File

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
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ENFORCEMENT DIVISION
2000 MAY 25 A 11:5?

Appeal No. 16451 of Waste Management of Maryland, Inc., pursuant to 11 DCMR §§ 3105 and 3106, from the administrative decision of the Zoning Administrator to deny the owner, under Certificate of Occupancy Application No. 511823, the right to use the premises for a "carting or hauling terminal or yard, or a processing establishment, specifically a solid waste handling facility that will be used for the receipt, loading, compacting and transfer for disposal outside the District of Columbia of municipal solid waste and/or construction and demolition debris (all materials non-hazardous)," which is a permitted use in a C-M-2 District at premises 2160 Queens Chapel Road, N.E. (Square 4259, Parcels 154/72, 154/87, 154/110, 154/112 and Lot 3).

Appeal No. 16452 of Waste Management of Maryland, Inc., pursuant to 11 DCMR §§ 3105 and 3106, from the administrative decision of the Zoning Administrator to deny the owner, under Certificate of Occupancy Application No. 511823, the right to continue to use the premises for light manufacturing, processing, fabricating, and warehousing of steel products, office and retail construction and industrial supplies (all materials non-hazardous) except to transfer the name of the business, the nature of the business to remain the same, which is a permitted use in a C-M-2 District (all materials non-hazardous) at premises 2160 Queens Chapel Road, N.E. (Square 4259, Parcels 154/72, 154/87, 154/110, 154/112 and Lot 3).

HEARING DATES: **July 7, 1999 and September 22, 1999**
DECISION DATE: **November 3, 1999**

ORDER

PRELIMINARY AND PROCEDURAL MATTERS:

On February 12, 1999, Waste Management of Maryland, Inc. ("Waste Management" or "Appellant") filed two appeals and an application for a special exception with the Board of Zoning Adjustment ("Board" or "BZA"). The appeals challenge administrative decisions made February 21, 1996 by the Zoning Administrator to deny two applications by Waste Management for a Certificate of Occupancy ("C of O") for the property at 2160 Queens Chapel Road, N.E. The special exception application requests relief to establish a solid waste handling facility at the property, pursuant to 11 DCMR § 802.4 (BZA Application No. 16453). At the hearing on July 7, 1999, the Board granted Waste Management's motion to defer consideration of the special exception application until after the appeals were decided.

George Galish and his company, Auto Body Supply, Inc. (collectively, "Galish"), moved to intervene in opposition to the appeals and special exception application. Auto Body Supply, Inc. is located at 2215 Adams Place, N.E., directly across the street from the subject property.

BZA
Case No. 16588
Exhibit No. 24

Board of Zoning Adjustment
District of Columbia
CASE NO.16588
EXHIBIT NO.24A
CASE # 16588

The Board granted the motion to intervene. By letters dated September 22, 1999, Mr. Galish withdrew as intervenor and submitted a statement in support of Waste Management's appeals.

On September 21, 1999, Custom Machinery Company, Inc. also moved to intervene in these matters. Custom Machinery Company owns property at 2230 Adams Place, N.E., adjacent to and within 200 feet of the subject property, where it conducts its business of sales, warehousing, distribution, and consulting with regard to the repair of laundry and dry cleaning equipment. The Board granted Custom Machinery Company's motion to intervene.

James Shulman, on behalf of Citizens Against Trash Transfer Stations, requested party status. Because the organization has no specific interest that would be affected by these appeals, the Board denied party status.

The District of Columbia Department of Consumer and Regulatory Affairs ("DCRA" or "Government"), the government agency that includes the office of the Zoning Administrator, was accorded party status pursuant to 11 DCMR § 3399.1.[1] On July 6, 1999, the Government requested a continuance, citing a delay in receiving notice of the scheduled hearing. The motion was opposed by Waste Management and Intervenor Galish, but was granted by the Board, which set a new hearing date of September 22, 1999.

On August 12, 1999, the Government submitted a motion to dismiss the appeals as untimely. The motion was opposed by Waste Management, and the Board decided to take it under advisement until after the appeals had been heard. On September 21, 1999, Custom Machinery Company also filed a motion to dismiss, joining and incorporating by reference the motion to dismiss submitted by the Government.

The appeals were heard on September 22, 1999. Testimony was received from the Appellant, the Government, and Custom Machinery Company.

On October 21, 1999, Waste Management filed a motion to strike the Proposed Findings of Fact, Conclusions of Law, and Order submitted by the Government on October 14, 1999. In its motion, Waste Management alleges that the Government's filing presented substantive new legal arguments after the close of the record, in contravention of 11 DCMR § 3326.8. According to Waste Management, any proposed orders submitted to the Board after the close of the record may not include any new evidence or legal argument. The Government filed its opposition on November 2, 1999, and on November 8, 1999, Intervenor Custom Machinery Company joined with the Government's memorandum in opposition to Waste Management's motion to strike.

Finally, on November 30, 1999, Waste Management filed a motion for clarification. The Appellant asserts that the Board "apparently decided that it would . . . rule on the merits of the case at its meeting scheduled for December 1, 1999." Waste Management contends that the Board lacked jurisdiction to reach the merits of the appeals in light of its earlier orally announced decision to dismiss the appeals as untimely.

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[1] On October 1, 1999, the Rules of Practice and Procedure for the Board of Zoning Adjustment were recodified under Chapter 31 of Title 11 of the District of Columbia Municipal Regulations. This Order refers to sections of Chapters 31 and 33, Title 11, in effect at the time the appeals were filed.

FINDINGS OF FACT:

1. The subject property is approximately 2.3 acres located at 2160 Queens Chapel Road, N.E., near the intersection of Queens Chapel Road and Adams Place, N.E. in Ward 5 (Square 4259, Lot 3 and Parcels 154/72, 154/87, 154/110, and 154/112). The property is zoned C-M-2.

2. The property is owned by Caslin Associates, L.P. and is used as a solid waste handling facility, operated by Waste Management, pursuant to an interim operating permit issued by DCRA on August 2, 1996 in accordance with the Solid Waste Handling Facility Act of 1995 (D.C. Code § 6-3451 *et seq.*). Issuance of the interim permit was conditioned on Caslin Associates' obtaining a C of O that described the use of the subject property as a "solid waste handling facility."

3. The property is improved with three one-story buildings: the "tipping" building where solid waste is "tipped" from smaller garbage trucks onto the concrete floor for transfer to larger trucks; a garage building; and a storage building. Two truck scales are also located on the property.

4. Solid waste handling involves the aggregation of individual loads of solid waste, collected by short-haul collection trucks from residential, commercial, or industrial neighborhoods, into larger loads to be hauled to a final disposal site.

5. Waste Management currently handles approximately 16,000 tons of commercial waste per month at the property. Private haulers enter from the east on Queens Chapel Road, line up on the site to be weighed, then enter the main building and "tip" their loads onto the tipping floor, and finally exit the site southbound onto Queens Chapel Road. The solid waste is transferred from the tipping floor into larger transfer trucks, which enter the property from Adams Place, for transfer to a permanent disposal site.

6. On November 21, 1995, Waste Management filed an application for a certificate of occupancy (Application No. 511823, known as the "processing application") with respect to the use of the property as a "carting or hauling terminal or yard, or processing establishment, specifically a solid waste handling facility for receipt, loading, compacting and transfer for final disposal outside of the District of Columbia of solid waste and/or construction and demolition debris (all materials non-hazardous)."

7. By letter dated February 21, 1996, the Zoning Administrator denied the processing application and directed Waste Management to seek a variance from the Board pursuant to 11 DCMR §§ 801 and 3107. The letter stated that "the operation of a solid waste facility is not allowed as a matter of right in a C-M District," citing 11 DCMR § 800.6, which provides that any use specifically prohibited in an M district is not permitted in a C-M district. The letter stated further that:

> Because 11 DCMR § 823.1 specifically prohibits, among other things, slaughterhouses, animal rendering facilities, oil refineries, bone products manufacturing, the curing, tanning or storage of hides, fertilizer manufacturing, and "other uses with objectionable characteristics similar to those listed," in M

> districts, there is a legitimate question as to whether the "carting", "hauling" and "processing" of solid waste has similarly objectionable characteristics, and as such would be banned from CM districts. Whether [Waste Management's] operation is similarly objectionable to prohibited uses is a decision that should be made by the BZA. Furthermore, because there is no specific zoning category for solid waste handling facilities, [Waste Management's] application must have BZA approval through the variance process.

