LAW OFFICES
GREENSTEIN DELORME & LUCHS, P. C.

WILLIAM H. HARRIS, JR.
RICHARD G. WISE
ABRAHAM J. GREENSTEIN
GILBERT E. DELORME
VINCENT MARK J. POLICY
RICHARD W. LUCHS
JUDITH R. GOLDMAN
JACQUES B. DEPUY
JEFFREY H. GELMAN
ALAN S. WEITZ
STEPHEN H. ABRAHAM
LEWIS F. MORSE
JOHN PATRICK BROWN, JR.
ALFRED M. GOLDBERG
DONALD F. HOLMES, JR.
MIRIAM HELLEN JONES
SARAE T. LEUCKEL
ISABEL P. RUIZ DE GAMBOA
JEANNINE RUSTAD
JAMES D. SADOWSKI

1620 L STREET, N.W., SUITE 900
WASHINGTON, D.C. 20036-5605
TELEPHONE (202) 452-1400
FACSIMILE (202) 452-1410

OF COUNSEL
MARK J. ZWEIFLER
61 WEST 62ND STREET
7TH FLOOR - SUITE E
NEW YORK, NEW YORK 10023
(212) 664-1099
FACSIMILE (212) 586-1535

April 10, 2000

'00 APR 10 P4:42

BY HAND-DELIVERY

Ms. Sherri Pruitt
Secretary
Board of Zoning Adjustment
441 Fourth Street, N.W., Room 210 South
Washington, D.C. 20001

Re: BZA Appeal No. 16533

Dear Ms. Pruitt:

Enclosed please find the original and eight (8) copies of the Intervenor's Draft Order , including Findings of Fact and Conclusions of Law in the above-referenced appeal. By letter dated and filed with the Board on April 6, the parties jointly requested an extension until today for the filing of the draft orders. The Board's cooperation in this personal situation is greatly appreciated.

For your convenience, I have also forward this draft order on computer disc formatted in Word Perfect. Thank you for your assistance in this matter. If you have any questions, please do not hesitate to contact me.

Very truly yours,

GREENSTEIN DELORME & LUCHS, P. C.

By: _____
John Patrick Brown, Jr.

Enclosures134603
cc: George R. Clark, Esquire
Mr. Philip Kogan, ANC 3F
Mr. Armando M.. Lourenco
Mr. Michael D. Johnson

BZA
Case No. 16533
Exhibit No. 40

Board of Zoning Adjustment
District of Columbia
CASE NO.16533
EXHIBIT NO.40

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment 16533

Appeal of George and Mary Clark, Stuart Sloame and Ellen Seeherman, and James D. and Emily Baker, pursuant to 11 DCMR 3100 and 3101, from the administrative decision of Lloyd J. Jordan, Director, Department of Consumer and Regulatory Affairs, made on June 7, 1999 and September 17, 1999, to the effect that Forest Hills, LLC, did not comply with the height requirements of the Zoning Regulations for a private residence. Appellant alleges that permits were issued in error based on the existing grade of the property, inadequate side yard, and that the property does not conform to the height requirements in an R-1-A District at premises 4512 28th Street, N.W. (Square 2251, Lot 29).

HEARING DATES: February 2, 2000 and February 23, 2000

DECISION DATE: April 18, 2000

00 APR 10 P4:42

ORDER

PRELIMINARY AND PROCEDURAL MATTERS:

This Appeal was brought by George and Mary Clark of 4525 28th Street, N.W.; Stuart Sloame and Ellen Seeherman of 4508 28th Street, N.W.; and James D. and Emily Baker of 4531 28th Street, N.W., owners of the enumerated properties which are located next door or across the street from the subject property.

Specifically, the Appeal alleged that the building permits for the subject property were issued in violation of the applicable 3-story height limit, minimum side yard and minimum lot area requirements of the Zoning Regulations, 11 DCMR (July 1995), as amended, and the Building Restriction Line. George R. Clark, Esquire acted as counsel for himself and the other Appellants. [Transcript, p. 86]

By letter dated November 16, 1999 and at the Board's February 2, 1999 hearing, Forest Hills, LLC, through counsel, requested Intervenor status. The Board granted the request for Intervenor status. At the February 2, 2000 hearing, the Intervenor requested dismissal of the Appeal because it was not timely filed and was also barred by the doctrines of laches. The Board determined that the facts of the case must be heard before addressing the issues of timeliness and laches.

