

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441 4th Street, N.W.
Washington, D.C. 20001

Appeal of Peter & Diana Minshall

Appeal No. 18965

RESPONDENT’S MOTION TO DISMISS AS UNTIMELY AND
PRE-HEARING STATEMENT

Appellant alleges that the Zoning Administrator (“**ZA**”) erred in approving for zoning compliance the building permit application B1410905 issued on November 26, 2014 (the “**2014 Permit**”, **Exhibit A**) because the work permitted under the 2014 Permit violated the retaining wall regulations enacted by the Zoning Commission effective June 13, 2014. Respondent, the District of Columbia Department of Consumer & Regulatory Affairs (“**DCRA**”), asserts that (i) the retaining wall opposed by Appellants was approved under prior DCRA permits – B1110228 issued March 23, 2012 (“**2011 Building Permit**”, **Exhibit B**) and SP1200001, issued May 25, 2012 (the “**2012 Swimming Pool Permit**”, and collectively with the 2011 Building Permit, the “**Prior Permits**”) and (ii) the 2014 Permit’s scope of work only covered the refacing of the existing retaining wall approved under the Prior Permits, which Appellant failed to appeal. Moreover, even assuming hypothetically that the Prior Permits did not exist and so did not authorize the construction of the retaining wall opposed by Appellant, DCRA asserts that Appellant still untimely filed the Appeal. DCRA asserts that the Zoning Administrator’s August 13, 2014 approval of the 2014 Permit application for zoning compliance triggered the 60 day appeal period under 11 DCMR §3112.2(a), since Appellant had notice of the existence of the retaining wall and the filing of the 2014 Permit application as well as having retained an expert zoning attorney, Mr. Sullivan as of March 18, 2014.¹ DCRA therefore respectfully requests that the Board of Zoning Adjustment (the “**Board**”) dismiss the Appeal as untimely filed.

¹ March 18 email from Keith Lambert to Doris Parker-Woolridge, Exhibit E of Pre-Hearing Statement of Appellant.

If, however, the Board decides not to grant DCRA's motion to dismiss the appeal as untimely, DCRA moves to dismiss on the merits. DCRA asserts that the structure at issue is composed of two separate legal entities – a lower retaining wall (the “**Retaining Wall**”) on top of which sits a series of fences - a concrete wall/fence flanked by wooden slat fences (the “**Fence/Wall**”) as seen in Exhibit C.² Section 413 of the Zoning Regulations only governs retaining walls, not fences or above-ground walls, and so only the Retaining Wall must comply with Section 413, which DCRA asserts that it does. DCRA therefore respectfully requests in the alternative that the Board dismiss this appeal as without merit.

FACTS

1. The subject property, 3329 Q Street, N.W., and the adjacent 3333 Q Street, N.W., are a single family residence composed of two buildings, a garage, swimming pool and landscaping (the “**Property**”) which were renovated at the same time in a series of building permits filed by the owner of the Property (the “**Permit Holder**”).
2. The Property is in a R-3 zone district and in the Georgetown Historic District.
3. The Property shares the same grade at the Q Street frontage with Appellant's adjacent property at 3327 Q Street, N.W; but a grade differential along the lot line between the Property and Appellant's property increases toward the rear lot lines of these properties.
4. This grade differential pre-existed the construction of the Retaining Wall and Fence/Wall, with the Property prior to the construction increasing in elevation by up to fourteen (14) feet from Q Street toward the rear of the property (from 147 elevation in southeast corner to 160 elevation in northwest corner), with the increase in grade along the lot line shared with Appellant of eight (8) feet, as shown on a survey dated September 2011 and included in the approved plans for the 2012 Swimming Pool Permit. Exhibit D.³
5. This grade differential can also be seen from the approved plans showing the Proposed North Elevation (from the rear yard looking toward Q Street, N.W., with Appellant's property the second structure from the left and the Fence/Wall depicted next to the small

² February 20, 2014 Inspection Report by District of Columbia, Office of Planning, Historic Preservation (“**HP Inspection Report**”), pp. 45 and 47.

