INTERVENOR'S PROPOSED ORDER
ON MOTION TO DISMISS

Appeal No. 18469 of Susan L. Lynch, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs ("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).

HEARING DATE: October 16, 2012
DECISION DATE: November 7, 2012

DECISION AND ORDER

Susan Lynch filed this appeal with the Board of Zoning Adjustment (the "Board" or "BZA") on August 28, 2012. Ms. Lynch challenged the administrative decision of the Zoning Administrator to approve the issuance of Building Permit Nos. RW1200113 and B1207072 for 2338 King Place, N.W, Square 1394, Lot 23, and Building Permit Nos. RW1200111 and B1207074 for 2334 King Place, N.W., Square 1394, Lot 24. The "RW" permits were issued on June 29, 2012, and authorized the construction of a retaining wall comprised of a masonry wall, geogrid fabric and fill dirt. The Zoning Administrator granted zoning approval of the RW permit applications approximately a month earlier on May 30, 2012. The "B" permits authorized construction of one single-family dwelling on each lot. Those permits were issued on February 7, 2012, and revised on April 6, 2012, to remove the retaining wall structures from the scope of work. With respect to the "RW" permits, Ms. Lynch claimed that the Zoning Administrator erred in (i) issuing a retaining wall permit instead of a building permit for the masonry wall, geogrid fabric and fill dirt structure; (ii) finding that the structure was exempt from the side yard, rear yard and lot occupancy requirements under section 2503; (iii) finding that that structure complied with the side yard requirements of section 405; (iv) finding that the structure complied with the rear yard setback requirements of section 404; (v) finding that the structure did not exceed the maximum percentage of lot occupancy under section 403; and (vi) finding that the structure did not exceed the lot occupancy limitation of 50 percent for any required yard, as established in the definition of "yard" under section 199.1. With respect to the "B" permits, Ms. Lynch did not claim any specific zoning error in their issuance.

On October 12, 2012, the owners of 2334 and 2338 King Place, N.W., filed a motion to dismiss the appeal as untimely filed. The property owners alleged that the decision complained of was the Zoning Administrator's approval of the RW permits on May 30, 2012, thereby necessitating the filing of any appeal within 60 days thereafter, or by July 30, 2012. The evidence of record showed that Ms. Lynch's attorney had notice of the Zoning Administrator's decision no later than June 1, 2012. Ms. Lynch argued, however, that she was unable to obtain copies of the drawings for the permit until July 6, 2012, and thus there were extenuating circumstances that prevented her from filing her appeal by July 30, 2012. Alternatively, Ms. Lynch argued that the decision complained of was permit issuance on June 29, 2012, and that the appeal period ran until August 28, 2012.

Based on the evidence of record and for the reasons set forth below, the Board agrees with the Zoning Administrator and the property owner that the appeal was filed more than 60 days after the

zoning decision complained of was issued. The Appellant (i) knew or should have known that the zoning approval was issued on May 30, 2012, based on DCRA's electronic permit system; (ii) had actual knowledge of the decision on June 1, 2012, based Zoning Administrator's affidavit, or at the very latest on June 6, 2012, based on Appellant's email to her counsel; (iii) could have filed an appeal within 60 days of the zoning decision (by July 30, 2012), but chose to wait until August 28, 2012 (60 days after the permit was issued); but (iv) gave no reason why the appeal was not or could not have been filed within 60 days of the zoning decision (27 days after reviewing the plans on July 3), even though she knew the clock was running. The Board therefore dismisses the appeal as untimely.

PRELIMINARY MATTERS

Notice of Public Hearing

The Office of Zoning scheduled a hearing on October 16, 2012. In accordance with 11 DCMR §§ 3112.13 and 3112.14, the Office of Zoning mailed notice of the hearing to the appellant, Advisory Neighborhood Commission ("ANC") 3D (the ANC in which the property is located), the property owners, and to DCRA.

Parties

The appellant in this case is Susan L. Lynch ("Appellant"), the owner-occupant of the single family house at 2344 King Place, N.W., which is immediately adjacent to and contiguous with the property at 2338 King Place, N.W. The Appellant was represented by the law firm of Sullivan & Barros, LLP, Martin P. Sullivan, Esq. The Appellee, DCRA, was represented by its Office of the General Counsel, Jay Surabian, Esq., Assistant Attorney General for the District of Columbia. SSB 2338 King LLC, the owner of 2338 King Place, N.W., and Ben and Amy Chew, the owners of 2334 King Place, N.W., ("Property Owners") were automatic parties to the proceeding under 11 DCMR § 3199.1. The Property Owners were represented by the law firm of Holland & Knight, Mary Carolyn Brown, Esq. ANC 3D, also an automatic party in the case, did not participate in the proceeding or otherwise take a position on the appeal.