At the February 2, 2000 hearing date, the Appellants, the Department of Consumer and Regulatory Affairs ("DCRA"), and Advisory Neighborhood Commission 3F ("ANC 3F") made presentations and were subject to cross-examination by the other parties. On behalf of the Appellants, testimony was received from Mr. George Clark, Mr. Stuart Sloame, Mrs. Emily Baker and Mr. James McGee. On behalf of DCRA, Mr. Armando M. Lourenco, the Administrator of

the Building and Land Regulation Administration ("BLRA")[1]; Mr. Michael D. Johnson, the current Zoning Administrator; and Mr. Toye Bello, Zoning Technician, testified. On behalf of ANC 3F, Mr. Philip Kogan and Mr. David Bardin, Chairperson, testified. At the conclusion of the testimony by the Appellants, DCRA and ANC 3F, the hearing was recessed. On February 23, 2000, the hearing was continued with the Intervenor presenting its case and final rebuttal from the Appellants. On behalf of the Intervenor, Mr. Neal Allan Duncan, architect, and Mr. Murray Cohen, the builder and member of Forest Hills, LLC, testified.

FINDINGS OF FACT:

1. The subject property is located at 4512 28th Street, N.W. (Square 2251, Lot 29) in the Forest Hills neighborhood of Ward 3. The natural topography of the area is steeply sloping with the elevation falling as you travel from west to east.[2]

---

[1] Prior to August 2, 1999, Mr. Lourenco was the Acting Zoning Administrator before Mr. Michael D. Johnson assumed that post. The Zoning Administrator reports directly to Mr. Lourenco as Administrator of BLRA.

[2] The subject property is at a higher elevation than the houses located on the opposite (or eastern) side of 28th Street or the Sloame/Seeherman house located immediately adjacent on the south side. Mr. and Mrs. Clark's house at 4825 28th Street sits entirely below the level of the immediately adjacent 28th Street and dramatically demonstrates the grade changes in the neighborhood. [Transcript, p. 232, 277, 344-45]

[Intervenor's Site Photographs; Transcript at p. 232, 277, 344-45].

2. The subject property contains 7,494.25 square feet and was originally developed in approximately 1956 with a two-story ("basement" and main floor) rambler house. [Intervenor's Exhibit 12; Transcript at p. 174].

3. In early 1999, the Intervenor purchased the subject property.

4. The subject property is zoned R-1-A. As relevant to this Appeal, the applicable maximum height, minimum lot area and minimum side yard restrictions were adopted in the current Zoning Regulations which became effective on May 12, 1958 and continue without modification to be effective in the R-1-A zone. [Transcript, p. 118, 245.]

5. Maximum Height: Forty feet (40 ft.) and three (3) stories. 11 DCMR 400.1. The Zoning Regulations specifically provide the following method for determining height both in linear distance and number of stories.

"Building, height of" is defined as follows in the R-1-A zone: "[t]he height of the building may be measured from the **finished grade level at the middle of the front of the building**

to the ceiling of the top story." 11 DCMR 199.1 (Emphasis added).

"Story" is defined as "the space between the surface of two (2) successive floors in a building or between the top floor and the ceiling or underside of the roof framing. The number of stories shall be counted at the point from which the height of the building is measured. For the purpose of determining the maximum number of permitted stories, **the term "story" shall not include cellars**, stair or elevator penthouses or other roof structures; ... 11 DCMR 199.1 (Emphasis added).

"Story, top" is defined as "the uppermost portion of any building or structure that is used for purposes other than housing for mechanical equipment, or elevator or stairway penthouses. The term 'top story' shall exclude architectural embell." 11 DCMR 199.1.

"Cellar" is defined as "that portion of a story, the ceiling of which is **less than four feet (4 ft.) above the adjacent finished grade.** 11 DCMR 199.1. (Emphasis added).

"Basement" is defined as "that portion of a story partly below grade, **the ceiling of which is four feet (4 ft.) or more**

above the adjacent finished grade." 11 DCMR 199.1. (Emphasis added).

6. Minimum Lot Area: 7,500 square feet. 11 DCMR 401.3. Under 11 DCMR 407, the Zoning Administrator is specifically authorized to permit a deviation of not more than two percent (2%) or 150 square feet in the minimum lot area required in an R-1-A district. [Transcript, pp. 244-245, 282-285.]

7. Minimum side yard: Eight feet (8 ft.) (11 DCMR 405.9), **except** "[i]n the case of a building existing on or before May 12, 1958, with a side yard less than eight feet (8 ft.), an extension or addition may be made to the building; provided that the width of the existing side yard shall not be decreased; and provided further, that the width of the existing side yard shall be a minimum of five feet (5 ft.). 11 DCMR 405.8.

