BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPEAL OF:

Susan L. Lynch from the Administrative Decision of the Zoning Administrator, DCRA, to issue Building Permit Nos. RW1200113, RW1200111, B1207072 and B1207074 approving the construction of two one-family detached dwellings and retaining walls in the R-1-B District at premises 2334 King Place, N.W. (Square 1394, Lot 24) and 2338 King Place, N.W. (Square 1394, Lot 23)	**BZA Appeal No. 18469** **Hearing Date: October 16, 2012** **ANC 3D**

PROPERTY OWNERS' MOTION TO DISMISS

I.
INTRODUCTION

On behalf of SSB 2338 King LLC ("SSB"), the owner of Lot 23 in Square 1394 and the builder of the two houses on the properties at issue in the above-referenced appeal, we hereby move to dismiss as untimely under section 3112 of the Zoning Regulations and the doctrine of laches the Board of Zoning Adjustment ("BZA" or "Board") Appeal No. 18469 filed by Susan L. Lynch. Ms. Lynch waited to file her appeal until 173 days after the Zoning Administrator's approval of the permit applications for Building Permit Nos. B1207072 and B1207074 (the "King Place House Permits"). Additionally, Ms. Lynch filed her appeal of the Zoning Administrator's decision to approve the revised permit applications for Permit Nos. RW1200111 and RW1200113 (the "Retaining Wall Permits") 87 days after gaining actual knowledge of their approval. This is well after the requisite 60-day period in which a party may appeal a zoning decision under section 3112.2(a) of the Zoning Regulations.

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Ms. Lynch's appeal is time-barred, as it is well settled that "the Board lacks jurisdiction to hear any appeal that is not filed in a timely manner." See *BZA Appeal No. 18070 of ANC 6B*, at 4 (December 17, 2010), *citing Economides v. District of Columbia Bd. of Zoning Adjustment*, 954 A. 2d 427, 434-35 (D.C. 2008); *Waste Mgmt. of Md., Inc. v. District of Columbia Bd. of Zoning Adjustment*, 775 A. 2d 1117, 1121-22 (D.C. 2001); *Mendelson v. District of Columbia Bd. of Zoning Adjustment*, 645 A. 2d 1090, 1093 (D.C. 1994) (the timely filing of an appeal with the Board is mandatory and jurisdictional; if an appeal is not timely filed, the Board is without power to consider it). By virtue of her own delay, Appellant has divested the Board of jurisdiction over this matter, and her appeal should be dismissed.

II.
FACTS

This appeal involves the construction of two houses at 2334 and 2338 King Place, N.W. in the Palisades neighborhood, Lot 23 in Square 1394 and Lot 24 in Square 1394, respectively. Construction of the two houses is currently proceeding pursuant to the King Place House Permits issued on April 6, 2012. Construction of the retaining walls that provide the homes with flat, usable rear yards has been conducted pursuant to the Retaining Wall Permits, approved by the Zoning Administrator, Matthew LeGrant, on June 1, 2012 and issued on June 29, 2012.

Starting at least in early February, Ms. Lynch, an adjacent neighbor to 2338 King Place, was already actively attempting to derail the approval of the neighboring retaining wall and raised rear yards, which she characterized as an elevated platform structure and not as a retaining wall. This nature of this characterization was significant in that a retaining wall could be included within the required, 25-foot rear yard, but an elevated platform structure could not. Accordingly, Ms. Lynch retained an experienced zoning lawyer, Martin P. Sullivan, lobbied her councilmember Mary Cheh, challenged the DCRA's approval of the permits at issue, and

threatened SSB that she would appeal any ruling that went against her. (See Exhibits A, B and C, attached hereto). For example, on March 9, 2012, Mr. Sullivan made the following threats to SSB, while cc'ing Ms. Lynch:

> The Zoning Administrator has promised us a decision in the next few days. It seems to me that holding off for just one week until he makes his determination would be the prudent move (regardless of what you think about the likelihood of the ZA revoking the permits). If he does not disturb his office's previous approval, then we intend to appeal that decision on both building permits and you may end up having to remove the fill and the wall if the BZA grants our appeal.