³ Existing Conditions Plan, September 2011 Survey of 3329 and 3333 Q Street, NW, Lots 244 and 245, Square 1278, Georgetown by CAS Engineering.

foreground tree). **Exhibit E**.⁴ Note the steady grade decline from upper right to lower left across multiple properties as echoed by the relative heights of the buildings. The pre-existing decline in grade from northwest to southeast that also characterizes Appellant's rear yard is illustrated in photos of the new Retaining Wall and Fence/Wall that show Appellant's rear yard with retaining walls supporting large existing trees. **Exhibits D**.

6. This grade differential was supported by an unfaced concrete retaining wall that pre-existed the current Retaining Wall, as shown in the photos included in the June 12, 2014 letter of the District of Columbia Office of Planning, Historic Preservation ("HP") to the Old Georgetown Board/U.S. Commission of Fine Arts ("CFA") (the "HP Letter to CFA"). **Exhibit F**.⁵

2011 Building Permit

7. The application for the 2011 Building Permit described the proposed work as:

"Interior renovation at existing property, 2 story rear addition with penthouse and basement, rear in ground pool, **5' exterior stone walls** + excavation for basement + underground parking." (emphases added).
Exhibit G.⁶
8. This "5' exterior stone walls" inadvertently became "5 exterior stone walls" – missing the crucial apostrophe denoting "feet" - on the permit as issued. **Exhibit B**.
9. The plans approved for the 2011 Building Permit show "proposed retaining walls" including the L-shaped wall that corresponds to the all-concrete portion of the Retaining Wall and Fence/Wall. **Exhibit H**.⁷
10. These proposed retaining walls, including the L-shaped wall, were part of the structural support for the in-ground swimming pool included in the scope of the 2011 Building Permit, with more detailed information on the pool itself provided in the 2012 Swimming Pool Permit.

⁴ HP Inspection Report, p. 24.

⁵ HP Letter to CFA, " 'Before' photographs (taken from 3327 Q)", nos. 4 and 6.

⁶ DCRA Application for 2011 Building Permit (B1110228), p. 1.

⁷ HP Letter to CFA, p. 33.

11. The plat included with the approved 2011 Building Permit calls out one “proposed 5’ high wall’ on the west side of the Property, but does show the L-shaped wall with a similar notation. **Exhibit I**.⁸
12. The detailed structural sheets included in the approved 2011 Building Permit plans specifically show at the Foundation and Basement Structural Plan the “concrete footing” along the lot line shared with Appellant, with a notation that this footing will support a “wall above spanning between wing walls” that are perpendicular to the lot line and which anchor the Retaining Wall and Fence/Wall. **Exhibit J**.⁹ The First Floor Structural Plan detail shows the retaining wall with the symbol for “Concrete Wall” as different from the symbol for “Existing Concrete Wall”. **Exhibit K**.¹⁰
13. The 2011 Building Permit was issued on March 23, 2012 and Appellant failed to file an appeal within the sixty-day period in which appeals under the Zoning Regulations must be filed under 11 DCMR 3112.2(a). As a result, Appellant’s right to appeal this permit terminated on May 22, 2012.

2012 Swimming Pool Permit

14. The 2012 Swimming Pool Permit plan approved by the Zoning Administrator on November 8, 2011 included a clear statement that the rear 75 feet of the lot line shared with Appellant would have a “Pool Enclosure Fence per 2006 IRC Code”. **Exhibit L**.¹¹
15. The 2012 Swimming Pool Permit approved plans included two (2) sheets that specifically illustrated the proposed fence/wall: P3.1, “Pool/Fencing Site Plan” and P3.2, “Elevations of Fencing”. **Exhibit M**.¹²
16. P3.1 shows three separate sections of proposed fencing along the lot line shared with Appellant:
 - “Wall A – Newly Proposed Wood Fence @ 5’8” High”;
 - “Wall A – Newly Proposed Masonry Wall @ 5’8” High”; and
 - “Wall A – Newly Proposed Chain Link Fence @ 5’0” High”.

⁸ Plat signed February 16, 2012 and submitted as part of approved 2011 Building Permit.

⁹ HP Letter to CFA, p. 34, Detail of Structural Plans for Foundation and Basement for 2011 Building Permit.

¹⁰ HP Letter to CFA, p. 35, Detail of Structural Plans for First Floor for 2011 Building Permit.

¹¹ Plat signed August 8, 2011 and submitted as part of approved 2012 Swimming Pool Permit.

