeal was the fact that the Task Force had been told in January 1977 (by Mr. Middleton) and in December 1977 (by Mr. Fahey) that WSC's building plans appeared to comply with D.C. Zoning Regulations.

13. Earlier drafts had explicitly mentioned the Task Force request for 1200 spaces, even while rejecting it. This draft stated only, "[t]he Hotel will do everything possible to get maximum use out of its parking facilities and to minimize street parking."

14. Unlike previous WSC drafts of the Joint Statement, which appeared to assume that a traffic loop would be provided, the April draft stated that the results of the Barton-Aschman study "will be reviewed with the community and taken into account in reaching the final decision on this on-site loop."

15. In its draft of the Joint Statement, the Task Force included separate sections outlining the Task Force's and WSC's positions on parking. The Task Force first set forth its position that WSC was legally obligated—because of prior BZA actions and an increase in hotel rooms—to provide 1103 parking spaces. The Task Force then stated WSC's position that "its planned 750 parking spaces not only fulfill city regulatory requirements, but also will provide the number of parking spaces required to meet peak demand."

16. The full building permit was approved on April 28, 1978. An initial permit for excavation had been issued on January 6, 1978, and a foundation building permit was issued March 3, 1978.

In late February and early March 1979, the Task Force and WSC reviewed the draft of the Barton-Aschman study of parking and traffic problems submitted February 5, 1979. The study concluded that an estimated 850 parking spaces were necessary and that only approximately 750 were planned. Also during this period, the Task Force learned for the first time of the calculation sheet prepared by zoning officials, indicating that only 751 spaces were required to comply with the zoning regulations.[17]

Increasingly convinced that WSC representations could not be relied upon, the Task Force undertook a count of the number of parking spaces at the hotel. The Task Force's physical count of spaces revealed that only 595 spaces existed.

As a result of the traffic study, information about the calculation sheet, and the physical count of spaces, WPCA informed WSC that it could not continue negotiations until furnished with a plan showing the precise location of parking spaces to be included at the hotel. On May 31, 1979, WSC furnished plans showing 750 spaces. Of these spaces, 225 were on the front lawn of the property, and 525 were in the garages.[18]

In June 1979, the Task Force met with the Zoning Administrator to report on the status of negotiations and to share its concerns about WSC plans. The Zoning Administrator acknowledged that the drawing of parking spaces furnished on May 31, 1979 and the physical count of spaces conducted by the Task Force indicated that WSC had not provided parking spaces in accordance with information submitted along with its building permits. The Zoning Administrator informed the Task Force that he could take no action, however, until WSC applied for an occupancy permit.

In August 1979, as part of its application for certificates of occupancy for the new building, WSC submitted revised plans to the Zoning Administrator providing for 595 parking spaces, over two hundred fewer than had been approved as part of the building permit. According to WSC's revised plans, the completed hotel would contain 1366 units, not 1502 as represented earlier. In addition, WSC asserted that no parking spaces were required for the 209 units in the Wardman Tower, because this structure had been constructed before applicable zoning regulations went into effect in 1958. Thus, WSC claimed that after the 209 Wardman Tower units were subtracted from the hotel's total of 1366 units, only one space for every two of the remaining 1157 units would be required to comply with the zoning regulations. The Zoning Administrator agreed with WSC and revised the computation sheet to reflect that only 579 parking spaces were required, and that 595 were being provided.

On September 12, 1979, WSC was issued occupancy permits for 320 of 945 new units. One month later, on October 10, 1979, WPCA filed its appeal with the BZA.

II

[1] The threshold issue presented is whether WPCA's administrative appeal of building and occupancy permits issued to WSC was timely. The question of timeliness is jurisdictional. *Goto v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 917, 923 (D.C.1980). Consequently, if WPCA's appeal was not timely filed, the BZA was without power to consider it. *Id.*

[2, 3] The Supplemental Rules of Practice and Procedure before the Board of

17. Also at this time, the Task Force learned that WSC's final plans for the hotel did not include the traffic loop.

18. The Task Force believed that the location of the 225 parking spaces spread across the front lawn of the hotel contradicted earlier representations by the WSC that the parklike front of the hotel would be preserved. Moreover, the number of spaces listed by WSC in the parking garages was higher than the physical count of spaces in the garages obtained by the Task Force.

Zoning Adjustment ("Supplemental Rules") provide, in part:

> Any person aggrieved by any order, requirement, decision, determination, or refusal made by any administrative officer or body ... in the administration or enforcement of the Zoning Regulations, may file a *timely* appeal with the Board.

22 DCRR § 2.21 (1972) (emphasis added). Because the rules of the BZA adopt no specific time limit on appeals, a standard of reasonableness is applied in determining whether an appeal is timely. *Goto v. District of Columbia Board of Zoning Adjustment, supra,* 423 A.2d at 923; *see also State ex rel. Housing Authority v. Wind,* 337 S.W.2d 554, 558 (Mo.App.1960); *Cave v. Zoning Board of Appeals,* 49 A.D.2d 228, 231, 373 N.Y.S.2d 932, 935 (1975), *app. denied,* 38 N.Y.2d 710, 382 N.Y.S.2d 1030, 346 N.E.2d 829 (1976). In applying the reasonableness standard, courts have consistently held that the time for filing an appeal commences when the party appealing is chargeable with notice or knowledge of the decision complained of. *E.g., Arkae Development, Inc. v. Zoning Board of Adjustment,* 312 N.W.2d 574, 577 (Iowa 1981); *State ex rel. Green's Bottom Sportsmen, Inc. v. St. Charles County Board of Adjustment,* 553 S.W.2d 721, 724–25 (Mo.App. 1977); *Ostrowsky v. City of Newark,* 102 N.J.Eq. (1 Backes) 169, 174–75, 139 A. 911, 913 (1928); *Pansa v. Damiano,* 14 N.Y.2d 356, 359–60, 251 N.Y.S.2d 665, 668, 200 N.E.2d 563, 565 (1964); *Hartunian v. Matteson,* 109 R.I. 509, 519–25, 288 A.2d 485, 490–93 (1972).[19]

[4] Here, the BZA found that WPCA's appeal as to all issues was "reasonably asserted" and filed in a "timely manner." In reviewing this determination, we are mindful that "[w]e accord great deference to an agency's interpretation of its own administrative regulations, and we will uphold that construction unless clearly erroneous or inconsistent with the regulations." *Dupont Circle Citizens Association v. District of Columbia Zoning Commission,* 431 A.2d 560, 565 (D.C.1981); *see also Sheridan-Kalorama Neighborhood Council v. District of Columbia Board of Zoning Adjustment,* 411 A.2d 959, 961 (D.C. 1979).[20] For purposes of clarity, our review of the BZA's findings on the issue of timeliness is in two sections. The first section addresses the timeliness of WPCA's appeal on the number of parking spaces required at the hotel. The second section addresses the timeliness of the appeal as to the issues of height, setback, and use.

A.

Review of the dispute over parking at the Washington Sheraton Hotel clearly shows that the BZA did not err in finding WPCA's appeal on this issue to be timely. WSC's original building plans were submitted to the Zoning Administrator in August 1977. These plans, approved as part of the building permit, provided for 798 parking spaces at the hotel. On October 6, 1978, the full building permit for construction of the hotel was issued.

In August 1979, as part of its application for a certificate of occupancy, WSC submitted revised plans to the Zoning Administrator. These plans provided for only 595 parking spaces. The Zoning Administrator agreed with WSC's assertions that only 579 parking spaces were required to meet the requirements of the zoning regulations. On September 12, 1979, WSC was issued a partial occupancy certificate that incorporated these new parking calculations. WPCA's appeal was filed with the BZA on

19. Under the zoning regulations, an appeal will lie from "any decision of an administrative officer granting or refusing a building permit or granting or withholding a certificate of occupancy or any other administrative decision based [i]n whole or part upon any zoning regulations or zoning maps adopted pursuant to the Zoning Act." 11 DCRR § 8102.1 (1977).

20. The BZA's conclusion is entitled to additional deference because the agency was interpreting its own internal rule of procedure rather than the zoning regulations. *Dupont Circle Citizens Ass'n v. District of Columbia Zoning Comm'n, supra,* 431 A.2d at 565.

October 12, 1979, one month after the certificate of occupancy was issued.

WPCA was "chargeable with notice" of the Zoning Administrator's approval of revised plans requiring only 595 spaces at the Washington Sheraton Hotel only as of September 12, 1979.[21] Thus, WPCA's appeal was filed only one month after receiving notice of the Administrator's decision dramatically reducing the required number of parking spaces.[22] This interval of one month between notice and filing of an appeal was reasonable. *Goto v. District of Columbia Board of Zoning Adjustment, supra,* 423 A.2d at 924 (delay of two months in filing appeal reasonable); *see also Keating v. Zoning Board of Appeals,* 325 A.2d 521, 524–25 (Me.1974) (60 days is reasonable appeal period). We, therefore, find no error in the ruling that this aspect of WPCA's appeal was timely.

B.

[5] The chronology of events relating to the timeliness of the appeal of height, setback, and use contrasts sharply with that on parking. In December 1976, and January 1977, members of the Task Force met with representatives of WSC to review plans for the proposed hotel redevelopment. As to the issues of height, setback, and use, the plans presented at these meetings were substantially similar to those objected to in WPCA's appeal.

Soon after reviewing the development plans, the Task Force recognized that possible grounds for appeal existed on the issues of height, setback, and use. On February 21, 1977, the Task Force sent WSC its initial report on the plans. In this report, the Task Force articulated its "view that the Sheraton Convention Hotel complex is a 'non-conforming structure' as well as a 'non-conforming use'...." Later, on December 5, 1977, the Task Force wrote to the Zoning Administrator and outlined objections to the development plans on the basis of violations of setback, rear yard, and height regulations, as well as an incorrect determination that hotel convention activities constituted an accessory use.

Thus, by October 6, 1978—the date the full building permit was issued—the Task Force had full actual notice of the aspects of the building project relating to height, setback, and use. Nevertheless, one year elapsed between the issuance of the building permit and the filing of the appeal on October 12, 1979. During this time, construction work on the hotel was commenced and substantially completed.

On this factual record, we conclude that as to height, setback, and use, the one-year delay from the issuance of the building permit to the filing of the appeal was not reasonable. *See Maroney v. Friere,* 74 Misc.2d 339, 340, 343 N.Y.S.2d 183, 185 (N.Y.Sup.Ct.1973) (delay of 127 days unreasonable); *In re Building Permit and Zoning,* 29 N.C.App. 749, 751, 225 S.E.2d 647, 649 (delay of 14 months unreasonable), *cert. denied,* 290 N.C. 661, 228 S.E.2d 451 (1976). Thus, we find the BZA's conclusion that the WPCA's appeal as to these issues was timely to be "not in accordance with law." D.C.Code § 1–1510(a)(3)(A) (1981). Consequently, the BZA lacked jurisdiction to consider WPCA's appeal of these issues.

WPCA argues, however, that WSC's conduct during negotiations renders its appeal timely as to all issues. WPCA claims that throughout negotiations, WSC misrepresented its actual final plans for parking and traffic circulation at the hotel. An earlier appeal was not filed, WPCA ex-

21. WPCA was aware in June 1979, of the substantial likelihood that WSC would not provide the number of parking spaces called for in the building plans. However, WPCA was not chargeable with notice of the Zoning Administrator's approval of the reduction in the required number of spaces until the occupancy permit was issued.

22. At no time during negotiations did WPCA receive notice that WSC planned to provide fewer spaces than the 798 called for in the building permit. Thus, nothing that transpired during negotiations provided WPCA with notice earlier than September 12, 1979, of the lower number of spaces to be provided.

plains, because of WSC misrepresentations that misled the Task Force into believing that its concerns on parking and traffic circulation would be accommodated. According to WPCA, once it became known that WSC's representations were misleading, an appeal was promptly filed. WPCA asserts that viewed in the context of WSC's conduct,[23] its delay in filing its appeal was reasonable, and its appeal was, therefore, timely.[24] We disagree.

The record underlying this appeal reveals two parties—WSC and the Task Force—engaged in complex and difficult negotiations over matters of great concern to both sides. WSC initiated negotiations, at least in part, to avert a lengthy and time-consuming appeal of its development plans. WPCA participated in negotiations in order to minimize harm and maximize benefits to its community from the hotel expansion.[25] Both sides hoped to realize gains if negotiations were successful, and faced potential losses if negotiations failed.

Proceeding concurrently with these negotiations was the lengthy administrative process undertaken by the WSC to obtain approvals for permits required for renovation of the hotel. Throughout its dealings with WSC, WPCA faced the difficult choice of continuing negotiations with the goal of reaching an agreement responsive to community concerns, or pursuing the alternate route of an administrative challenge to WSC's development plans. WPCA was fully aware of this choice throughout the negotiations.

WPCA chose to continue negotiations until June 1979, when they elected to pursue an administrative appeal.[26] In deciding to continue negotiations until this late date, WPCA was fully aware of the sharp differences that existed between the parties on parking, and that problems had emerged in regard to the traffic loop. Indeed, as early as September 12, 1978—one month before the building permit was issued—the Task Force informed WSC of its decision to continue negotiations despite a failure to agree on parking. This choice, WPCA stated, was made after "intense deliberations" and because of other issues "important to area residents."