(See Exhibit B, Mr. Sullivan Email dated March 9, 2012, attached hereto).

As evidenced by this email, Ms. Lynch is represented by a sophisticated zoning lawyer who is well-versed in the rules related to the zoning appeals process.

On April 10, the Zoning Administrator determined that the previously issued building permits for the work had been issued in error, because the 25 foot-rear yard requirement did not allow for the inclusion of a structure in excess of four-feet above grade. (See Email by Mr. Surabian, General Counsel's Office, Department of Consumer and Regulatory Affairs ("DCRA"), dated April 10, 2012 in correspondence contained in the Retaining Wall Permit File and submitted by Appellant's counsel at Exhibit C on October 9, 2012).

Based on the emails in the DCRA files, Ms. Lynch then met with her D.C. Councilmember Mary Cheh regarding the retaining wall on the subject properties on April 15, 2012. (See Exhibit A). In fact, Ms. Lynch indicates to Ms. Cheh that the Zoning Administrator's original revocation of the building permits was a result of the "prodding from your office." Ms. Lynch writes of "her concern" and "her fear" with respect to the existing structure and "the speed with which the developer turned the Stop Work order around (2 days) as it had taken us one month to have it issued."

As a result of subsequent discussions between DCRA, SSB and SSB's engineering consultant, CAS Engineering ("CAS"), CAS revised the grading concepts for the rear yards and retaining walls at the King Place properties in order to comply with the Regulations and the *Economides* decision of the Board of Zoning Adjustment. CAS submitted its revised drawings and computations on April 23, 2012 for confirmation of compliance. (See Exhibit D, CAS Engineering Letter dated April 23, 2012). In an email the next day, CAS stated to DCRA: "Once we've received your confirmation, we'll submit to permit the walls separately." (See Exhibit E, David C. Landsman (CAS) email, dated April 24, 2012).

On May 30, 2012 Matt LeGrant of DCRA sent an email to SSB and its counsel communicating that he had "concluded [his] reviews of the application numbers RW1200111 and RW1200113 and approved them." (See Exhibit C). Mr. Sullivan, Appellant's counsel, confirmed his knowledge of the Zoning Administrator's decision to approve the revised retaining wall and grading plans in an email to Matt LeGrant on June 1, 2012: (See Exhibit A). Mr. Sullivan's email, which was cc'd to Ms. Lynch, states: "We understand there has been a zoning approval on new building permit applications for the elevated platform structure/retaining wall on the King Place lots....We look forward to hearing more on this, under what rationale the EPS [Elevated Platform Structure] is now approved...." Mr. LeGrant informed Appellant's counsel that same day by telephone of his decision to approve for zoning purposes the revised permits for the elevated platform structure/retaining wall.

The Appellant also had daily access to the status of the permit approval, including the zoning review approvals, through the Permit Information Verification System ("PIVS") on DCRA's website. Any member of the public can enter an address into PIVS to get up-to-date information on pending permits for any property. Copies of the PIVS reports for 2334 and 2338

King Place, N.W., printed October 11, 2012, are attached as Exhibit F. They clearly show that the zoning approvals for the revised retaining wall, or elevated platform structures, were approved on May 30, 2012.

With respect to the houses, construction continued on them under the revised permits issued April 6, 2012. The house at 2334 King Place was "under roof" as of April 30, 2012. The house at 2338 King Place was "under roof" as of July 12, 2012. As an immediate neighbor who has closely monitoring construction at the two properties, Appellant and her counsel had full knowledge of the roof installation.

This appeal was filed with the Board on August 27, 2012. Appellant's counsel made an unambiguous admission that he and Ms. Lynch knew on June 1, 2012 that the Zoning Administrator had decided to approve the revised permit application. Thus, Ms. Lynch waited 87 days after that decision to file her appeal. Her appeal is untimely.

