BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPEAL OF:

Kalorama Citizens Association from the Administrative Decision of David Clarke, Director, Department of Consumer and Regulatory Affairs, from the issuance of Building Permit Nos. B455571 and B455876, dated October 6 and 16, 2003, respectively, to Montrose, LLC, to adjust the building height to 70 feet and to revise penthouse roof structure plans to construct a five-story apartment building in the R-5-D District at 1819 Belmont Road, N.W., Washington, D.C.	)	**BZA Appeal No. 17109** **Hearing: February 17, 2004**

MOTION OF MONTROSE L.L.C. TO DISMISS

I.
INTRODUCTION

Montrose, LLC, the owner of the above-referenced property, through undersigned counsel, hereby moves to dismiss Board of Zoning Adjustment ("BZA" or "Board") Appeal No. 17109 filed by Kalorama Citizens Association ("KCA" or "Appellant") on November 10, 2003. Two of the three issues raised in the appeal – the setbacks of the roof structure and the height of the of deck and railing – are not encompassed in the October 6 and 16, 2003, revisions permits appealed by KCA. Rather, those issues were authorized solely under the original building permit issued to Montrose, LLC ("Montrose") on March 11, 2003. KCA did *not* appeal this permit despite having constructive knowledge of its issuance as early as March 19, 2003, when plans were presented at a community with KCA in attendance. Thus, KCA is precluded from raising these issues in the instant appeal and any attempt to include the roof structure setbacks and deck and railing height at this late date should be barred as untimely.

Additionally, the entire appeal should be dismissed under the doctrine of laches and estoppel. Montrose has relied in good faith on the affirmative actions of the District to construct this project, which is virtually completed. It has expended considerable sums of money on permanent improvements to its property in excess of $700,000.00, and it would be patently unfair and work to the detriment of Montrose to force it to alter completed construction. Thus, the appeal should be dismissed.

II.
STANDING

Montrose is the owner of the property for which this appeal is filed and is an automatic party to this proceeding pursuant to 11 DCMR § 3199.1 (2003).

III.
STATEMENT OF FACTS

On December 12, 2002, Montrose filed a permit application to alter and repair the existing three-story plus basement building at 1819 Belmont Road, N.W., construct an addition at the rear of the building and add two floors and an attic (the "Project"). Montrose retained the services of a third-party inspector to review the project for compliance with the Zoning Regulations. As part of the application, Montrose submitted drawings and an estimate of the construction costs totalling $705,000.00. A copy of the construction estimate is attached hereto as Exhibit A.

On March 11, 2003, the D.C. Department of Consumer and Regulatory Affairs ("DCRA") issued Building Permit No. B449218 authorizing construction of the Project (the "Original Permit"). Montrose displayed the permit on the building in accordance with the requirements of the D.C. Construction Codes.

Just prior to the issuance of the Original Permit, Montrose also applied for a public space permit requesting a curb cut and driveway across the sidewalk area to create a garage at the basement and cellar level of the building. A berm that was once located in front of the Montrose property had been removed by a previous owner, and Montrose believed it to be an appropriate location for a driveway and garage entrance to its building.

On March 19, 2003, Montrose presented its plans for a curb cut and driveway to the Transportation Committee of Advisory Neighborhood Commission ("ANC") 1C. Ann Hargrove of KCA was in attendance at the meeting. Elevation drawings showing the garage and the full height of the building, including the addition of the fourth, fifth and attic levels, and the penthouse, were shared with the community. The community strongly opposed the curb cut and driveway, and as a result, Montrose withdrew its public space application. During this time period, Montrose also met with its adjacent neighbors to discuss issues that might arise during the construction process. The neighbors were shown elevations and plans for the Project, and were encouraged to contact Montrose if they had any concerns.

From March through September 12, 2003, Montrose proceeded with construction of the Project. By September 1, 2003, Montrose had completed the framing for the additional floors, attic and penthouse in conformance with the approved plans and in full view of the community.

On September 10, 2003, KCA wrote to Mr. Denzil Noble, Administrator of the Building and Land Regulation Administration ("BLRA"), complaining that the Project appeared to exceed the allowable height under the 1910 Height Act and the density limitation of the R-5-D District, which permits a maximum floor area ratio ("FAR") of 3.5. The letter did not complain of any roof structure setback issues.

Based on the letter received from KCA, the BLRA issued a stop work order for the Project on September 12, 2003. Although the stop work order did not identify the provisions of the building code or zoning regulations that Montrose had violated, BLRA orally informed Montrose that the order was based on the KCA letter. BLRA determined that the third party inspector for zoning had erroneously neglected to analyze the building height under the 1910 Height Act, which limited the height to 70 feet. Montrose agreed with this finding and accordingly reduced the height of the Project's parapet from 71 feet, 3 inches, to 69 feet, 9 and 3/8ths inches. BLRA would not issue a revised permit, however, or lift the stop work order, until it was satisfied that the project comported in all other respects to the 1910 Height Act, the Zoning Regulations and the D.C. Construction Codes, including roof structure setback requirements and FAR restrictions.

While discussions ensued between Montrose and BLRA on resolution of these issues, on September 16, 2003 KCA filed with the BZA a Notice of Intent to Appeal certain permits issued to Montrose on the grounds of 1910 Height Act violations. KCA further stated to BZA that it was researching the applicable facts and law prior to proceeding with such an appeal. A copy of the resolution is attached hereto as Exhibit B.

On October 6, 2003, BLRA issued Building Permit No. B455571 (the "First Revision Permit") to revise the Original Permit "to adjust the height of the building to 70'-0" [and] clarify FAR calculations, as per attached drawings." Four drawings were attached to the First Revision Permit: (i) a section drawing through the east elevation showing the original height at the roof of the building; (ii) a section drawing through the east elevation showing the revised height at the roof of the building; (iii) a drawing showing the area of each level included in the FAR calculations; and (iv) the FAR calculations. See copies of drawings attached as Exhibit C. The

drawings do not depict in any way the roof deck and railing, nor do they address the setback of the roof structure. Those details are provided only in the Original Permit.

Pursuant to continuing discussions between BLRA and Montrose, BLRA requested a second modification to the Original Permit to ensure that the rear portion of the penthouse could not be construed as usable storage space. Montrose acquiesced and agreed to remove the back half of the penthouse. On October 16, 2003, BLRA issued Building Permit No. 445873 (the "Second Revision Permit") to "revise penthouse roof structure per DC request and per attached drawings." Only one drawing was submitted with the Second Revision Permit showing the rear half of the roof structure gable removed. A copy of that drawing is attached as Exhibit D. No other changes were made to the penthouse, and the penthouse setbacks along the interior lot lines remained as shown in the Original Permit.

On November 10, 2003, KCA filed its appeal with the Board challenging the issuance of the First and Second Revision Permits. KCA did not appeal the Original Permit showing the location of the east and west penthouse walls and the roof deck and railing.

III.
ARGUMENT

A. Scope of KCA's Appeal Does Not Reach Issues of Penthouse Setbacks and Height of Roof Deck and Railing.

1. Scope of BZA Jurisdiction is Limited to Permits Appealed.

In redressing claims of error in an administrative proceeding, an appellate body is limited to precise decision or permit listed in the appeal. An appellant's failure to challenge the correct decision or permit bars the appellate body's ability to consider the challenge and the case should be dismissed. For example, in BZA Appeal No. 16934, the Board dismissed the appeal of Advisory Neighborhood Commission 6A challenging the lack of a side yard for a residence at

922 Constitution Avenue, N.E., under a foundation permit instead the building permit. The Board held that a foundation did not trigger the side yard requirements and that the side yard issue could only be reached under the building permit. Because the ANC appealed the wrong permit, the challenge was dismissed. *See Appeal of Advisory Neighborhood Commission 6A*, BZA Appeal No. 16934 (2003), attached hereto as part of Exhibit E.

2. KCA Failed to Appeal the Only Permit that Addressed the East and West Penthouse Setbacks and the Height of the Roof Deck and Railing.

By appealing only the First and Second Revision Permits, and not the Original Permit, KCA failed to appeal the only permit that addresses the east and west penthouse setbacks and the height of the roof deck and railing. Had KCA wished to address these two issues, it needed to appeal the March 11, 2003, permit within sixty days in accordance with section 3112.3 of the Zoning Regulations. It did not. Only the Original Permit authorized the location of the penthouse walls flush with the east property line and set back only six feet from the west wall. Neither the First Revision Permit nor the Second Revision Permit requested any change to the location of the east and west walls. Similarly, only the Original Permit authorized the construction of the roof deck and railing, and the revision permits did not seek any change to this element of the project. Consequently, because the First and Second Revision Permits do not reach these issues, KCA is barred from raising height and setback issues in the instant appeal.