Letter from Gladys Hicks, Acting Zoning Administrator, to Andrew Mishkin, counsel for Waste Management, dated February 21, 1996, page 3. [Statement of Applicant, Exhibit F.]

8. Also on November 21, 1995, Waste Management filed an application requesting reissuance, in Waste Management's name, of a C of O held by Mike Perkins, the previous owner of the property (Application No. 511824, known as the "name change application").

9. Certificate of Occupancy No. B168010 was issued to Mike Perkins on March 21, 1994 authorizing use of the subject property for "light manufacturing, processing, fabricating, and warehousing of steel products and office and retail construction industrial supplies (all materials non-hazardous)."

10. The Zoning Administrator letter of February 21, 1996 referenced in Paragraph 7 above also denied the name change application on grounds that the Board had recently revoked the Perkins' C of O[2] and consequently there was no certificate to reissue in Waste Management's name.[3]

CONCLUSIONS OF LAW AND OPINION:

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 § 3200.2. The Board's powers with regard to appeals include the power 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.

The Zoning Regulations provide that an appeal to the Board must be "timely." 11 DCMR § 3315.2. The question of timeliness is jurisdictional; if an appeal was not timely filed, the Board is without power to consider it. *Goto v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 917, 923 (D.C. 1980). Because the Board's rules do not adopt a specific time limit on appeals, a standard of reasonableness is applicable to determine whether an appeal is timely. *Id.* In applying the reasonableness standard, courts have consistently held that the time for filing an appeal commences when the party appealing is chargeable with notice or knowledge of the decision complained of. *Woodley Park Community Association v. District of Columbia Board of*

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[2] *See* BZA Appeal No. 16041 (December 12, 1995). In that case, the Board upheld DCRA's decision to revoke the C of O held by Perkins for failure to use the property in compliance with the permit.

[3] Revocation of the C of O was contested by Perkins and is the subject of a pending appeal before the District of Columbia Court of Appeals (Nos. 96-AA-30 and 97-AA-772).

Zoning Adjustment, 490 A.2d 628, 636 (D.C. 1985). *See also, e.g., Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994).

This case concerns appeals of two decisions of the Zoning Administrator denying two C of O applications for the subject property. Both applications were denied by the Zoning Administrator by letter to counsel for Waste Management dated February 21, 1996. Waste Management appealed both decisions to the Board on February 12, 1999 – almost three full years later. The Board concurs with the Government that Waste Management was "chargeable with notice or had knowledge of the decision complained of" starting February 21, 1996, the date of the Zoning Administrator's letter, and that any appeal of those decisions should have been filed within a reasonable period thereafter. It is not reasonable to file an appeal of a decision of the Zoning Administrator three years after the appellant had notice of the written decision. *See, e.g., Woodley Park Community Association*, 490 A.2d at 637 (D.C. 1985) (one-year delay from issuance of building permit to filing of appeal relating to height, setback, and use was not reasonable).

Waste Management argues that the reasonableness test must take into account whether an appellant was pursuing other administrative remedies or instead was "sleeping on its rights" by taking no action at all. The Appellant states that Waste Management "was vigorously pursuing" administrative solutions by seeking issuance of a C of O during the three years before the appeals were filed, and, citing *Goto*, contends that the delay therefore cannot count against it in determining the timeliness of the appeals.

The Board rejects this argument as without merit. A long interval, such as three years, does not become reasonable merely because an appellant initially chooses to pursue other options instead of preserving its appeal rights by filing a timely appeal. In *Goto*, the court upheld the BZA's determination that an appeal was timely because it was filed two months after the issuance of a written decision by the Zoning Administrator, even though the appellants in that case had oral notice of the decision six months earlier. In an inquiry separate from the issue of timeliness, the court also considered whether the appeal in *Goto* was barred by laches. 423 A.2d 917, 925. The court looked to the record as to the timing of the appeal to determine whether there was any unreasonable delay, and concluded – with respect to laches, not timeliness – that a seven-month delay in filing the appeal was reasonable when, during that period, the appellants were working within the administrative process to attempt to prevent construction of the property at issue.

The Board here concludes that time spent pursuing administrative solutions does not excuse a lengthy delay – especially a delay of three years – in filing an appeal of a decision by the Zoning Administrator. *See also Woodley Park*, 490 A.2d at 638 (court rejected appellant's contention that intervenor property owner's conduct during negotiations, after building permit was issued, rendered its appeal timely; appellant was responsible for its choices and could not escape harsh consequences of its one-year delay in filing an appeal merely because intervenor – its adversary in difficult negotiations – was less than fully candid.) Nor is the Board persuaded by cases from other jurisdictions cited by the Appellant. *See Morris v. Borough of Haledon*, 93 A.2d 781 (N.J. Super. Ct. App. Div. 1952) (individual plaintiff can bring action to enjoin businesses operating in residential district in violation of zoning ordinance); and *Larkin v.*

Tsavaris, 85 So.2d 731 (Fla. 1956) (suit between owners of neighboring property, alleging zoning violations by defendant, was not barred by laches where plaintiff acted with all due diligence after discovering facts upon which suit was brought).

Because the appeals are untimely, the Board concludes that Waste Management's motion to strike and its motion for clarification are moot. Both motions are therefore denied as moot. *See* 11 DCMR § 3100.9.

The motion to **DISMISS** the Appeals as untimely is **GRANTED.** Therefore, it is hereby **ORDERED** that the Appeals are **DISMISSED.**

VOTE: 5-0 (Sheila Cross Reid, Betty King, Robert Sockwell, Anthony Hood, and Jerry Gilreath to grant.)

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

ATTESTED BY: _____
JERRILY R. KRESS
DIRECTOR

FINAL DATE OF ORDER: MAY 22 2000

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."

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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BZA APPEAL NOS.: 16451 AND 16452

As Director of the Office of Zoning, I certify and attest that on MAY 22 2000 a copy of the order entered on that date in this matter was mailed first class, postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

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Attested by: Jerrily R. Kress
JERRILY R. KRESS, FAIA
Director

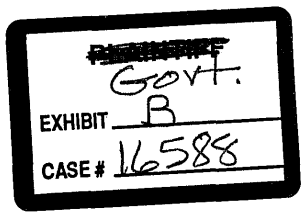
423 A.2d 917 printed in FULL format.

TAIKO GOTO, PETITIONER, v. DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT. MILTON M. GOTTESMAN, CITIZENS ASSOCIATION OF GEORGETOWN, INTERVENORS

No. 13491

District of Columbia Court of Appeals

423 A.2d 917; 1980 D.C. App. LEXIS 402



April 26, 1979, Argued
November 5, 1980, Decided

Appeal upheld as timely filed 2 months after written decision.

PRIOR HISTORY: [**1]

Petition for Review of a Decision of the District of Columbia Board of Zoning Adjustment

CORE TERMS: kiln, zoning, laches, regulation, person aggrieved, jurisdictional, aggrieved, neighborhood, estoppel, rear, neighbor, administrative decision, aggrieved person, intervenor, intervene, timeliness, Zoning Act, final order, notice, build, yard, shop, agency action, per curiam, suit filed, zoning administrator, administrative officer, motion to dismiss, timely filed, estopped

COUNSEL: Whayne S. Quin, with whom Norman M. Glasgow and Norman M. Glasgow, Jr. were on the briefs, for petitioner.

Leo N. Gorman, Assistant Corporation Counsel, with whom Louis P. Robbins, Acting Corporation Counsel at the time the brief was filed, and Richard W. Barton, Deputy Corporation Counsel at the time the brief was filed, were on the brief, for respondent.

Milton M. Gottesman, with whom Courts Oulahan was on the brief, for intervenors.

JUDGES: Kelly, Gallagher, and Ferren, Associate Judges. Opinion for the court by Associate Judge Ferren. Associate Judge Kelly concurs in part and dissents in part.

OPINIONBY: FERREN

OPINION: [*918] Petitioner Taiko Goto seeks review of an order of the Board of Zoning Adjustment (the Board or BZA) which reversed an earlier determination by the Zoning Administrator that Goto could build a kiln at the rear of her pottery shop without a permit. She contends the Board should have held that principles of laches and estoppel barred the Citizens Association of Georgetown (CAG) and Milton Gottesman from appealing the Zoning Administrator's decision to the BZA. [**2] We agree as to laches and reverse. n1

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n1 We accordingly need not deal with Goto's contention that the Board erred in concluding that she required a permit because the kiln is a "building" or

building addition and because a gas pipe connecting the kiln to the shop building constitutes a "communication" between buildings within the meaning of District of Columbia Zoning Regulations @ 1202 (1979).