III.
ARGUMENT

A. The Appeal Is Untimely

Despite Ms. Lynch's active involvement in the Zoning Administrator's reconsideration of his approval of the original design of the retaining wall permits, their revocation, and subsequent revision, resubmission and reevaluation since at least March 4, 2012, Ms. Lynch failed to file her appeal within the requisite 60 days after the Zoning Administrator informed her counsel of his decision to approve the Retaining Wall Permits on June 1, 2012. Instead, she waited 87 days before submitting her appeal to the Board. Consequently, the appeal should be dismissed.

With respect to the houses that were under roof by April 30 (2334 King Place) and July 12 (2338 King Place), the appeal is equally late. Pursuant to 3112.2(b)(1), appeals of those permits were due no later than May 10 and July 22, respectively.

B. The Appeal Fails to Comply with the Zoning Regulations on Timeliness

Under section 3112.2 of the Zoning Regulations, an appeal must be filed within 60 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. Zoning Commission Order No. 02-01, February 7, 2003, at 3-4; *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"). The requirement for a timely appeal is jurisdictional. If any appellant misses the deadline, the Board is without power to consider the appeal. *Goto v. District of Columbia Bd. of Zoning Adjustment,* 423 A.2d 917, 923 (D.C. 1980); *Mendelson v. District of Columbia Bd. of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994).

In analyzing whether an appeal is timely, the reviewing agency or court must determine: (i) the official decision complained of that triggers the start of the 60-day clock; (ii) whether the appellant had notice or knowledge of that decision, or should have reasonably known of it, *whichever is earlier*; and (iii) whether there were any exceptional circumstances beyond the control of the appellant that would have substantially impaired its ability to file an appeal.[1] Each is discussed in turn below.

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[1]Section 3112.2 provides that any person aggrieved by a decision of an administrative officer in the administration of the Zoning Regulations may file a timely appeal as follows:

> (a) An appeal shall be filed within sixty (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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> * * *
>
> (c) Notwithstanding paragraphs (a) and (b) of this subsection, for purposes of establishing the timeliness of an appeal under this subsection, an appellant shall have a minimum of

1. The Official Decision Complained Of

The Appellant takes exception with the Zoning Administrator's decision to approve the Retaining Wall Permits, which were approved as part of a post-revocation reevaluation process, initiated as a result of Ms. Lynch's lobbying of her Councilmember, Mary Cheh, and providing her detailed opposition to the design to the DCRA and the Zoning Administrator. Ms. Lynch suggests in her appeal that she "appeals the administrative decision of the Zoning Administrator to approve the issue of Building Permits No. RW1200113 and No, B1207072...and Building Permits No. RW1200111 and No, B1207074...." However, the issuance of the RW permits on June 29, 2012 is not the correct administrative decision on appeal. Instead, it is the Zoning Administrator's *decision to approve the permits* that is the key trigger date for the 60-day time period. See Ausubel Appeal No. 18300, April 11, 2012, at 7. Appellant counsel's own writing, cc'd to Ms. Lynch, establishes the fact of the Zoning Administrator's decision on or before June 1, 2012 and the Appellant's actual knowledge of the decision on that same date. (See Exhibit A). Appellant even attempts to stretch the starting date for the 60-day clock into July by asserting that Appellant's counsel "was not permitted access to these plans or the decisions underlying those plans until July 6, 2012." (See Statement in Support of Appeal of Susan Lynch at 2). It seems unlikely, however, that a zoning lawyer of Mr. Sullivan's sophistication would not be able to access these documents directly from the Zoning Administrator or from SSB's counsel, with

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sixty (60) days from the date of the administrative decision complained of in which to file an appeal.

(d) The Board 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 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, as identified in § 3199.1.

11 DCMR § 3112.2, Zoning Commission Order No. 02-01, February 7, 2003 (emphasis added).

whom Mr. Sullivan is familiar. Even assuming these allegations of inaccessibility are accurate, these delays to access of underlying documentation are irrelevant in light of Mr. Sullivan's actual knowledge of the decision, as evidenced in his June 1 email.