WSC engaged in hard bargaining during negotiations with the Task Force.[27] Nevertheless, WSC's behavior does not eliminate WPCA's responsibility for the negotiating choices it made. WPCA cannot now escape the harsh consequences of its one-year delay in appealing because WSC—its adversary in difficult negotiations—was less than fully candid. While the circumstances presented here certainly make WPCA's one-year delay in appealing the building permit understandable, they do not make it reasonable for purposes of timeliness.

III

Because we have concluded that only the appeal as to parking is timely, we need

23. In its reply brief, WPCA characterizes WSC's conduct as follows: "WSC initiated, nurtured and manipulated discussions and negotiations with WPCA for the express purpose of deterring WPCA from seeking review by the BZA of its applications to build and occupy the Sheraton Washington."

24. While it is difficult to determine the BZA's precise reasoning for finding the appeal as to these issues timely, it does appear that some elements of this argument were accepted. The BZA concluded:

> The [WPCA] expected that it would be satisfied by the Sheraton as to the number of parking spaces, which was its principal concern. Upon discovering that the District of Columbia was on record as stating that only 579 spaces were required, and only 595 spaces were to be provided, the appeal was promptly filed.

25. *See supra* note 6 (quoting, in pertinent part, the February 21, 1977 Task Force Report on perceived benefits and losses to the community from the proposed development plans).

26. The appeal was not actually filed until October 1979, because the Zoning Administrator informed the Task Force that nothing could be done until WSC applied for certificates of occupancy.

27. We note, however, that the BZA concluded, "[i]t is difficult for the Board to determine whether either party was not acting in good faith."

consider only whether the appeal as to this issue is barred by laches and estoppel. We find the doctrines of laches and estoppel inapplicable to WPCA's appeal on the parking issue.

[6, 7] In order to make out a claim for laches, a party must establish " 'omission to assert a right for *an unreasonable and unsatisfactorily explained length of time* under circumstances prejudicial to the party asserting laches.' " *Wieck v. District of Columbia Board of Zoning Adjustment*, 383 A.2d 7, 11 (D.C.1978) (quoting 3 RATHKOPF, LAW OF ZONING AND PLANNING 67–1 (3d ed. 1972)) (emphasis added); *see also Goto v. District of Columbia Board of Zoning Adjustment, supra*, 423 A.2d at 925. We find neither element of laches present in this situation.

As discussed above, WPCA filed its administrative appeal on the issue of parking only one month after becoming chargeable with notice of the Zoning Administrator's recomputation of parking requirements. More importantly, WSC was not prejudiced by the one-month delay because it was not until September 12, 1979, that it received authorization from the Zoning Administrator to provide a lesser number of parking spaces than called for in the original building plans. Nothing in the record indicates that WSC acted in reliance on this authorization prior to the time WPCA filed its appeal.

[8, 9] The elements required to establish estoppel are: "a party (1) acting in good faith, (2) on affirmative acts of a municipal corporation, (3) makes expensive and permanent improvements in reliance thereon, and (4) the equities strongly favor the party invoking the doctrine." *Wieck v. District of Columbia Board of Zoning Adjustment, supra*, 383 A.2d at 11 (citation omitted). In this case, WSC fails to meet these requirements. In particular, as noted above, WSC did not establish "expensive and permanent improvements" made in reliance on the Zoning Administrator's recomputation of parking requirements. Moreover, estoppel cannot apply because the Zoning Administrator's September 1979, calculations and approval of WSC's applications for certificates of occupancy were subject in any event to BZA review and possible modification. *See Interdonato v. District of Columbia Board of Zoning Adjustment*, 429 A.2d 1000, 1004 (D.C. 1981) (petitioners could not justifiably rely on non-final BZA action still subject to review).

IV

Two claims of error are asserted in relation to the BZA's consideration of the merits of the parking issue. First, WSC claims in its cross-appeal that the BZA erred in finding that the Wardman Tower contained 60 units in 1958, thereby increasing the number of parking spaces required at the hotel. Second, WPCA claims that the BZA erred in ruling that the WSC was not required under prior BZA Order 6750 to provide 898 parking spaces. We consider these claims of error separately below.

A.

The Wardman Tower

The Zoning Regulations require, in general, that one parking space be provided for every two units at a hotel. 11 DCMR § 7202.1 (1977).[28] With several exceptions not relevant here, the regulations exempt buildings built before May 12, 1958—the effective date of the parking regulations—from this requirement. 11 DCMR § 7201.1

28. The zoning regulations require that one parking space be provided "for each two sleeping rooms or suites." 11 DCMR § 7202.1 (1977). As the Zoning Administrator interprets this regulation, a room that cannot be separately rented (*i.e.*, that does not have a bathroom) is not counted as a "room" for purposes of computing parking requirements. Thus, a suite could have ten rooms, but if those rooms were rentable only as a group, it would require only one parking space. To avoid confusion, we use the term "unit" to signify a separately rentable sleeping room or suite.

(1977); *see Page Associates v. District of Columbia*, 463 A.2d 649, 651 (D.C.1983).

In applying for certificates of occupancy for the hotel, WSC represented to the Zoning Administrator that the completed structure would contain 1366 units. WSC claimed that no parking spaces were required for the 209-unit Wardman Tower because that structure had been built prior to May 1958. In issuing the certificate of occupancy, the Zoning Administrator accepted this contention, and calculated the parking required based on a total of 1157 units. In its appeal to the BZA, the WPCA claimed that as of May 1958, the Wardman Tower contained only 60 units. WPCA argued, therefore, that in calculating parking requirements, only 60 units should be excluded from the hotel's total of 1366. Thus, the factual question before the BZA was the number of units contained in the Wardman Tower as of May 12, 1958.

[10, 11] In reviewing the BZA's findings on this question, we apply the "substantial evidence test." District of Columbia Administrative Procedure Act (DCAPA), D.C.Code § 1–1509(e) (1981).[29] That test requires that in each agency decision (1) there must be findings on each contested issue of fact; (2) the decision must rationally follow from the facts; and (3) there must be sufficient evidence supporting each finding. *Citizens Association of Georgetown, Inc. v. District of Columbia Zoning Commission*, 402 A.2d 36, 41 (D.C. 1979) (citations omitted). To be sufficient to support a finding, evidence must be "more than a mere scintilla [and must be] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938); *see also Vestry of Grace Parish v. District of Columbia Alcoholic Beverage Control Board*, 366 A.2d 1110, 1112 (D.C.1976).

The evidence presented to the BZA on both sides of this issue was meager. WPCA offered the testimony of Mr. Lindsley Williams, an area resident and former Area Neighborhood Commissioner, who had prepared an application in 1978 to designate the Wardman Tower a historical landmark. Mr. Williams testified that according to his "information and belief" the Wardman Tower "was used entirely as a residential hotel with approximately 60 permanent residential suites until early in the 1960's."[30] The Zoning Administrator testified that he had "no idea" how many rooms were in the Wardman Tower in 1958. He explained that his determination that the Wardman Tower contained 209 units in 1958 was based on plans showing 209 to be the current number, coupled with an inability to locate any evidence that a different number existed in 1958.[31] WSC, owner of

29. The DCAPA requires that every agency decision be accompanied by written "[f]indings of fact and conclusions of law ... supported by and in accordance with the reliable, probative, and substantial evidence." D.C.Code § 1–1509(e) (1981).

30. In support of his position, Mr. Williams cited a newspaper article which contained the following statement, "Mrs. Irwin ... is one of 60 permanent tenants at the Sheraton Park." WASHINGTON POST, Feb. 6, 1969. This article cannot be used as support for the BZA's finding for two reasons. First, the article was excluded from evidence because it was not filed with the BZA five days prior to the hearing as required by Board rules. Supplemental Rules, 22 DCRR § 2.31 (1972). Second, the article does not meet the requirements of "reliable, probative, and substantial evidence," D.C.Code § 1–1509(e) (1981); *see General Ry. Signal Co. v. District Unemployment Compensation Bd.*, 354 A.2d 529, 532 (D.C.1976), because it is a human interest feature not purporting to address the situation at the Wardman Tower in 1958, but only in 1969. Moreover, the article did not address the number of units at Wardman Tower, but only the number of tenants.

31. In this regard, the Zoning Administrator testified that he conducted an exhaustive search of city records in an attempt to determine the correct number of units in 1958. The Zoning Administrator checked records of the Fire Marshal's Office, the Building Inspector's Office in the Department of Housing and Community Development, the Permit Branch and the License Branch of the Department of Licenses, Investigations and Inspection, and the Assessor's Office in the Department of Finance and Revenue.

the Wardman Tower in 1958, presented no evidence on the issue to the BZA.

The BZA's conclusion that "the most reliable information seems to be that the Wardman Towers had sixty permanent residential units in 1958" based on Mr. Williams' testimony, is bolstered by the fact that the testimony was essentially unrebutted. Given the absence of contrary evidence, the record before the BZA was sparse. Nonetheless, we find the BZA's conclusion that the Wardman Tower contained 60 units in 1958 to be based on substantial evidence. *See Lynchburg Gas Co. v. Federal Power Commission*, 119 U.S.App.D.C. 23, 29, 336 F.2d 942, 948 (1964) (where proof of certain facts is unavailable or such proof as is available is highly speculative, courts give greater deference to agency expertise); *see also Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 28–29, 81 S.Ct. 435, 450, 5 L.Ed.2d 377 (1961); *Federal Communications Commission v. RCA Communications*, 346 U.S. 86, 96–97, 73 S.Ct. 998, 1005, 97 L.Ed. 1470 (1953).

BZA Order 6750

[12] WPCA claims error in the BZA's ruling that prior BZA Order 6750 (dated December 5, 1962) did not require WSC to provide 898 parking spaces. We find no error in the BZA's ruling on this issue.

In 1962, WSC applied to the BZA for a variance for the Sheraton-Park Hotel.[32] In granting the variance, the BZA issued Order 6750 which contained the following finding of fact:

> (4) A traffic report relating to the proposed addition ... was made part of the record before the Zoning Commission [in the above cited case]. *This report disclosed that the existing off-street parking spaces totaling 564 will be increased to 898* and that the present hotel rooms, excluding permanent suites, will be increased from 910 to 1100 rooms. [Emphasis added.] [33]

WPCA argued to the BZA that this prior order imposed a requirement on WSC to provide 898 parking spaces at the hotel.[34] This requirement, WPCA claimed, was still in effect.

The BZA rejected WPCA's contention on two grounds, both of which are challenged on appeal by WPCA. First, the BZA found "no legal requirement" in the prior orders to provide a specified number of spaces. The BZA reasoned:

> The Zoning Commission Order rezoned the property, and cannot be read to apply any conditions other than to permit what is allowed and required under R–5–C zoning. The BZA orders are vague, very short and do not specifically require a set number of spaces. In one case, the Order referenced instructions given outside the context of the hearing and not found in writing anywhere.

WPCA now claims that the BZA erred as a matter of law in finding that the prior order imposed no legal requirement as to parking. *See Gordon v. District Unemployment Compensation Board*, 402 A.2d 1251, 1254 (D.C.1979) (court does not defer to agency in reviewing conclusion on matter of law). We disagree.

The section of BZA Order 6750 relied upon by WPCA is found in a finding of fact contained in that order. In testimony to

None of these sources yielded any information that shed light on the number of units in Wardman Tower in 1958.

32. The variance was from the zoning regulation's setback requirement to permit an addition to the hotel. Also at this time, the BZA approved roof structures proposed for the hotel.

33. The variance was made subject to the following conditions:

> The building shall be erected substantially in accord with revised plans marked "Exhibit A—William E. Chase" dated December 5, 1962 and filed for the record on that date to comply with verbal instructions issued to the appellant by this Board immediately following the hearing of this case.

34. In support, WPCA cited testimony and evidence in the 1962 zoning applications indicating that the hotel would provide 898 parking spaces.

the BZA, the Zoning Administrator stated that the consistent policy of his office is that only statements included as conditions to variances impose legal requirements and are therefore enforceable. The Zoning Administrator explained that because the statement at issue in Order 6750 was contained in a finding of fact, it imposed no legal requirement. This testimony, coupled with the BZA's finding that the language cited in the order was vague, makes clear that the BZA's ruling that Order 6750 imposed no legal requirement as to parking was not in error as a matter of law.

The BZA further found Order 6750 unenforceable because the building to which it applied no longer exists. WPCA challenges this factual finding as not based on substantial evidence. Again, we disagree.

Evidence before the BZA showed that the main portion of the previous hotel building was demolished after construction of the new portion of the hotel. This evidence amply supports the BZA's conclusion that "[e]ven if any requirements had been imposed as a result of the previous orders, those requirements cease to be applicable when the building to which they were attached is demolished." Thus, the BZA's conclusion on this issue was supported by substantial evidence. *See Citizens Association of Georgetown, Inc. v. District of Columbia Zoning Commission, supra,* 402 A.2d at 41.