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I.

Since 1974, Taiko Goto has leased a store at 2605 P Street, N.W., in Georgetown, for use as a ceramics workshop. The area is zoned C-1, which permits "neighborhood shopping." District of Columbia Zoning Regulations @ 2101.14 (1979). In early 1974, Goto wished to build a gas-fired kiln in the [*919] rear yard of her shop. She consulted with Mr. Krassensky, Chief of the Mechanical Section, Engineering Branch, Bureau of Building, Housing and Zoning (now a branch of the Building Division of the Building and Zoning Regulation Administration). n2 Krassensky told Goto that she could build the kiln without a permit [**3] if the kiln were set back from the walls of the existing structure and used less gas than a residence. Goto began constructing the kiln in November 1974.

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n2 Effective July 3, 1975, the Department of Housing and Community Development of the District of Columbia government employed all the officials who were involved in the controversy concerning Goto's kiln. The Corporation Counsel's office provided the court with organizational charts showing the hierarchy of the officials involved in this case as follows:

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

Director

Building and Zoning Regulation

Administration

Administrator -- Dripps

Building Division

Engineering Branch Chief -- Osborg

Mechanical Section Chief -- Krassensky

Zoning Division Administrator -- Fahey

Zoning Review Branch Chief -- Bottner

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Soon thereafter, Milton Gottesman, the owner of the adjacent property to the rear of Goto's shop, and Eva Hinton, Chairperson of CAG's Committee on Zoning and Planning, complained of the [**4] kiln to James J. Fahey, the Zoning Administrator. See note 2 supra. Fahey investigated the complaint and orally advised Goto to stop construction until she obtained a permit, and to

submit plans for the kiln to his office. Goto submitted plans showing the kiln attached to the main building. Joseph Bottner, Chief of the Zoning Review Branch (under Fahey), see note 2 supra, advised her that the BZA would have to approve construction of the kiln.

Goto amended the plans to show the kiln as a separate structure and submitted them next to Howard A. Osborg, Chief of the Engineering Branch, Inspection (now Building) Division. See note 2 supra. Osborg determined that a permit was not required for the kiln and made a notation to that effect, dated April 30, 1975, on a letter to the owner of the property leased by Goto for her shop. Fahey, the Zoning Administrator, appealed Osborg's decision to Fahey's superior, William Dripps, Chief of the Bureau of Building, Housing and Zoning (now Building and Zoning Regulation Administration). See note 2 supra. In May 1975, Dripps sustained Osborg's determination that Goto could construct the kiln without a permit. Gottesman [**5] and Hinton had notice of this decision by June 1975. Goto completed the kiln and began to operate it by August 1975. n3

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n3 Goto initially used propane gas to fire the kiln. By February 1976, after public hearings, the Public Service Commission granted Goto permission to use natural gas (this service was not automatic for new hookups). Goto obtained natural gas service by April 1976.

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On November 18, 1975, Gottesman and Hinton met with Dripps, who reiterated his opinion that the kiln required no permit. At Hinton's request, Fahey wrote a letter on January 6, 1976, reflecting Dripps' position. n4 Hinton (on behalf of CAG) filed an appeal with the BZA on March 4, 1976, contesting the decision in Fahey's letter. Gottesman intervened as an appellant at the end of the first public hearing on July 21, 1976.

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n4 Fahey's letter of January 6, 1976, informed Hinton:

This office has reviewed the kiln located at the rear of 2605 P Street, N.W. It has been determined that the kiln is not a building, but an accessory structure and, therefore permitted to be located within the rear yard.

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[**6]

Goto did not learn of the appeal until May 25, 1976, when she heard of it from the owner of her leased property, who had received notice, and from her attorney, who read about the appeal on a BZA agenda. Goto's attorney made a motion to dismiss the BZA proceedings for lack of jurisdiction, [*920] as well as on grounds that laches barred CAG's appeal and that Goto's reliance on the prior decisions of District officials estopped the Board from requiring a permit. More specifically, Goto contended that the Board lacked jurisdiction to hear the appeal because (1) it was not timely filed, (2) CAG did not comply with the rules of the Board regarding authorization of the appeal, and (3) CAG was not a "person aggrieved" by Fahey's January 6 decision letter, within the meaning of the District of Columbia Zoning Act, D.C. Code 1973, @ 5-420,

and Zoning Regulations @ 8102.1 (1979). Before the first public hearing, the Board denied the motion as to the jurisdictional grounds. The Board then considered Goto's kiln on three days of hearings between July 1976 and April 1977. In its final order of March 28, 1978, the Board reaffirmed its jurisdictional ruling, rejected the defenses of [**7] laches and estoppel, and concluded that a permit was required for construction of the kiln. Goto petitions for review of the Board's decision. See D.C. Code 1973, @@ 11-722, 17-303; id. 1978 Supp., @ 1-1510.

II.

We first consider the three jurisdictional issues which Goto raised initially in her motion to dismiss the proceedings before the Board.

A. Goto contended that Hinton lacked authority to bring an appeal on behalf of CAG because the organization had not authorized her to do so. Hinton failed to attach to the appeal form a letter from CAG authorizing Hinton to act on its behalf, although the form directed: "If appeal is filed by agent of the appellant, Form 1 (Notice of appeal) shall be accompanied by a letter signed by the appellant authorizing the agent to act on his behalf in this appeal." Goto argues that this deficiency in the filing of the appeal deprived the Board of jurisdiction.

We cannot agree. Although the Zoning Regulations dictate that appeal forms must be complete at the time of filing, n5 the error here was not substantial. On February 26, 1976, before the appeal was filed, CAG, by resolution, authorized Hinton to act in its behalf in filing an [**8] appeal against Dripps' oral decision to allow construction of the kiln. Because it was Fahey's written decision (reflecting Dripps' view) that CAG apparently wished to contest, on June 21, 1976, CAG ratified Hinton's filing of the appeal against Fahey. This action eliminated any doubt that Hinton had authority to act as CAG's agent. The purpose of the BZA's authorization-letter requirement -- i.e., that the Board should not be party to unauthorized appeals -- was adequately fulfilled in this case.

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n5 The Zoning Regulations provide:

Each appeal or application to the Board shall be made on the appropriate form provided by the Board and all information required by such form shall be furnished by the appellant or applicant at the time of filing the appeal.

District of Columbia Zoning Regulations @ 8203.1 (1979) (emphasis in original).

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B. Goto also contended that CAG was not a "person aggrieved" within the meaning of the Zoning Act n6 and Regulations n7 and thus was not entitled to [**9] appeal [*921] Fahey's decision that no permit was required to build the kiln. The Board rejected her argument, stating in its final order:

The Association and Mr. Gottesman are both "persons aggrieved" within the meaning of the Zoning Regulations. Mr. Gottesman lives immediately behind the subject site. The Association represents residents of both the immediate and

the general area, and has had a long standing history of appearing in zoning matters before the Board.

We need not deal with the issue of the CAG's standing as a "person aggrieved" before the Board n8 because Gottesman, the intervenor-appellant, had standing to support the appeal. n9

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n6 The statute provides:

Appeals to the Board of Adjustment may be taken by any person aggrieved, or organization authorized to represent such person, or by any officer or department of the government of the District of Columbia or the Federal Government affected, by any decision of the inspector of buildings granting or refusing a building permit or granting or withholding a certificate of occupancy, or any other administrative decision based in whole or part upon any zoning regulation or map adopted under sections 5-413 to 5-428.

D.C. Code 1973, @ 5-420. [**10]

n7 The regulations track the language of the statute:

The Zoning Act of June 20, 1938 (52 Stat. 797), as amended, provides that appeals to the Board of Zoning Adjustment may be taken by any person aggrieved, or organization authorized to represent such person, or by any officer or department of the government of the District of Columbia or the Federal Government affected, by any decision of an administrative officer granting or refusing a building permit or granting or withholding a certificate of occupancy or any other administrative decision based [in] whole or part upon any zoning regulations or zoning maps adopted pursuant to the Zoning Act.