KCA was fully aware of the Original Permit, and even showed its intent to appeal this permit in its September 16th filing with the BZA and its September 29th resolution. Moreover, it even recognized it might require a waiver to contest the work authorized under the March 11 Original Permit on grounds of timeliness:

> WHEREAS, KCA on September 16, 2003 filed with the Board of Zoning Adjustment (BZA) a Notice of Intent to File an Appeal of certain permits issued to Montrose LLC for construction at these premises on the grounds that the

> Height of Buildings Act or zoning regulations may have been violated, and the KCA is currently researching the applicable facts and law prior to proceeding with such an appeal, and
>
> * * *
>
> WHEREAS, section 3112.2(a) of the Zoning Regulations, Title 11 DCMR, requires that an appeal be filed "within 60 days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier,"
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> * * *
>
> NOW THEREFORE, BE IT RESOLVED,
>
> * * *
>
> THAT, KCA urges the BZA to treat any Appeal by the KCA under its September 16, 2003, Notice of Intent [to File an Appeal] as timely filed pursuant to the Zoning Regulations and to provide KCA with a reasonable extension of time as permitted by the Regulations in order to attain relevant materials for an appeal of the DCRA/BLA-issued permits....

Kalorama Citizens Association (KCA) Resolution on DCRA Remedial Action and Potential KCA Appeal to the Board of Zoning Adjustment of Permits Issued for 1819 Belmont Road, N.W., September 29, 2003 (*see* Exhibit B).

Despite this knowledge, KCA chose not to appeal the Original Permit and thus foreclosed its ability to challenge the height and setback issues.

3. KCA is Barred from Raising Height and Setback at this Late Date.

Under Section 3112.2 of the Zoning Regulations, an appeal must be filed within sixty days from either the date the appellant had notice or knowledge of the decision complained of, or the date the appellant reasonably should have known of such complaint. *See also Waste Management of Maryland, Inc. v. D.C. Board of Zoning Adjustment,* 775 A.2d 1117,1122 (D.C. 2001) ("in the absence of exceptional circumstances substantially impairing the ability of an

aggrieved party to appeal – circumstances outside of the party's control – we conceive of two months between notice of a decision and appeal therefrom as the limit of timeliness"). Here, the Appellant was required to raise any arguments pertaining to the deck and railing height or roof structure setback sixty days from March 11, 2003, the date the permit was issued, or by May 10, 2003. Appellant failed to meet this regulatory deadline. Appellant was fully aware of the timeliness requirements for an appeal, as evidenced by a resolution passed by KCA at its September 29, 2003, meeting, yet it chose not to file a timely appeal of the Original Permit.

Appellant has urged in its September 10, 2003, letter to BLRA that it was prejudiced by the District's inability to produce the Original Permit and associated drawings for KCA's review, and that it has been hampered in its appeal efforts. These allegations do not constitute exceptional circumstances substantially impairing the ability of KCA to file a timely appeal and thus this argument must fail. There is nothing in the record to demonstrate that KCA attempted to appeal or seek information about the Original Permit within sixty days of its issuance. KCA had ample opportunity to make that inquiry.

Even assuming *arguendo* that the Appellant did not have notice or knowledge of the scope of the Original Permit during the 60 days following March 11, 2003, it is indisputable that the Appellant should have know of such asserted defects well before the filing of its November 10, 2003 appeal. First, pursuant to the ANC law, a listing of all building permits issued by DCRA, including the proposed construction, was mailed to the ANC. Second, the same notice was published in the *D.C. Register*. Third, on March 19, 2003, Montrose met with the Transportation Committee of the ANC, at which KCA was present, to discuss the application and provided an elevation of the building, which showed the height of the building on each side of the site, as well as a direct elevation of Montrose's building including the addition of the fourth

and fifth floors. During this time period, Montrose also met with its adjacent neighbors to discuss issues and concerns that might arise during the construction process, and shared its plans and elevations with those neighbors. Fourth, as reported in the *Intowner* newspaper article provided in Appellant's prehearing submission, KCA complained of the Project and its height at its May meeting. Fifth, the full height of the roof structure framing was in place by September 1, 2003, in complete view of the surrounding community. Sixth, photographs attached to Appellant's September 10, 2003 letter and dated that same day demonstrate that the east and west walls of the roof structure were clearly visible to the Appellant prior to September 10th. Thus, based on the combination of these six separate triggering events, Appellant had constructive knowledge and had more than an ample opportunity to appeal the Original Permit prior to the end of the regulatory period for *any* of the possible triggering events, yet chose not to do so. Instead, KCA limited its appeal to the First and Second Revision Permits, and the work approved therein.

KCA is also precluded on timeliness grounds from amending its current appeal to include the Original Permit. Even if viewed in a light most favorable to KCA – a standard which the Board has *not* adopted, – it is indisputable that KCA had full knowledge of the height and setback issues pertaining to the Original Permit on September 10, 2003, the date of its own photographs. Based on this September 10th date, KCA was required to appeal the March 11th Original Permit no later than November 10, 2003. Although KCA appealed the October revision permits on this date, there was no corresponding appeal of the Original Permit. Thus, KCA is barred from amending its current appeal to include the location of the east and west penthouse walls, or the height of the roof deck and railing, which are solely governed by the Original Permit.

The Board has held in other cases that an appeal period cannot continually be renewed with each new reevaluation of the facts and circumstances of the case. As the Board held in *Appeal of Robert Lehrman,* BZA Appeal No. 16849 (2003):

> to hold that the appeal period continues so long as a reevaluation is occurring would place holders of building permits in a state of chronic uncertainty and allow disgruntled individuals to endlessly extend the appeal period through repeated requests for DCRA to reevaluate its last stated position. While *Grinstead* recognized value in allowing DCRA to reevaluate its positions on zoning matters, the need for finality and the prompt resolution of zoning disputes dictates that such an internal process should be permitted only once, if at all.

Lehrman Appeal, at 7, *quoting Appeal of Darrel J. Grinstead,* BZA Appeal No. 16764 (2001). A copy of the *Lehrman Appeal* is attached hereto as Exhibit F.

Based on this holding, KCA should not be permitted to reach back in time to capture the Original Permit and continue the reevaluation of this issue. The regulatory appeal period has expired. Accordingly, the portion of the appeal relating to the alleged building height and roof structure setback deficiencies should be dismissed, leaving FAR as the sole remaining issue. As discussed below, however, the entire appeal should be dismissed under the doctrine of estoppel and laches.

V.
APPELLANT IS BARRED FROM CHALLENGING THE WORK AUTHORIZED IN THE ORIGINAL PERMIT UNDER THE DOCTRINES OF ESTOPPEL AND LACHES.

The applicability of the equitable doctrines of estoppel and laches is well established in District of Columbia zoning law. *See Smith v. District of Columbia Board of Zoning Adjustment*, 342 A.2d 356 (D.C. 1975); *Lyke v. DC BZA*, 383 A.2d 7 (D.C. 1978); *Goto v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 917, (D.C. 1980). The elements of estoppel are that the claimant is required to prove: 1) that it acted in good faith; 2) on affirmative acts of

the District; 3) made expensive and permanent improvements and reliance thereon; and 4) the equities are strongly in the claimant's favor. *See also District of Columbia v. Cahill*, 60 App. DC 342 (1931). Laches, on the other hand, is the equitable principal that there is an unreasonable delay in challenging an approval with resulting prejudice to the other party. With laches, the entire chain of events must be considered. *See Goto* at 925.

The subject site, 1819 Belmont Road, N.W., is a property that Montrose purchased in January 2003 to develop into condominiums. Prior to acquiring the property, Montrose conducted due diligence, which included investigation into the zoning classification, D.C. Comprehensive Plan and Historic Status. Montrose hired an architect to design the building, and also hired zoning consultants and code consultants to review all of the issues surrounding the project. Moreover, on March 19, 2003, Montrose met with the ANC to discuss its permit application and provided an elevation of the building, which showed the height of the building on each side of Montrose's building, as well as a direct elevation of Montrose's building, including the addition of the fourth and fifth floors. The ANC and neighbors who were present expressed their disapproval of a proposed curb cut and a proposed garage door. No comments were made regarding the height of the building. In an attempt to work with its neighbors, Montrose withdrew its request for the curb cut and did not proceed with the garage door plan. Montrose also continued to meet with its adjacent neighbors to discuss issues and concerns that might arise during the construction process, and showed its plans and elevations to all parties.