¹² 2012 Swimming Pool Permit, Sheets P3.1 and P3.2.

17. P3.2 shows elevations of these three sections of proposed fencing, with Wall B, the Masonry Wall specifically called out as attached to the wing walls detailed on the Structural Plans for the 2011 Building Permit (B1110228).
18. The 2012 Swimming Pool Permit approved plans included sheet S2.9 from the 2011 Building Permit with a detail of the connection between the Retaining Wall and wing wall as called out on P3.2 and by a handwritten note on this copy of S2.9. **Exhibit N**.¹³
19. 2012 Swimming Pool Permit included notification to Appellant by email on February 21, 2012, which Appellant acknowledge with a return email dated March 4, 2012. **Exhibit Q**.¹⁴
20. DCRA completed its review of the 2012 Swimming Pool Permit application before it was sent to HP for review and to determine if the proposed project required review by CFA. HP approved the 2012 Swimming Pool Permit and decided that it did not require referral to CFA for review. **Exhibit P**.¹⁵
21. The 2012 Swimming Pool Permit was issued on May 5, 2012 and Appellant failed to file an appeal within the sixty-day period in which appeals under the Zoning Regulations must be filed under 11 DCMR 3112.2(a). As a result, Appellant's right to appeal this permit terminated on July 4, 2012.

Stop Work Order

22. Appellant engaged in discussions with the Permit Holder over Permit Holder's offer to pay to finish Appellant's side of the concrete portion of the Retaining Wall and Fence/Wall from at least January 5 to February 4, 2014. **Exhibit Q**.¹⁶
23. Based on Appellant's February 18, 2014 complaint to HP (**Exhibit R**¹⁷), an HP inspector issued a Stop Work Order (the "SWO") on February 20, 2014 for alleged violations of 12A DCMR §105.1, 105.2.5, 3110.1 and 3110.3.3, specifically for:

¹³ 2012 Swimming Pool Permit, Sheet S2.9.

¹⁴ March 4, 2012 email of Appellant acknowledging receipt of Permit Holder's February 21, 2012 email with attached electronically-completed DCRA notification of pool fence near property line; with hard copy of DCRA notification form.

¹⁵ DCRA Permit Status Tracking website for 2012 Swimming Pool Permit.

¹⁶ Email chain between Appellant (Diana Minshall) and Permit Holder (Sean Glass) and Permit Holder's contractor regarding possible finishes for Appellant's side of Retaining Wall and Fence/Wall.

“Failure to obtain a separate rear yard perimeter fence wall permit in a historic district. This concrete wall/fence exceeds the 7 ft. residential height limit with no record of an adjoining property owner agreement.”

Exhibit S.¹⁸

24. At the appeal hearing on the SWO on March 12, 2014, the DCRA hearing officer determined that all required permits had been obtained, and therefore summarily dismissed the SWO and withdrew the Notice of Infraction and accompanying fine.

Exhibit T.¹⁹

25. Appellant indicated in a March 18, 2014 email to HP that the DCRA hearing officer for the SWO had notified Appellant of the DCRA decision to summarily dismiss the SWO no later than March 18, 2014. **Exhibit R.**

26. Appellant chose not to appeal DCRA’s dismissal of the SWO as the final agency decision under 12A DCMR 114.11.1 within the sixty (60) days following when Appellant knew of the decision, as provided by 11 DCMR 3112.2(a). As a result, Appellant’s right to appeal DCRA’s determination that all required permits had been obtained at the time of dismissal of the SWO terminated no later than May 17, 2014.

Commission on Fine Arts (“CFA”) Review

27. Although HP had approved the 2012 Swimming Pool Permit and decided it did not require CFA review, Appellant convinced HP to refer the Retaining Wall and Fence/Wall to CFA two years after issuance of the 2012 Swimming Pool Permit. **Exhibit U.**
28. HP referred the Retaining Wall and Fence/Wall to the CFA by letter of June 12, 2014. The CFA at its July 17, 2014 meeting rejected the application for review until accompanied by evidence of a new DCRA permit application for the Retaining Wall and Fence/Wall. **Exhibit V.**²⁰

¹⁷ Email chain between Appellant and HP included as part of Appellant’s October 26, 2014 FOIA request.

¹⁸ HP Inspection Report, pp. 49-50, February 20, 2014 SWO.