District of Columbia Zoning Regulations @ 8102.1 (1979).

n8 We do not reach the question -- addressed in Judge Kelly's opinion, post slip op. at 27-34 -- concerning the breadth of the "person aggrieved" requirement in the zoning context. As set forth in notes 6 and 7 supra, the Zoning Act and Regulations permit only a "person aggrieved" to appeal a decision of a zoning administrator to the BZA. Cf. DeLevay v. District of Columbia Rental Accommodations Commission, D.C.App., 411 A.2d 354, 359 (1980) (regulation permitting appeal from Rental Accommodations Office to Commission by "any person adversely affected" exceeds statutory authorization of appeal by "aggrieved party"). Because we conclude that Gottesman had standing to appeal to the BZA, we need not determine whether the "person aggrieved" language of the zoning laws is broad enough to allow appeal of a zoning decision to the BZA by CAG, a neighborhood organization, absent an allegation of specific injury to its members. We note that the issue of standing to appeal an administrative decision to higher administrative authority is primarily one of statutory construction. See id. 411 A.2d at 358-60. Administrative appeals do not necessarily depend on the elements of standing that judicial review would require. See 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE @ 22.08, at 239-40 (1958); 3 A. RATHKOPF, THE LAW OF ZONING AND PLANNING @ 37.03, at 37-40 & n.2, 37-49 (4th ed.) (April 1979).

For completeness, we note that the question of CAG's standing to appeal to the BZA is conceptually separate from the question of its standing to petition this court for review of a BZA decision adverse to its interests. If, for example, an agency imposes sanctions on a person not party to a complaint, that person may petition for review here in spite of -- indeed because of -- the absence below. See Ammerman v. District of Columbia Rental Accommodations Commission, D.C.App., 375 A.2d 1060, 1063 (1977). Nonetheless, when a person has the opportunity to present a complaint to an agency having jurisdiction, the failure to do so may preclude a petition for review of agency action by the court. See DeLevay, supra at 358. We note, finally, that when agency action in other contexts has adversely affected CAG's interests, this court has entertained CAG's petition for review. See Citizens Ass'n of Georgetown v. Simonson, 131 U.S. App. D.C. 152, 153, 403 F.2d 175, 176 (1968) (per curiam), cert. denied, 394 U.S. 975, 22 L. Ed. 2d 755, 89 S. Ct. 1454 (1969) (Congressional direction to Alcoholic Beverage Control Board to consider "the wishes of the persons residing or owning property in the neighborhood" in issuing licenses and CAG's allegation that many members reside or own property within neighborhood establishes nexus between plaintiff's interests and adverse action of defendants required to support judicial review of relicensing of saloon); Citizens Ass'n of Georgetown v. District of Columbia Alcoholic Beverage Control Bd., D.C.App., 288 A.2d 666, 669 (1972) (CAG has standing to seek D.C. Court of Appeals review under @ 1-1510 of issuance of liquor license) (citing Simonson, supra). See generally Basiliko v. Government of the District of Columbia, D.C. App., 283 A.2d 816 (1971); K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES @@ 22.00-.21 (1976 & Supp. 1980). See also French, Broadened Concepts of Standing in the Local District of Columbia Courts, 23 How. L.J. 255 (1980). [**11]

n9 The Zoning Regulations contain no provision for intervention. The Board presumably allowed intervention pursuant to its Supplemental Rules of Practice and Procedure, which provide:

At the time of the hearing on the appeal, the Board may in its discretion and for good cause shown, permit interested persons to intervene in the appeal for such general or limited purpose as the Board may specify.

Supplemental Rules of Practice and Procedure Before the Board of Zoning Adjustment, 22 DCRR @ 2.4 (1972).

The cases cited in the text below generally construe FED. R. CIV. P. 24, which regulates intervention in federal courts:
"Ordinary interveners [in administrative proceedings], as distinguished from public interest ones, are treated about the way interveners in a civil action in a federal court are treated." K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, supra @ 8.11, at 293.

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[*922] As a rule, an intervenor joins a preexisting dispute and cannot cure a jurisdictional defect in the original case. Intervention ordinarily will be denied if the intervenor is the only party [**12] who fulfills jurisdictional prerequisites. See, e.g., McClune v. Shamah, 593 F.2d 482, 486 (3d Cir. 1979) (district court properly denied motion of limited partnership to intervene in suit by limited partners when original plaintiffs lacked standing to assert claims); Gebhard v. GAF Corp., 59 F.R.D. 504, 507-08 (D.D.C. 1973) (motion of

employee to intervene in age discrimination suit by fellow employees denied when original plaintiffs failed to satisfy jurisdictional prerequisite of filing timely notice with EEOC); cf. Lidie v. California, 478 F.2d 552, 555 (9th Cir. 1973) (motion of food stamp applicants to add other plaintiffs properly denied when original plaintiffs were not qualified to represent class). In other words, an intervenor cannot come into a case that is not really there.

The courts, however, have established a narrow exception to this rule. In order to avoid excessive technicality, expense, and delay, a court in limited circumstances may treat an intervenor's claim as a separate action and decide the matter, while dismissing the original action. A court, accordingly, may invoke this exception only if there is an independent jurisdictional basis for [**13] the intervenor's claim and failure to adjudicate the claim would result in unnecessary delay. See, e.g., Miller & Miller Auctioneers, Inc. v. G.W. Murphy Industries, Inc., 472 F.2d 893, 895-96 (10th Cir. 1973) (district court lacked interpleader jurisdiction over original defendant but still had jurisdiction to award judgment to intervenor-defendant); Atkins v. State Board of Education, 418 F.2d 874, 876 (4th Cir. 1969) (per curiam) (original plaintiff failed to show standing to bring desegregation suit; case remanded so that parents of schoolchildren could intervene); Fuller v. Volk, 351 F.2d 323, 328-29 (3d Cir. 1965) (district court lacked jurisdiction over original plaintiffs; case remanded to determine whether court had independent basis for jurisdiction over intervenor-plaintiffs); Hunt Tool Co. v. Moore, Inc., 212 F.2d 685, 688 (5th Cir. 1954) (permissive intervention with independent jurisdictional grounds survives dismissal of original suit); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE @ 1920, at 613 (1972).

We are persuaded that Gottesman's intervention falls within this exception. First, because Gottesman's property adjoined Goto's, the Board [**14] had a basis for jurisdiction over Gottesman's claim independent of its jurisdiction over CAG's appeal. Generally, persons wishing to contest zoning determinations must demonstrate some damage -- damage greater than that suffered by the general public -- to satisfy the "person aggrieved" requirement. See 3 A. RATHKOPF, THE LAW OF ZONING AND PLANNING @ 37.03, at 37-52 & n.35 (4th ed.) (April 1979). Members of the Board, however, apparently assumed that, as the adjoining property owner, Gottesman did not have to claim any special damage to intervene in this case. n10 We agree. A property owner has a sufficient interest in the zoning of adjoining property to permit an appeal on the basis of that interest alone, without [*923] additional allegations of interest or injury. See Weiner v. City of Los Angeles, 68 Cal.2d 697, 706, 441 P.2d 293, 300, 68 Cal. Rptr. 733, 740 (1968) (en banc); Gnau v. Seidel, 25 Md. App. 16, 25-26, 332 A.2d 739, 744-45 (Ct. Spec. App. 1975); 3 A. RATHKOPF, supra @ 37.03, at 37-46 to -47; Comment, Standing to Appeal Zoning Determinations: The "Aggrieved Person" Requirement, 64 MICH. L. REV. 1070, 1079 & n.63 (1966). Accordingly, any [**15] defect in CAG's jurisdictional assertions, see note 8 supra, does not apply to Gottesman.

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n10 The following colloquy occurred at the end of the July 21, 1976, hearing:

MR. HARPS [of the Board]: That will be for my file. Anything I request you must also send to Mr. Gottesman and Mrs. Hinton.

MR. QUIN [Goto's attorney]: There is only one party here and you are identifying them both?

MR. HARPS: Mr. Gottesman is the man next door and I cannot eliminate him from this case. He is the man next door.

MR. QUIN: He did not take the appeal.

MR. HARPS: You cannot get any closer.

MR. HATTON: The Board will determine who are the parties.

MS. CUMMINGS [of the Board]: He can be made a party.

MR. GOTTESMAN: I can pay the fee and become a party. I move to intervene as a party.