Relying on the comments provided by neighbors, and the issuance of the March 11, 2003 permit, construction commenced and proceeded apace until September 12, 2003, when, without any warning, Montrose was issued a Stop Work Order. No one in the community, the District, or the Council Member's office contacted Montrose to express concerns, or to ask questions or

request any type of clarification. Montrose contacted BLRA for clarification, and immediately began diligently working with Mr. Noble and his staff to address the concerns Mr. Noble felt warranted the issuance of the Stop Work Order. This process continued for three weeks, and culminated with the issuance of two new permits that allowed the construction to continue.

Since construction began last Spring, Montrose has invested significant time and approximately $700,000 in construction costs. Additionally, Montrose has suffered losses in excess of $160,000 due to costs overruns and legal fees directly attributable to the delays caused by the appeal. *See* Affidavit of Gail Montplaisir, President, Taurus Enterprise Group, Inc., Managing Member of Montrose LLC., attached hereto as Exhibit G. Montrose proceeded with construction in good faith on the affirmative actions of the District in approving not only the Original Permit but the First and Second Revisions Permits.

The equities favor Montrose in the instant appeal because the public interest is best served by consistent and timely interpretations of the Zoning Regulations. If the appeal were allowed to proceed, all construction projects would be at risk of untimely challenges, uncertainty over the validity of building permits, cost overruns and the inability to obtain financing. This would jeopardize the clear objectives of the Comprehensive Plan and the Mayor's objectives for new residential construction in the city.

Based upon the facts of this case, including the affirmative actions of the District of Columbia, the inaction over an extended period of time by Appellant, the substantial investment by Montrose and the permanent improvements made, equity weighs in favor of Montrose and the District is estopped from granting the appeal.

VI.
CONCLUSION

WHEREFORE, based on the foregoing, the Board should dismiss the appeal on the grounds of timeliness and under the doctrine of estoppel and laches.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: _____
Whayne S. Quin
Mary Carolyn Brown

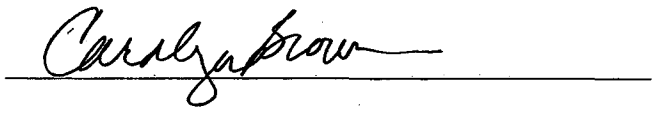
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion to Dismiss was served this 17th day of February, 2004, by hand-delivery, or first-class mail postage prepaid, on the following:

Andrea Ferster, Esq.
1100 17th Street, N.W., 10th Fl.
Washington, D.C. 20036

Advisory Neighborhood Commission 1C
P.O. Box 21652
Washington, D.C. 20009

Laurie Gisolfi Gilbert
Office of General Counsel, DCRA
941 North Capitol St., N.E., Suite 9400
Washington, D.C. 200001



FILE

TAURUS
RENOVATION & CONSTRUCTION
A TAURUS GROUP MEMBER

2311 15th Street, N.W., Washington, D.C. 20009 (202) 462-4904 Fax (202) 462-4906

December 23, 2002

Mr. Norman Smith
Norman Smith Architecture
3800 Military Road, N.W.
Washington, DC 20015

Re: 1819 Belmont Road, N.W., Washington, DC 20009

Dear Mr. Smith:

This letter is an estimate of the cost of the work to be performed at the above referenced multi-family use building. The space being added is to be residential in nature.

The costs are as follows:

Electrical	$ 70,000.00
HVAC	$ 50,000.00
Plumbing	$ 70,000.00
Sprinkler	$ 25,000.00
Glass	$ 45,000.00
Concrete	$100,000.00
Exterior Cladding	$150,000.00
Structural	$195,000.00
Total Construction	$705,000.00

If you have any further questions, please feel free to call.

Sincerely,

Gail Montplaisir

KALORAMA CITIZENS ASSOCIATION (KCA) RESOLUTION ON DCRA REMEDIAL ACTION AND *POTENTIAL KCA APPEAL* TO THE BOARD OF ZONING ADJUSTMENT OF PERMITS ISSUED FOR 1819 BELMONT ROAD, NW

WHEREAS, Montrose LLC is currently redeveloping 1819 Belmont Road, NW (Square 2551, Lot 45) in a manner grotesquely inconsistent with the character of the surrounding area, typified by rowhouses along a 30 foot wide street, and

WHEREAS, certain construction permits issued by the Department of Consumer and Regulatory Affairs (DCRA), Building and Land Regulation Administration (BLRA), may be contrary to laws and regulations governing the height of buildings and/or zoning, and the construction itself may be beyond the scope of demolition and construction permits issued by BLRA, and

WHEREAS the Department of Consumer and Regulatory Affairs, Building and Land Regulation has been requested to review these permits for these possible violations and to require remedial action, and

WHEREAS, KCA on September 16, 2003 filed with the Board of Zoning Adjustment (BZA) a Notice of Intent to File an Appeal of certain permits issued to Montrose LLC for construction at these premises on the grounds that the Height of Buildings Act or zoning regulations may have been violated, and the KCA is currently researching the applicable facts and law prior to proceeding with such an appeal, and

WHEREAS, section 3112.2(a) of the Zoning Regulations, Title 11 DCMR, requires that an appeal be filed "within 60 days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier," and

WHEREAS, the alleged unlawfulness of any permits issued for 1819 Belmont Road, NW, or the failure of DCRA/BLRA to enforce the requirements of such permits, could not have been discovered or anticipated by any reasonable person in the absence of posted, fully informative permits and until after actual construction made the alleged violations evident to passers-by from the street in early September 2003, and

WHEREAS, representatives of the KCA have thus far been denied full access to and copying of Montrose LLC's plans and drawings by DCRA/BLRA as of September 29, 2003, in spite of verbal and written requests and a written Freedom of Information Act (FOIA) request for this information,

NOW, THEREFORE, BE IT RESOLVED,

THAT KCA requests the Department of Consumer and Regulatory Affairs to revoke as issued in error any construction and related permits that are not fully compliant with Construction Codes, Zoning Regulations or Height Act requirements, to cause any construction thus far undertaken that is not so fully compliant to be brought into compliance by whatever means necessary, including the removal of structures exceeding the lawful height, and to ensure that any new or revised building plans and related construction permits be made fully compliant with said laws and regulations, and

THAT KCA urges the BZA to treat any Appeal by the KCA under its September 16, 2003 Notice of Intent as timely filed pursuant to the Zoning Regulations and to provide KCA with a reasonable extension of time as permitted by the Regulations in order to attain relevant materials for an appeal of the DCRA/BLA-issued permits, and

THAT KCA is authorized to pursue appropriate legal remedies as necessary.

BOGDAN BUILDERS
08816-0001

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16934 of Advisory Neighborhood Commission 6A, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs (DCRA), in the issuance of building permit (No. B445856) issued on May 28, 2002, to JFC Builders, LLC, allowing construction of a foundation at 920 and 922 Constitution Avenue, N.E., Washington, D.C. (Square 939, Lot 27).

HEARING DATES: November 14, 2002; February 18, 2003; March 4, 2003; March 18, 2003

DECISION DATES: March 4, 2003; March 18, 2003

FINAL ORDER DISMISSING APPEAL

Advisory Neighborhood Commission ("ANC") 6A filed an appeal with the Board of Zoning Adjustment on July 24, 2002 challenging the decision of the Zoning Administrator to approve the issuance of a foundation permit at 920 and 922 Constitution Avenue, N.E. (Square 939, Lots 27 and 28) in an R-4 district as noncompliant with the side yard requirements in the Zoning Regulations. For the reasons stated below, the Board concludes that it has no jurisdiction over the decision complained of, and must therefore dismiss the appeal.

PRELIMINARY AND PROCEDURAL MATTERS

Notice of Filing and Notice of Hearing. By memoranda dated September 20, 2002, the Office of Zoning advised the Zoning Administrator, the Office of the Corporation Counsel, the property owner, Advisory Neighborhood Commission (ANC) 6A (the ANC for the area within which the property that is the subject of this appeal is located), the Ward 6 Councilmember, and the D.C. Office of Planning of the filing of the appeal.
The Board of Zoning Adjustment (the BZA) scheduled a public hearing on the appeal for November 19, 2002. Pursuant to 11 DCMR § 3113.14, on October 4, 2002 the Office of Zoning, mailed the ANC and the Zoning Administrator notice of the hearing. The property owner was copied on the ANC's notice. Notice of hearing was also published in the *D.C. Register.*

FINDINGS OF FACT

1. On May 22, 2002, John Casey, agent for JFC Builders, LLC, applied to DCRA for a permit to construct the foundation for a single-family dwelling to be located at 920 & 922 Constitution Avenue, N.E., Washington, D.C. The permit application depicted the footprint of the foundation, but not its height.