8. On June 7, 1999, Building Permit No. B424294 was issued by DCRA which authorized Intervenor to "DEMOLISH EXIST. SFD TO FOUNDATION. (BASMT TO REMAIN) CONSTRUCT 3 FLOORS AND ADDITION TO EXIST. FOOTPRINT, NEW 1 STORY GARAGE." [Intervenor's Exhibit 4.]

9. In late June, 1999, Mr. Cohen met with the Appellants and provided them with copies of the elevations and site plan for

the construction of the addition at the subject property. [Transcript, pp. 90-91, 314-316.]

10. On July 1, 1999, Intervenor in reasonable reliance on the approved building permit began site preparation work on the subject property. [Transcript, p. 313.]

11. On July 12, 1999, Intervenor began removal of the roof and top story of the existing house. [Transcript, p. 313.]

12. On July 27, 1999, Mr. Cohen was informed by his permit expediter that Mr. Toye Bello, a Zoning Technician, had raised questions about the zoning compliance of the approved and issued building permit. [Transcript, pp. 316-317.] No stop work order was issued by DCRA at that time or at any other time. [Transcript, pp. 167, 169, 323.]

13. On July 28, 1999, Mr. Cohen met with Mr. Bello and was informed for the first time that the approved permit exceeded the three-story height restriction because the existing lower level was considered a "basement" because the ceiling was more than four feet (4 ft.) above the finished grade at the measuring point. Under the Zoning Regulations, a "basement" is a story which counts towards the applicable three-story height limitation. Mr. Bello advised Mr. Cohen that raising the finished grade would allow the lower level to be classified as a

"cellar" which does not constitute a "story" for height purposes. [Transcript, pp. 317-318, 325-26.] Mr. Bello specifically authorized Intervenor to continue construction while obtaining a revised building permit to raise the finished grade. [Transcript, pp. 183-184, 319, 356-361.]

14. In reasonable reliance on the authorizations and guidance provided by Mr. Bello, Intervenor continued construction of the addition, including the following milestones: August 11, 1999: concrete block delivered for rear addition crawlspace; August 12, 1999; foundation for rear addition started; August 16, 1999: carpenters begin framing house; August 19, 1999: floor trusses for second floor delivered to site; and August 25, 1999: floor trusses and joists for top story delivered to site. [Intervenor's Chronology.]

15. By letter dated August 20, 1999 and delivered to Intervenor on or about August 25, 1999, the Appellants alleged that the construction of the addition was in violation of the side-yard and height restrictions. [Transcript, pp. 104-106.]

16. On August 25, 1999, Intervenor submitted a revised building permit application based on the advice provided by Mr. Bello to raise the finished grade. [Intervenor's Exhibit 8.]

17. Intervenor continued construction in reasonable reliance on the authorization and advice from Mr. Bello, including the following milestones: August 26, 1999: second story walls installed; September 1, 1999: top story joists installed; September 2, 1999: roof plywood delivered to site; September 7, 1999: framing of first, second and part of the third story is completed (Intervenor's Exhibit 12). [Intervenor's Chronology.]

18. Beginning on August 25, 1999, the Appellants knowing that continued construction by Intervenor was taking place and had been authorized by DCRA, began a letter writing campaign to the various responsible officials at DCRA, including: Mr. Edgar T. Nunley, Chief, Zoning Review Board (August 25, September 2,); Mr. Michael D. Johnson, Zoning Administrator (September 2, September 8, September 10); Lloyd J. Jordan, Director of DCRA (September 14, 1999); and Ward 3 Council member Kathy Patterson (received letters from DCRA on September 10 and 20, 1999; sent letters to DCRA on September 8 and September 13, 1999). [Intervenor's Exhibits 10, 11, 13, 15, 16, 17, 18, 19, 21.]

19. On September 7, 1999, the Appellants were informed by Council member Patterson that DCRA had approved the revised building permit. [Transcript, pp. 140-142.] The Appellants confirmed receiving notice of DCRA's decision in a September 8,

1999 letter to Mr. Johnson, the Zoning Administrator. [Intervenor's Exhibit 13]. On the same day, Council member Patterson confirmed in writing to Mr. Jordan that based on the change in finished grade, the subject property was in compliance with the Zoning Regulations. [Intervenor's Exhibit 15.] On September 10, the Appellants acknowledged by letter to Mr. Johnson receipt of his September 8 voicemail informing the Appellants that DCRA "saw no violations and approved the amended permits for this property." [Intervenor's Exhibit 16.]

