DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of Larry and Louise Smith and Mary Ann Snow,	)
No. 17085	)

STATEMENT OF THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

The Department of Consumer and Regulatory Affairs (DCRA or Appellee) submits this statement to clarify the agency's position regarding the appropriate time frame in which a party may amend an appeal before the Board of Zoning Adjustment (BZA or Board). The timely filing of an appeal is both mandatory and a jurisdictional predicate. The failure to file timely removes the appeal from the jurisdiction of the Board.

Here, Larry and Louise Smith and Mary Ann Snow filed an appeal challenging the Zoning Administrator (ZA) issuance of building and foundation permits for the project at 206-210 "D" Street, S.E., Washington, D.C. A timely appeal to the Board was taken on September 16, 2003, BZA Appeal No. 17085. Thereafter, on May 6, 2004, [1]/ the appellant sought to amend their appeal by adding an additional claim; in effect, arguing joinder. DCRA objects to the amendment as untimely.

Procedural Background.

The subject properties are located at 206, 208 and 210 "D" Street, S.E., Washington, D.C. The developer Folger Park LLC bought three tax lots (one record lot), applied and

[1]/ The Department of Consumer and Regulatory Affairs did not receive a copy of this filing and was not included on the service of notice certification.

BZA
Case No. 17085
Exhibit No. 53

Board of Zoning Adjustment
District of Columbia
CASE NO. 17085
EXHIBIT NO. 53

obtained a subdivision (creating three record lots), and built three town homes. The property is located in a CAP/R-4 District.

Neighbors, Larry and Louise Smith and Mary Ann Snow, sought to challenge the project on several grounds outlined in an appeal of September 16, 2003. The appeal listed 10 bases for the appeal arising from the creation of the subdivision and the construction of the townhouses. In a parallel action by the developer, Folger Park LLC applied to the BZA for a variance from the minimum lot and floor area ratio requirements. *See* BZA Application 17108. (The basis for the ten items raised on appeal by the appellant.) Folger Park LLC also moved to strike the appeal arguing that it was untimely. Appellant, in response, withdrew three items from their list. Following a hearing on the application, in which the appellant participated, the Board granted the variance to Folger Park LLC on April 6, 2004 by oral vote.

Folger Park LLC moved to dismiss the appeal upon obtaining the variance. R. Agulgia Letter dated May 10, 2004. While the appellant concedes the Board's approval of the variance moots the entire basis for their appeal, they have raised an additional item -- the absence of a side yard for the two end homes.[2]/ App. Suppl. Statement, dated May 6, 2004.

DCRA objects to appellants' attempt to amend the appeal on the basis that it is untimely. The Board requested DCRA to clarify its position regarding the issue of amendment.

[2] / Pursuant to 11 DCMR § 405.3.

Discussion.

Appellant seeks to amend the appeal six months after the building permits, the subject of the appeal, were issued. Claiming the factual basis for the amendment only came to light in February 2004, the appellant has misconstrued the administrative process.

BZA regulations require an appeal to be timely filed. 11 DCMR 3112.2 (2004). The regulations provide:

> 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 (emphasis added).

Id. While the statute or regulation does not state a time limitation, in this jurisdiction the courts have spoken on this issue. Uniformly, the Court of Appeals has held that a 'reasonable period' of time is sufficient for a party to have notice of a decision which they seek to appeal. *See Sisson v. District of Columbia Bd. of Zoning Adjustment*, 805 A.2d 964 (D.C. 2002), *Mendelson v. District of Columbia Bd. of Zoning Adjustment*, 645 A.2d 1090 (D.C. 1994); *Woodley Park Cmty. Assn. v. District of Columbia Bd. of Zoning Adjustment*, 490 A.2d 628 (D.C. 1985). The primary consideration for the 'timeliness' analysis is the fairness of notice to the other party. A reasonable time in which to appeal, the court has stated, 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 purposes is essentially what a statutory appeal period comtemplates." *Beins v. District of Columbia Bd. of Zoning Adjustment*, 572 A.2d 122, 127 (D.C. 1990).