2. DCRA approved the application and issued a permit to construct the foundation on May 28, 2002. The permit (Number B445856) allowed the construction of the "foundation only", "per HPRB (Historic Preservation Review Board) concept approval".

3. On July 11, 2002, at a regularly scheduled ANC meeting, ANC 6A met and voted 6-0 to initiate an appeal of the permit.

4. The following day, on July 12, 2002, DCRA issued a second permit (Number B447067) allowing construction of a new single-family dwelling at the subject property.

5. On July 24, 2002, Daniel Pernell, the ANC Vice-Chair, filed an appeal with the Office of Zoning challenging the issuance of permit Number B445856, the foundation permit. Mr. Pernell was assisted by Virginia Gaddis, a long-time ANC member, and Keith Jarrell, the ANC chair.

6. On or about July 25, 2002, the Director of the Office of Zoning, wrote to the ANC requesting additional information regarding the basis for its appeal. The ANC responded to this request with a submission dated September 4, 2003. The submission contained numerous references to the building at the site, but did not specifically challenge the second permit which allowed the construction.

7. The ANC met again on November 7, 2002, and resolved that ANC member Virginia Gaddis appear at the November 19, 2002 BZA hearing due to her familiarity with the property and the issues surrounding the appeal.

8. That same day, November 7, 2002, Ms. Gaddis filed an application with the BZA for "party status" in the appeal. In addition, Christopher's Row, LLC filed an application for "party status" on November 14, 2002, since it had acquired the subject property from JFC Builders, LLC after the appeal was filed.

9. On November 19, 2002, the ANC requested a postponement of the hearing due to an emergency in Ms. Gaddis's family. Benny Kass, Esq., of Kass, Mitek & Kass, appeared for Christopher's Row, LLC and consented to the postponement. At that time, the BZA re-set the hearing for February 18, 2003 and urged the ANC to include a challenge to the building permit in the appeal, indicating to the ANC representative that the "wrong" permit number (the foundation permit number,

instead of the building permit number) was listed on the appeal form. The BZA directed the ANC to file further submissions by January 21, 2003, and gave Christopher's Row, LLC until February 3, 2003 to respond.

10. Thereafter, the law firm of Holland & Knight replaced Kass, Mitek & Kass as counsel for the property owner and filed a motion to dismiss the appeal dated February 3, 2003. In its motion the owner claimed that: (a) the BZA lacked jurisdiction over the appeal because the ANC was not properly authorized to prosecute the appeal at the time it was filed; (b) the redistricting of Ward 6 invalidated whatever authorization the ANC may have previously had; and, (c) the appeal was legally insufficient because the ANC appealed from the foundation permit instead of the building permit.

11. Due to inclement weather on February 18, 2003, and the closing of offices within The District of Columbia, the BZA hearing was postponed to March 4, 2003, and neither the motion to dismiss nor any other issues were addressed.

12. On March 4, 2003, the BZA heard arguments on the motion to dismiss. It Concluded that: (a) the ANC did have proper authorization to prosecute the appeal based upon the ANC's representation that the ANC Chair and Vice-Chair filed the appeal with Ms. Gaddis's assistance; and, (b) the appeal of the foundation permit was not legally insufficient on its face, and a hearing was required to determine whether the foundation permit violated the side yard requirements.

13. Since the motion to dismiss was denied, the hearing was scheduled for March 18, 2003, and the BZA directed the owner to provide documents that it submitted to DCRA to obtain the foundation permit. The BZA also directed the parties to focus on the height of the foundation, inasmuch as § 2503.2 of the Zoning Regulations prohibits any structure exceeding 4 feet in height in the side yards.

14. During the March 4, 2002 proceedings, the ANC did not seek to amend its appeal to include a challenge to the building permit as well as the foundation permit.

15. At the March 18 hearing, ANC Commissioner Cody Rice appeared for the ANC for the first time and framed the issue on appeal as whether the newly constructed row dwelling violates the side yard requirements. Mr. Rice maintained that the building permit is inextricably connected to the foundation permit because the foundation permit stated that the foundation was intended for a dwelling. The BZA treated these remarks as an oral motion to amend the appeal to include a challenge to the building permit. However, after deliberating, the BZA denied the motion to amend the appeal, finding that the property owner would be prejudiced by an amendment at such a late date.

16. The BZA then considered the property owner's motion to dismiss the appeal of The foundation permit. The owner claimed the appeal should be dismissed for two reasons:

    (a) the side yard requirements in the Zoning Regulations are not triggered by a "foundation", but by a "building"; and, (b) even if the side yard requirements were triggered, structures such as a foundation less than 4 feet in height, are permitted in the side yard under § 2503.2 of the Zoning Regulations.

17. Documents provided by the owner were inconclusive as to the foundation height approved by DCRA. Because of this, the BZA considered continuing the case to give the ANC one last chance to prove that the foundation exceeded 4 feet in height and encroached on the side yards. Ultimately, the BZA found that the ANC had not established that the height of the approved foundation exceeded 4 feet, and had not met its burden of proof on this factual issue.

CONCLUSIONS OF LAW

The Board has before it a motion by the property owner to dismiss the appeal. The motion argues that dismissal is required because the ANC purportedly was not authorized to bring the appeal and because DCRA's decision to issue a foundation permit was not based upon any Zoning Regulation, and therefore not within this Board's jurisdiction to review. Although the Board finds the first argument unpersuasive, it agrees with the property owner as to the second and therefore dismisses this appeal.

Turning first to the authorization issue raised by the property owner, the Board concludes that ANC 6Awas properly authorized to prosecute the appeal. The property owner claimed that the ANC was not authorized to prosecute the appeal until November 7, 2002, long after the appeal was filed on July 24, 2002. The property owner is mistaken in this regard. Although Virginia Gaddis was not authorized to represent the ANC until November 7, the evidence of record shows that the ANC voted to initiate the appeal on July 11, 2002. And, the appeal itself was filed on July 24, 2002 – after the ANC vote – by the ANC Chair and Vice-Chair (with the assistance of Ms. Gaddis), both of who were authorized to act for the ANC.

As to the second ground for dismissal,. the Board first notes that its jurisdiction in an appeal pursuant to the Zoning Act is limited to whether an administrative official erred in the carrying out or enforcement of the Zoning Regulations. *See* D.C. Official Code § 6-641.07(g)(1) (2001). An appeal may only be brought by persons or entities aggrieved as a result of "any decision of ... granting ... a building permit ...based in whole or in part upon any zoning regulation". D.C. Official Code § 6-641.07(f). The Board agrees with

the property owner that the issuance of the foundation permit was not based upon any zoning regulation.

Section 405.3 of the Zoning Regulations provides that a "dwelling", "flat" or "multiple dwelling" erected in an R-4 zone shall have a side yard. However, a "foundation" is not a "dwelling", "flat" or "multiple dwelling". (A "dwelling" is defined under § 199 of the Regulations as a "building designed for human habitation".) Because a foundation is neither a "building"[1] nor designed for human habitation, the side yard provisions of the Zoning Regulations are not triggered. But, even were the side yard provisions triggered by a "foundation", as argued by the ANC, § 2503.2 of the Zoning Regulations[2] permits structures (such as foundations) in the side yard, so long as they do not exceed 4 feet in height. Since the ANC failed to establish that the foundation approved by DCRA was more than 4 feet above grade, it did not prove that the foundation violated the side yard requirements of the Zoning Regulations.

To the extent that the ANC sought, on March 4, 2003, to amend the appeal to include the building permit that actually authorized the erection of a structure on the subject property, that motion is denied. As detailed above, the ANC had several opportunities to amend its appeal to include a challenge to the building permit. It chose not to do so. When the appeal was initially filed on July 24, 2002, both the foundation permit and building permit had already been issued. The ANC appealed only the foundation permit. The ANC could have sought to amend the appeal on November 19, 2002 when it requested a postponement of the case, and when the BZA Chair expressly urged the ANC to include a challenge to the building permit in its appeal.

Finally, the ANC had additional opportunities to seek amendment after it was served with the property owner's February 3, 2003 motion to dismiss, and, again at the March 4, 2003hearing before the BZA. It was not until March 18, 2003 that Commissioner Rice urged the BZA to include the building permit as part of the appeal – nearly 8 months after the initial appeal had been filed and after the construction of the dwelling had been completed. Because of the lengthy and inexplicable delay of the ANC, and the prejudice to the owner which would have resulted by an amendment at this late date, the motion to amend the appeal is denied.