Accordingly, as to the issues of height, setback, and accessory use, we reverse the BZA's denial of WSC's motion to dismiss. The BZA's decision on the merits of the parking issue is affirmed.

So ordered.



Robert L. BALTIMORE, Appellant,

v.

B.F. GOODRICH COMPANY, Appellee.

No. 84-1214.

District of Columbia Court of Appeals.
Argued March 7, 1985.
Decided April 16, 1985.

Plaintiff brought action to recover damages for injuries sustained when he fell from car in a garage. The Superior Court, John J. Malloy, J., granted directed verdict in favor of garage owner, and plaintiff appealed. The Court of Appeals, Nebeker, J., held that plaintiff presented sufficient evidence from which reasonable juror could have inferred that individual, who had lifted car on hydraulic lift while plaintiff was retrieving personal articles from car, was employee of garage owner, garage owner was liable.

Reversed and remanded for a new trial.

Master and Servant ⇐332(1)

Plaintiff, who was injured in fall from car, presented sufficient evidence from which reasonable juror could have inferred that individual, who had lifted car on hydraulic lift while plaintiff was retrieving articles from car, was an employee of garage owner, thus garage owner was liable.

John T. Irick, Ronald E. Tucker and Albert L. Preston, Washington, D.C., were on the brief, for appellant.

R.G. Guziak, Washington, D.C., for appellee.

Before NEBEKER, BELSON and ROGERS, Associate Judges.

NEBEKER, Associate Judge:

Mr. Baltimore appeals the trial court's granting of a directed verdict in favor of

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they decided to fire her because she proved to be an assertive proponent of black participation in community outreach, rather than a docile employee who would not make waves. Although record support for this proposition is somewhat thin, an impartial trier of fact might arguably resolve the issue in Ms. Blount's favor if he or she credited all of Ms. Blount's testimony and disbelieved NCTFK's allegations regarding Ms. Blount's performance.[12]

Given the summary judgment standard, the nature of the action, and the centrality of the factual issue relating to the state of mind of NCTFK's representatives, we conclude that NCTFK has failed to satisfy its formidable burden under Super. Ct. Civ. R. 56.

III.

CONCLUSION

For the foregoing reasons, the judgment is reversed, and the case is remanded to the trial court for further proceedings consistent with this opinion.

So ordered.[13]



12. We note that NCTFK did not file affidavits by any of the representatives of constituent organizations whose complaints about Ms. Blount were considered by Mr. Novelli and Mr. Myers in reaching their decision to terminate her. This issue may be more amenable to resolution on the basis of a full evidentiary record from which the trier of fact can ascertain, in greater depth and detail, precisely what occurred.

WASTE MANAGEMENT OF MARYLAND, INC.,
Petitioner,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT,
Respondent.

No. 00-AA-770.

District of Columbia Court of Appeals.

Argued May 15, 2001.
Decided July 5, 2001.

Property owner appealed decision by zoning administrator denying application for certificate of occupancy to run a solid waste handling facility. The Board of Zoning Adjustment (BZA) dismissed appeal as untimely. Owner appealed. The Court of Appeals, Glickman, Associate Judge, held that owner's decision to wait three years before filing appeal was unreasonable.

Affirmed.

1. Zoning and Planning ⇐494

To obtain a variance, the applicant must demonstrate that an undue hardship or an extraordinary situation would result if the zoning regulations were applied.

2. Zoning and Planning ⇐490

Board of zoning adjustment (BZA) may grant requests for special exceptions where the proposed use will be in harmony

13. As an alternative ground for summary judgment, NCTFK has argued that the action is barred under the doctrine of accord and satisfaction. The trial judge did not reach this issue, and we decline to address it for the first time on appeal. Instead, we leave the accord and satisfaction claim to the trial court for disposition on remand.

with the general purpose and intent of the zoning regulations.

3. Zoning and Planning ⇐358.1

Requirement of rule of board of zoning adjustment (BZA) that an appeal of zoning decision be timely is jurisdictional.

4. Zoning and Planning ⇐605

Appellate court's review of a board of zoning adjustment (BZA) decision that an appeal of zoning decision was not "timely" is deferential, and court will uphold the agency's interpretation of its own procedural regulation unless that interpretation is clearly wrong.

5. Zoning and Planning ⇐358.1

Because the rules of the board of zoning adjustment (BZA) adopt no specific time limit on appeals, a standard of reasonableness is applied in determining whether an appeal is timely; reasonableness is a standard that requires due consideration of attendant facts and circumstances that legitimately may bear on the particular appellant's ability to seek review.

6. Zoning and Planning ⇐358.1

Although what constitutes reasonable time to appeal a zoning decision to the board of zoning adjustment (BZA) may depend on the circumstances, the question should not be decided on an ad hoc basis.

7. Zoning and Planning ⇐358.1

A reasonable time in which to appeal zoning decision is measured by the time that fairness dictates to enable an aggrieved party to evaluate the appropriateness of seeking review, to obtain the assistance of counsel, and to take the other steps necessary to proceed.

8. Zoning and Planning ⇐358.1, 584.1

Reasonableness standard imposes a duty on parties appealing zoning decision to act with diligence and prudent dispatch in protecting their own interests through the appellate process.

9. Zoning and Planning ⇐358.1

In the absence of exceptional circumstances substantially impairing the ability of an aggrieved party to appeal, that is, circumstances outside the party's control, two months between notice of a zoning decision and appeal therefrom is the limit of timeliness.

10. Zoning and Planning ⇐442

Property owner's decision to wait three years before filing appeal of decision denying application for certificate of occupancy to run a solid waste handling facility was unreasonable, and thus appeal was untimely; fact that owner chose to concentrate on avenues that reasonably may have appeared more promising than an appeal did not excuse its delay in noting an appeal, and owner could have taken an appeal and applied for a variance or a special exception simultaneously.

Paul J. Kiernan, with whom Mary Carolyn Brown, Washington, DC, was on the brief, for petitioner.

James C. McKay, Jr., Senior Assistant Corporation Counsel, with whom Robert R. Rigsby, Corporation Counsel, and Charles L. Reischel, Deputy Corporation Counsel, were on the brief, for respondent.

Before TERRY, GLICKMAN, and WASHINGTON, Associate Judges.

GLICKMAN, Associate Judge:

After the Zoning Administrator denied its application for a certificate of occupancy to run a solid waste handling facility, Waste Management of Maryland, Inc., waited three years before taking an appeal to the District of Columbia Board of Zoning Adjustment ("BZA"). The BZA dismissed the appeal as untimely. Seeking

reversal of that decision, Waste Management argues that its delay in appealing was justified because the District directed it to pursue alternative administrative approaches in the interim to obtain an occupancy certificate. We agree with the District, however, that the BZA was without jurisdiction because Waste Management failed to note its appeal within a reasonable time. We take this opportunity to explicate the requirement of a "timely" appeal.

I.

In November 1995, Waste Management applied for a certificate of occupancy (C of O) to operate a solid waste handling facility at 2160 Queens Chapel Road, N.E., in an area that is zoned C–M (Commercial–Light Manufacturing).[1] Waste Management contended that under the Zoning Regulations then in effect, it was entitled to this C of O as a matter of right. Alternatively, Waste Management asked the Zoning Division to reissue in its name a C of O for "processing" and other operations that had been issued in 1994 to a previous owner of the Queens Chapel Road facility.

[1] The Zoning Administrator denied Waste Management's application on February 21, 1996. The Administrator concluded that the applicable Zoning Regulations did not permit solid waste handling operations at the Queens Chapel Road facility as a matter of right, and that Waste Management would therefore need to seek a variance[2] from the BZA. The Administrator denied Waste Management's alternative application for reissuance of the 1994 C of O because that C of O had since been revoked, "so there is no C of O to reissue." The Administrator stated that Waste Management could appeal this denial to the BZA.

Six days later, on February 27, 1996, the Solid Waste Facility Permit Act of 1995 went into effect. This Act, codified at D.C.Code §§ 6–3451 *et seq.* (1995), required all solid waste facilities in the District to apply for special permits as a condition of continued operation. Permits would be issued only upon a determination "that the solid waste facility is operating, or will operate, in full compliance with environmental, health, safety, and zoning laws, rules and regulations and that the solid waste facility will not endanger public health, safety, welfare, or the environment." D.C.Code § 6–3453(e)(2)(C). The Act further provided that existing facilities, such as the one at Queens Chapel Road, could continue to operate under interim operating permits while their permit applications were pending. *See* D.C.Code § 6–3453(b).

The responsibility for implementing the Solid Waste Facility Permit Act was delegated to the DCRA. On May 22, 1996, the DCRA sent a letter to Waste Management explaining what it needed to do to obtain an interim operating permit for its Queens Chapel Road facility. The DCRA advised that the interim operating permit would require Waste Management to apply for a "solid waste handling facility" C of O. Further, because the Zoning Administrator had already determined that solid waste

1. Waste Management submitted its application to the Zoning Division of the Building and Land Regulation Administration (BLRA) of the District of Columbia Department of Consumer and Regulatory Affairs (DCRA).

2. *See* D.C.Code § 5–424(g)(3) (1994). "[A] variance is granted to allow a use that ordinarily would be prohibited by the zoning regulations.... To obtain a variance, the applicant must demonstrate that an undue hardship or an extraordinary situation would result if the Zoning Regulations were applied." *Citizens Coalition v. District of Columbia Bd. of Zoning Adjustment,* 619 A.2d 940, 948 (D.C.1993) (citations and footnotes omitted).

handling facilities must be approved by the BZA, Waste Management's C of O application would be denied and the DCRA then would "advise Waste Management to apply to the BZA for a variance."

Thereafter, on August 2, 1996, the DCRA issued Waste Management its interim operating permit for solid waste handling at the Queens Chapel Road facility. The permit required Waste Management to apply for a C of O within 30 days, and to apply to the BZA for the issuance of a solid waste handling facility C of O after the application was denied. The permit stated that it would expire if, among other contingencies, the BZA denied the request for a C of O.

[2] As of August 1996, Waste Management had not appealed the denial of its 1995 C of O application.[3] Instead of doing so at that time, Waste Management reapplied for a C of O on September 3, 1996, as its interim operating permit directed it to do. In May of 1997, the DCRA denied the reapplication. The DCRA did not, however, advise Waste Management to seek a variance. Rather, the DCRA said that the company should seek a special exception[4] in accordance with proposed amendments to the Zoning Regulations that the Zoning Commission was then considering. The proposed amendments would authorize the BZA to grant special exceptions for solid waste handling facilities in districts zoned M and C M. Waste Management thereupon tendered a special exception application to the BZA. However, the BZA rejected the application because the proposed regulations had not yet been adopted.

Subsequently, in March of 1998, the Zoning Commission did adopt the proposed amendments. *See* 45 D.C.Reg. 187 (1998). For whatever reasons, however, Waste Management did not resubmit its special exception application for its Queens Chapel Road facility. Rather, Waste Management advised the DCRA "that it was not going to proceed further with any action on a certificate of occupancy until DCRA worked out an appropriate procedure, process and rules that would not be changed and gave Waste Management explicit instructions." Waste Management asserts that the "DCRA never refused to acknowledge that position," though the DCRA did not furnish the company with written instructions on how to proceed.

Instead, beginning in April of 1998, the DCRA issued notices of infraction to Waste Management for operating a solid waste handling facility on Queens Chapel Road without a proper C of O. By January 1999, Waste Management claims, it was "becoming clear that the process mandated by DCRA was in fact little more than a 'bait and switch' game where Waste Management could not obtain the requisite approvals." As a result, as Waste Management later told the BZA, the company "determined that it had no choice other than to resume seeking a C of O as a matter-of-right as set forth in its 1995 application."

3. Waste Management subsequently represented to the BZA that it had been "preparing to file an appeal" up until the time it received the May 22, 1996, letter from the DCRA. "Based on" that letter, Waste Management said, it determined that "filing an appeal of its 1995[sic] action could result in DCRA's taking action to shut down the facility." The record contains no support, however, for the assertion that the DCRA would have tried to shut down the Queens Chapel Road facility if Waste Management had taken a prompt appeal.

4. Pursuant to D.C.Code § 5–424(g)(2), the BZA may grant requests for special exceptions where "the proposed use will be in harmony with the general purpose and intent of the Zoning Regulations.' " *Citizens Coalition*, 619 A.2d at 948 (citations and footnote omitted).

Accordingly, on February 12, 1999, almost three years to the day after the Zoning Administrator denied its initial C of O application, Waste Management appealed that denial to the BZA.[5] The DCRA moved to dismiss the appeal for lack of jurisdiction on the ground that it was not timely, as required by the BZA's Supplemental Rules of Practice and Procedure. *See* 11 D.C.M.R. § 3315.2 (1985).

After a hearing on the issue, the BZA granted the motion and dismissed Waste Management's appeal. In its written order of May 22, 2000, the BZA stated that "a standard of reasonableness is applicable to determine whether an appeal is timely," and that it was "not reasonable" for Waste Management to wait three years after it had notice of the decision of the Zoning Administrator before taking an appeal. The BZA rejected Waste Management's argument that it filed its appeal within a reasonable time in light of its active pursuit of other administrative remedies at the behest of the DCRA: "A long interval, such as three years, does not become reasonable merely because an appellant initially chooses to pursue other options instead of preserving its appeal rights by filing a timely appeal."