¹⁹ DCRA March 12, 2014 Summary Motion to Dismiss SWO.

²⁰ CFA July 17, 2014 rejection of Permit Holder’s application for review of Retaining Wall and Fence/Wall due to lack of new DCRA permit application.

29. Upon the submission of the application for the 2014 Permit on August 13, 2014, CFA considered the 2014 Permit application at its September 18, 2014 meeting at which it approved the 2014 Permit application. Exhibit W.²¹

2014 Permit

30. The Zoning Commission enacted a new Section 413 of the Zoning Regulations governing Retaining Walls, with a new definition of “retaining wall” in Section 199.1, effective June 13, 2014. Zoning Commission Case 13-06, 61 D.C. Register 25 (March 31, 2014).
31. The approved 2014 Permit description of work specifically revises the existing Fence/Wall and Retaining Wall. Exhibit A.
32. The approved 2014 Permit plans include sheet SSK-13 that specifically revises S2.9 of the approved 2011 Building Permit plans that had also been included in the 2012 Swimming Pool Permit plans. Exhibit X.²² SSK-13 specifies that the Retaining Wall – the lower portion of the wall holding back the higher grade of the Property to the left, with Appellant’s property to the right – is no more than four feet (4 ft.) above Appellant’s grade.
33. The Zoning Administrator approved the proposed permit on August 13, 2014. Exhibit Y.²³

ARGUMENT

1. The Board lacks jurisdiction to hear the Appeal which was untimely filed

The Retaining Wall and Fence/Wall were included within the scope of multiple permits, as well as the subject of the SWO hearing. DCRA asserts that this Appeal was filed far outside of the maximum sixty (60) day period after an appellant “had notice or knowledge of the [administrative] decision complained of, whichever is earlier”, as provided by 11 DCMR 3112.2(a).

²¹ CFA September 18, 2014 approval of Permit Holder’s 2014 Permit application for Retaining Wall and Fence/Wall.

²² 2014 Permit, SSK-13.

²³ DCRA Permit Status Tracking website for 2014 Permit.

Appellant repeatedly chose to abandon its rights to appeal each of these permits and the dismissal of the SWO. Therefore DCRA asserts that Appellant has no standing on which to base the Appeal.

No appeal of the 2011 Building Permit

The 2011 Building Permit clearly showed the proposed Retaining Wall, if not the elevation of the Fence/Wall on top of it, in the approved Structural Plans and Details that referred to and illustrated “concrete footers”, “concrete walls” and “wing walls”. ¶ 12, **Exhibits J and K**.

Appellant received notification of at least the portion of the Retaining Wall and Fence/Wall proposed as a pool fence to be constructed along the lot line shared with Appellant no later than March 4, 2012 as indicated by Appellant’s response to the Permit Holder’s notification. ¶ 19, **Exhibit O**. Yet Appellant chose to not appeal the issuance of the 2011 Building Permit on March 23, 2012 within the subsequent sixty (60) day appeal period provided by 11 DCMR 3112.2(a).

No appeal of the 2012 Swimming Pool Permit

Even if the Board decides that the 2011 Building Permit plans did not fully include all information required to approve the Fence/Wall, the 2012 Swimming Pool Permit clearly included both the Retaining Wall and Fence/Wall in both plan and elevation and in direct citation to the Structural Plans and Details of the 2011 Building Permit. ¶¶ 16 and 17, **Exhibit M**. The elevations shown in P3.2 show the Fence/Wall from the Property looking toward the property of the Appellant, with the concrete “masonry” portion of the Fence/Wall explicitly tied to “wing wall” and “footing” referred to on 2011 Building Permit S2.9. **Exhibit M**.

Appellant received notification of at least the portion of the Retaining Wall and Fence/Wall along the lot line shared with Appellant no later than March 4, 2012 as indicated by Appellant’s response to the Permit Holder’s notification of a proposed pool fence to be constructed along the lot line. ¶ 19, **Exhibit O**. Yet Appellant chose to not appeal the issuance of the 2012 Swimming Pool Permit on May 5, 2012 within the subsequent sixty (60) day appeal period provided by 11 DCMR 3112.2(a).