MR. HARPS: Granted. I do not think the Board will reverse me on that.

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Second, failure to adjudicate Gottesman's claim would result in unnecessary delay in the resolution of this case. In reliance on advice of Building Division [**16] officials, Goto began building her kiln in November 1974. She completed and began operating it in August 1975, five years ago. CAG instituted its appeal in March 1976, and Gottesman intervened in July of that year. The Board issued its final order on March 28, 1978. To dismiss the case for lack of jurisdiction at this late stage would only further protract this lengthy proceeding and disserve the interests of justice.

Third, permitting the case to proceed on the strength of Gottesman's standing does not prejudice any party. See United States Steel Corp. v. EPA, 614 F.2d 843, 846 & n.4 (3d Cir. 1979) (intervenor-plaintiff permitted to proceed after dismissal of original plaintiff when defendant on notice of intervenor's claims); Atkins, supra at 876 (case remanded to permit intervention by new plaintiffs when change would not cause prejudice). Gottesman has been involved in a timely fashion. See note 10 supra. As an immediate neighbor, he would be a proper appellant before the Board. Furthermore, the interests of Gottesman and CAG have been closely identified with each other throughout this proceeding. Gottesman testified as a witness for CAG before he intervened; [**17] Gottesman and CAG filed a single brief in this court. In these circumstances, no party can claim lack of notice of Gottesman's participation or claims.

Finally, no evidence of record suggests that Gottesman intervened in order to save the Board's jurisdiction, although in retrospect his entry may have had that effect. See note 8 supra. Compare United States Steel Co., supra at 846 (intervention after dismissal of original plaintiff permitted when intervenor was attempting only to protect own interests, not to cure jurisdictional defect) with McClune, supra at 486 (intervention properly denied when directed toward forestalling defendants' argument that original plaintiffs lacked standing to assert certain claims). The parties appear to have assumed CAG's standing. Gottesman has participated in this proceeding from the beginning. There is no indication that this case presents an effort to create sham jurisdiction.

We accordingly treat CAG's pleadings as those of Gottesman and conclude that the Board had jurisdiction to consider the appeal.

C. Finally, there is the question whether CAG's appeal was timely filed. The question of timeliness is jurisdictional; if the [**18] appeal was not timely filed, the Board was without power to consider it. See Bertrand v. Zoning Board of Review, 99 R.I. 329, 331-32, 207 A.2d 604, 605 (1965).

By rule, the Board requires appeals to be filed in merely a "timely" manner. n11 When an administrative agency has not adopted a specific time limit on appeals, a reviewing court should apply a standard of reasonableness. n12 See State ex rel. Housing [*924] Authority v. Wind, 337 S.W.2d 554, 558 (Mo. Ct. App. 1960); Cave v. Zoning Board of Appeals, 49 A.D.2d 228, 231, 373 N.Y.S.2d 932, 935 (App. Div. 1975).

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n11 The BZA's Supplemental Rules of Practice and Procedure provide in part:

Any person aggrieved by any order, requirement, decision, determination, or refusal made by any administrative officer or body . . . in the administration or enforcement of the Zoning Regulations, may file a timely appeal with the Board . . . .

Supplemental Rules of Practice and Procedure Before the Board of Zoning Adjustment, 22 DCRR @ 2.21 (1972) (emphasis added).

n12 We agree, however, with cases and commentators that a specific time limit on appeals would serve the salutary purpose of increasing certainty and predictability for all parties to Board proceedings. See Keating v. Zoning Bd. of Appeals, 325 A.2d 521, 523-25 (Me. 1974); Ehrenberg v. Persons, 8 A.D.2d 18, 21, 185 N.Y.S.2d 369, 372 (App. Div. 1959) (per curiam); 3 A. RATHKOPF, supra @ 37.04, at 37-53 to -54.

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[**19]

In considering whether CAG's appeal was timely filed, the Board began to run the clock with Fahey's letter of January 6, 1976, although CAG had oral notice of that decision six months earlier. In its final order, the BZA concluded: ["The] written ruling dated January 6, 1976 was the first action which could be appealed to the Board." The BZA cites nothing in its order indicating that appeal lies only from a written decision, nor do the regulations explicitly establish such a requirement. According to the Zoning Act and Regulations, an appeal will lie from "any decision of an administrative officer granting or refusing a building permit or granting or withholding a certificate of occupancy or any other administrative decision based [in] whole or part upon any zoning regulations or zoning maps adopted pursuant to the Zoning Act." District of Columbia Zoning Regulations @ 8102.1 (1979); see D.C. Code 1973, @ 5-420; notes 6-7 supra. In similar circumstances, courts in other jurisdictions have concluded that a verbal decision is an appealable order which begins the running of the time for appeal. See State ex rel. Beacon Court Inc. v. Wind, 309 S.W.2d 663, 665-66 (Mo. [**20] Ct. App. 1958); Hunter v. Board of Appeals, 4 A.D.2d 961, 962, 168 N.Y.S.2d 148, 150-51 (App. Div. 1957) (mem.).

We conclude, however, that we cannot appropriately overrule the Board's construction of the Act and Regulation. Administrative determinations regarding an agency's internal procedures are entitled to due respect and should not be reversed unless "clearly wrong." Capitol Hill Restoration Society v. Zoning Commission, D.C.App., 380 A.2d 174, 181-82 (1977), overruled on other grounds, Citizens Association of Georgetown v. Zoning Commission, D.C.App., 392 A.2d 1027 (1978) (en banc); see Leefer v. Administrator, National Aeronautics & Space Administration, 177 U.S. App. D.C. 62, 66, 543 F.2d 209, 213 (1976) (per curiam) (agency interpretation of its regulations honored unless "plainly erroneous or inconsistent with the regulations") (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414, 89 L. Ed. 1700, 65 S. Ct. 1215 (1945)). Applying that test, we conclude it was not clearly wrong for the Board to calculate timeliness of CAG's appeal by reference to the written order; thus, we defer to that interpretation. See Gueory v. Hampton, 167 U.S. App. [**21] D.C. 1, 4-5, 510 F.2d 1222, 1225-26 (1974); Wasserman v. Udall, 234 F. Supp. 651, 654 (D.D.C. 1964). n13 Our deference is reinforced by our concern that we cannot foresee how different interpretation of the Act and Regulation, linking timeliness of an appeal to oral notice of a decision, would affect how the BZA functions in future cases. See Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 674-79, 94 L. Ed. 1194, 70 S. Ct. 876 (1950). n14

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n13 Cf. People's Counsel v. Public Serv. Comm'n, D.C.App., 414 A.2d 520 (1980) (per curiam). There we held that the time for filing an appeal from a decision of the Public Service Commission runs from the release of the printed copy of the decision rather than from a verbal announcement at a "sunshine hearing." Id. at 521. In People's Counsel, the Commission had offered no interpretation of the statutory terms at issue, leaving the question to this court in the first instance. Id. In that case, we accordingly were required to construe a statute, performing a task more appropriate to a court than an agency, and our construction did not interrupt the prior practice of the agency. [**22]

n14 We should not be understood, however, to hold that the BZA must interpret timeliness by reference to a written decision within the Department of Housing and Community Development.

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Given that calculation of the timeliness of CAG's appeal began with the January 6 Fahey letter, the Board reasonably concluded that the appeal two months later was timely. See Keating v. Zoning Board of Appeals, 325 A.2d 521, 524-25 & n.5 (Me. 1974) (60 days is a reasonable appeal period). We cannot hold this conclusion "arbitrary, capricious, an abuse of discretion, [*925] or otherwise not in accordance with law." D.C. Code 1978 Supp., @ 1-1510 (3)(A). We conclude that the Board had jurisdiction.

III.

Goto claims that the Board is estopped from enforcing the Zoning Regulations against her because she relied to her detriment on the assurances of District officials that the kiln could be constructed without a permit. She also contends that the claim of Gottesman and CAG is barred by laches because they waited to appeal until after she had undertaken significant work on the kiln.