Waste Management petitioned this court to reverse the BZA's dismissal of its appeal as arbitrary, capricious, and an abuse of discretion. *See* D.C.Code § 1–1510(a)(3)(A) (1999). Waste Management argues that the BZA erred in applying a per se rule that a delay of three years is "too long no matter what the reason," and in disregarding what it calls "the run-around process which the District made Waste Management endure." Opposing the petition, the District argues that Waste Management's three-year delay in appealing the denial of its C of O application was "inherently unreasonable," and that the BZA's determination was well within its discretion.

II.

[3, 4] "Appeals to the Board of [Zoning] Adjustment may be taken by any person aggrieved . . . by any . . . administrative decision based in whole or in part upon any zoning regulation or map. . . ." D.C.Code § 5–424(f) (1994). Although the statute thus confers a right of appeal to the BZA, it is silent as to the time frame in which an appeal must be taken. The statute does, however, authorize the Zoning Commission and the BZA to adopt rules of procedure. *See* D.C.Code § 5–424(c). Pursuant to that authorization, the BZA adopted the following rule:

> Any person aggrieved by any order, requirement, decision, determination, or refusal made by an administrative officer or body, including the Mayor of the District of Columbia, in the administration or enforcement of the Zoning Regulations, may file a *timely* appeal with the Board as may be provided by the Board.

11 D.C.M.R. § 3315.2 (emphasis added). The requirement set forth in this rule that an appeal be timely is jurisdictional; hence we have said that "if the appeal was not timely filed, the Board was without power to consider it." *Goto v. District of Columbia Bd. of Zoning Adjustment*, 423 A.2d 917, 923 (D.C.1980); *accord*, *Mendelson v. District of Columbia Bd. of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C.1994). Our review of a BZA decision that an appeal was not "timely" within the mean-

5. Together with its appeal, Waste Management also applied in the alternative for a special exception to permit it to operate a solid waste handling facility, pursuant to the March 1998 amendments to the Zoning Regulations. At Waste Management's request, the BZA agreed to defer consideration of the special exception application until after the appeal was decided.

ing of § 3315.2 is deferential; and we will uphold the agency's interpretation of its own procedural regulation unless that interpretation is "clearly wrong." *Goto*, 423 A.2d at 924 (citations omitted).

[5] "Because the rules of the BZA adopt no specific time limit on appeals, a standard of reasonableness is applied in determining whether an appeal is timely." *Woodley Park Cmty. Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 490 A.2d 628, 636 (D.C.1985). Reasonableness is a standard that requires due consideration of attendant facts and circumstances that legitimately may bear on the particular appellant's ability to seek review. For example, "[i]n applying the reasonableness standard, courts have consistently held that the time for filing an appeal commences [only] when the party appealing is chargeable with notice or knowledge of the decision complained of." *Woodley Park*, 490 A.2d at 636.

[6–8] Although what constitutes reasonable time to appeal may thus depend on the circumstances, the question "should not be decided on an ad hoc basis." 3 EUGENE H. ZIEGLER, RATHKOPF'S THE LAW OF ZONING AND PLANNING § 37.04[1][a][ii] at 37–61–62 (4th ed.2001)(hereinafter "ZIEGLER"). A reasonable time in which to appeal is measured by the time that fairness dictates to enable an aggrieved party to evaluate the appropriateness of seeking review, to obtain the assistance of counsel, and to take the other steps necessary to proceed. "[A] delay ... for that purpose is essentially what a statutory appeal period contemplates." *Beins v. District of Columbia Bd. of Zoning Adjustment*, 572 A.2d 122, 127 (D.C.1990). This conception of the reasonableness standard does not countenance delay in taking an appeal when it is merely convenient for an appellant to defer making that decision. Rather, because deadlines for taking appeals serve important ends,[6] they should not be extended without good cause. We therefore think that the reasonableness standard imposes a duty on appellants to act with diligence and prudent dispatch in protecting their own interests through the appellate process.

[9] Consistent with these principles, prior decisions of this court have held delays of one or two months in filing appeals to the BZA to be reasonable. *See Mendelson*, 645 A.2d at 1094; *Beins*, 572 A.2d at 127; *Woodley Park*, 490 A.2d at 637; *Goto*, 423 A.2d at 924–25. On the other hand, in *Woodley Park*, we held that a delay of a year was not reasonable, and we implied through citation of authority from another jurisdiction that a delay of four months would not be reasonable either. *See* 490 A.2d at 637 (citing *Maroney v. Friere*, 74 Misc.2d 339, 343 N.Y.S.2d 183, 185 (N.Y.Sup.Ct.1973)). Experience teaches that in the ordinary scheme of things, two months is ample time in which to decide whether to seek appellate review and act accordingly. At least in the absence of exceptional circumstances substantially impairing the *ability* of an aggrieved party to appeal-circumstances outside the party's control—we conceive of two months between notice of a decision and appeal therefrom as the limit of timeliness.

6. A rule designating a period after which the order, requirement, decision, or determination of the administrative officer is no longer subject to review is a salutary one. It provides a period after which the permittee knows that he may proceed safely in accordance with the permit. Where the permit is denied, it gives those opposing its issuance assurance that the applicant who has been denied the permit may no longer secure a review, and a possible reversal, by the board of appeals, and that their vigilance need no longer be maintained.

ZIEGLER, § 37.04[1][a][i] at 37–60–61.

[10] Turning now to this case, Waste Management knew of the Zoning Administrator's final decision on its 1995 C of O application on or about the date it was issued, February 21, 1996. The BZA therefore properly assessed the timeliness of Waste Management's appeal by reference to that date. *See Goto,* 423 A.2d at 924 and 925 n. 16. And in light of our precedents and the principles discussed above, Waste Management's decision to wait three years before filing its appeal was presumptively unreasonable. Waste Management's burden of convincing us otherwise is a heavy one.

Waste Management has not shouldered that burden. Contrary to its argument, the BZA did take into consideration Waste Management's reasons for not appealing sooner. The BZA simply found those reasons wanting. We do not see how the BZA could have reached any other conclusion. The fact that Waste Management chose to concentrate on avenues that reasonably may have appeared more promising than an appeal does not excuse its delay in noting an appeal. *Cf. Woodley Park,* 490 A.2d at 638 (efforts to resolve dispute through negotiations did not excuse delay in filing appeal; appellant "cannot now escape the harsh consequences of its one year delay in appealing because WSC—its adversary in difficult negotiations—was less than fully candid"). It is true that from the February 1996 denial onward, the DCRA consistently disagreed with Waste Management's contention that it was entitled to a C of O as of right, and took the contrary position that Waste Management should apply for a variance or a special exception. But the DCRA did not preclude Waste Management from taking a prompt appeal from the February 1996 denial if the company was of a mind to do so. Indeed, Waste Management could have taken such an appeal and applied for a variance or a special exception simultaneously—as it eventually did three years later, in February 1999. *See* note 5, *supra.*

We conclude that the BZA's determination that Waste Management's appeal was untimely was fully in accordance with law, and was neither arbitrary, capricious, nor an abuse of discretion. The decision of the BZA dismissing the appeal is affirmed.

So ordered.



In re Tony O. SHAW, Respondent.

A Member of the Bar of the District of Columbia Court of Appeals.

No. 00–BG–837.

District of Columbia Court of Appeals.

Argued April 12, 2001.
Decided July 12, 2001.

Attorney disciplinary proceedings were instituted. The Court of Appeals held that: (1) evidence supported finding that attorney violated disciplinary rule requiring him to notify interested party of receipt of funds, and (2) public censure was warranted for attorney's conduct charging an unreasonable fee and failing to notify interested party of receipt of funds.

Public censure ordered.

1. Attorney and Client ⇐57

The Court of Appeals accepts the findings of the Board on Professional Responsibility as long as they are supported by substantial evidence in the record.

2. Attorney and Client ⇐53(2)

Evidence supported finding that attorney violated disciplinary rule, requiring him to notify interested party of receipt of

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ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
Case No. 98-19
(Text Amendments – Zoning Commission and Board of Zoning Adjustment
Rules of Practice and Procedure)
September 13, 1999

Zoning Commission Case No. 98-19 (Text Amendments – Rules of Practice and Procedure – Zoning Commission and Board of Zoning Adjustment) is an initiative of the Zoning Commission resulting from resolutions, orders and recommendations on regulatory reform by the D. C. Financial Responsibility and Management Assistance Authority (the "Authority"). The proposed text amendments aim to effectuate improvements in Zoning Commission and Board of Zoning Adjustment (BZA) procedures in the interests of effective and timely hearings and decisions. The proposed amendments relate to Chapters 30 and 31 as modified and recommended by the Authority. Also, the advertised text includes a further modification of a text amendment adopted in Zoning Commission Order No. 62 relating to flexibility to be exercised by the Zoning Administrator.

The public hearing was held on October 5, 1998, and the written record was left open until November 13, 1998. Notice of the hearing was published in the *D.C. Register* on September 18, 1998 and in the *Washington Times* on September 25, 1998. The hearing was conducted according to the provisions of Section 3021 of the Zoning Regulations as a rulemaking case.

At its public meeting on December 14, 1998, the Zoning Commission took proposed action to amend the text of the Zoning Regulations. Following the Commission's action, a Notice of Proposed Rulemaking was published in the D.C. Register at 46 DCR 2184 (February 26, 1999) for a thirty (30) day public notice and comment period. The comment period expired on (March 30, 1999). As a result of the publication of the notice of proposed rulemaking, comments were received from the National Capital Planning Commission (NCPC), Ms. Barbara F. Kahlow, Mr. Lindsley Williams and Mr. Christopher H. Collins, Vice-President of the D.C. Building Industry Association. Minor changes were made to correct the inconsistencies and editorial corrections and to clarify the Commission's intent. The specific amendments that were adopted by the Zoning Commission as final action at its public meeting of September 13, 1999 are as follows:

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TORRES *v.* OAKLAND SCAVENGER CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 86-1845. Argued February 23, 1988—Decided June 24, 1988

Petitioner is one of 16 plaintiffs whose complaint seeking intervention in an employment discrimination action against respondent Oakland Scavenger Co. (hereafter respondent) was dismissed by the District Court. On remand following the Court of Appeals' reversal of the dismissal, the District Court granted summary judgment against petitioner on the ground that he had not been named in the notice of appeal to the Court of Appeals, albeit inadvertently. The Court of Appeals affirmed, ruling that exclusion from the notice of appeal constituted a jurisdictional bar.

Held: Failure to file a notice of appeal in accordance with Federal Rule of Appellate Procedure 3(c)'s requirement that the notice "specify the party or parties taking the appeal" presents a jurisdictional bar to the appeal. The Rule's caveat that an appeal "shall not be dismissed for [the notice's] informality of form or title" does not aid petitioner, since his exclusion from the notice constitutes a failure to appeal rather than excusable informality. Nor can petitioner find relief in Rule 2's grant of broad equitable discretion to the courts of appeals, "for good cause shown," to "suspend the requirements . . . of any [Rule]," since Rule 26(b) contains an exception forbidding "enlarg[ing]" Rule 4's mandatory time limits for filing a notice, which would be vitiated if courts could exercise jurisdiction over parties not named in the notice. This reading is supported by the Advisory Committee's Note following Rule 3, and does not contravene *Foman* v. *Davis*, 371 U. S. 178, since, although under that decision a court may construe the Rules liberally and ignore "mere technicalities" in determining compliance, it may not waive the jurisdictional requirements of Rules 3 and 4, even for "good cause shown." Here, petitioner never filed the functional equivalent of a notice of appeal, was not named by implication in the notice that was filed, and did not seek leave to amend the notice within the time limit set by Rule 4. The use of "et al." in the notice was insufficient to notify respondent and the court that petitioner was an appellant or to allow them to determine with certitude whether he should be bound by an adverse judgment or held liable for costs or sanctions. Pp. 314-318.

807 F. 2d 178, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, STEVENS, O'CONNOR, and KENNEDY, JJ.,

joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 318. BRENNAN, J., filed a dissenting opinion, *post*, p. 319.

B. V. Yturbide argued the cause and filed briefs for petitioner.

Stephen McKae argued the cause for respondents and filed a brief for respondent Oakland Scavenger Co.

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether a federal appellate court has jurisdiction over a party who was not specified in the notice of appeal in accordance with Federal Rule of Appellate Procedure 3(c).

I

Petitioner Jose Torres is one of 16 plaintiffs who intervened in an employment discrimination suit against respondent Oakland Scavenger Co. (hereafter respondent) after receiving notice of the action pursuant to a settlement agreement between respondent and the original plaintiffs. In their complaint, the intervenors purported to proceed not only on their own behalf, but also on behalf of all persons similarly situated. On August 31, 1981, the District Court for the Northern District of California dismissed the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim warranting relief. 4 Record, Doc. No. 87. A class had not been certified at the time of the dismissal.