A case with a very similar notice issue is *BZA Appeal No. 17411 of Paul A. Basken and Joshua S. Meyer* (March 23, 2006), *aff'd, Basken v. District of Columbia Bd. of Zoning Adjustment*, 946 A. 2d 356 (D.C. 2008). *Basken* involved the expansion, conversion and occupancy of a three-unit apartment building into a seven-unit condominium. Two building permits were issued--one on September 9, 2004 for an addition to the existing building, and the other on December 17, 2004 authorizing conversion of the building to a seven-unit condo, "subject to zoning approval of the number of units in zone." After issuance of the second building permit in December, the appellants in that case voiced their zoning concerns about the project with DCRA, with their Councilmember, with their ANC and with the owner/developer of the property at issue on a number of occasions.

On May 26, 2005, in response to an inquiry from the ANC, the DCRA Director sent a letter to the ANC in which he acknowledged an error by the Office of the Zoning Administrator in the review and issuance of the building permit. His letter also stated, however, that "the Zoning Administrator will not deny the property owners a Certificate of Occupancy for the property on the basis of the zoning review error."[2] The record in that case reflects that the appellants received a copy of that letter by May 27, 2005. The certificate of occupancy for the seven-unit building was issued 14 days later, on June 10, 2005. *Basken,* at 358-60.

Basken and Meyer filed their appeal to the Board on August 5, 2005, which was less than 60 days after the certificate of occupancy was issued, but 70 days after they had received actual

[2] The DCRA Director's letter to the ANC also stated that the ANC "has the right to appeal this decision to the [BZA]." *Basken,* at 359. However, this additional language is not what makes this an appealable decision. The ANC was not represented by zoning counsel in that case.

notice of the zoning decision to issue the certificate of occupancy. The Board treated the December 2004 building permit issuance as the notice of the zoning decision. However, the Board also found that even if the appellants' confusion as to the language on the December 17, 2004 building permit about approval of seven units "subject to zoning approval" was deemed reasonable and created an extenuating circumstance beyond their control that impaired their ability to file an appeal, "that circumstance ended on May 26, 2005, the date of the DCRA Director's letter to the ANC." *Id.* at 362. The Board found that the appellants had actual knowledge of the decision to issue the certificate of occupancy on May 27, 2005, "and concluded that there can be no doubt that by May 27, 2005, [the appellants] knew that it was time to appeal." *Id.*

In upholding the Board's dismissal of the appeal for lack of timeliness, the Court of Appeals in *Basken* concluded that the May 26, 2005 letter from the DCRA Director clearly indicated that a zoning decision had been made, and was the date from which the 60-day appeal period ran. *Id.* at 364. The Court's explanation of its holding in *Basken* is instructive for SSB's current motion to dismiss:

> Further, and importantly for our decision, the zoning statute and regulations do not tie the time for appealing to the BZA to the issuance of a specified type of notice. *See* D.C. Code § 6-641.07 (f) (authorizing appeals from "any other administrative decision") and 11 DCMR § 3112.2 (providing for an appeal by any person aggrieved by "any order, requirement, decision, determination, or refusal" within sixty days from the date the person knew or reasonably should have known of "the decision complained of"). In addition, our case law specifically recognizes that a letter from DCRA or the Zoning Administrator conveying a zoning decision may be an appealable decision, *See Goto v. District of Columbia Bd. of Zoning Adjustment*, 423 A.2d 917, 924 (D.C. 1980) (upholding BZA decision that "began to run the clock with [Zoning Administrator] Fahey's letter of January 6, 1976"), and may start the time for appeal by a person who has notice of the letter.

Id. at 366.[3]

The Board followed the holding of *Basken* most recently in Appeal No. 18300 (Ausubel Appeal). Like here, the attorney for the appellant in that case learned of the zoning approval prior to the issuance of the building permit, but relied on permit issuance as the trigger date for starting the 60-day clock. The appeal was filed 86 days after the zoning decision was rendered, but within 60-days of permit issuance. The Board dismissed the appeal as untimely because the decision complained of was notice and knowledge of the zoning approval, not permit issuance.