The Board is required under § 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21, as amended; D.C. Official Code § 1-309.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected

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[1] A "building" is defined as a "structure having a roof supported by column or walls for the shelter, support or enclosure of persons, animals or chattel." 11 DCMR § 199.

[2] "[A] structure, not including a building no part of which is more than four feet (4 ft.) above the grade at any point, may occupy any yard required under the provisions of this title." 11 DCMR § 2503.2

ANC's recommendations. To give great weight, the Board must articulate with particularity and precision the reasons why the ANC does or does not offer persuasive advice under the circumstances and make specific findings and conclusions with respect to each of the ANC's issues and concerns. In this appeal, the ANC has not offered advice, but sought to appeal a decision that falls outside the Board's jurisdiction.

Therefore. for the reasons stated above, it is hereby **ORDERED** that that the motion of the property owner to Dismiss the Appeal on the ground that the appeal was not properly authorized is **DENIED,** the motion of the Appellant to amend the appeal, is **DENIED,** and the motion of the property owner to dismiss the appeal because the issuance of the foundation permit did not trigger or violate any provision of the Zoning Regulations is **GRANTED** and the appeal is **DISMISSED.**

Vote taken on March 5, 2003, on the motion to deny the property owner's motion to dismiss the appeal based upon the ANC's lack of proper authorization.

VOTE: 3-1-1 (Geoffrey H. Griffis, Anne M. Renshaw and David A. Zaidain, in favor of the motion; Curtis L. Etherly, Jr., opposed; and Carol J. Mitten being necessarily absent and having submitted a neutral proxy vote)

Vote taken on March 18, 2003, on the motion to deny the ANC's motion to amend the appeal to include a challenge to the building permit.

VOTE: 5-0-0 (Geoffrey H. Griffis, Anne M. Renshaw, David A. Zaidain, Curtis L. Etherly, Jr., and Carol J. Mitten in agreement to deny the motion)

Vote taken on March 18, 2003, on the motion to grant the property owner's motion to dismiss the appeal challenging the foundation permit.

VOTE: 4-1-0 (Geoffrey H. Griffis, David A. Zaidain, Curtis L. Etherly, Jr., and Carol J. Mitten in agreement to grant the motion, Anne M. Renshaw was opposed)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order.

ATTESTED BY: _____
JERRILY R. KRESS. FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: JUL 10 2003

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL. rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

★ ★ ★

Appeal No. 16849 of Robert Lehrman, pursuant to §§ 3100 and 3101 of the Zoning Regulations from the administrative determination of Michael Johnson, Zoning Administrator, dated October 10, 2001 stating that the holder of permit Nos B439404 and B435446 did not effect the illegal removal of trees in violation of the Tree and Slope Protection Overlay District (§1511) in the TSP/R-1-A District, at premises 2221 30th Street, NW (Square 2198, Lot 6) and the reaffirmation of that determination made by the BLRA Administrator, dated December 10, 2001.

HEARING DATE: September 24, 2002
DECISION DATE: September 24, 2002

DECISION AND DISMISSAL ORDER

Robert Lehrman ("Appellant") filed an appeal with the Board of Zoning Adjustment on January 17, 2002, challenging the determination of the Zoning Administrator and the BLRA Administrator that the holder of permit Nos B439404 and B435446 did not violate the Tree and Slope Protection Overlay District, § 1511 of the Zoning Regulations. Mr. Lehrman was originally represented by counsel, but represented himself at the hearing. Mr. Estrin, the owner of the premises ("Owner") at 2221 30th Street, NW (the "Property"), was represented by Whayne S. Quin, Esquire, from the law firm of Holland & Knight LLP. As a preliminary matter, before the scheduled public hearing for this case, the Board granted the Owner's Motion to Dismiss on the ground that the appeal was not filed in a timely manner.

Notice of Appeal and Notice of Public Hearing. By memoranda dated April 9, 2002, the Office of Zoning advised the Zoning Administrator, the Office of the Corporation Counsel, the Owner, Advisory Neighborhood Commission ANC 3C, the ANC for the area within which the property is located, the ANC Commissioner for the affected Single-Member District, the affected Ward Councilmember, and the D.C. Office of Planning.

The Board originally scheduled a public hearing on the appeal for April 9, 2002. Pursuant to 11 DCMR § 3113.14, the Office of Zoning, on February 25, 2002, mailed to the Appellant, the Zoning Administrator, ANC 3C, and Owner's counsel, notice of hearing. Notice of public hearing was also published in the *D.C Register* on July 19, 2002, at 49 DCR 6792. The hearing was rescheduled for September 24, 2002.

In its Motion to the Board dated March 20, 2002, the Owner alleged that that the appellant lacked standing, the appeal was filed untimely, and was barred by laches and mootness.

ANC Report. In its report dated March 25, 2002, ANC 3C states that, at its regularly scheduled public hearing, with a quorum present, the ANC voted to support the appeal on the grounds that

a violation of the Tree and Slope Overlay occurred on the subject property. The report did not address any jurisdictional issues.

On March 26, 2002, Appellant filed a prehearing statement and a request to the Board to stay the building permit for the Property. On April 4, 2002, Appellant filed a motion in opposition to Owner's motion for dismissal of the appeal. Owner filed, on April 5, 2002, an opposition to Appellant's stay request, and on April 8, 2002 a reply to Appellant's motion in opposition. The appeal was rescheduled for a hearing date on September 24, 2002.

Prior to the scheduled hearing date, the Board, through the Office of Zoning, asked Appellant for additional copies of materials, including: copies of all relevant building permit applications, permits, stop work orders, site plans, a chronology of all permitting and construction activities on site and any other fact relevant to the timeliness of the appeal and whether laches applies to the appeal, and any other materials that could assist the Board in its decision-making.

On the day of the scheduled hearing, Owner requested that the Board dismiss the appeal for lack of jurisdiction and requested a preliminary hearing on its motion. The Board did not address the Appellant's request for a stay, having disposed of the case by granting the Owner's motion to dismiss as a preliminary matter.

Hearing and Decision. On September 24, 2002, the Board voted to grant the property Owner's motion to dismiss the appeal based upon timeliness.

FINDINGS OF FACT

1. Appellant resides at 2900 Benton Place, NW., adjacent to the Property.

2. The trees at issue in this case are visible from Appellant's property.

3. It is undisputed that Appellant's property and Owner's property are subject to the provisions of the Woodland Normanstone Tree and Slope Protection overlay ("WNTSP").

4. The WNTSP, 11 DCMR § 1511 *et seq.*, is designed to protect the park-like setting of designated neighborhoods and includes limitations on the removal of healthy trees, depending upon their sizes. The penalty for any such removal is a prohibition on the issuance of a building permit for a seven-year period, unless the Board of Zoning Adjustment grants a special exception.

5. Owner received Building Permit No. B435446, dated March 7, 2001, from the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"), Building and Land Regulation Administration ("BLRA"), to expand certain portions of the residential premises on the Property and to undertake various interior and exterior remodeling of the same. The construction began at the Property on or around June or July of 2001.

6. On or around July 19, 2001, a tulip poplar tree on the Property was removed.

7. At or around July 19, 2001, a second tree, located at the center of the Property, was damaged, allegedly as a result of construction activity.

8. Because the Board did not reach the merits of the appeal, the Owner's proffered explanation for these events are not relevant to this order.

9. On or around July 26, 2001, Appellant, through his counsel, sent a letter to Zoning Administrator Michael D. Johnson (the "Zoning Administrator") requesting that a stop work order be issued for the construction under the March 7, 2001 building permit, alleging that the construction was in violation of the WNTSP provisions of the Zoning Regulations.

10. As explained by letter to Appellant from J. Gregory Love, BLRA Administrator(the "BLRA Administrator"), dated September 14, 2001, a stop work order was issued at the Property by the BLRA Construction Inspection Branch because demolition of the existing building was beyond the scope of the plans approved for Building Permit No. B435446. By the same letter, the BLRA Administrator stated that the Zoning Administrator was "reviewing the other zoning issues related to construction not in accordance with approved plans, including the one related to the removal of trees in violation of the Zoning Regulations, DCMR 11, Section 1514. A review of our records confirms that no prior request for tree removal was made as required by the Tree and Slope Protection Form that was attached to the construction permit application. Therefore, I have instructed the Zoning Administrator to make an expeditious determination on this matter."