On September 29, 1981, a notice of appeal was filed in the Court of Appeals for the Ninth Circuit. The Court of Appeals reversed the District Court's dismissal and remanded the case for further proceedings. *Bonilla* v. *Oakland Scavenger Co.*, 697 F. 2d 1297 (1982). Both the notice of appeal and the order of the Court of Appeals omitted petitioner's name. It is undisputed that the omission in the notice of appeal was due to a clerical error on the part of a secretary employed by petitioner's attorney.

On remand, respondent moved for partial summary judgment on the ground that the prior judgment of dismissal was final as to petitioner by virtue of his failure to appeal. The

District Court granted respondent's motion. App. to Pet. for Cert. B–1, Civ. Action No. C 75–0060 CAL (ND Cal., Oct. 30, 1985). The Court of Appeals affirmed, judgment order reported at 807 F. 2d 178 (1986), holding that "[u]nless a party is named in the notice of appeal, the appellate court does not have jurisdiction over him." App. to Pet. for Cert. A–4, citing *Farley Transportation Co.* v. *Santa Fe Trail Transportation Co.*, 778 F. 2d 1365, 1368 (CA9 1985).

We granted certiorari to resolve a conflict in the Circuits over whether a failure to file a notice of appeal in accordance with the specificity requirement of Federal Rule of Appellate Procedure 3(c) presents a jurisdictional bar to the appeal.[1] 484 U. S. 894 (1987). We now affirm.

II

Federal Rule of Appellate Procedure 3(c) provides in pertinent part that a notice of appeal "shall specify the party or parties taking the appeal." The Rule was amended in 1979 to add that an appeal "shall not be dismissed for informality of form or title of the notice of appeal." This caveat does not aid petitioner in the instant case. The failure to name a party in a notice of appeal is more than excusable "informality"; it constitutes a failure of that party to appeal.

More broadly, Rule 2 gives courts of appeals the power, for "good cause shown," to "suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion." Rule 26(b), however, contains certain exceptions to this grant of broad equitable dis-

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[1] Compare *Farley Transportation Co.* v. *Santa Fe Trail Transportation Co.*, 778 F. 2d 1365, 1368–1370 (CA9 1985) (failure to specify party to appeal is jurisdictional bar); *Covington* v. *Allsbrook*, 636 F. 2d 63, 64 (CA4 1980) (same); *Life Time Doors, Inc.* v. *Walled Lake Door Co.*, 505 F. 2d 1165, 1168 (CA6 1974) (same), with *Ayres* v. *Sears, Roebuck & Co.*, 789 F. 2d 1173, 1177 (CA5 1986) (appeal by party not named in notice of appeal is permitted in limited instances); *Harrison* v. *United States*, 715 F. 2d 1311, 1312–1313 (CA8 1983) (same); *Williams* v. *Frey*, 551 F. 2d 932, 934, n. 1 (CA3 1977) (same).

cretion. The exception pertinent to this case forbids a court to "enlarge" the time limits for filing a notice of appeal, which are prescribed in Rule 4. We believe that the mandatory nature of the time limits contained in Rule 4 would be vitiated if courts of appeals were permitted to exercise jurisdiction over parties not named in the notice of appeal. Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal. Because the Rules do not grant courts the latter power, we hold that the Rules likewise withhold the former.

We find support for our view in the Advisory Committee Note following Rule 3:

> "Rule 3 and Rule 4 combine to require that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an appeal. Because the timely filing of a notice of appeal is 'mandatory and jurisdictional,' *United States* v. *Robinson*, [361 U. S. 220, 224 (1960)], compliance with the provisions of those rules is of the utmost importance." 28 U. S. C. App., p. 467.

This admonition by the Advisory Committee makes no distinction among the various requirements of Rule 3 and Rule 4; rather it treats the requirements of the two Rules as a single jurisdictional threshold. The Advisory Committee's caveat that courts should "dispense with literal compliance in cases in which it cannot fairly be exacted," *ibid.*, is not to the contrary. The examples cited by the Committee make clear that it was referring generally to the kinds of cases later addressed by the 1979 amendment to Rule 3(c), which excuses "informality of form or title" in a notice of appeal.[2] Permitting imperfect but substantial compliance with a technical re-

[2] For example, the Advisory Committee approvingly cited cases permitting a letter from a prisoner to a judge to suffice as a notice of appeal, see *Riffle* v. *United States*, 299 F. 2d 802 (CA5 1962), and permitting the mailing of a notice of appeal to constitute its time of "filing" rather than its receipt by the court, see *Halfen* v. *United States*, 324 F. 2d 52 (CA10 1963).

quirement is not the same as waiving the requirement altogether as a jurisdictional threshold. Our conclusion that the Advisory Committee viewed the requirements of Rule 3 as jurisdictional in nature, although not determinative, is "of weight" in our construction of the Rule. *Mississippi Publishing Corp.* v. *Murphree*, 326 U. S. 438, 444 (1946).

Nor does this Court's decision in *Foman* v. *Davis*, 371 U. S. 178 (1962), compel a contrary construction. In *Foman*, the Court addressed a separate provision of Rule 3(c) requiring that a notice of appeal "designate the judgment, order or part thereof appealed from." Foman was a plaintiff whose complaint was dismissed. She first filed motions in the District Court seeking to vacate the judgment against her and to amend her complaint. While the motions were pending, she filed a notice of appeal from the dismissal. When the District Court denied his motions, Foman filed a second notice of appeal from the denial. The Court of Appeals concluded that the first notice of appeal was premature because of Foman's pending motions, and that the second notice of appeal failed to designate the underlying dismissal as the judgment appealed from. This Court reversed the appellate court's refusal to hear Foman's appeal on the merits of her dismissal, holding that the court should have treated the second notice of appeal as "an effective, although inept, attempt to appeal from the judgment sought to be vacated." *Id.*, at 181.

Foman did not address whether the requirement of Rule 3(c) at issue in that case was jurisdictional in nature; rather, the Court simply concluded that in light of all the circumstances, the Rule had been complied with. We do not dispute the important principle for which *Foman* stands—that the requirements of the rules of procedure should be liberally construed and that "mere technicalities" should not stand in the way of consideration of a case on its merits. *Ibid.* Thus, if a litigant files papers in a fashion that is technically

at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires. See, *e. g.*, *Houston* v. *Lack*, *ante*, p. 266 (delivery of notice of appeal by *pro se* prisoner to prison authorities for mailing constitutes "filing" within the meaning of Federal Rules of Appellate Procedure 3 and 4). But although a court may construe the Rules liberally in determining whether they have been complied with, it may not waive the jurisdictional requirements of Rules 3 and 4, even for "good cause shown" under Rule 2, if it finds that they have not been met.[3]

Applying these principles to the instant case, we find that petitioner failed to comply with the specificity requirement of Rule 3(c), even liberally construed. Petitioner did not file the functional equivalent of a notice of appeal; he was never named or otherwise designated, however inartfully, in the notice of appeal filed by the 15 other intervenors. Nor did petitioner seek leave to amend the notice of appeal within the time limits set by Rule 4. Thus, the Court of Appeals was correct that it never had jurisdiction over petitioner's appeal.

Petitioner urges that the use of "et al." in the notice of appeal was sufficient to indicate his intention to appeal. We

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[3] In addition to urging that the requirements of Rule 3(c) are not jurisdictional in nature, petitioner advances two other arguments in support of his position, neither of which has merit. First, petitioner argues that courts of appeals should apply "harmless error" analysis to defects in a notice of appeal. This argument misunderstands the nature of a jurisdictional requirement: a litigant's failure to clear a jurisdictional hurdle can never be "harmless" or waived by a court. Second, petitioner argues that refusal to permit him to cure the defect in the original notice of appeal will unfairly permit absent class members, now that the suit has been certified as a class action, to obtain relief from which petitioner is barred. The District Court, however, in granting summary judgment against petitioner, explicitly left open "the issue of whether Mr. Torres can or cannot participate in this litigation as a member of a class, should a class be properly certified." App. to Pet. for Cert. B–4.

cannot agree. The purpose of the specificity requirement of Rule 3(c) is to provide notice both to the opposition and to the court of the identity of the appellant or appellants. The use of the phrase "et al.," which literally means "and others," utterly fails to provide such notice to either intended recipient. Permitting such vague designation would leave the appellee and the court unable to determine with certitude whether a losing party not named in the notice of appeal should be bound by an adverse judgment or held liable for costs or sanctions. The specificity requirement of Rule 3(c) is met only by some designation that gives fair notice of the specific individual or entity seeking to appeal.

We recognize that construing Rule 3(c) as a jurisdictional prerequisite leads to a harsh result in this case, but we are convinced that the harshness of our construction is "imposed by the legislature and not by the judicial process." *Schiavone* v. *Fortune*, 477 U. S. 21, 31 (1986) (construing Federal Rule of Civil Procedure 15(c) in a similarly implacable fashion).

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SCALIA, concurring in the judgment.

I agree with the judgment of the Court, but I do not believe that the principles set forth in its opinion produce it. If it is the fact that the requirements of the rules of procedure should be "liberally construed," that "'mere technicalities' should not stand in the way of consideration of a case on its merits," and that a rule is complied with if "the litigant's action is the functional equivalent of what the rule requires," *ante*, at 316, it would seem to me that a caption listing the first party to the case and then adding "et al." is enough to suggest that all parties are taking the appeal; and that the later omission of one of the parties in listing the appellants can, "liberally viewed," be deemed to create no more than an

ambiguity which does not destroy the effect of putting the appellee on notice.

The principle that "mere technicalities" should not stand in the way of deciding a case on the merits is more a prescription for ignoring the Federal Rules than a useful guide to their construction and application. By definition all rules of procedure are technicalities; sanction for failure to comply with them always prevents the court from deciding where justice lies in the particular case, on the theory that securing a fair and orderly process enables more justice to be done in the totality of cases. It seems to me, moreover, that we should seek to interpret the rules neither liberally nor stingily, but only, as best we can, according to their apparent intent. Where that intent is to provide leeway, a permissive construction is the right one; where it is to be strict, a permissive construction is wrong. Thus, the very first of the Rules of Civil Procedure does not prescribe that they are to be "liberally construed," but rather that they are to be "construed to secure the just, speedy, and inexpensive determination of every action." Fed. Rule Civ. Proc. 1.

The Appellate Rule at issue here requires the appellant to "specify the party or parties taking the appeal," Fed. Rule App. Proc. 3(c), which suggests to me more than just a residual "et al." Moreover, that it was thought necessary to specify that "informality of form or title" would not entail dismissal, *ibid.*, suggests that a strict application was generally contemplated. I concur in today's judgment, therefore, for essentially the same reasons that I dissented from the judgment in *Houston* v. *Lack*, *ante*, p. 266, which the Court appropriately cites to support its reasoning in the present case, but which in my view stands in stark contrast to its conclusion.

JUSTICE BRENNAN, dissenting.

"The Federal Rules," we have previously observed, "reject the approach that pleading is a game of skill in which one mis-

step by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Foman* v. *Davis*, 371 U. S. 178, 181–182 (1962). Although the Court today pays lip-service to the spirit of liberality animating the Federal Rules, it nevertheless holds that the Court of Appeals below lacked jurisdiction over petitioner's suit because his lawyer's secretary inadvertently omitted his name from the notice of appeal filed on behalf of him and his 15 coplaintiffs. Eschewing any inquiry into whether this omission was excusable or whether respondent suffered any prejudice as a result of it, the Court concludes that this "misstep by counsel" decides the outcome of petitioner's case because compliance with the party-specification requirement of Federal Rule of Appellate Procedure 3(c) is a jurisdictional prerequisite to appellate review. Nothing in the Federal Rules, however, compels such a construction of Rule 3(c), which I believe to be wholly at odds with the liberal policies underlying those Rules, as well as our own prior construction of them.

As the Court notes, Federal Rule of Appellate Procedure 2 permits the courts of appeals, upon a showing of good cause, to "suspend the requirements or provisions of any of these rules in a particular case," except as otherwise provided by Rule 26(b). Rule 26(b), in turn, permits appellate courts to enlarge the time established by the Rules for any act, except the "time for filing a notice of appeal" set out in Rule 4. On their face, then, Rules 2 and 26(b) together confer broad equitable discretion on the courts of appeals to excuse compliance with the requirements of any and all Rules save the time limitations of Rule 4. Notably, neither mentions Rule 3(c) as falling outside the purview of this broad equitable power.

In the face of this express policy favoring a liberal construction of all the Rules except the timeliness requirements of Rule 4, the Court nevertheless holds that Rule 3(c)'s party-

specification requirement must be deemed jurisdictional, for the "mandatory nature of the time limits contained in Rule 4 would be vitiated if courts of appeals were permitted to exercise jurisdiction over parties not named in the notice of appeal." *Ante*, at 315. This unsupported assertion, however, is only correct if we assume the answer to the question at issue here, *i. e.*, that "[t]he failure to name a party in a notice of appeal . . . constitutes a failure of that party to appeal." *Ante*, at 314. If, on the other hand, we assume, as several Courts of Appeals have, that an unnamed party effectively appeals where a notice is timely filed and the unnamed party's intention to join in the appeal is clear to all and prejudicial to none, see, *e. g.*, *Harrison* v. *United States*, 715 F. 2d 1311, 1312–1313 (CA8 1983); *Williams* v. *Frey*, 551 F. 2d 932, 934, n. 1 (CA3 1977), then Rule 4's mandatory time limitations would remain inviolate. The Court itself acknowledges that a "litigant's action [may be] the functional equivalent of what the rule requires." *Ante*, at 317. It is obvious, however, that the initial determination whether a given act satisfies any test of "functional equivalence" depends not at all on the time limitations prescribed by Rule 4; it is only *after* a court decides that a given act is not the functional equivalent of filing a notice of appeal that the necessity of amending any notice that was filed, and hence the necessity of enlarging the time requirements of Rule 4, arise.