Although the [**23] courts disfavor the affirmative defenses of estoppel and laches because of the public interest in enforcement of the zoning scheme, see Wieck v. District of Columbia Board of Zoning Adjustment, D.C.App., 383 A.2d 7, 10 (1978) (citing cases), we conclude that the appeal was barred by laches in this case. n15

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n15 The same elements of prejudice cited by Goto to support her laches defense give weight to her argument that the District is estopped from reversing its agents' earlier decision that a permit is not required. In order to establish a defense of equitable estoppel, Goto would be required to prove that (1) acting in good faith, (2) on affirmative acts of the District, (3) she made expensive and permanent improvements in reliance, and (4) the equities are strongly in her favor. See Wieck, supra at 11; District of Columbia v. Cahill, 60 App. D.C. 342, 343, 54 F.2d 453, 454 (1931).

Goto arguably has met all these requirements. Her estoppel claim presents a problem, however. It is not clear that estoppel will bar a case brought by a neighboring landowner; arguably, that defense may be asserted only against the municipality which rendered the decision on which a party relied. See Wright v. DeFatta, 129 So.2d 614, 619 (La. Ct. App. 1961); Lichte v. Heidlage, 536 S.W.2d 898, 901 (Mo. Ct. App. 1976). The District itself did not become involved in enforcing Zoning Regulations against Goto until after the BZA proceedings, i.e., until the BZA rendered a decision adverse to Goto which became the official position of the District. The estoppel defense thus may not have been available to Goto until the proceedings in this court, in which she could argue that the BZA could not compel her to observe zoning requirements that other agents of the District were estopped to enforce.

Given our conclusion that laches barred the appeal, we need not resolve these issues.

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[**24]

Laches will bar the claim of Gottesman and CAG if they delayed unreasonably in bringing their appeal to the Board, to Goto's prejudice. n16 "The principal element in applying the doctrine of laches is the resulting prejudice to the defendant, rather than the delay itself." 4 A. RATHKOPF, supra at 67-12 (1967) (footnote omitted). See generally American University Park Citizens Association v. Burka, D.C.App., 400 A.2d 737, 740 (1979); Wieck, supra at 11.

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n16 Laches presents a question distinct from that of the timeliness of CAG's appeal, discussed in Part II.C., supra. In deciding that jurisdictional question, we look only to the period from the zoning official's decision to the filing of the appeal. See Supplemental Rules of Practice and Procedure Before the Board of Zoning Adjustment, 22 DCRR @ 2.21 (1972); note 11 supra. In contrast, to determine the validity of a laches defense, we look to the entire course of events. See, e.g., American Univ. Park Citizens Ass'n v. Burka, D.C. App., 400 A.2d 737, 740-45 (1979); Wieck, supra at 11-13. Moreover, laches may bar consideration of an appeal which, for jurisdictional purposes, would be timely, just as laches may bar an equitable claim brought within an applicable

statute of limitations. See Amidon v. Amidon, D.C.App., 280 A.2d 82, 84 (1971).

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[**25]

We look, first, to the record before the Board as to the timing of the claim in order to determine whether there was any unreasonable delay. Goto began work on the kiln in November 1974; Gottesman and Hinton learned by June 1975 that Dripps had decided no permit was necessary. During that seven-month period, Gottesman and CAG were working within the administrative process to attempt to prevent construction of the kiln; that delay is reasonable and cannot be held against them. See Larkin v. Tsavaris, 85 So.2d 731, 733 (Fla. 1956); Morris v. Borough of Haledon, 24 N.J. Super. 171, 178, 93 A.2d 781, 784 (Super. Ct. App. Div. 1952).

The critical period was from June 1975 to March 1976. Hinton and Gottesman were aware of Dripps' ruling by June 1975. The record reveals no reason why they waited until November 1975 to discuss that decision with Dripps. That unexcused delay of five months was compounded by an additional [*926] two months during which they requested (the record does not show when) and received a written decision. There is no record indication that bureaucratic delay was responsible for the two-month lag between the meeting on November 18, 1975, and the [**26] written decision of January 6, 1976. Finally, the delay of still another two months between that letter decision and the filing of the appeal on March 4, 1976, adds to the unreasonableness of the timing of CAG's action. Accordingly, although we have held that the appeal was timely filed, see Part II.C. supra, we cannot agree with the Board's conclusion that "the appellants have diligently objected to the kiln . . . ." During the nine months between their discovery of Dripps' decision and the filing of the appeal, Gottesman and CAG had knowledge of their rights and an opportunity promptly to assert them.

The second element of the laches equation is prejudice to Goto resulting from the delay. See American University Park Citizens Association, supra at 740. As the Board itself found, Goto spent approximately $2,000 of the $5,000 to build the kiln after Osborg, see note 2 supra, told her in April 1975 that no permit was required. She also expended time and money seeking a natural gas hookup at a hearing before the Public Service Commission. See note 3 supra. Essentially, therefore, the neighbors stood by and watched Goto spend time and money months before [**27] pressing their objections before the BZA.

Under similar circumstances, courts in other jurisdictions have concluded that equity requires the barring of a claim. In Hill v. Board of Adjustment, 122 N.J. Super. 156, 299 A.2d 737 (Super. Ct. App. Div. 1972), for example, homeowners relied on a building inspector's grant of a permit to build a garage. Id. at 158, 299 A.2d at 738. The homeowners began construction and had spent $3,500 of an estimated cost of $6,000 when, four months later, neighbors alerted the building inspector that the garage construction violated the side-yard requirement. Id. at 159, 299 A.2d at 738. The Board of Adjustment granted a variance to the homeowners. Id. The court held that the neighbors' appeal was barred by estoppel and laches. Id. at 162-63, 299 A.2d at 740-41. Similar, and occasionally even shorter, delays have been held to bar claims in light of a party's reliance on a zoning official's decision, to his or her prejudice. See Medical Arts, Inc. v. Rohrbaugh, 293 So.2d 366, 369 (Fla. Dist. Ct. App. 1974) (laches bars appellee-neighbors' suit filed three months after issuance of building permit and two months after complaint [**28] to City Council when

appellant had spent considerable sums on construction before suit filed); Black v. Barnes, 215 Ga. 827, 829, 114 S.E.2d 38, 39 (1960) (laches bar plaintiff-neighbor's suit filed three months after commencement of construction when defendant had undertaken substantial building activity and financial commitment); Oeth v. Felty, 421 S.W.2d 860, 860-62 (Ky. 1967) (laches bars plaintiff-neighbors' suit filed six months after issuance of permit to erect television transmission tower when neighbor moved for rehearing only after tower partially built and filed suit only after tower completed); Maroney v. Friere, 74 Misc.2d 339, 341, 343 N.Y.S.2d 183, 185 (Sup. Ct. 1973) (laches bars petitioner-neighbors' suit filed four months after issuance of building permit when respondents had entered into building contract in interim).

Goto's actions in reliance on the assurances of zoning officials were reasonable, in contrast with the unexplained delays by her neighbors in instituting an appeal, to Goto's substantial prejudice.

IV.

We conclude that the Board had jurisdiction over this appeal. Nonetheless, the Board's conclusion that Gottesman's and CAG's claim was [**29] not barred by laches was "unsupported by substantial evidence in the record of the proceedings before the court." D.C. Code 1978 Supp., @ 1-1510(3)(E). We therefore set aside the BZA's order reversing the decision of the Zoning Administrator dated January 6, 1976.

So ordered.

CONCURBY: KELLY (In Part)

DISSENTBY: KELLY (In Part)

DISSENT: [*927] KELLY, Associate Judge, concurring in part and dissenting in part:

I agree with the majority opinion's holding as to laches but would reverse for lack of jurisdiction in the Board.

The Board's final order in this case held that petitioner's kiln was a "building" and a "building addition" under @ 1202 of the Regulations, and not an "accessory structure" which would have automatically been permitted within the C-1 zone. n1 Variances from the floor area ratio, rear yard and open court requirements were thus necessary.

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n1 The Board interpreted the term "building," defined as a "structure having a roof supported by columns or walls for the shelter, support or enclosure of persons, animals, or chattel" in @ 1202 of the Zoning Regulations, to include the kiln. It rejected petitioner's argument that a kiln is not for sheltering, supporting, or enclosing pots but for firing, or "cooking" them, and that it is thus most comparable to a backyard barbecue. The Board also found that the gas pipes running from the main building to the kiln constituted such "communication" between them as to make them one building, despite the following language in the Regulations: "The existence of communication between separate portions of a structure below the main floor shall not be construed as making

such structure one building" (@ 1202) and despite the absence of any statutory or case law referring to pipes or plumbing as a means of "communication" between buildings. ("Communication" normally appears to be used as an equivalent term for "access.") In my judgment, the Board's interpretation of the terms "building" and "communication" are not only contrary to common sense but also plainly erroneous and inconsistent with the Zoning Regulations. See Dietrich v. District of Columbia Board of Zoning Adjustment, D.C.App., 320 A.2d 282, 286 (1974).