11. By letter to Owner dated October 10, 2001, with copy to Appellant, the Zoning Administrator concluded, in response to the issues raised in Appellant's July 26, 2001 letter, that "while there may be a question as to whether the Tree and Slope Protection Overlay Zone is even applicable to an area outside the zone of construction, I find, based upon the information that I received and the investigation conducted, that there was an unsafe condition which warranted the removal of the tree under Section 1514.1(b) of the Zoning Regulations. Further, based upon my review, site inspection and understanding of the issues raised, I conclude that there is no violation of the Zoning Regulations and no further enforcement action is required regarding this matter." The Board finds that this letter addressed both alleged violations, one involving the tree already cut down, and one involving the injured but still standing tree, where the Zoning Administrator specifically addressed the tree already cut down and conducted a site inspection to determine whether there were any other violations of the Overlay.

12. In response to the earlier stop work order, Owner obtained Building Permit No. B439404, dated October 16, 2001, which revised Permit No. B435446 and granted permission to replace masonry cinder block walls as per plan.

13. In the three months subsequent to the Zoning Administrator's ruling of October 10, 2001, Appellant did not file an appeal. Rather, Appellant communicated with various representatives of the BLRA to seek reversal of the Zoning Administrator's determination.

14. By letter to counsel for Appellant dated November 5, 2001, the BLRA Administrator noted that "[a]t the behest of your client, Robert Lehrman, I am in the process of re-evaluating the Zoning Administrator's determination. If a different interpretation is made, you will be so advised."

15. As a result of conversations between Appellant and David A. Clark, DCRA Director, a second stop work order was issued by BLRA at the Property on November 21, 2001.

16. By letter dated December 7, 2001, Acting Zoning Administrator Toye Bello notified counsel for Owner that the second stop work order was lifted and that no further enforcement action is necessary. In the same letter, the Acting Zoning Administrator noted that "[t]he Department stands by the resolution of the previous complaint of illegal tree removal as encapsulated inn(sic) the Zoning Administrator Opinion dated October 10, 2001, in which the [Zoning] Administrator found no cause for further enforcement action."

17. By letter dated December 10, 2001, the BLRA Administrator issued a letter to Appellant once again confirming the Zoning Administrator's proper application of the Zoning Regulations as well as addressing a variety of zoning and building code issues related to the Property. The BLRA Administrator noted that "the second stop work order was issued solely to address [the Appellant's] concern that construction activity continued to willfully cause fatal damage to protected trees. This stop work order has also been lifted as there was no evidence upon which [the BLRA Administrator] could justify the continuance of said order.

18 Appellant filed the present appeal on January 17, 2002 -- 99 days after the date of the Zoning Administrator's October 10, 2001, ruling, and 39 days after the date of the BLRA administrator correspondence confirming the Zoning Administrator's ruling.

19. The Board finds that the Appellant knew or should have known of the adverse decision of DCRA as of October 10, 2001, the date of the Zoning Administrator's full and final determination with respect to the issues presented on this appeal

20. The December 10, 2001, letter from the BLRA Administrator merely reaffirmed the October 10, 2001 decision.

21. Because no exceptional circumstances existed that could have impaired the Appellant's ability to file this appeal within two months after October 10, 2001, *the* Board finds that the appeal is untimely.

CONCLUSIONS OF LAW

The Owner argued that the Board lacks jurisdiction to hear this appeal because: (1) Appellant was not aggrieved as required by the Zoning Act and §3112.2 of the Zoning Regulations and therefore lacked standing; (2) because the appeal was not timely filed by Appellant; (3) because the appeal was barred by the equitable doctrine of laches; and (4) because the appeal was moot.

Because the arguments raised by Owner involve the authority of the Board to exercise jurisdiction over the appeal, the Board addressed Owner's Motion to Dismiss prior to entertaining Appellant's Motion for Stay or the parties' arguments on the merits.

Standing

In support of its argument that Appellant lacks standing, Owner contended, at the hearing and through his pre-hearing submissions, that the instant appeal is not proper because Appellant is not an "aggrieved" person within the meaning of §3112.2. Owner submitted that in order for Appellant to qualify as an "aggrieved" person within the meaning of the Zoning Regulations, Appellant must demonstrate that he has an interest that will be more significantly, distinctively, or uniquely affected in character or kind than those of other persons in the general public.

The Owner further claimed that Appellant has not suffered any injury as a result of the Zoning Administrator's ruling and that, even if such injury could be said to have been suffered, it was no different than that suffered by the general public, given the distance of Appellant's property from the subject Property.

The Board concludes, however, that the Appellant qualifies as an "aggrieved" person within the meaning of §3112.2 because of the proximity between Appellant's property and the Property and Appellant's testimony that the tree canopy from the Property can be seen from Appellant's property. Therefore, the Board concludes that Appellant does have standing to bring the instant appeal.

Timeliness

As of the date that this appeal was filed, the Zoning Regulations did not specify a particular number of days within which a decision must be appealed. The Board and the courts have long applied a standard of reasonableness, which requires appeals to be brought within a "reasonable" period of time in order to invoke the appellate jurisdiction of the Board. The "reasonableness" of the timing of an appeal has historically been judged on a case-by-case basis depending on the circumstances and factors that caused the delay.

In *Waste Management of Maryland, Inc., v. District of Columbia Board of Zoning Adjustment*, 775 A.2d 1117, 1122 (D.C. 2001), the Court of Appeals re-affirmed that the timeliness requirement is jurisdictional and that if an appeal is not timely filed, the Board lacks jurisdiction to consider it. There, the Court articulated a test for timeliness:

> 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."

(Emphasis added.)

In support of its argument that dismissal is required because the instant appeal was not timely filed, the Owner contended that Appellant waited more than three months from the date of the Zoning Administrator's October 10, 2001 determination to file the instant appeal with the Board, more than a month beyond what the Court of Appeals, in *Waste Management,* has determined is the reasonable limit of timeliness. Appellant, in turn, argued that its appeal was timely because it was filed within 60 days after Mr. Love's December 10, 2001 letter. Therefore, the Board must decide which of the two communications start the two-month time period for the Appellant to file its appeal.

The Board's decision in *Appeal of Robert E. Love*, BZA Appeal No. 14054 (1984) is dispositive of this issue. The appellant in *Love* received a letter on December 6, 1982, from DCRA, advising him that plans approved by the disputed building permits were in compliance with the Zoning Regulations. The appellant in *Love* "chose not to file an appeal before the Board of Zoning Adjustment at that time," but rather "attempted to resolve the problem through letters to and meetings with staff and members of the City Council, other D.C. Departments and the Mayor." *Love*, Findings of Fact No. 13. As a result of these efforts, an additional DCRA letter, dated August 12, 1983, was sent. However, because the letter was only a "reaffirmation of the facts" stated in the December, 1982 correspondence, the Board held that the December letter began the time for filing the appeal. The Board dismissed the appeal as untimely.

Like the August 12th letter in *Love*, the December 10, 2001 letter from the BLRA Administrator in this case merely reaffirmed the conclusion reached earlier by the Zoning Administrator on October, 10, 2001. Therefore, the time for filing this appeal began on October 10, 2001.

Appellant waited more than three months from the October 10, 2001, to file his appeal with the BZA, an additional month beyond what the Court of Appeals has defined as the limit of timeliness, absent exceptional circumstances.

The Board finds no evidence in the record upon which the Board could base a conclusion that there existed any "exceptional circumstances . . . outside [Appellant's] control," that "impaired" the ability of Appellant to appeal or to warrant extending the two-month deadline to nearly 100 days. Appellant does not deny receiving the October 10, 2001 determination by the Zoning Administrator. The Board finds that there is no reason that Appellant could not have filed an appeal to this Board shortly after October 10, 2001. Appellant became involved in the proceedings as early as June, 2001 when he corresponded with Owner regarding the removal of the tree. Likewise, Appellant maintained close contact with the Zoning Administrator and the BLRA Administrator throughout the period in question prior to October 10, 2001.

After October 10, Appellant did not choose to appeal to the BZA but rather sought reversal of the ruling by asking the BLRA to further review the determination. There is no basis in the record to indicate that the Zoning Administrator would reverse his ruling. The Board concludes that these efforts do not rise to the level of an exceptional circumstance outside Appellant's control that "impaired" the ability to appeal earlier.

With regard to the issuance of the second stop work order, issued on November 21, 2001, by BLRA under the Building Code, which was issued subsequent to the Zoning Administrator's

October 10, 2001, determination, the majority of this Board finds that such an order also does not create an exceptional circumstance. As discussed at the hearing (Transcript at 288-89), the December 10, 2001 letter from DCRA made it clear that the order was issued to ensure that existing activity was not jeopardizing the remaining trees in violation of the Overlay. It was not issued in direct response to the allegations of past violations, allegations that form the basis of this appeal. While it is not clear that the Appellant knew the reason for the issuance of the stop work order prior to the December 10, 2001, letter, neither was it clear that the stop work order was in response to his concerns of past violations.