More recently, the Court of Appeals has expressly stated that 'in the ordinary scheme of things, *two months is ample time* in which to decide whether to seek appellate review or act accordingly.' *Waste Mgmt of Md. v. District of Columbia Bd. of Zoning Adjustment*, 775 A.2d 1117, 1123 (D.C. 2001) (emphasis added). Thoughtfully, the Court concluded two months or sixty days established the appropriate benchmark for the 'reasonable time' standard. The Zoning Commission, in its proposed rulemaking, sought to codify the case law and put an end to the discrepancy by establishing a time limitation – sixty days. See, ZC Case No. 02-01, 49 D.C. Reg. 4884 (May 24, 2002).

Appellant argues the second appeal filed in May 2004 isolated Folger Park LLC's failure to obtain a variance for the side yard as the only remaining issue. Further, appellant offers, incorrectly, that once an appeal is filed timely, it can be supplemented indefinitely.

1. The amendment to the appeal is untimely because it is not based on new information.

Each party must have adequate notice and knowledge to participate meaningfully in the administrative process[3]/. A permit holder, for instance, must have notice and time to defend its right to build or construct pursuant to a validly approved permit. The agency which issued the permit must be afforded notice and time to defend its actions. Both parties must be afforded finality. Without these rights, a party is unfairly prejudiced in its efforts to defend its actions or unjustly barred from operating

[3]/ These safeguards are frequently referred to as the bundle of due process rights afforded citizens under the U.S. Constitution. In the District of Columbia, parties may avail themselves of the administrative process to challenge agency decisions set out in the Administrative Procedures Act, D.C. Official Code § 1-206, *et seq.*

under the permit. This is the case here because the appellant's new challenge to the permit is not rooted in fair notice or knowledge of the facts.

The appellants learned about the Folger Park LLC project at ANC meetings before DCRA issued the building permits on August 25, 2003.[4]/ The initial appeal was filed on September 12, 2003. The neighbors were on notice on August 25, 2003 that the three townhouses would be built on the site in August; the very subject of the appeal. The building and lot measurements, including the side yards, were clearly noted in the application package for the permits. Indeed, the appeal packages contained detailed information about lot measurements.

In the laundry list of items which appellant challenged, they did not raise the need for a side yard variance. The appellant did not seek a decision, information or clarification from anyone, including the ZA, about the need for a variance related to the side yard.

Appellant reviewed all aspects of the project before filing the appeal and did not find a basis pertaining to the side yard. The facts related to this issue were not just discovered - - the facts related to the lot and size measurements were available to appellants in August and later in September when the appeal was filed.

If appellant's contentions are fully explored, the analysis is faulty for another reason. If information that forms the basis for the amendment did not become known to the appellant until February (during the application hearing as they have argued), the supplement to the appeal should have been filed sixty days later - applying the sixty day rule of reasonableness, outlined by the case law and the zoning commission. Appellant,

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[4]/ Testimony of appellants and appeal package.

however, did not amend the appeal until May, more than three months later. Indeed, the amended appeal is not reasonably related to either the initial appeal (filed in September) or the time when the information allegedly first became available (at the hearing in February). For these reasons, it is untimely.

b. There is no final agency action relating to a side yard.

The BZA regulations require the party bringing an appeal to be 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. The suggestion or reference to a possibility of a need for a variance does not meet the standard set out in the regulations.

The ZA did not make a decision regarding the side yard. The ZA did not request a variance for a side yard before the permits were issued. The building permits were issued and construction began. When the ZA reviewed the project, after construction had begun, he requested a variance for the building lot measurements, but nothing for the side yard. Appellant did not seek an agency decision from the ZA related to the side yard and they do not have an order, requirement, decision, determination or refusal by the ZA related to the side yard. Accordingly, they had no basis for an appeal or amendment to an appeal on this issue.[5]/

[5]/ Similarly, it appears the Board did not give pause to the OP suggestion that an additional variance may be needed since no further discussion was required on this issue during the hearing on the application for variance.

In this matter, the appeal was not properly timely amended. For these reasons, DCRA urges the Board to dismiss the appeal as it relates to the side yard variance.

Respectfully submitted:

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Certificate of Service

Appellant, counsel for Appeal of Larry and Louise Smith and Mary Ann Snow, and Intervenor Folger Park, LLC were served through electronic transmission and first class mail on June 7, 2004.

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