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[**30]

The Board found merit neither in petitioner's argument that the BZA was estopped by petitioner's good faith detrimental reliance on the actions of the District of Columbia officials nor in her contention that the defense of laches barred the CAG from bringing its appeal. n2

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n2 I note in passing that the Board's conclusions and findings of fact seem insufficient to defeat what the Board itself seems to concede is a prima facie case of estoppel against the municipality, which is a cognizable defense to Zoning Board jurisdiction in the District of Columbia. See Wieck v. District of Columbia Board of Zoning Adjustment, D.C.App., 383 A.2d 7 (1978); District of Columbia v. Stewart, D.C.App., 278 A.2d 117 (1971); District of Columbia v. Cahill, 60 App.D.C. 342, 54 F.2d 453 (1931); and see Smith v. District of Columbia Board of Zoning Adjustment, D.C.App., 342 A.2d 356 (1975).

The Board concluded that

Ms. Goto did indeed receive the approval of the government of the District of Columbia to construct the kiln.

And that

The total cost of building the kiln was approximately $5,000, of that total cost, approximately $2,000 was expended after Ms. Goto received an indication from the permit authorities in April of 1975 that no permit was required.

Unless the Board found, as it did not, that petitioner's reliance was insufficiently detrimental or not reasonable and in good faith, or that the balance of equities does not favor the petitioner here, it would be difficult to affirm the Board's conclusion that estoppel was an insufficient defense. See Wieck v. District of Columbia Board of Zoning Adjustment, supra at 11:

The necessary elements [of estoppel] are: a party (1) acting in good faith, (2) on affirmative acts of a municipal corporation, (3) makes expensive and permanent improvements in reliance thereon, and (4) the equities strongly favor the party invoking the doctrine . . . . Furthermore, the reliance of the party must be justifiable . . . . [Citations omitted.]

And see Smith v. District of Columbia Board of Zoning Adjustment, supra at 359:

[The] Board must make findings as to (a) whether there was reasonable and good faith reliance by petitioners . . . and (b) the extent to which they were

on notice that the [structure] might violate the Zoning Regulations.

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[**31]

The BZA also found that the CAG had standing before it as a "person aggrieved" within the meaning of the Zoning Regulations, @ 8102, and as an "appellant" alleging error under @ 8206.

In reviewing the BZA's decision, or the decision of any administrative agency with quasi-judicial powers, this court must, before reaching the standards of review set forth in @ 1-1510 of the District of Columbia Administrative Procedure Act, make two threshold determinations. First, as any court, it must ascertain the adequacy of its own jurisdiction. Reid v. United States, 211 U.S. 529, 53 L. Ed. 313, 29 S. Ct. 171 (1909); Minnesota v. Hitchcock, 185 U.S. 373, [*928] 46 L. Ed. 954, 22 S. Ct. 650 (1902). Second, almost as a conceptual prerequisite to its own exercise of jurisdiction, it must assure itself that there was a proper assertion of jurisdiction by the agency (or court) below. Normally, this court is bound by the BZA's interpretation of its own regulations unless it is plainly erroneous or inconsistent with the Regulations. Dietrich v. District of Columbia Board of Zoning Adjustment, D.C.App., 320 A.2d 282, 286 (1974). However, an agency's faulty interpretation of its [**32] governing jurisdictional regulations can never be harmless error. Our inherent judicial authority in matters of statutory construction requires us to consider de novo the propriety of an agency's exercise of jurisdictional power under its statutory grant of authority. Furthermore, this inquiry needs no prompting; it must be done by this court sua sponte. n3 Although a presumption of regularity attaches to jurisdictional questions, it may be disproved by extrinsic evidence or by the record itself. Pardo v. Wilson Line of Washington, Inc., 134 U.S. App.D.C. 249, 252, 414 F.2d 1145, 1148 (1969).

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n3 Petitioner raised the issue of jurisdiction in her motion to dismiss, which was summarily denied before the first hearing began. See Smith v. District of Columbia Board of Zoning Adjustment, supra at 359 n.8, where we suggested that defenses to an agency's exercise of jurisdiction be heard before proceeding to the merits, "in the interest of judicial economy, [so] that this court [need] not be compelled to reach the merits . . . if petitioners will prevail in their defense . . . ." The jurisdictional question was raised there, as here, in a motion to dismiss, but there based solely on the defenses of estoppel and laches.

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[**33]

The crucial jurisdictional question before us, in my opinion, is whether the CAG, appellant below, had proper standing to come before the Board and contest the Zoning Administrator's January 6, 1976, decision in Miss Goto's favor. n4 I recognize that over the years CAG has brought many important cases in the interest of its members, but this is the first time this point has been squarely presented.

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n4 The name of Mr. Gottesman, intervenor both here and before the BZA, does not appear anywhere on the March 4, 1976, appeal form. He was not granted leave to intervene on the side of the CAG until July 21, 1976, the day of the first BZA hearing. There is nothing in the record that argues that his relationship to the CAG is the basis for the CAG's appeal.

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The Board's jurisdiction is set forth in D.C. Code 1973, @ 5-420, which codifies section 8, chapter 534 of the congressional Act of June 20, 1938. n5 The Act empowers the Zoning Commission to adopt Zoning Regulations pursuant to it and also give the BZA the power [**34] to "make special exceptions" and "pass upon disputed questions . . . as they arise in the administration of the Regulations." It then sets forth the Board's jurisdiction to hear "appeals . . . taken by any person aggrieved [etc.]" (the language is identical to @ 8102 of the Regulations) and gives the Board four categories of powers "upon appeals": (1) to "hear and decide appeals where it is alleged by any appellant that there is error . . ." (identical to @ 8206), n6 (2) to hear and decide requests for special exceptions, (3) to grant hardship variances, and (4) to assume "all the powers of the officer or body from whom the appeal [*929] is taken" necessary to "exercise the above mentioned powers." n7

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n5 The 1938 Act is found in Pub. L. No. 684, 52 Stat. 797.

n6 "Appeals from Administrative Decisions," @ 8102, says, in pertinent part:

The Zoning Act of June 20, 1938 (52 Stat. 797), as amended, provides that appeals to the Board of Zoning Adjustment may be taken by any person aggrieved, or organization authorized to represent such person . . . by any decision of an administrative officer . . . or any other administrative decision based in whole or part upon any zoning regulations or zoning maps . . . .

Under @ 8206, the Board

shall hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination or refusal made by any administrative officer or body . . . in the administration or enforcement of these regulations.

At the first BZA hearing on this action, Board Member Cummings could not distinguish the two provisions. She complained, "There are two sections under which one could appeal and I could never get them straight and I could never understand why there were two sections." [**35]

n7 The BZA's powers under (2) and (3) were codified in the Regulations under @@ 8207.11 and 8207.2 ("Original Jurisdiction"), while (4) was codified in @ 8208 ("Administrative Powers").

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The Act sets forth two cumulative (not alternative) requirements for appeals to the BZA: first, a showing of aggrievement, and, second, either invoking the Board's original jurisdiction under @@ 8207.11 or 8207.2 or its appellate

jurisdiction under @ 8206 by "alleging error" in an administrative order, etc. Thus, all applicants to the Board's jurisdiction, whether original or appellate, must include a @ 8102 showing that they are aggrieved.

Presuming that the CAG is technically an "organization," rather than a "person" under @ 8102, it bears the additional burden of showing that it is "authorized to represent [an aggrieved] person." There is nothing in the record before us to support such a finding.

Even assuming that the CAG is a "person," the CAG, and the BZA in its ultimate conclusions, made no adequate showing that it was an "aggrieved" one. n8 Given the apparent confusion regarding the interpretation [**36] of the term "aggrieved person" within the Zoning Regulations, I briefly examine its provenance and use in this jurisdiction and its application (particularly to neighborhood associations) in zoning board of appeals cases elsewhere.