The Court purports to find support for its jurisdictional construction of Rule 3(c) in the Advisory Committee Notes, which explain that Rules 3 and 4 "combine to require that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an appeal," and that "[b]ecause the timely filing of a notice of appeal is mandatory and jurisdictional . . . compliance with the provisions of those rules is of the utmost importance." 28 U. S. C. App., p. 467. Arguing that this admonition does not differentiate

between the various requirements of the two Rules, the Court concludes that all the requirements of both form "a single jurisdictional threshold." *Ante*, at 315. I believe the Advisory Committee Note lends no support to the result the Court reaches today. The comment itself says only that the "timely filing" requirement is mandatory and jurisdictional; significantly, the Advisory Committee stopped short of describing Rules 3 and 4 as jurisdictional in their entirety. Moreover, it is apparent from the context that the Advisory Committee did not intend to incorporate by reference every requirement of the two Rules, but rather, only those provisions discussed in the first sentence of the comment. Rule 3(a) provides that an appeal "shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4." It is thus this provision—which is tracked nearly word for word in the Advisory Committee Note—and not every enumerated requirement of Rule 3, that combines with Rule 4 to form the jurisdictional requirement "that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an appeal."

The Court's broader reading of the Note, and its jurisdictional construction of the Rule, are flatly inconsistent with *Foman* v. *Davis*, *supra*, where we held that Rule 3 (c)'s judgment-designation requirement is not jurisdictional. That requirement, which immediately precedes the party-specification provision, states that a notice of appeal "shall designate the judgment, order, or part thereof appealed from." Although the Court today suggests that in *Foman* we simply forgave mere technical noncompliance with the Rule, see *ante*, at 316, the lower court in that case expressly stated that the second notice of appeal in question made no reference to the judgment for which review was sought, and that the first notice of appeal was premature and thus void. *Foman* v. *Davis*, 292 F. 2d 85, 87 (CA1 1961). Because we

affirmed the lower court's disposition of the first notice, the lack of a designated judgment in the second notice was no more nor less a "mere technicality" than the absence of petitioner's name from the notice of appeal filed in this case: both the notice here and in *Foman* omitted precisely the information required by Rule 3(c). In *Foman*, we nevertheless held that the Court of Appeals should have "*treated* the [second notice of] appeal . . . as an effective, although inept, attempt to appeal" because when the two ineffective notices were read together, "petitioner's *intention to seek review* . . . was manifest." 371 U. S., at 181 (emphasis added).

Petitioner Torres makes precisely the same claim here, arguing that appellate counsel's presentation of the case—in which all issues in the case were treated as common to all the plaintiffs, named and unnamed in the District Court—and the inclusion of 15 of the 16 named intervenors in the notice of appeal, made his intention to join in the appeal manifest. The Court, however, simply dismisses this contention by asserting that "petitioner failed to comply with the specificity requirement of Rule 3(c)"; failed to "file the functional equivalent of a notice of appeal"; and was "never named or otherwise designated, however inartfully, in the notice of appeal filed by the 15 other intervenors." *Ante*, at 317. These statements, however, are wholly conclusional, and in no way distinguish petitioner's omission from that involved in *Foman*.

In 1979, Rule 3(c) was amended to provide that "[a]n appeal shall not be dismissed for informality of form or title of the notice of appeal." The Advisory Committee Note accompanying this amendment explained that "so long as the *function* of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with." Advisory Committee Note to Rule 3, 28 U. S. C. App., p. 467 (emphasis added). The function of a notice of appeal, of course, is to notify the court of appeals

and the opposing party that an appeal is being taken, see *Cobb* v. *Lewis*, 488 F. 2d 41, 45 (CA5 1974) (cited with approval in Advisory Committee Note to Rule 3), which in turn ensures that the appellees are not prejudiced in any way by the appeal and that the appellants have made the requisite commitment to assuming the obligations of the appeal, particularly the obligation to pay any costs and fees that the appellate court might ultimately assess. These are factual inquiries that the courts of appeals are entirely capable of undertaking, and that better serve the purposes supposedly advanced by the bright-line jurisdictional rule the Court announces today.*

After today's ruling, appellees will be able to capitalize on mere clerical errors and secure the dismissal of unnamed appellants no matter how meritorious the appellant's claims and no matter how obvious the appellant's intention to seek appellate review, and courts of appeals will be powerless to correct even the most manifest of resulting injustices. The Court identifies no policy supporting, let alone requiring, this harsh rule, which I believe is patently inconsistent not only with the liberal spirit underlying the Federal Rules, but with Rule 2's express authorization permitting courts of appeals to forgive noncompliance where good cause for such forgiveness

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*Although the Court's jurisdictional approach to the specificity requirement provides no greater protection to litigants than the equitable approach adopted by several Courts of Appeals, like all bright-line tests its application is more certain and predictable. This advantage, however, is of marginal significance inasmuch as few courts have found the notice function satisfied where a party's name is omitted, and those that have have acknowledged that it is the exceptional case in which such a finding is even possible. See *Harrison* v. *United States*, 715 F. 2d 1311, 1313 (CA8 1983) ("[T]his is a very rare but appropriate case for a liberal construction of FRAP 3"); *Williams* v. *Frey*, 551 F. 2d 932, 934, n. 1 (CA3 1977) ("Under most circumstances, the designation of the party appellant in the notice of appeal will govern"). Certainly no responsible lawyer would intentionally omit a party's name in reliance on an equitable construction of the notice of appeal.

is shown. Instead, the Court simply announces by fiat that the omission of a party's name from a notice of appeal can never serve the function of notice, thereby converting what is in essence a factual question into an inflexible rule of convenience. Because the Court has failed to demonstrate that the notice filed in this case failed to apprise the court below or respondents that petitioner intended to join in the appeal taken by his 15 coplaintiffs, I would reverse the case and remand for the necessary factual inquiry.

Accordingly, I dissent.

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Charles SISSON, Petitioner,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, Respondent,

Mildred R. CRARY, Intervenor.

No. 00-AA-97.

District of Columbia Court of Appeals.

Argued Nov. 9, 2001.

Decided Aug. 29, 2002.

Homeowner sought review of decision by the Board of Zoning Adjustment that zoning administrator erroneously issued building permits for garage and home. The Court of Appeals, Reid, J., held that: (1) neighbor timely appealed issuance of building permits more than two months earlier, and (2) evidence supported Board's conclusion.

Affirmed.

1. Administrative Law and Procedure ⇐413

The Court of Appeals accords great deference to an agency's interpretation of its own administrative regulations and will uphold that construction unless clearly erroneous or inconsistent with the regulations.

2. Zoning and Planning ⇐605

The Board of Zoning Adjustment's judgment is entitled to additional deference where it is interpreting its own internal rule of procedure, rather than the zoning regulations.

3. Zoning and Planning ⇐358.1

The timely filing of an appeal with the Board of Zoning Adjustment is mandatory and jurisdictional.

4. Zoning and Planning ⇐358.1

A "timely appeal" to the Board of Zoning Adjustment is an appeal within a reasonable time. D.C. Mun.Regs. tit. 11, § 3315.2.

See publication Words and Phrases for other judicial constructions and definitions.

5. Zoning and Planning ⇐358.1

At least in the absence of exceptional circumstances that substantially impair the ability of an aggrieved party to appeal and are outside the party's control, two months between notice of a decision and appeal therefrom are the limit of timeliness for an appeal to the Board of Zoning Adjustment. D.C. Mun.Regs. tit. 11, § 3315.2.

6. Zoning and Planning ⇐442

Homeowner's multiple building permits based on applications that were often incomplete or misleading as to plans for garage, rear addition, and front porch created exceptional circumstances that substantially impaired neighbor's ability to appeal and were outside of her control, and thus, neighbor timely appealed issuance of building permits more than two months earlier; because of the cumulative, piecemeal nature of the applications, the full extent of the construction project could not be discerned as each individual permit was issued, and the neighbor was not chargeable with notice of the entire scope of work until all permits were issued. D.C. Mun. Regs. tit. 11, § 3315.2.

7. Zoning and Planning ⇐762

The defenses of estoppel and laches are judicially disfavored in the zoning context because of the public interest in enforcement of the zoning laws.

8. Zoning and Planning ⇐762

Laches is rarely applied in the zoning context except in the clearest and most compelling circumstances.

9. Zoning and Planning ⇐642

While the Court of Appeals gives deference to the Board of Zoning Adjustment's findings with respect to laches, the question whether the facts, taken together, are sufficient to sustain the defense of laches is one of law to be answered de novo by the appellate court.

10. Equity ⇐67

To determine the validity of a laches defense, the Court of Appeals looks to the entire course of events.

11. Equity ⇐72(1)

Laches is not a valid defense, unless the defendant has been prejudiced by delay and that delay was unreasonable.

12. Equity ⇐84

In the absence of an analogous statute of limitations, the party asserting laches has the burden of establishing that the defendant has been prejudiced by delay and that delay was unreasonable.

13. Zoning and Planning ⇐442

Neighbor's delay of several months before appealing building permits for homeowner's addition and garage renovation was not unreasonable, and, thus, laches did not bar appeal to Board of Zoning Adjustment; the delay resulted from the fact that the homeowner applied for separate building permits for each component of the construction on his property.

14. Estoppel ⇐52(5)

Application of estoppel is limited to situations when the equities are strongly in favor of the party invoking the doctrine.

15. Zoning and Planning ⇐377

To make out a case of estoppel barring neighbor's appeal of building permits issued to homeowner, homeowner needed to show that: (1) he acted in good faith, (2) he acted on affirmative acts of the Department of Consumer and Regulatory Affairs, (3) he made expensive and permanent improvements in reliance thereon, and (4) the equities strongly favored him.

16. Zoning and Planning ⇐377

Homeowner did not act in good faith in presenting the proposed renovations to his property in piecemeal fashion, in demolishing his old garage and constructing a new garage without proper permits, or in building a new garage that was larger than the approved garage addition, and, thus, neighbor was not estopped from appealing issuance of building permits.

17. Zoning and Planning ⇐385

Evidence supported conclusion of the Board of Zoning Adjustment that zoning administrator erroneously issued building permits for rear addition and garage in Wesley Heights Overlay District; the work increased nonconformity with respect to setbacks and lot occupancy, and the larger garage would accommodate two cars. D.C. Mun.Regs. tit. 11, § 2117.8(b, c).

18. Zoning and Planning ⇐605, 703

In reviewing a decision of the Board of Zoning Adjustment, the Court of Appeals must determine whether (1) the agency has made a finding of fact on each material contested issue of fact; (2) substantial evidence of record supports each finding; and (3) conclusions legally sufficient to support the decision flow rationally from the findings.

19. Zoning and Planning ⇐618

The Court of Appeals cannot substitute its judgment for that of the Board of Zoning Adjustment.

Maureen E. Dwyer, with whom Paul J. Kiernan, Washington, was on the brief, for petitioner.

Charles L. Reischel, Deputy Corporation Counsel, filed a first and second statement in lieu of brief.

Before SCHWELB, REID, and WASHINGTON, Associate Judges.

REID, Associate Judge:

This case concerns a challenge to the Zoning Administrator's issuance of several construction permits regarding petitioner Charles Sisson's renovation of his home and garage. Mildred Crary, Mr. Sisson's neighbor, appealed the issuance of the permits to the Board of Zoning Adjustment ("BZA"), which ruled in her favor.[1] Mr. Sisson primarily contends that Ms. Crary's BZA appeal is jurisdictionally and procedurally barred because of untimeliness and laches. He also contends that the BZA erred with respect to its decision on the merits. We affirm the decision of the BZA, which (a) denied Mr. Sisson's motion to dismiss Ms. Crary's appeal; and (b) found that the Zoning Administrator erred by issuing the building permits to Mr. Sisson.

FACTUAL SUMMARY

Responding to Mr. Sisson's requests, the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") issued five building permits to him between January 29, 1998, and October 5, 1998, covering a rear two-story addition, the garage, and the front porch.[2] Mr. Sisson's home is located in the Northwest quadrant of the District of Columbia, within the Wesley Heights Overlay District ("WHOD"). Residential properties within the WHOD are subject to particularized zoning regulations.

The BZA made extensive factual findings regarding Mr. Sisson's permit applications and the regulatory requirements for the issuance of the requested permits. Although Mr. Sisson's property is actually zoned as WHOD/R–1–A, his permit applications generally were reviewed erroneously as R–1–A or R–1–B, rather than as WHOD/R–1–A.[3] Furthermore, Mr. Sisson's piecemeal application process and his tendency to complete, or substantially complete, work before obtaining a permit made it difficult to determine the full scope of the renovation project.