No appeal of the Dismissal of SWO

The SWO specifically asserted that the Retaining Wall and Fence/Wall was outside the scope of the 2011 Building Permit and the 2012 Swimming Pool Permit. ¶ 23, **Exhibit S**. Yet the DCRA hearing officer summarily dismissed the SWO and told Appellant that the Retaining Wall and Fence/Wall were within the scope of the Prior Permits. ¶ 24, **Exhibit T**.

Appellant received notification of DCRA's March 12, 2014 dismissal of the SWO no later than March 18, 2014 as indicated by Appellant's email to HP of that date. ¶ 25, **Exhibit R**. Yet Appellant chose to not appeal the issuance of the DCRA dismissal of the SWO within the sixty (60) day appeal period provided by 11 DCMR 3112.2(a). Moreover, Appellant appears to have retained an expert zoning attorney, Mr. Sullivan, within the time period permitted to file such an appeal, but chose not to do so.²⁴

As shown above, Appellant had ample opportunity to appeal either or both the 2011 Building Permit and 2012 Swimming Pool Permit, or at the least to appeal the DCRA dismissal of the SWO. Instead Appellant chose to abandon its rights to appeal the Retaining Wall until December 2014.

2. CFA determination that it had failed to review the 2012 Swimming Pool Permit did not invalidate the 2012 Swimming Pool Permit as issued by DCRA.

If there was any defect in the 2012 Swimming Pool Permit as issued, it was that HP determined that it had failed to adequately review the 2012 Swimming Pool Permit and so approved it without referral to CFA for review. HP review occurred after DCRA had completed all of its reviews and publicly announced its decision that the 2012 Swimming Pool Permit should be issued. ¶ 20, **Exhibit P**. To the extent that CFA required a valid DCRA permit for the portion of the 2012 Swimming Pool Permit subject to CFA jurisdiction – only that portion of the structure visible from the public right of way of Q Street, which is only the upper portion of the Fence/Wall and not the Retaining Wall – the 2012 Swimming Pool Permit was that permit.

²⁴ March 18 email from Keith Lambert to Doris Parker-Woolridge, Exhibit E of Pre-Hearing Statement of Appellant.

Moreover, since the Retaining Wall is not visible from the Q Street right of way, CFA lacks jurisdiction over the Retaining Wall and only could address the upper portion of the Fence Wall.

Indeed this is precisely what the 2014 Permit proposed – to lower the top of the Fence/Wall and reface Appellant’s side of the concrete portion of the Fence/Wall in stucco. The 2014 Permit description specifically states that the scope of the permit includes “lower[ing] existing fence” and “add[ing] stucco facing to exterior of already constructed wall”. ¶ 31, **Exhibit A**. The 2014 Permit only functioned as a revision to the 2011 Building Permit and 2012 Swimming Pool Permits, which had already approved the Retaining Wall and Fence/Wall - as had already been established by the DCRA dismissal of the SWO that had asserted the Retaining Wall and Fence/Wall were outside the scope of the 2011 Building Permit and 2012 Swimming Pool Permit.

3. The Board lacks jurisdiction to hear the Appeal as 11 DCMR 413, governing “Retaining Walls”, entered into effect only after the issuance of the Prior Permits that permitted the Retaining Wall.

The Retaining Wall clearly was clearly included within the 2012 Swimming Pool Permit, if not also within the 2011 Building Permit – as was established by the unappealed March 12, 2014 DCRA dismissal of the SWO that had asserted the Retaining Wall was outside the scope of the Prior Permits and required an additional permit. Since 11 DCMR 413 entered into effect two months later - on June 13, 2014 - the Retaining Wall was not subject to 11 DCMR 413. DCRA asserts that the Board therefore lacks jurisdiction to hear this Appeal. ¶ 30.

4. The Board lacks jurisdiction to hear the Appeal under the 2014 Permit as Appellant failed to timely appeal the Zoning Administrator’s approval.

Even assuming the Retaining Wall was never included in either of the Prior Permits, despite the unappealed DCRA dismissal of the SWO, DCRA asserts that the Appeal was untimely filed since the Zoning Administrator approved the proposed permit as compliant with the Zoning Regulations on August 13, 2014. Since the sixty (60) day appeals period provided by 11 DCMR 3112.2(a) starts from the earliest of when Appellant had notice or should have had

notice, Appellant should have filed an appeal no later than October 12, 2014. Appellant had notice of the application for the 2014 Permit, since Appellant had been the instigator insisting that the CFA had to review the Retaining Wall and Fence/Wall despite HP's approval of the 2012 Swimming Pool Permit and since CFA forced the Permit Holder to apply for a new DCRA building permit as a condition of CFA review. ¶¶ 27-29, Exhibits U-W. Moreover, Appellant had retained an expert zoning attorney, Mr. Sullivan, who has plenty of experience in monitoring the public DCRA PIVS and Permit Status Tracking websites.