Motion to Dismiss

On October 12, 2012, the Property Owners filed a motion to dismiss the appeal, contending that the appeal was untimely filed. (Exhibit 18 & 18L). DCRA filed its opposition to the appeal, in which it stated its support for the Property Owners' motion to dismiss. (Exhibit 19). By a separate pleading, Appellant filed her opposition to the motion dismiss on October 16, 2012. (Exhibit 20).

Hearing and Closing of the Record

The public hearing took place on October 16, 2012, during which time the Appellant, DCRA and the Property Owners presented their respective cases. The Board closed the record, except to receive certain specified submissions. These were (i) an affidavit from the Appellant attesting to her efforts to obtain plans and records associated with the "RW" permits, due by October 23, 2012; (ii) a counter-affidavit from DCRA regarding the availability of those materials to the public and to the Appellant, in particular due by October 29, 2012; and (iii) proposed findings of fact and conclusions of law from all parties by October 29, 2012. The Board scheduled the case for decision on November 7, 2012, at which time it voted _____ to dismiss the appeal as untimely.

FINDINGS OF FACT

The Property

1. The subject properties are located at Square 1394, Lot 23, premises address 2338 King Place, N.W. ("2338 Property"), and at Square 1394, Lot 24, premises address 2334 King Place, N.W. ("2334 Property") in the R-1 B District.

2. Each lot is rectangular in shape with street frontage on King Place. The remainder of the lots abut other residential properties. The rear yard of each lot slopes downward, with a change in grade of approximately eight to ten feet from the backs of the houses to the rear lot lines.

Events Leading to the Filing of the Appeal

3. In early February 2012, DCRA issued permits authorizing Sandy Spring Builders to construct two detached single-family dwellings, one on the 2334 Property and a second on the 2338 Property, and retaining walls surrounding the properties. The work was authorized under Building Permit Nos. B1110274 (2334 Property) and B1200230 (2338 Property).

4. Shortly after issuance of these permits, the Appellant contacted SSB in February 2012 to complain about the scope of construction. On March 9, 2012, Appellant's counsel sent an email to SSB stating that he believed the permits were issued in error and in violation of the Board's ruling on "retaining walls" and "elevated platform structures" in BZA Appeal No. 17285 of Patrick J. Carome, March 24, 2006, ("Carome Appeal") and as upheld by the D.C. Court of Appeals in *Economides v. District of Columbia Bd. of Zoning Adjustment*, ___ A.2d ___ (D.C. 2008) (collectively, the *"Economides"* case). Appellant's counsel stated that he had contacted the Zoning Administrator ("ZA") and that if the permits were allowed to stand, he would appeal the issuance of the permits to the BZA. (Exhibit 18I).

5. After receiving a complaint from Appellant in early March 2012, the ZA conducted a review of the plans, discussed them with the Property Owners, and determined that the building permits had, in fact, been issued in error. Specifically, the ZA determined that the retaining wall was comprised of fill dirt supported by geogrid sheets that were anchored to a masonry wall. The ZA determined that these three elements created an "elevated platform structure" under the *Economides* case and, as designed, violated 11 DCMR § 2503.2 as being in excess of 4 feet in height in the required rear yard. On April 2, 2012, DCRA revoked Building Permit Nos. B1110274 and B1200230.

6. In order to allow construction to continue on the houses authorized under the permits, the Property Owners amended the permits to exclude the retaining wall/platform structure from the scope of work. On April 6, 2012, DCRA issued revised Building Permit Nos. B1207074 and B1207072, allowing for the construction of a detached single-family house on the 2334 Property and 2338 Property, respectively. Stop work orders, however, were issued for the retaining walls/platform structure.

7. The Appellant continued to express concerns about construction at the property. She met with her councilmember and staff on April 15, 2012, and followed up with emails describing the alleged violations and suspicions that the stop work orders were being violated. (Exhibit 18J).

