BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of Susan Lynch	)	Appeal No. 18469

APPELLANT'S RESPONSE TO
PROPERTY OWNER'S MOTION TO DISMISS

In its Motion to Dismiss filed on Friday afternoon, October 12th (the "Motion"), the property owners' counsel ("Intervenor Counsel") proposes a radical and dangerous interpretation of the 60-day filing deadline for appeals under Section 3112.2. Intervenor Counsel asserts that the date of an administrative decision is the date of the internal zoning approval, even if that decision is undocumented, unofficial, and not made official through issuance of a building permit or some other official determination. In addition, they assert that even if a citizen is denied all access to the information underlying that internal zoning approval, the 60-day deadline should run anyway.

Under this interpretation, DCRA can greatly reduce the number of potential Zoning Administrator appeals simply by waiting to issue a building permit until 60 days after the internal, undocumented, unofficial zoning approval hits PIVS. Even if the appellant fails to gain knowledge of the substance of that PIVS note, or the Zoning Administrator's decisions underlying that PIVS note, or any evidence to evaluate a potential appeal, the 60-day deadline

will begin at that point, and will end 60 days later, even if the building permit is issued a week before or a day before (or a week after, for that matter).

Such an interpretation must not be upheld by the Board, and the Motion should be denied. Even the case submitted by Intervenor Counsel - BZA Appeal No. 17411 of Paul A. Basken and Joshua S. Meyer (hereinafter referred to as "*Basken*") - does not support such an interpretation. As discussed below, the Board's ruling in *Basken* actually provides clearly that this Appeal was timely filed.

A. <u>The Appeal was Timely Filed and Meets the Requirements of 11 DCMR 3112.2</u>.

For two reasons, the Motion must be denied. First, the date of the administrative decision must be the date that the building permit was issued, June 29, 2012. Until that time, the Zoning Administrator's review and zoning approval of the underlying building permit applications was not official and was merely an internal determination with no documentation, no explanation, and in effect no final decision. Pursuant to § 3112.2 (c), an appellant has a <u>minimum</u> sixty (60) days from this date to file its appeal. Since the Appellant filed its appeal within that minimum time period, the Appeal is timely.

Second, even if the Board were to find that the date of the administrative decision was some time prior to June 29th, extenuating circumstances impaired the Appellant's ability to file an appeal until the Appellant was permitted access to the building permit applications, building permits, and underlying documentation, on July 6, 2012. Pursuant to the Board's decision in *Basken*, cited even by Intervenor Counsel, the 60-day appeal period does not begin until the date on which an Appellant's ability to file an appeal is no longer impaired. In addition, because the appeal was filed within sixty (60) days of issuance of the building permit, and because the property owners had full notice and knowledge of the potential for an appeal, and because this

Board expedited this hearing even in contravention of the required notice period, there is no prejudice to the property owner in extending the sixty (60) – day deadline. So if the Board determines the date of the decision to be a date previous to issuance of the Building Permits, then pursuant to § 3112.2 (d), the Appeal must still be considered to be timely.

1) **The Date of the Administrative Decision was June 29, 2012**.

Intervenor Counsel is proposing that the date of the administrative decision complained of is the date of the internal, unpublished, virtually undocumented, reversible, and unofficial "sign off" of the Zoning Division on a building permit application. Such an interpretation threatens the legitimacy of the appeal process, and threatens to eliminate or greatly restrict citizens' opportunities to review building permits (and related documentation) and to file appeals of Zoning Administrator decisions.

The Board, in almost all instances, has determined the date of an Administrative Decision, for purposes of evaluating the timeliness of an Appeal, as the date of issuance of the building permit evidencing that decision. In rare instances, the date of an Administrative Decision has been an earlier date, when such a decision was evidenced by a written determination by the Zoning Administrator or the Director of DCRA, detailing the substance of a particular decision. That did not happen in this case.

The Appellant's counsel was notified by his permit expediter that DCRA records showed an internal zoning review and approval of the two subject building permit applications. On June 12, 2012, Appellant's counsel confirmed that internal approval in a 15-second conversation with the Zoning Administrator - while meeting with him on a separate matter – in which the Zoning Administrator simply responded that he found that the permit applicant's proposal complied with his interpretation of the *Economides* decision. Appellant's counsel has no recollection or record

of any phone call from the Zoning Administrator in response to his June 1st inquiry into the building permits, and the Zoning Administrator never responded to that June 1st inquiry.

In the absence of any official determination – such as issuance of the building permit or a written determination letter from the Zoning Division – the official date of this Administrative Determination is the building permit issuance date of June 29, 2012. The Appellant has a *minimum* of sixty (60) days from this date to file its appeal. The Appeal was filed fifty-nine (59) days after this date, and therefore the Motion must be denied pursuant to § 3112.2(c). To find otherwise opens the door to all means of manipulation, intentional or otherwise, on the part of DCRA or a permit applicant to avoid zoning appeals. The applicant will be able to obtain an internal zoning sign-off and then delay the permit issuance (or be delayed involuntarily) as the permit application is processed by the other DCRA disciplines. Even if an application was sent back to the Zoning Division for a re-review, the count to the sixty (60) day appeal filing deadline would continue running.