The Board has consistently ruled that where the administrative decision appealed to the Board is that of the Zoning Administrator, the starting point for the appeal period is the date that the Zoning Administrator's decision is publicly announced, and the Board has accepted that the publication on the DCRA PIVS and Permit Status Tracking websites qualifies as public announcement sufficient to trigger the appeal period. *Basken v. District of Columbia Board of Zoning Adjustment*, 946 A.2d 356, 366 (D.C. 2008)(no specific notice required to trigger the Board's appeal period); *BZA Appeal No. 18469 of Susan L. Lynch* (March 19, 2013)(denotation of "approved" in PIVS sufficient to announce Zoning Administrator's approval and so trigger the Board's appeal period).

Therefore, even if the 2011 Building Permit, 2012 Swimming Pool Permit and March 2014 DCRA dismissal of the SWO had never existed, Appellant failed to appeal the Zoning Administrator's decision within sixty (60) days of the decision on August 13, 2014. As a result, DCRA asserts that the Board lacks jurisdiction to hear the Appeal.

5. Even on the merits, the Board should dismiss the Appeal because the Retaining Wall is under the four foot (4 ft.) maximum permitted by 11 DCMR 413.4(a).

"Retaining wall" is defined in the Zoning Regulations as:

"a vertical, self-supporting structure constructed of concrete, durable wood, masonry or other material, designed to resist the lateral displacement of soil or other materials." 11 DCMR 199.1.

Sheet SSK-13 of the 2014 Permit clearly illustrates that the Retaining Wall – the portion of the concrete wall that resists the lateral displacement of the higher grade on the Property (on the left side of the illustration), per the Zoning Regulations' definition – is at most four feet (4 ft.) above Appellant's grade (on the right side of the illustration). ¶ 32, Exhibit X. The remaining portion of the concrete wall – that freestanding portion that does not hold back soil – is the Fence/Wall,

which is not subject to the Zoning Regulations, but instead governed as a fence by the Construction Code.

The Retaining Wall, as shown in the 2014 Permit as no more than four feet above Appellant's grade, therefore complies with 11 DCMR 413.4(a), which establishes the maximum height for retaining walls along property lines. As a result, DCRA asserts that the Appeal is without merit and that the Zoning Administrator correctly approved the 2014 Permit.

CONCLUSION

Based on the facts and argument stated above, DCRA asserts that the Appeal was filed too late and not against the issued permits and DCRA SWO dismissal decision that directly authorized the Retaining Wall. Even if the Prior Permits and DCRA SWO dismissal had never existed, however, DCRA also asserts that the Appeal of the 2014 Permit was itself untimely filed and in the alternative that the Retaining Wall complies with the requirements of 11 DCMR 413.4. DCRA therefore respectfully requests that the Board dismiss the Appeal for lack of jurisdiction based on the untimely filing of the Appeal or alternatively that the Board dismiss the Appeal as without merit since the Zoning Administrator correctly applied the Zoning Regulations to evaluate and approve the Retaining Wall.

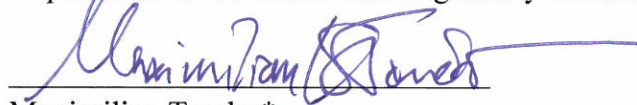
Respectfully submitted,

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Interim General Counsel

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Date: 4/13/2015



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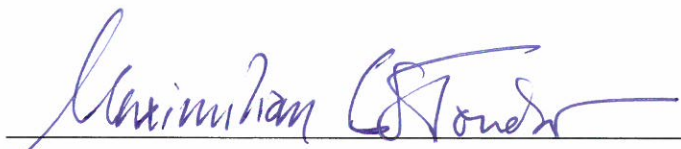
CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April 2015, a copy of the foregoing Pre-Hearing Statement was served via electronic mail to:

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