8. At the same time, the Property Owners worked with the ZA to resolve the zoning issues with the retaining wall/platform and bring it into compliance. The changes proposed by the Property Owners included lowering the height of the wall and the retained soil in the rear yard. On April 23, 2012, CAS Engineering, the Property Owner's civil engineer, submitted a report to the ZA (the "April 23rd Report"), which explained the changes that would be made to the platform. The ZA reviewed this report and found the proposed construction described therein to be in compliance with the Zoning Regulations. On May 30, 2012, the ZA gave final zoning approval to the plans and entered the approval into the DCRA database, which then made the approval publicly known and available that same day through the Permit Information Verification System ("PIVS").

9. On June 1, 2012, Appellant's counsel sent an email to the ZA stating that he understood that "there has been a zoning approval on the new building permit applications for the elevated platform structure/retaining wall on the King Place lots. You mentioned that you would advise us of your determination on this. We look forward to hearing more on this, under what rationale the EPS is now approved, and whether or not their current situation is in compliance with this new determination. If there is a written determination letter underlying, we'd appreciate a copy." (Exhibit 18J).

10. That same day, immediately after receiving the email, the ZA telephoned Appellant's counsel to explain his decision. (Affidavit of Matthew LeGrant).

11. On June 6, 2012, the Appellant emailed her counsel to inquire whether the plans approved by zoning on May 30, 2012, were available to the public. The email indicates that the Appellant was monitoring the progress of the RW permits through PIVS, and also posed a question to her counsel regarding the structural review comments posted on the system. Appellant's counsel referred the questions to his permit expediter, Ms. Rochelle Joseph, who was retained to obtain information from DCRA regarding building permit applications for property located at 2334 and 2338 King Place, N.W. Ms. Joseph replied on June 7, 2012, that the "permit and approved plans become a matter of public record once the permit has been issued rather than when each discipline approves" and that "Records Management will not release the documents to the public until the process is complete." Neither the Appellant nor Appellant's counsel nor Ms. Joseph made any further attempt to request copies of the drawings approved by the ZA until June 27, 2012. (Exhibit 25). Between June 27 and July 5, 2012, Ms. Joseph made four separate requests of DCRA Records Management, asking for access to view and copy the plans.

12. Meanwhile, on June 12, 2012, after a meeting with the ZA on a different matter, the Appellant's counsel asked the ZA again about his decision to approve the revised permits for the 2334 Property and the 2338 Property. However, Appellant's counsel did not request a copy of the plans approved by the ZA or otherwise indicate that he had difficulty obtaining copies of the plans from DCRA. (Affidavit of Matthew LeGrant).

13. After the revised permit applications and plans were reviewed by other disciplines within DCRA, Building Permit Nos. RW1200111 and RW1200113 were issued for the construction of the retaining wall/platform on June 29, 2012.

14. Separate efforts by another attorney to review the approved plans were more successful. On July 3, 2012, the Appellant's counsel and the other attorney met with Mr. Rohan Reid, of the DCRA Zoning Division, to view the RW permits and approved plans. (Affidavit of Rohan Reid). However, the Appellant did not make any independent, earlier attempts to secure such a meeting upon learning of zoning approval on May 30, 2012.

15. Ms. Joseph obtained copies of the permits and plans on July 12, 2012. The Appellant lodged her appeal on August 28, 2012, which was exactly 60 days after the issuance of the permit on June 29, 2012, but 87 days after the ZA approved the plans on May 30, 2012, and 27 days after reviewing the plans on July 3, 2012.

CONCLUSIONS OF LAW

Before ruling on the merits of an appeal, the Board is bound to consider a motion to dismiss an appeal for lack of jurisdiction on timeliness grounds. *See Basken v. District of Columbia Bd. of Zoning Adjustment,* 946 A.2d 356 (D.C. 2008). It is well settled that the timely filing of an appeal is mandatory and jurisdictional. If an appeal is not timely filed, the Board is without power to consider it. *Economides v. District of Columbia Bd. of Zoning Adjustment,* 954 A.2d 427 (D.C. 2008); *Waste Mgmt. of Md., Inc. v. District of Columbia Bd. of Zoning Adjustment,* 775 A.2d 1117 (D.C. 2001); *Mendelson v. District of Columbia Bd. of Zoning Adjustment,* 645 A.2d 1090 (D.C. 1994).