In reaching this decision, the Board was divided, with two members indicating during the decision meeting that dismissing this case would be inconsistent with the Board's prior decision in *Appeal of Darrel J. Grinstead,* BZA Appeal No. 16764 (2001).

Grinstead involved an appeal filed seven months after the issuance of a building permit, but less than two months after Mr. Grinstead received his first and only letter from DCRA upholding the disputed building permit. The minority equate the following to Grinstead: 1) the October 10th letter in this appeal to the permit challenged in Grinstead; 2) the November 21, 2001 stop work order, the December 7, 2001 letter from the Acting Zoning Administrator, and numerous telephone exchanges in between to the period of internal DCRA resolution in Grinstead (i.e., the time during which the Appellant's letters to DCRA went unanswered), and 3) the December 10th letter in this appeal to the subsequent letter of final decision in the Grinstead case. The second stop work order is found by the minority to indicate that serious reconsideration of the Zoning Administrator's October 10th decision was underway and that a final decision had not, in fact, been made.

Based upon this ruling, the two members felt that the October 10, 2001 letter could not be a final decision where DCRA continued to review the allegations made by the Appellants. The minority thus appears to equate the October 10th letter in this appeal to the permit challenged in *Grinstead,* and to equate the December 10th letter in this appeal to the subsequent letter in the *Grinstead* case.

The majority does not find it appropriate to treat the October 10th letter as if it were no more than a bare bones permit. That letter, like the letter in *Grinstead* and the first letter in *Love,* fully addressed the issues raised. No purpose, other than delay, is served by permitting an appeal based upon follow-on correspondence.

To hold that the appeal period continues so long as a reevaluation is occurring would place holders of building permits in a state of chronic uncertainty and allow disgruntled individuals to endlessly extend the appeal period through repeated requests for DCRA to reevaluate its last stated position. While *Grinstead* recognized value in allowing DCRA to reevaluate its positions on zoning matters, the need for finality and the prompt resolution of zoning disputes dictates that such an internal process should be permitted only once, if at all.[1]

Thus, the December 10, 2001 letter from the BLRA Administrator did not begin the time for filing this appeal because it was simply a reaffirmation of the earlier decision and because, even

if it constituted more than a reaffirmation, the earlier October 10th letter fully addressed all issues raised and therefore was the only writing that could properly furnish the basis for this appeal.

Because of the disposition of this appeal on the grounds that it was not timely, the Board need not address the Owner's further assertions that the appeal is barred by the equitable doctrine of laches and is moot.

It is therefore **ORDERED** that the **MOTION TO DISMISS** be **GRANTED**, and this appeal be **DISMISSED** for lack of jurisdiction.

VOTE: 3-2-0 (Geoffrey H. Griffis, Curtis L. Etherly, Jr., and David A. Zaidain to grant Owner's Motion and dismiss the appeal, Carol J. Mitten and Anne M. Renshaw opposed)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: MAY 0 8 2003

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT. crb/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 16849

As Director of the Office of Zoning, I hereby certify and attest that on MAY 0 8 2003 a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

Whayne S. Quin, Esq.
Holland & Knight LLP
2099 Pennsylavania Avenue, N.W.
Suite 100
Washington, D.C. 20006-6801

Robert Lehrman
2900 Benton Place, N.W.
Washington, D.C. 20008

Nancy J. MacWood, Chairperson
Advisory Neighborhood Commission 3C
2737 Devonshire Place, N.W.
Washington, D.C. 20008

Single Member District Commissioner 3C08
Advisory Neighborhood Commission 3C
2737 Devonshire Place, N.W.
Washington, D.C. 20008

Kathleen Patterson, City Councilmember
Ward Three
1350 Pennsylvania Avenue, N.W.
Suite 109
Washington, D.C. 20004

Acting Zoning Administrator
Building and Land Regulation Administration
Department of Consumer and Regulatory Affairs
941 N. Capitol Street, N.E.
Washington, D.C. 20002

Ellen McCarthy, Deputy Director
Office of Planning
801 North Capitol Street, N.E.
4th Floor
Washington, D.C. 20002

Alan Bergstein, Esq.
Office of Corporation Counsel
441 4th Street, N.W., 6th Floor
Washington, D.C. 20001

rsn

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

AFFIDAVIT

I, GAIL MONTPLAISIR, being of the age of majority and otherwise competent to make this affidavit do state:

1. I am over the age of eighteen (18) and am a resident of the District of Columbia.

2. I am the President of Taurus Enterprise Group, Inc, the Managing Member of Montrose, LLC ("Montrose"), the owner of the property at 1819 Belmont Road, N.W., Washington, D.C.

3. Montrose purchased 1819 Belmont Road, N.W., in January 2003 with the intent to redevelop the three-story row dwelling, with four residential units, into a five-unit condominium building. The redevelopment contemplated adding two floors, an attic and a roof deck to the existing structure.

4. Prior to acquiring the property, Montrose conducted due diligence, which included investigation into the zoning classification, the D.C. Comprehensive Plan and historic status. Montrose hired an architect to design the building, and also hired zoning consultants and code consultants to review all of the issues surrounding the project.

5. On March 19, 2003, Montrose met with the Transportation Committee of the Advisory Neighborhood Commission ("ANC") 1C to discuss an application for a public space permit for a curb cut and garage door related to the redevelopment of the property. At that time, Montrose provided an elevation of the building showing the height of the building at the east and west elevations, as well as a direct elevation of depicting the addition of the fourth and fifth floors.

6. The ANC and neighbors who were present expressed their disapproval of a proposed curb cut and a proposed garage door. No comments were made regarding the height of the building. In an attempt to work with its neighbors, Montrose withdrew its request for the curb cut and did not proceed with the garage door plan. Montrose also continued to meet with its adjacent neighbors to discuss issues and concerns that might arise during the construction process, and share its plans with those neighbors.

7. Relying on the issuance of the March 11, 2003 permit, and the lack of substantive comments from neighbors, Montrose began construction and proceeded apace. By September 1, 2003, the additional floors, attic and roof structure had been framed out, and their full height and mass apparent to the surrounding community.

8. On September 12, 2003, without any warning, Montrose was issued a Stop Work Order. No one in the community, the District, or the Council Member's office contacted Montrose to express concerns, or to ask questions or request any type of clarification.

9. Montrose contacted the D.C. Building and Land Regulation Administration ("BLRA") for clarification, and immediately began diligently working with that office to address the issues believed to warrant the issuance of the Stop Work Order. This process continued for three weeks, and culminated with the issuance of two revised permits that allowed the construction to continue.

10. As of February 13, 2004, Montrose is continuing with the installation of non-structural finishes, including drywall, plumbing fixtures and appliances. The building structure has been constructed both inside and out. The exterior water proofing has been completed with the exception of minor areas of EIFS and the metal roofing which has been delayed. Presently

the rear fire stair is being installed, the balconies and decks being finished and the interior finishes are being completed.

11. Since construction began last Spring, Montrose has invested significant time and approximately $700,000 in construction costs. Additionally, Montrose has suffered losses in excess of $160,000 due to costs overruns and legal fees directly attributable to the delays caused by the appeal.

12. Montrose both heavily and detrimentally relied upon the District of Columbia's issuance of the March 11, 2003, building permit and proceeding in good faith with substantial and permanent construction of the additional floors, attic and roof structure.