In the instant case, similar to the *Basken* and *Ausubel* cases, Ms. Lynch and her counsel were notified by the Zoning Administrator on or before June 1, 2012, in clear and unambiguous terms, of his decision for "zoning approval on new building permit applications for the elevated platform structure/retaining wall on the King Place lots." (See Exhibit A). As in the *Basken* case, after learning of the June 1, 2012 ,zoning decision, rather than filing their appeal to the Board, Ms. Lynch and her counsel sought to voice their concerns with the Zoning Division staff on July 6, 2012 upon review of the underlying plans. (See Statement in Support of the Appeal of Susan Lynch at 2). Of course, Ms. Lynch still had 25 days to file her appeal before the July 31 deadline, even after reviewing the plans on July 6th. Nevertheless, she waited another 27 days past the deadline to file her appeal. Both the D.C. Court of Appeals and this Board have held that "the Board need 'not countenance delay in taking an appeal when it is merely convenient for an appellant to defer in making that decision.'" *BZA Appeal of de Brito and Gottlieb, supra*, at 7, *citing Waste Management, supra.*

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[3] The Court in *Goto* held that even an oral ruling from the Zoning Administrator is sufficient for the purpose of filing an appeal. The Court in *Goto* noted that there was nothing in the regulations at that time providing that only written rulings may be appealed, nor is there anything to that effect in the D.C. Code or the Zoning Regulations today. Rather, the Court in *Goto* found that an appeal may be taken from "any decision of an administrative officer..." on a zoning matter. 423 A. 2d at 924.

There can be no real dispute then that the time period for filing an appeal began to run on June 1, 2012, and, in order to be timely, the appeal should have been lodged no later than July 31, 2012. Because the appeal was filed more than 60 days after Ms. Lynch had actual knowledge of the decision complained of, this appeal was untimely per 11 DCMR, §3112.2(a) and must be dismissed.

2. Knowledge of the Official Decision

Ms. Lynch and her counsel were actively involved in the scrutiny of this project (since at least early March 2012) and in subsequent revision and review in April and May of that year. Morever, in light of Mr. Sullivan's June 1, 2012 email, there can be no dispute that Ms. Lynch knew or should have known of the Zoning Administrator's decision to approve the Retaining Wall Permits as of June 1, 2012. Indeed, the PIVS database available on the DCRA website offered up-to-date information to the Appellant on the status of the reviews of each discipline, including zoning, in the permit process. Thus, the 60 day period for filing an appeal of that decision began to run as of June 1, 2012 and elapsed well before Ms. Lynch filed her appeal.

3. No Exceptional Circumstances Exist to Toll the 60-Day Deadline

Finally, Ms. Lynch does not allege any exceptional circumstances beyond her control that would warrant the tolling of the 60-day deadline. For example, Ms. Lynch has not claimed that her view of the construction at the property was obstructed, such that she was not aware of what was going on until her time to appeal had elapsed. *See* BZA Order in Appeal No. 17285 (Economides Residence), March 24, 2006 (extent of construction activity not visible from appellant's distant property by virtue of leaves that had not yet fallen from the intervening deciduous trees, such that appellant would have notice of the decision complained of). While Ms. Lynch claims that she was not permitted access to view the underlying documents in the

permit files until July 6, 2012, that date was still only 35 days after Ms. Lynch *knew* that the zoning administrator had decided to approve the Retaining Wall Permits. July 6, 2012, was still well within the 60-day period for filing an appeal. Thus, Ms. Lynch cannot be heard to claim there were any exceptional circumstances hindering her ability to file a timely appeal.

4. SSB Will Be Prejudiced if The Deadline Is Extended

Even if exceptional circumstances existed in this case, which they do not, SSB would be severely prejudiced by any extension in the requisite 60-day filing deadline.

> The purpose in prescribing time limits 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.

Waste Management, 775 A.2d at 1122, fn. 6.