The rules governing the timely filing of an appeal before the Board are set forth in 11 DCMR § 3112.2. Subsection (a) provides that an appeal must be filed within 60 days from the date the person filing the appeal first had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge, whichever is earlier.

There is no dispute that the zoning decision complained of is the ZA's determination that the proposed elevated platform structure complied with the provisions of the zoning regulations. The question is whether the appealable form of that decision was the ZA's approval issued on May 30, 2012, and immediately available to the public through PIVS, or the RW permits issued on June 29, 2012. Appellant urges that the clock began to run when the permits were issued on June 29. However, based on the totality of facts in this case as discussed below, the Board concludes that the ZA approval issued on May 30, 2012, constituted the only decision complained of and, accordingly, this appeal must be dismissed.

The Board's bases its decision upon precedent established by the D.C. Court of Appeals and this Board, most recently in *BZA Appeal No. 18300 of Lawrence and Kathleen Ausubel* (April 11, 2012). *See also Basken v. District of Columbia Bd. of Zoning Adjustment,* 946A.2d 356 (D.C. 2008); *Bannum, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 894 A.2d 423 (D.C. 2006); *Goto v. District of Columbia Bd. of Zoning Adjustment,* 423 A.2d 917 (D.C. 1980).

In the *Ausubel* case, the Ausubels filed an appeal challenging the zoning approval of a building permit issued for their neighbor's house based on an alleged violation of the Tree and Slope Overlay ("TSP") under Chapter 1511 of the Zoning Regulations. They became aware of the permit application for the proposed addition shortly after it was filed, and discussed their concerns regarding compliance with the TSP Overlay with the ZA. The neighboring property owner also met with the ZA to ensure compliance with the regulations and provided supplemental information in response to the ZA's requests. After his review of the additional information, as well as other material furnished by the Ausubels and the Urban Forestry Administration, the ZA approved the permit application for zoning purposes and notified the Ausubel's counsel by email of his decision. Approximately 30 days later, DCRA issued the building permit. Several days thereafter, the Ausubels informed the ZA that they intended to appeal his decision. They filed a complaint in D.C. Superior Court two weeks after the permit was issued and lodged an appeal before this Board approximately 55 days after permit issuance, but 86 days after the ZA emailed his decision that the project complied with the zoning requirements.

The Board concluded that the Ausubel appeal was untimely. The Board held that the ZA's email to the Ausubels included a decision that cleared the way for the issuance of a permit. In the email, the ZA unequivocally stated that he "'would proceed to approve the revised plans for [the] submitted building permit application'," thus removing all zoning obstacles to permit issuance. *Ausubel,* at 8. Moreover, the ZA made his decision after a full briefing of the facts from numerous sources. While the Ausubels argued that the email was ambiguous, this Board disagreed, finding that the meaning of the email was crystal clear. "Because the email constituted an 'administrative decision based in whole or in part upon the zoning regulation,…the Appellants were required to appeal it no later than 60 days after it was received….'" *Id. citing* D.C. Code § 6-641.07(f). In reaching its conclusion, the Board relied on and provided an exhaustive analysis of the case law on timeliness for BZA Appeals. *See Basken, Bannum,* and *Goto, supra.*

The facts in this case mirror those in *Ausubel*. As in *Ausubel,* Ms. Lynch, her attorney, and permit expediter were fully aware of the initial permits issued for the houses and retaining walls, challenged them on the grounds that they did not comply with the *Economides* decision, caused them to be revoked, and monitored the applications to revise the permits. See Exhibits 18J and 26. The Appellant or her representatives engaged in discussions with the Ward 3 Councilmember and the ZA regarding ongoing construction and dirt being removed from the site while stop work orders were in effect for the retaining walls, but not the houses. They also followed the progress of the revised permit applications through PIVS. See Exhibits 18J and 26. Most importantly, they were immediately aware of the ZA's approval of the permit applications for zoning approval, as evidenced by the email from Appellant's counsel to the ZA on June 1, 2012, and the Appellant's email to her counsel on June 6. The word "approved" next to zoning in PIVS, without any qualifications whatsoever, was unequivocal: the permit had been cleared by zoning for issuance. That is, the Appellant and her counsel knew that the ZA had approved without reservation the revised permit applications and had removed all zoning obstacles to permit issuance. *Id.* at 7. The Appellant's counsel acknowledged that approval in an email to the ZA on June 1; the Appellant herself recognized that approval in a June 6 email to her counsel; and her counsel briefly discussed the approval with the ZA in person on June 12, 2012.