The first permit issued by DCRA in response to Mr. Sisson's request, dated January 29, 1998, related to a proposed "two-story addition" to the rear of the home. This permit application apparently was examined under the R–1–B zoning classification instead of the WHOD/R–1–A regulations. The BZA found that:

> Plans submitted by [Mr. Sisson] as part of his application for the first permit did not reflect all of the construction work that [he] planned to perform at the site. [His] project was developed in a piecemeal manner and the various applications were often incomplete or otherwise misleading in that they did not always reflect [Mr. Sisson's] plans for the garage, rear addition, and front porch consistently and accurately.

1. Ms. Crary did not file an appellate brief in this case.

2. In actuality, the Department issued a sixth permit to Mr. Sisson on October 11, 2000, although that permit is not before the court for review at this time.

3. The R–1–A and WHOD/R–1–A zoning classifications specified requirements for minimum lot area, minimum lot width, lot occupancy, floor area ratio, minimum front yard, minimum rear yard, minimum side yard, and off-street parking; and the R–1–A and WHOD/R–1–A classifications contained different requirements for lot occupancy, floor area ratio, and minimum front yard. The applicable zoning requirements for Mr. Sisson's renovation had to be considered in light of the existing dimensions of his home and garage.

The second permit issued by DCRA, dated February 9, 1998, concerned an addition to Mr. Sisson's garage. The permit was issued pursuant to the R–1–A, rather than the WHOD/R–1–A regulations. The BZA's factual findings establish that "the second permit authorized an addition to an existing garage"; Mr. Sisson "demolished [the existing garage] without authorization"; and constructed a new garage "that was larger than the approved garage addition."

A third permit for the construction of a new garage, dated May 27, 1998, replaced the February 1998 permit, and "was issued after the new garage was already substantially completed." Moreover, "[t]he large size of the new garage also exceeded the dimensions allowed by the third building permit." [4]

DCRA issued a fourth permit, dated August 17, 1998, to repair a roof allegedly situated over Mr. Sisson's porch. The permit was issued pursuant to the R–1–B zoning regulations, rather than the appropriate WHOD/R–1–A regulations. In addition, even though this permit covered repairs to an existing porch roof, "at the time the permit was issued, the porch was open and did not have a roof." The fifth and final permit, dated October 5, 1998, was issued to build a "new porch roof." In this court, "Mr. Sisson concedes that the BZA did not commit reversible error in finding that the two front porch permits (August and October 1998) were not appropriately issued ... [and does] not contest[ ] the validity of BZA's rejection of the front porch permits."

Ms. Crary filed her BZA appeal on September 18, 1998, approximately two weeks prior to the issuance of the fifth and final permit in this case. In response to Mr. Sisson's contention that Ms. Crary's appeal was barred by untimeliness, the BZA stated:

> The Board concludes that the Appeal was timely with respect to all five permits. [Mr. Sisson] submitted five separate applications for building permits that all related to work performed on a single property. Because of the cumulative, piecemeal nature of the applications, the full extent of [Mr. Sisson's] construction project could not be discerned as each individual permit was issued and therefore they must be considered as a whole.... The Board is not persuaded that the first permit put [Ms. Crary] on notice of all the work to be done on [Mr. Sisson's] property or, therefore, that the work allegedly violated the Zoning Regulations.
>
> Other factors also support our conclusion that [Ms. Crary] was not "chargeable with notice" as soon as the first permit was issued. [Mr. Sisson's] various permit applications contained errors of omission or were otherwise misleading in that they did not reflect all existing and planned improvements accurately and consistently.... Because of these errors, zoning violations arising from the failure to comply with lot occupancy and setback requirements of the Wesley Heights overlay, in particular, were not apparent until the work was substantially completed on [Mr. Sisson's] property. Moreover, some work was performed beyond the scope of the permit, as with the demolition of the existing garage and the construction of a new garage larger than the dimensions specified on the permit, and two of the permits (the

4. A new permit was required when structural impediments prevented Mr. Sisson from completing the addition to the garage as originally planned. After discovering the structural problem, however, Mr. Sisson continued construction without first obtaining a new permit. When the DCRA received Ms. Crary's complaint about Mr. Sisson's construction, an investigation was conducted, resulting in a Stop Work Order.

third and fifth) were issued for work that was undertaken prior to receiving the permits. Therefore, the Board concludes that [Ms. Crary] was not chargeable with notice of the entire scope of work performed at [Mr. Sisson's] property until all of the permits were issued.[5]

With respect to Mr. Sisson's argument regarding laches, the BZA declared: "Any delay in filing the appeal was not unreasonable but resulted from the fact that [Mr. Sisson] applied for separate building permits for each component of the construction on his property." Thus, there was no "unexcused delay." As for the merits of Ms. Crary's Appeal, the BZA asserted, in part:

> The Board concludes that the work performed on [Mr. Sisson's] property increased its nonconforming aspect with respect to setbacks and lot occupancy.
>
> As [the Zoning Administrator] acknowledged at the public hearing, the permits for the garage should not have been issued if the garage did not provide access in conformance with the zoning regulations. The two-car garage [which Mr. Sisson constructed] is accessible only through an easement that, at a width of eight feet, is narrower than the minimum width of 14 feet specified in the zoning regulations for a driveway with two-way circulation serving a parking space.
>
> The Board concludes that the Zoning Administrator erred in issuing the five building permits to [Mr. Sisson]. The Zoning Administrator's decisions were not based on complete and accurate information about [Mr. Sisson's] property, reflecting all existing and planned improvements. The zoning Administrator also failed to apply the correct zoning classification, which resulted in the issuance of permits that did not conform to applicable zoning provisions, especially the Wesley Heights Overlay District, in several material respects. The violations stemming from erroneously issued permits were compounded in this case by the fact that some work, with respect to the garage and front porch, was not performed strictly in compliance with the permits.

Ms. Crary filed her appeal on September 18, 1998, prior to the issuance of the fifth permit on October 5, 1998, for a new porch roof. At a February 17, 1999, hearing, Ms. Crary sought to amend her BZA appeal to include two permits not addressed in her original notice of appeal. The BZA granted the amendment.

ANALYSIS

[1–3] Mr. Sisson continues to press his jurisdictional and procedural arguments in this court. In addition, he contends that his new garage and the two-story rear addition to his home do not violate the zoning regulations. "We accord great deference to an agency's interpretation of its own administrative regulations, and we will uphold that construction unless clearly erroneous or inconsistent with the regulations.... Moreover, the agency's judgment ... is entitled to additional deference [where] it was interpreting its own internal rule of procedure rather than the Zoning Regulations." *Dupont Circle Citizens Ass'n v. District of Columbia Zoning Comm'n*, 431 A.2d 560, 565 (D.C.1981) (citations and references omitted); *see also Waste Mgmt. of Md., Inc. v. District of Columbia Bd. of Zoning Adjustment*, 775 A.2d 1117, 1122 (D.C.2001) (citing *Goto v. District of Columbia Bd. of Zoning Adjustment*, 423 A.2d 917, 924 (D.C.1980) (ci-

5. Both the Zoning Administrator and Ms. Crary's attorney had difficulty locating the third and fourth permit in DCRA's records. In fact, Ms. Crary did not locate the third permit until January 1999.

tations omitted)). However, we are required to "[t]o hold unlawful and set aside any action or findings and conclusions found to be ... [a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; ... [or] in excess of statutory jurisdiction, authority, or limitations or short of statutory jurisdiction, authority, or limitations or short of statutory rights." D.C.Code § 2–510(a)(3)(A),(C) (2001). Furthermore, "[t]he timely filing of an appeal with the BZA is mandatory and jurisdictional." *Mendelson v. District of Columbia Bd. of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C.1994) (referencing *Woodley Park Cmty. Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 490 A.2d 628, 635 (D.C.1985)) (other citations omitted).

[4, 5] We turn first to Mr. Sisson's argument that the BZA should have dismissed Ms. Crary's appeal on the ground that it was untimely. The underlying events critical to this issue occurred around 1998. In 1998, BZA regulations required a "timely" appeal. While there was no time limitation specified in statute or regulation, our case law generally held that the filing had to be within a "reasonable period" after the appellant was chargeable with notice of the decision that was the subject of the appeal. As this Court said in *Woodley Park Cmty. Ass'n*, *supra*, "[b]ecause the rules of the BZA adopt no specific time limit on appeals, a standard of reasonableness is applied in determining whether an appeal is timely." [6] 490 A.2d at 636 (citation and references omitted). More recently, we have stated that "[a]t least in the absence of exceptional circumstances substantially impairing the *ability* of an aggrieved party to appeal—circumstances outside the party's control—we conceive of two months between notice of a decision and appeal therefrom as the limit of timeliness." *Waste Mgmt. of Md., supra*, 775 A.2d at 1122 (emphasis in the original).

[6] Ms. Crary's case, as the BZA implicitly determined, falls under the principle of "exceptional circumstances substantially impairing the *ability* of an aggrieved party to appeal—circumstances outside of the party's control." *Id.* Application of this principle supports the Board's conclusion that the timing of Ms. Crary's BZA appeal was not unreasonable, precisely because circumstances beyond her control impacted the timeliness of her filing. As the BZA determined, "[b]ecause of the cumulative, piecemeal nature of the applications, the full extent of [Mr. Sisson's] con-

6. The applicable BZA rule stated:

> Any person aggrieved by any order, requirement, decision, determination, or refusal made by an administrative officer or body, including the Mayor of the District of Columbia, in the administration or enforcement of the Zoning Regulations, may file a timely appeal with the Board as may be provided by the Board.

11 DCMR § 3315.2 (1995). This provision was recodified in 1999 as 11 DCMR § 3112.2 (1999), 46 D.C.Reg. 7900 (1999). A notice of proposed rulemaking modifying this provision was published on May 24, 2002, 49 D.C.Reg. 4884 (2002), but apparently has not yet become final. The proposed rule would require an appeal to be filed "within sixty days (60) from the date the person appealing ... had notice or knowledge of the decision complained of, or reasonably should have had notice or known of the decision complained of, whichever is earlier." 49 D.C.Reg. at 4884. However, it also states:

> The [BZA] may extend the sixty (60) day deadline for the filing of an appeal only if the appellant demonstrates that:
>
> (1) There are exceptional circumstances that are outside of the appellant's control and that could not have been reasonably anticipated that substantially impaired the appellant's ability to file an appeal to the Board; and
>
> (2) The extension of time will not prejudice the parties to the appeal....

49 D.C.Reg. at 4885.

struction project could not be discerned as each individual permit was issued and therefore they must be considered as a whole." Thus, "[Ms. Crary] was not chargeable with notice of the entire scope of work performed at [Mr. Sisson's] property until all of the permits were issued." The factual record supports this conclusion.

Not only were most of the permits issued under the wrong zoning classification, but each of the individual permits failed to reflect the entire scope of Mr. Sisson's proposed renovations. The first permit, issued in January 1998, covered a proposed two-story addition to Mr. Sisson's home, but did not authorize any garage or front porch modifications. The second permit, relating only to the garage construction, contained information that was not entirely consistent with that provided in conjunction with the first permit. Indeed, during the hearing on Ms. Crary's appeal, the BZA questioned Mr. Sisson at length about relevant omissions in his permit application. Those omissions related to the overall construction renovations at his home. Ultimately, the District issued a Stop Work Order when it appeared that Mr. Sisson's renovations did not comport with the permit issued to him by the DCRA. In fact, although his "permit authorized an addition to an existing garage," Mr. Sisson "demolished [the existing garage] without authorization," and ultimately constructed a new garage, for which he had no permit, "that was larger than the approved garage addition." Mr. Sisson then applied for a new permit relating to the garage after the District issued the Stop Work Order. He obtained the secondary garage permit, the third of the five, on May 27, 1998, at a time when the new garage was substantially complete. In fact, even the secondary permit raises questions, as evidenced by discrepancies between the permit itself and the actual construction of the garage, particularly with respect to its physical location. While the secondary garage permit authorized a "[n]ew garage to be located on same spot as previous garage," when questioned directly about this issue by the Vice Chair of the BZA, Mr. Sisson confirmed very little other than that the old and new garages shared a common wall. As to the porch, Mr. Sisson concedes that the fourth and fifth permits at issue in this case "were not appropriately issued."

Mr. Sisson argues that this court's approach in *Woodley Park Cmty. Ass'n*, *supra*, should control the timing of Ms. Crary's appeal to the BZA in this case, and that under that decision, her appeal was untimely. There, as in Mr. Sisson's case, the appellants before the BZA challenged permits issued on separate dates concerning different aspects of the relevant construction project, but did not file separate BZA appeals at the time each permit was issued. Rather than assessing the timeliness question in terms of the cumulative nature of the hotel project, however, this court analyzed the timeliness of the appeal on the issues of "height, setback, and accessory use" as a discrete matter, separate and apart from the timeliness of the challenge relating to parking issues. Mr. Sisson urges the court to adopt the *Woodley Park* approach in his case, rather than the analysis followed by the BZA in this case.