20. On September 17, 1999, DCRA issued Building Permit No. B426784 which authorized the Intervenor to "REVISE BUILDING PERMIT #B424294 CHANGE FINISHED GRADE TO CONVERT BASEMENT TO CELLAR AS PER ROBERT CHEN." [Intervenor's Exhibit 20.] The building permit application was specifically reviewed and approved by the Environmental Regulation Administration for Erosion Control compliance. [Intervenor's Exhibit 8.] The change in finished grade authorized and completed was minor and returned the grade to approximately the level that existed prior to the original construction of the house in 1956. [Intervenor's Exhibit 1; Transcript, pp. 299, 322]. The change in grade extended the existing slope or topography in the front yard all the way to the front facade of the building. [Transcript, pp. 277-78.] This

second permit, including specifically the finished grade and resulting non-story "cellar" would have been approved in the first permit. No special consideration or treatment was afforded Intervenor as a result of the change in finished grade coming after and to revise the first permit. It has long been the established practice and interpretation of the Zoning Administrator to allow any property owner to change finished grade. [Transcript, pp. 183-185.]

21. In reasonable reliance on the building permits issued by DCRA and without notice of any further challenge of the permits by the Appellants, Intervenor continued construction of the addition at the subject property. [Intervenor's Chronology.]

22. Appellants filed this Appeal on November 3, 1999.

23. Advisory Neighborhood Commission 3F filed a written statement and resolution and provided testimony at the February 2, 2000 hearing through Mr. Philip Kogan and Mr. David Bardin. ANC 3F expressed concerns that the addition to the existing structure created a 4-story house, extended beyond the existing footprint and violated the minimum side yard requirement. [Transcript, pp. 72-85; 261-263.]

24. The Intervenor's architect admitted making a mistake in failing to recognize that the lower level accurately depicted in

the construction drawings submitted for the first building permit constituted a "basement" which counted as a story. [Transcript, pp. 274-275.] In the original permit, the Intervenor lowered the grade. [Intervenor's Exhibits 1 and 3; Transcript, p. 299.] The Intervenor was unaware of the architect's oversight and neither sought nor obtained any gain or advantage from this error. Similarly, the Zoning Review Branch failed to identify the lower level as a "basement" as part of its zoning review and approval process. [Transcript, pp. 275-276.] Confusion over the definition and distinction between a "basement" and a "cellar" is common even among licensed architects in the District of Columbia. [Transcript, pp. 167-168, 196-197, 236.]

25. Intervenor acted in good faith and submitted accurate permit applications. [Transcript, pp. 201, 235, 242-243.] There was no attempt to mislead DCRA or provide false information at any time and the Zoning Administrator's decisions were based on complete and accurate information reflecting all existing and proposed improvements. [Transcript, pp. 174, 182-183, 234, 274-275.]

26. The Intervenor constructed the addition to the existing house strictly in compliance with the building permits issued,

except the authorized garage in the rear yard adjacent from the public alley was never constructed. [Transcript, p. 316.]

27. The subject property and the permits issued by DCRA have been subjected to an extraordinary and ongoing process of scrutiny at every level of the zoning hierarchy, including the Zoning Technician; Chief, Zoning Review Branch; Zoning Administrator; Administrator of BLRA; and Director of DCRA. [Transcript, pp. 178-79.] Mr. Lourenco has visited the site at least three times and Mr. Johnson has also visited the site. [Transcript, pp. 230-231, 246-247.] The review was "by the book" and did not rely on subjective and personal criteria or concerns or unrelated worst-case hypothetical raised by the Appellants. [Transcript, pp. 191, 233, 277-78, 296-97.]

28. The height of the structure is 33.5 feet as measured from the finished grade at the center of the front of the house to the ceiling of the top story. [Intervenor's Exhibit 26.] Under the Zoning Regulations, the structures could be 6.5 feet taller and still comply with the forty-foot height limitation. [Transcript, p. 241.]

29. As measured at the center of the front of the house, the current measurement from the finished grade to the ceiling of

the lower level is 3.5 feet. [Intervenor's Exhibit 9, 26; Transcript, p. 284.]

30. The lot area of the subject property is 7,494.25 square feet or 5.75 square feet less than the minimum lot area of 7,500 square feet. [Transcript, pp. 244-245, 282-25.] Five point seventy-five square feet (5.75 sq. ft.) is equal to 0.00076666 (less than 1/10 of one percent) of the minimum required.