Here, SSB was aware of Ms. Lynch's objections to the retaining wall design and their approval upon revision and resubmission in April. SSB also knew that any appeal of the Zoning Administrator's decision on June 1, 2012 would have to be filed no later than July 31, 2012. When that day came and went without any such action, SSB confidently proceeded with its construction efforts. The houses and yards are virtually completed, and are consistent with the Zoning Administrator's interpretations of the zoning regulations and past decisions of the Board and the courts, in particular with the *Patrick J. Carome Appeal No. 17285* (BZA March 24, 2006) ("*Economides*" decision). SSB is marketing the house at 2338 King Place to potential purchasers but the unresolved zoning appeal prejudices SSB's ability to sell the property.

The Appellant must now suffer the consequences of her untimeliness, and the appeal should be dismissed. It would be patently unfair and work a great hardship on SSB if the Board were to depart from past precedent and find excusable delay.

C. The Appeal is Also Barred Under the Doctrine of Laches

Ms. Lynch's appeal should also be dismissed under the equitable doctrine of laches. The equitable doctrine of laches is based upon the maxim that equity aids the vigilant and not those who slumber on their rights. *See Goto v. District of Columbia Bd. of Zoning Adjustment*, 423 A.2d 917, 925 (D.C. 1980); *see also Smith v. District of Columbia Bd. of Zoning Adjustment*, 342 A.2d 356 (D.C. 1975); *Lyke v. District of Columbia Bd. of Zoning Adjustment*, 383 A.2d 7 (D.C. 1978). Laches is defined as the neglect to assert a right or claim which, taken together with a lapse of time and other circumstances, cause prejudice to another party. With laches, the entire chain of events must be considered. *See Goto* at 925.

Here, despite clear knowledge that the Zoning Administrator had decided to approve the Retaining Wall Permits and that construction was continuing, and contrary to the explicit 60-day deadline set forth in the Zoning Regulations, Ms. Lynch let the time period lapse for filing her appeal. Ms. Lynch was actively involved in the review of this project at least as of early March 2012, and she followed the retaining wall's evolution through a stop work order, revisions, resubmissions and revised approval in April, May and June, 2012. Furthermore, Ms. Lynch and her zoning lawyer Mr. Sullivan, were in regular contact with DCRA regarding the project and were very familiar with the applicable requirements, but still chose not to act in a timely fashion.

In reviewing the entire chain of events, Ms. Lynch unreasonably delayed in challenging the permit approvals. If her appeal were granted, it would result in severe prejudice to SSB. SSB relied on DCRA's decision to approve the retaining wall permits and on the time limits for appeals, proceeded in confidence on the affirmative acts of the District and have expended significant sums on grading their rear yard and building their retaining walls and homes. The

delayed action of Ms. Lynch should not negate the protections afforded to SSB by the regulations and long-standing interpretations of this jurisdiction.

VI.
CONCLUSION

WHEREFORE, based on the foregoing, the Board should dismiss the appeal on the grounds of untimeliness.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: _____

Mary Carolyn Brown
800 17th Street, N.W.
Suite 1100
Washington, D.C. 20006
(202) 955-3000

October 12, 2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion to Dismiss was served this 12th day of October, 2012, via email or first-class mail, postage prepaid, upon the following:

Stuart Ross, Chair
Advisory Neighborhood Commission 3D
P.O. Box 40846 Palisades Station, N.W.
Washington, D.C. 20016
Stuart.Ross@troutmansanders.com

Jay Surabian, Esq.
Assistant Attorney General
Office of the General Counsel
D.C. Department of Consumer and
Regulatory Affairs
1100 4th Street, S.W., 5th Floor
Washington, D.C. 20024
Jay.surabian@dc.gov

Matthew LeGrant
Zoning Administrator
D.C. Department of Consumer and
Regulatory Affairs
1100 4th St., S.W., 3rd Floor
Washington, D.C. 20002
matthew.legrant@dc.gov

Martin P. Sullivan
Sullivan & Barros, LLP
1990 M Street, N.W.
Suite 200
Washington, D.C. 20036
msullivan@sullivanbarros.com

Mary Carolyn Brown