Significantly, "[t]his court is not to substitute its judgment for that of the agency, and ... the decision of the BZA will be upheld provided there is a rational basis for it." *Gladden v. District of Columbia Bd. of Zoning Adjustment*, 659 A.2d 249, 253 (D.C.1995) (quotation omitted). Moreover, *Woodley Park* does not compel a decision different from that reached by the BZA, because it is distinguishable. We note first that the issue here pertains to renovations on private residential property and a challenge by a single individual, whereas *Woodley Park* involved the con-

struction of a hotel and a challenge by a community association on other grounds. Furthermore, the parties in *Woodley Park* engaged in negotiations through a task force on which the Woodley Park Community Association was represented. The negotiations lasted for many months, during which the hotel construction project was discussed at length. Consequently, the negotiations provided the BZA appellants ample opportunity to become thoroughly informed about and to raise objections relating to height, setback, and accessory use. "Thus, by October 6, 1978—the date the full building permit was issued—the [appellants before the BZA] had full actual notice of the aspects of the building project relating to height, setback, and use. Nevertheless, one year elapsed between the issuance of the building permit and the filing of the appeal on October 12, 1979." *Woodley Park Cmty. Ass'n, supra,* 490 A.2d at 637. Under those particular circumstances, the court concluded that the challenge relating to height, setback, and use was not timely filed.

Unlike the facts that gave rise to the court's approach to the multi-permit question in *Woodley Park,* Mr. Sisson did not engage in a thorough negotiation process during which Ms. Crary would have been informed about all of Mr. Sisson's construction plans on his property. In short, there was no lengthy, intense and extensive effort by Mr. Sisson to collaborate with Ms. Crary and the local neighborhood associations on his construction project. In contrast, the negotiation process in *Woodley Park* rendered "unreasonable" the timing of the appeal as to height, setback, and use.[7]

Given the factual history of Mr. Sisson's permit applications, which lacked the kind of persistent and close collaboration with neighbors that was present in *Woodley Park,* the BZA reasonably concluded:

> Plans submitted by [Mr. Sisson] as part of his application for the first permit did not reflect all of the construction work that [he] planned to perform at the site. [Mr. Sisson's] project was developed in a piecemeal manner and the various applications were often incomplete or otherwise misleading in that they did not always reflect [his] plans for the garage, rear addition, and front porch consistently and accurately.

Significantly, the problematic permit history surrounding Mr. Sisson's renovations, coupled with the fact that some of the permits issued by the BZA were faulty on their face, constitute the very circumstances that were beyond Ms. Crary's control, *see Waste Mgmt. of Md., supra,* 775 A.2d at 1122, and make applicable the "extraordinary circumstances" exception in *Waste Mgmt.* Consequently, we affirm the BZA decision that Ms. Crary's appeal was timely.

[7–9] We turn next to Mr. Sisson's argument that Ms. Crary's appeal was procedurally barred by laches and estoppel. At the outset, we reiterate a fundamental notion that has controlled our treatment of these doctrines in prior cases: "[T]he defenses of estoppel and laches are judicially disfavored in the zoning context because of the public interest in enforcement of the zoning laws." *Beins v. District of Columbia Bd. of Zoning Adjustment,* 572 A.2d 122, 126 (D.C.1990) (citing *Goto, supra,* 423 A.2d at 925) (other citation omitted). Laches "is rarely applied [in the zoning context] 'except in the clearest and most compelling circumstances.'" *Id.* (quoting *Wieck v. District of Columbia Bd. of Zoning Adjustment,* 383 A.2d 7, 11 (D.C.1978) (citation omitted)). While we give defer-

7. We reiterate that the Court decided *Woodley Park* when the "reasonableness" test controlled the jurisdictional timeliness question.

ence to the BZA's findings with respect to laches, " '[w]hether the facts, taken together, are sufficient to sustain the defense of laches ... is a question of law,' to be answered *de novo* by the appellate court." *Id.* (quoting *American Univ. Park Citizens Ass'n v. Burka*, 400 A.2d 737, 741 (D.C.1979) (alterations in the original)).

[10–12] "[T]o determine the validity of a laches defense, we look to the entire course of events." *Goto, supra*, 423 A.2d at 925 n. 16 (reference and citation omitted). "Laches will not provide a valid defense, however, unless two tests are met: the defendant has been prejudiced by delay and that delay was unreasonable. In the absence of an analogous statute of limitations, the party asserting the defense has the burden of establishing *both elements.*" *American Univ. Park Citizens Ass'n, supra*, 400 A.2d at 740 (citations omitted) (emphasis added).

[13] The record before us does not reflect "the clearest and most compelling circumstance[ ]" requiring the application of the laches doctrine. *Beins, supra*, 572 A.2d at 126. Indeed, we agree with the BZA's conclusion that the first element of laches, unreasonable delay, is not present in this case.[8] As "the entire course of events," *see Goto, supra*, 423 A.2d at 925 n. 16, and the BZA factual record in the case show, the BZA properly determined that: "Any delay in filing the appeal was not unreasonable but resulted from the fact that [Mr. Sisson] applied for separate building permits for each component of the construction on his property." Consequently, we affirm the BZA's decision that the doctrine of laches does not apply in this case.

[14, 15] We have also previously set forth the elements of estoppel, while noting that the doctrine is "not judicially favored," *Wieck, supra*, 383 A.2d at 10 (references and citations omitted), and that its application is " 'limited [to] situations when the equities are strongly in favor of the party invoking the doctrine.' " *Id.* (quoting *District of Columbia v. Stewart*, 278 A.2d 117, 119 (D.C.1971) (citation and footnote omitted)). To make out a case of estoppel Mr. Sisson must show that: "(1) acting in good faith, (2) on affirmative acts of [the DCRA], (3)[he] ma[de] expensive and permanent improvements in reliance thereon, and (4) the equities strongly favor [him]." *Wieck, supra*, 383 A.2d at 11 (referencing *District of Columbia v. Cahill*, 60 App.D.C. 342, 344, 54 F.2d 453, 454–55 (1931)).

[16] On the record before us, we cannot say that Mr. Sisson acted in good faith in presenting the proposed renovations to his property in piecemeal fashion, or in demolishing his old garage and proceeding to construct a new garage without proper permits, or in building a new garage "that was larger than the approved garage addition." Nor can we conclude that Mr. Sisson initially relied on DCRA-issued permits that authorized him to demolish his existing garage and construct a new garage of larger dimensions than those approved for a garage addition. And, the record does not support Mr. Sisson's implicit assertion that the equities strongly favor him in this case. Thus, we see no reason to disturb the BZA's decision not to apply the estoppel doctrine to bar Ms. Crary's appeal.[9]

8. Since the first element of the laches doctrine is not satisfied, we need not address the second.

9. Furthermore, as we indicated in *Goto, supra*, 423 A.2d at 925 n. 15, and reiterated in *Rafferty v. District of Columbia Zoning Comm'n*, 583 A.2d 169, 176 (D.C.1990) (*Rafferty I*), "[i]t is not clear that estoppel will bar a case brought by a neighboring landowner; arguably, that defense may be asserted only against the municipality which rendered the

[17, 18] Finally, Mr. Sisson argues that: "Even if the appeal were not untimely and otherwise barred by the doctrines of laches and estoppel, the testimony before the [BZA] did not support the conclusion that the rear addition and the garage were in violation of the regulation[s] applicable in the [WHOD/R–1–A]." "In reviewing a BZA decision, we must determine '(1) whether the agency has made a finding of fact on each material contested issue of fact; (2) whether substantial evidence of record supports each finding; and (3) whether conclusions legally sufficient to support the decision flow rationally from the findings.'" *Mendelson v. District of Columbia Bd. of Zoning Adjustment*, *supra*, 645 A.2d at 1094 (quoting *Glenbrook Rd. Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 605 A.2d 22, 31 (D.C. 1992) (quoting *Levy v. District of Columbia Bd. of Zoning Adjustment*, 570 A.2d 739, 746 (D.C.1990))) (other citations omitted).

We are satisfied that: (1) the Board's conclusion—that the Zoning Administrator erred by issuing the five permits that are the subject of this case—is supported by its material findings of fact and substantial evidence of record, (2) and that its legal conclusion flows rationally from its findings. Not all of Mr. Sisson's permit applications were scrutinized under the WHOD/R–1–A regulations. As the BZA indicated:

> A more significant oversight [of the Zoning Administrator] was the failure to recognize that [Mr. Sisson's] property is located within the Wesley Heights Overlay District. Thus, the more stringent WHOD provisions were not applied, and permits were issued that purported to allow work that does not comply with relevant lot occupancy and setback requirements. The oversight was compounded by the fact that the full scope of the work planned for [Mr. Sisson's] property was not depicted consistently and accurately on all permit applications, thus precluding an assessment of each individual permit application within the context of all existing and planned improvements.

The BZA also recognized that "[Mr. Sisson's] property is nonconforming because its lot area, lot width, and setbacks are smaller than the minimums prescribed in the WHOD/R–1–A zone, and because its lot occupancy is higher than the prescribed maximum." This meant, as the BZA found, "that the work performed on [Mr. Sisson's] property increased its nonconforming aspect with respect to setbacks and lot occupancy."

[19] Despite these BZA conclusions, Mr. Sisson asserts that the BZA erred in its application of the regulation set forth at 11 DCMR § 2117.8,[10] and in its finding of

decision on which a party relied." 423 A.2d at 925, n. 15 (references omitted).

10. Section 2117.8 of 11 DCMR provides in pertinent part:

> A driveway which provides access to required parking spaces shall meet the following standards:
>
> ....
>
> (b) A driveway serving a one-family dwelling or flat or which otherwise serves only one parking space shall be not less than seven feet (7 ft.) in width;
>
> (c) A driveway serving any use other than a one-family dwelling or flat, *or* which serves more than (1) parking space shall be as follows:
>
> (1) Not less than twenty-five feet (25 ft.) from a street intersection as measured from the intersection of the curb line extended;
>
> (2) Not less than twelve feet (12 ft.) in width if designed for on[e]-way circulation or fourteen feet (14 ft.) if designed for two-way circulation; and
>
> (3) Not more than twenty-five feet (25 ft.) in width.

11 DCMR 2117.8 (1995) (emphasis added).

fact No. 14.[11] On the record before us, we cannot say that the BZA erroneously applied its regulation by citing subsection (c) of 11 DCMR 2117.8, rather than subsection (b) in accordance with Mr. Sisson's view. Subsection (c) applies to a "driveway ... which serves more than one (1) parking space" and which involves "two-way circulation." The Zoning Administrator's testimony before the BZA showed clear concern for ingress and egress as well as access to and from a public street or alley through a recorded easement. In addition, the Zoning Administrator recognized that the larger garage would accommodate two cars, and that there would be two-way circulation to and from Mr. Sisson's garage. We defer to an agency's reasonable interpretation of its regulations that is consistent with its governing statute. *See Dupont Circle Citizens Ass'n, supra*, 431 A.2d at 565. Given the language of the regulation and the Zoning Administrator's testimony at the BZA hearing, if we decided that subsection (b) of 11 DCMR § 2117.8 applied instead of subsection (c), we would be substituting our judgment for that of the BZA. That we cannot do. *See Gladden, supra*, 659 A.2d at 253.

Based upon our review of the record before us, the BZA's penultimate conclusion flows rationally from its findings and is amply supported by evidence of record:

> The Board concludes that the Zoning Administrator erred in issuing the five building permits to [Mr. Sisson]. The Zoning Administrator's decisions were not based on complete and accurate information about [Mr. Sisson's] property, reflecting all existing and planned improvements. The Zoning Administrator also failed to apply the correct zoning classification, which resulted in the issuance of permits that did not conform to applicable zoning provisions, especially the Wesley Heights Overlay District, in several material respects. The violations stemming from erroneously issued permits were compounded in this case by the fact that some work, with respect to the garage and front porch, was not performed strictly in compliance with the permits.

Consequently, we do not have grounds to reverse the BZA regarding its determination on the merits of Ms. Crary's appeal.

Accordingly, for the foregoing reasons, we affirm the Order of the Board of Zoning Adjustment.

So ordered.



SIBLEY MEMORIAL HOSPITAL, Petitioner,

v.

District of Columbia DEPARTMENT OF EMPLOYMENT SERVICES, Respondent,

Abdul Ghafoor, Intervenor.

No. 99-AA-864.

District of Columbia Court of Appeals.

Submitted Nov. 9, 2000.

Decided Aug. 29, 2002.

Employer appealed Department of Employment Services' decision to reverse

11. Finding of fact No. 14 stated:

> A driveway providing access to required parking spaces must meet certain standards, including that a driveway serving more than one parking space must be at least 12 feet wide if designed for one-way circulation or at least 14 feet wide if designed for two-way circulation. 11 DCMR § 2117.8.

G



SUBJECT PROPERTY



Neighbors on left - subject property on right



Neighbors on left; subject on right



Subject on left, alley, sports club on right



SAMPLE OF SPACING FOR HOUSES IN NEIGHBORHOOD



NEIGHBORHOOD SAMPLE



NEIGHBURHOOD SAMPLE



NEIGHBORHOOD SAMPLING