Finally, the D.C. Court of Appeals has ruled that in situations where ambiguity exists regarding the date of an order or decision, the ambiguity should be resolved in favor of the party seeking review (in this case, the Appellant). *Askin v. District of Columbia Renal Hous. Comm'n*, 521 A.2d 669, 675 (D.C. 1987).

2) **Even if the Board finds that the Date of the Administrative Decision was prior to June 29, extenuating circumstances completely impaired Appellant's ability to file an appeal until July 6, 2012, from which date the appellant had a full sixty days to file an appeal**.

Notwithstanding Intervenor Counsel's estimation of my sophistication, Appellant's counsel and his expediter were denied access to any information relating to the subject building permits prior to July 6, 2012, including building permit applications, plans, or any other

documentation. Perhaps Intervenor Counsel and her firm enjoy such access prior to building permit issuance, but in his experience, Appellant's counsel has never been able to obtain information until after building permit issuance.

Despite Appellant's counsel's diligent attempts before and after his 15-second conversation with the Zoning Administrator on June 12th, he was denied access to any information whatsoever about the nature of this approval, the substance of this approval, the actual building permit applications or related plans, or the impact it might have on his client.[1] So the Appellant had no information whatsoever about the Zoning Administrator's decisions underlying his zoning approval until July 6, 2012, and she therefore could not possibly have filed a good-faith appeal prior to that date. Stated another way: due to extenuating circumstances beyond Appellant's control, her ability to file an appeal was 100% impaired until July 6, 2012.

As noted in the Motion itself, pursuant to *Basken*, the 60-day filing deadline for an appeal does not *start* until after an appellant's ability to file an appeal is no longer impaired. All the necessary guidance in favor of the Appellant from *Basken* is provided within the Motion to Dismiss, on page 8 and 9. In *Basken*, the Board found that the appeal deadline was a full 60 days after the date on which appellant had the knowledge it needed to file the appeal (even though the building permit had been issued six months prior to *that* date). In the present case, the Appellant's ability to file an appeal was completely impaired until July 6, about 53 days before it filed the Appeal, well within the 60-day deadline under *Basken*.

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[1] Despite Intervenors' Counsel's claims that Appellant's counsel was in "regular contact" with DCRA, the contact was almost exclusively in one direction, with almost no cooperation at all from DCRA or the Zoning Administrator's office, particularly after the Notice to Revoke was issued and Holland & Knight became involved in the case.

B. Laches Does Not Apply.

Intervenor Counsel saved Appellant's counsel the trouble of retrieving and reproducing his March 9, 2012 e-mail to Mimi Kress of SSB. We cite that e-mail (Exhibit B to the Motion) as evidence that SSB was made well aware of the risk it was taking in proceeding with the EPS construction before it loaded one single truck of fill. The e-mail was not a "threat" (as gratuitously and grossly mischaracterized by Intervenor Counsel).[2] The e-mail was a notification meant to save SSB the trouble of later correcting a potentially expensive zoning deficiency (which turned out to be an accurate warning, as the Zoning Administrator completely agreed that there was a zoning violation, at that time). The e-mail was sent also for the purpose of negating any possible later claim of laches, since it shows clearly that SSB knew full well the risk it was undertaking in hauling tons of dirt into the two back yards. Following this notice, SSB immediately began construction of the EPS in earnest, working feverishly up to and past the date of the ZA's Notice to Revoke in installing tons of fill into the backyard.

As this Board knows, laches is disfavored because of the public interest in enforcement of the zoning scheme (*Wieck v. District of Columbia Bd. of Zoning Adjustment*, D.C. App., 383 A.2d 7,10 (1978)). The principal element in applying the doctrine of laches is the resulting prejudice to the defendant, rather than the delay itself. In this case, besides the fact that there was little or no delay (the appeal was filed within sixty (60) days of the building permit), there is no prejudice at all to the property owners, since the property owners knew, prior to beginning construction, that there was a potential problem with their zoning approval and a potential for an appeal of that approval. They chose to move forward anyway and cannot now claim prejudice in relying on the Zoning Administrator's June 29th decision.

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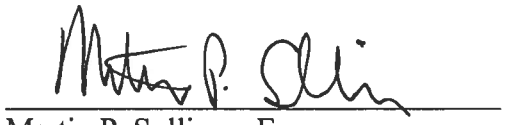
[2] If the existence of "threats" were germane to this proceeding, then the Appellant can produce letters from SSB's litigation counsel, as well as testimony regarding the actions of property owner Mr. Chew against Ms. Lynch and her husband, to provide evidence of what might more properly be characterized as threats.

C. Conclusion.

For all the reasons stated above, the Motion to Dismiss should be denied and Intervenors' laches claim should also be denied.

Respectfully Submitted



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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2012, a copy of this Response to Motion to Dismiss was delivered to the following, via e-mail:

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