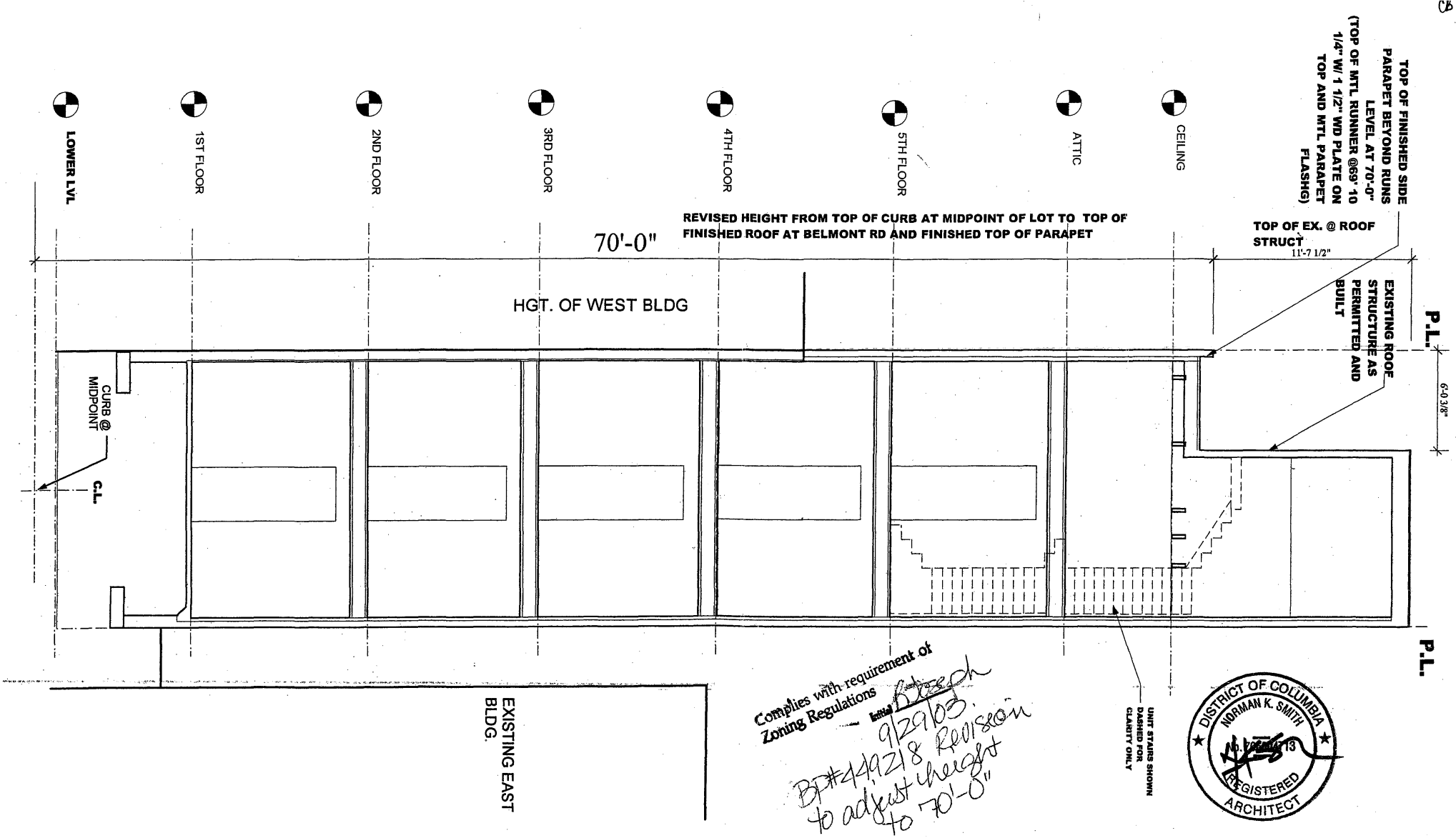
Gail Montplaisir
President, Taurus Enterprise Group, Inc.
Managing Member
MONTROSE, LLC

DISTRICT OF COLUMBIA:

Subscribed and sworn to before me this 17th day of February, 2004.

Notary Public

My commission expires: Glenn D. Simpson
Notary Public, District of Columbia
My Commission Expires 10-31-2008



SCHEMATIC BUILDING CROSS SECTION
Scale: 3/16" = 1 ft

SECTION SHOWING REVISED PARAPET AND BUILDING HEIGHT WITH ROOF STRUCTURE AS PERMITTED AND BUILT

1819 BELMONT RD., NW 09-29-03
NORMAN SMITH ARCHITECTURE 202.462.5886

ZONING INFORMATION; REVISED 09-29-03

1 **STREET ADDRESS:** 1819 BELMONT STREET, N.W. WASHINGTON, DC
2 **LOT:** 45
3 **SQUARE:** 2551
4 **ZONING:** R5D
5 **NUMBER OF DWELLING UNITS:** 5
6 **MINIMUM LOT SIZE:** NONE PRESCRIBED
7 **LOT SIZE:** 2000.4 SF
8 **FAR: SEE ATTACHED GRAPHIC**

8.1 ALLOWABLE/REQUIRED;
- 8.1.1 MAIN: 3.5 MAIN: 2000.4 SF X 3.5 = 7001.4 SF
- 8.1.2 ROOF STRUCTURE: .37 OF FAR OF FLOOR BELOW: .37 X 12705 = 470.1
- 8.1.3 TOTAL ALLOWABLE: 7471.4 SF

8.2 ACTUAL

8.2.1	CELLAR: (20% OF GFA CEILING HEIGHT AT LESS THAN 4' ABOVE GRADE, BASED ON PERIMETER CALCULATION) 736.6 X.20 = 147.3 SF	
8.2.2	1ST;	
8.2.2.1	MAIN:	1394.1 SF
8.2.2.2	STAIR LANDING	15.4 SF
8.2.3	2ND;	
8.2.3.1	MAIN:	1394.1 SF
8.2.3.2	STAIR LANDING	15.4 SF
8.2.4	3RD;	
8.2.4.1	MAIN:	1394.1 SF
8.2.4.2	STAIR LANDING	15.4 SF
8.2.5	4TH;	
8.2.5.1	MAIN:	1336.6 SF
8.2.5.2	STAIR LANDING	15.4 SF
8.2.6	5TH;	
8.2.6.1	MAIN:	1270.5 SF
8.2.6.2	STAIR LANDING: NONE	0 SF
8.2.7	ATTIC; NOT APPLICABLE	0 SF
8.2.8	ROOF STRUCTURE	124.3 SF
8.2.9	**TOTAL**	**7122.6 SF**

8.2.10 **NOTES:**
- 8.2.10.1 CALCULATION BASED ON LOT LINE TO LOT LINE AND INCLUDING EXTERIOR WALLS
- 8.2.10.2 CHASE SPACES INCLUDED IN FAR FOR EACH FLOOR
- 8.2.10.3 REAR STAIRS INCLUDED AS SEPARATE LINE ITEM AT FLOORS 1-4 (I.E. STAIR RUN FROM FLOOR 1 TO FLOOR 2 IS COUNTED AS FAR ON FLOOR 1); STAIR RUN TO GRADE IS BELOW MAIN LEVEL OF 1ST FLOOR AND DOES NOT COUNT TOWARD FAR; THERE IS NO STAIR ABOVE FLOOR 5
- 8.2.10.4 3'-0" DEEP REAR BALCONIES DO NOT COUNT TOWARD FAR
- 8.2.10.5 ROOF STRUCTURE FAR IS BASED ON THE STAIR, LANDING AND HORIZONTAL SURFACES WITHIN THE ROOF STRUCTURE
- 8.2.10.5.1 *TOTAL AREA OF ROOF STRUCTURE, INCLUDING OPEN AREAS = 260.7 SF, RESULTING IN TOTAL OF 7259 SF < 7471.4 ALLOWABLE*

9 **LOT COVERAGE:**
- 9.1 ALLOWABLE/REQUIRED; 75%; 2001.4 X .75 = 1500.3 SF
- 9.2 ACTUAL 1409.3 SF

10 **REAR YARD**
- 10:1 ALLOWABLE/REQUIRED: 4" PER 12" VERTICAL HEIGHT(.33) AT MIDPOINT REAR GRADE, 15'-0" MIN.; BUILDING HEIGHT AT REAR = 53'9 ¾" X .33= 17'9 1/8"
- 10.2 ACTUAL AT NEW WORK: 31' 2 ¼"

11 **SIDE YARDS:** NOT APPLICABLE
12 **COURTS:** NOT APPLICABLE
13 **BUILDING HEIGHT**
- 13.1 ALLOWABLE: 90.0' UNDER R5-D
  - 13.1.1 **UNDER 1910 HEIGHT ACT, FOR STREET WIDTH OF 80.0', BUILDING HEIGHT IS LIMITED TO 70.0'**
- 13.2 ACTUAL AS REVISED : 70.0'

14 **NUMBER OF STORIES**
- 14.1 ALLOWABLE: NO LIMIT
- 14.2 ACTUAL: 5

15 **USE GROUP UNDER BLDG CODE**
- 15.1 EXISTING: R-2; 4 UNITS
- 15.2 NEW: R-2; 5 UNITS (20% INCREASE IN USE INTENSITY)

16 **PARKING**
- 16.1 REQUIRED: (1) REQUIRED UNDER DCMR 11, #2100.7 FOR 5 UNITS (20% INCREASE IN USE INTENSITY).
- 16.2 PROVIDED: 1 SPACE PROVIDED; AUXILIARY PARKING SPACES WHICH MAY BE PROVIDED; 2