Nevertheless, Appellant argues that the zoning decision was not final, that plans could have changed in response to reviews by other disciplines, which in turn, presumably, could have required further review by the zoning division. Under the facts of this case, however, Appellant's argument is only speculative in nature and unsupported by law. As the D.C. Court of Appeals held in *Basken,* "the zoning statute and regulations do not tie the time for appealing to the BZA to the issuance of a specific type of notice….[O]ur case law specifically recognizes that a letter from DCRA or the Zoning Administrator conveying a zoning decision may be an appealable decision." *Basken,* 946A.2d at 366, *citing Goto,* 423 A.2d at 825; *see also Ausubel* at 7-8 (ZA email informing appellants of decision to approve permits was not ambiguous under totality of circumstances).

Even so, the Appellant asserts that the 60-day clock can only start once she was on notice as to what plans were approved by the ZA. Only then would she have an opportunity to analyze whether the plans did, in fact, comport with the zoning regulations. Because DCRA has a policy of not releasing plans that are still undergoing the permit review process, the Appellant claims there was no way to determine whether the elevated platform structure was too tall under the *Economides* decision or otherwise complied with zoning. She argues that this policy created extenuating circumstances that warrant the extension of the 60 day period under section 3112.2(d). That section provides that the Board may extend the 60-day deadline for the filing of an appeal only if the appellant demonstrates that "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 the extension will not prejudice the parties. Despite her diligent efforts, the Appellant argues that the plans simply were not available to her. See Appellant's Response Brief, at 5 (Exhibit 20).

This argument is unavailing. While Appellant claims to have made diligent efforts before and after a June 12 discussion with the ZA, the affidavit of the permit expediter proves otherwise. In fact, *no* efforts were made to obtain the drawings until *after* the permits were issued on the *belief* that they would not be available until then. That is, the Appellant was *not* thwarted in her attempts to gain access to the drawings because those attempts were never made. If the Appellant or her representatives had made inquiries and were denied, extenuating circumstances might have existed to delay the start of the 60-day clock. But those are not the facts of this case. Appellant's counsel had the opportunity to request the drawings from the ZA in his June 12 meeting, but did not avail himself of such. No requests were made to the permit branch, the zoning branch or even directly to the property owners for copies of the drawings upon learning that zoning approval had been granted.

Our decisions in the *Ausubel* case, which followed the holdings of *Basken* and *Goto,* put the public and Appellant on notice that the zoning decision complained of is *not* tied to permit issuance but to the zoning approval itself. Consequently, there was a duty to try to secure the plans upon learning of zoning approval and only if those efforts were impeded could the time deadline be extended. Significantly, the Appellant was able to secure the drawings on July 6, 2012, well within the 60 days appeal period, which did not expire until July 30, 2012. There is no evidence to suggest the Appellant was somehow impeded from filing her appeal in those remaining three weeks. Yet the Appellant waited until August 28, apparently on the mistaken

belief that permit issuance triggered the start of the 60-day clock. Unfortunately for the Appellant, this miscalculation divested the Board of jurisdiction to rule on the merits of the case.

The Board also concludes that the appeal of the revised permits authorizing construction of the houses are untimely. Those permits were approved by zoning on April 6, 2012 and issued that same day to remove the retaining wall/elevated platform structures from the scope of work. The 60-day deadline for appeals of those permits expired no later than June 5, 2012. The appeal was filed for these over 140 days later, well past the deadline.[1]

For reasons discussed above, the Board is divested of jurisdiction to hear this appeal due to its untimeliness. It is therefore and hereby **ORDERED** that the motion to dismiss the appeal as untimely is **GRANTED.**

Vote taken on November 7, 2012.

VOTE: _____ (Lloyd J. Jordan, Peter May and Jeffrey L. Hinkle to grant the motion to dismiss; Nicole C. Sorg, not present, not voting; third mayoral appointment vacant).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

ATTESTED BY: _____
SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: _____

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.

[1] The Board notes that these permits were revisions to ones issued in February 2012 and thus it is possible that the appeal deadline relates back to the initial zoning approval for these houses. The Board need not reach this issue, however, since under either scenario the appeals would be well out of time. In any even, the Appellant apparently abandoned her challenge of these permits since no evidence was ever offered alleging zoning violations in connection with their issuance.