31. The side yards for the original house were less than 8 feet, but greater than five (5) feet as shown on the December 1998 House Location Survey, March 1999 House Location Survey, and the August 1999 Wall Test Report. [Intervenor's Exhibits 23, 24 and 25; Transcript, pp. 185, 282].

32. The addition to the existing structure did not decrease the existing side yards as shown on the Wall Test Report which was submitted to and approved by DCRA. [Transcript, pp. 223-24.] The direct vent gas log fireplace or chimney (16 inches in depth) installed in the living room does not intrude into the existing side yard. [Intervenor's Exhibit 26; Transcript, pp. 289-90.] Under 11 DCMR 2502.8, a chimney, smokestack or flue may project into any required side yard for up to two (2) feet.

33. The existing structure and the addition, including the front porch and front balcony directly above the porch, were

constructed within the Building Restriction Line. [Intervenor's Exhibit 23, 26; Transcript, p. 289.]

CONCLUSIONS OF LAW:

An appeal to the Board may be taken by any person aggrieved by any decision of DCRA granting a building permit, or any other administrative decision based on the Zoning Regulations. D.C. Code 5-424; 11 DCMR 3202.2. The Board's powers with regard to appeals include to decide allegations of error in any decision made by DCRA in carrying out or enforcement of any zoning regulation. D.C. Code 5-424.

[insert timeliness, and laches discussion here]

On the merits of the Appeal, the original building permit as revised by the second permit were in compliance with the Zoning Regulations in all respects, including specifically maximum height, minimum lot area, and minimum side yard as set forth below:

1. The Board has reached its decision in this Appeal based solely on the objective and well-defined standards set forth in the existing Zoning Regulations and long-standing and established and accepted practices of the Zoning Administrator. [Transcript, pp. 163, 233, 245.]

2. The height of the structure is 33.5 feet which is substantially less than the 40-foot limit. [Intervenor's Exhibit 26; Transcript, p. 241.]

3. The lower level of the structure is a "cellar" and does not count as a story for purposes of the three-story height limit. [Transcript, p. 242.] The structure is a three-story building and complies with this height limit.

4. The Zoning Regulations' specific reference to "finished grade" clearly authorizes the raising or lowering of grade. It has been the long-standing and consistent interpretation and practice of the Zoning Administrator to allow any property owner to change finished grade. No restrictions exist in the Zoning Regulations which limit or restrict any property owner's right to raise or lower the finished grade. [Transcript, pp. 186-87, 188-89, 291 -92.]

5. The existing foundation, lower level walls, first floor joists and subfloor of the main floor were retained and improvements constructed on or added to the retained structure. The improvements constitute an "addition" under 11 DCMR 405.8 and can not be characterized as a demolition. [Transcript, pp. 110, 174-75, 185, 216-17, 224-25, 252-54, 270-272.]

6. The subject property complies with the side yard requirements set forth in 11 DCMR 405.8. The existing side yards were greater than 5 feet and the addition has not decreased the width of those side yards as established by the Wall Test Report. [Transcript, p. 282.]

7. The subject property complies with the minimum lot area requirements. The Zoning Administrator properly exercised the authority created under the Zoning Regulations to allow a deviation in the lot area of substantially less than the two percent (2%) allowed. [Transcript, pp. 282-285.]

8. 11 DCMR 223 which provides for special exception approval by the Board of additions to one-family dwellings does not apply in this Appeal. [Transcript, pp. 213-14, 281-82.] There is no basis for Intervenor to need Board approval because the subject property complies with all the applicable Zoning Regulations. [Transcript, p. 193.]

9. The Board has given the views of ANC 3F "great weight" as required by law.

10. The Board concludes that the DCRA properly issued the original permit as revised by the second permit as in compliance with the Zoning Regulations.

The motion to **DISMISS** the Appeal based on timeliness and laches is _____.

Vote:

The Department of Consumer and Regulatory Affairs acting in compliance with the Zoning Regulations in issuing Building Permit Nos. B424294 and B426784. Therefore, it is hereby **ORDERED** that the Appeal is **DENIED**.

Vote:

5-0 (Sheila Cross Reid, Anne M. Renshaw, Robert Sockwell, Rodney Molden and Carol Mitten to **DENY**).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: _____
JERRILY R. KRESS
DIRECTOR

FINAL DATE OF ORDER: _____

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