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n8 The Board found that "[The] Citizens Association of Georgetown is a neighborhood citizens' association composed of many residents of the area, including the immediate vicinity of the site which is the subject of this appeal. The Association has often appeared before both the Board of Zoning Adjustment and the Zoning Commission to represent the views of its members on zoning issues and to protect its community from negative influences." There was no evidence in the record to support these findings, which appear to be based entirely upon facts of which the Board took administrative notice. Aside from the propriety of adopting the CAG's self-depiction as a fighter against "negative influences," I question its unsupported finding that the CAG has members residing in the immediate vicinity and, if there are such members nearby, that it is authorized to represent their interests.

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[**37]

The term "aggrieved person" is not unfamiliar language in the District of Columbia. It is used to demarcate the standing required for judicial review of agency action in both the District of Columbia Administrative Procedure Act [DCAPA] n9 and in the analogous provision in the Federal Act. n10

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n9 D.C. Code 1978 Supp., @ 1-1510.

n10 5 U.S.C. @ 702 (1970).

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In Basiliko v. Government of the District of Columbia, D.C.App., 283 A.2d 816, 818 (1971), this court first construed the "aggrieved person" language in the DCAPA, adopting a three-part standing test that required a showing of injury in fact, caused by agency action which was arbitrary, capricious, or in excess of statutory authority, and within the zone of interests to be protected by the statute. n11

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n11 See Ballerina Pen Co. v. Kunzig, 140 U.S.App.D.C. 98, 101, 433 F.2d 1204, 1207 (1970), cert. denied sub nom. National Industries for Blind v. Ballerina Pen Co., 401 U.S. 950, 28 L. Ed. 2d 234, 91 S. Ct. 1186 (1971) (citing the test in the 1970 Supreme Court companion cases, Barlow v. Collins, 397 U.S. 159, 164-65, 25 L. Ed. 2d 192, 90 S. Ct. 832 (1970), and Association of Data Processing Service Associations v. Camp, 397 U.S. 150, 153-55, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970)).

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[**38]

The underlying concern in limiting standing is generally "that the questions . . . be framed with the necessary specificity, that the issues . . . be contested with the necessary adverseness and that the litigation . . . be pursued with the necessary vigor . . . ." Flast v. Cohen, 392 U.S. 83, 106, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968).

"The question of standing depends primarily upon the existence of a logical and adequately direct nexus between the plaintiff's interests and the adverse action of the opposing party or parties." Citizens Association of Georgetown v. Simonson, 131 U.S.App.D.C. 152, 153, 403 F.2d 175, 176 (1968), cert. denied sub nom. 3259 M Street, Inc. v. Citizens Association of Georgetown, 394 U.S. 975, 22 L. Ed. 2d 755, 89 S. Ct. 1454 (1969).

[*930] Standing restrictions are generally devised "not so much [out of] fear of a plethora of parties in interest as [out of] apprehension that standing might be abused by a person with no legitimate interest in the proceedings but with a desire only to delay the [agency action] for some private selfish reason." Office of Communication of United Church of Christ v. FCC, 123 U.S.App.D.C. 328, [**39] 335, 359 F.2d 994, 1001 (1966) (emphasis in original). And see legislative history cited, id. at 335 n.12, 359 F.2d at 1001 n.12.

Since the "aggrieved person" language that Congress employed in the District of Columbia Zoning Regulations, @ 8102, cannot, under any canons of statutory construction, be treated as surplusage or as adventitious terminology, especially given the established history of the term in federal law, the question becomes how to apply the term in Board of Zoning Adjustment cases. Since there has been no automatic "aggrieved person" standing statutorily granted to citizens associations in these cases, n12 I look to the use of the term elsewhere, as it applies to organizations and as used in zoning appeals.

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n12 Compare Citizens Association of Georgetown v. Simonson, supra at 153, 403 F.2d at 176, where Congress explicitly directed the Alcoholic Beverage Control Board to consider "the wishes of the persons residing or owning property in the neighborhood" in issuing liquor licenses. Simonson also involved the CAG, which there, unlike here, alleged in its complaint "that many of its members reside or own property within the neighborhood" and was shown to be "an authorized spokesman organized to promote [the neighbors'] interests for its individual members." Id. Nor was Simonson a case construing "aggrieved person" terminology. Cf. Kopff v. District of Columbia Alcoholic Beverage Control

Board, D.C.App., 381 A.2d 1372, 1376-77 (1977) (Advisory Neighborhood Commission members have individual standing as area residents to seek court review of ANC's statutorily granted rights).

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[**40]

"A mere 'interest in a problem,' no matter how long standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient itself to render an organization 'adversely affected' or 'aggrieved' within the meaning of the APA [5 U.S.C. @ 702]." Sierra Club v. Morton, 405 U.S. 727, 739, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972) (quoted in United States v. Richardson, 418 U.S. 166, 177, 41 L. Ed. 2d 678, 94 S. Ct. 2940 (1974)).

In zoning review cases, where aggrieved person language is frequently employed, n13 the test is generally whether the applicant for relief "show[s] a sufficient interest in the subject matter of the application that he will actually be injured by the governmental action. . . . The rule that one without some right, title or interest in property cannot apply for relief, rests on the theory that hardship . . . cannot be incurred by a person who is without some valid attachment to the land to which the application relates. ROHAN, ZONING AND LAND USE CONTROLS @ 51.02[1] (1979). "In a sense, every citizen of the community has a stake in the disposition of each zoning dispute, and may be 'aggrieved' by administrative [**41] decisions which he regards as erroneous. But it seems unlikely that the draftsmen . . . could have intended to give standing to such a broad class of persons." ANDERSON, AMERICAN LAW OF ZONING @ 21.06 (1968). See also 3 A. RATHKOPF, LAW OF ZONING AND PLANNING @ 37.03 (4th ed. 1979).

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n13 Most state enabling statutes have been modeled after the Standard State Zoning Enabling Act of 1926 which provides for appeals to the zoning board "by any person aggrieved" (@ 7).

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The cases generally require a "specific, personal and legal interest," Krejpcio v. Zoning Board of Appeals, 152 Conn. 657, 211 A.2d 687, 689 (1965), and, more than a general interest in the viability of the community zoning plan, "a pecuniary interest injuriously affected." Tyler v. Board of Zoning Appeals, 145 Conn. 655, 145 A.2d 832, 835 (1958). One test is the person's "'direct', 'immediate', 'pecuniary' and 'substantial' interest in the subject matter of the litigation . . . ." Baker v. Zoning Hearing Board of West Goshen Township [**42] , 27 Pa. Commw. 602, 367 A.2d 819, 822 (1976).

Property owners' associations cannot be characterized as "aggrieved" unless they [*931] "successfully demonstrate[] that those whom [they] represent have a significant interest in the matter." ROHAN, supra at @ 51.02[2]. See Vitolo v. Chave, 63 Misc. 2d 971, 314 N.Y.S.2d 51 (1970); RATHKOPF, supra at @ 37.03[5], and see ANDERSON, supra at @@ 21.05 to 21.10. A property owners' association that does not own land affected by a [zoning] board decision is not a person aggrieved by such a decision. Lido Beach Civic Association v. Board of Zoning Appeals, 13 App. Div. 2d 1030, 217 N.Y.S.2d 364 (1961); accord, Stocksdale v. Barnard, 239 Md. 541, 212 A.2d 282, 284 (1965) ("an appeal is

not authorized by an association as a party aggrieved [even] by reason of its members being aggrieved").

In light of the general consensus in federal law and in zoning appeals cases that "aggrieved" organizations must represent their members' concrete interests in a contested administrative decision, and in view of the specific language in @ 8102 of our Regulations that these appeals be made by an "organization [**43] authorized to represent [an aggrieved] person," and the lack of any per se standing exemptions in the regulations for citizens groups such as the CAG, n14 I would hold that the BZA must, before asserting jurisdiction, establish both "the existence of a logical and adequately direct nexus," Citizens Association of Georgetown v. Simonson, supra at 153, 403 F.2d at 176, between the interests of its members and the administrative decision it is contesting, and its own authority to represent those interests. Furthermore, these "interests" must be specific and significant, viewed under the standards we enumerated in Basiliko v. Government of the District of Columbia, supra at 818.

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n14 D.C. Code 1973, @ 5-420 exempts citizens associations "created for civic purposes and not for profit" only from paying the filing fee required in appeals to the BZA.

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The record before us is devoid of anything but vague, generalized assertions of injury. When asked on the BZA's application form for appeals to "state manner [**44] in which appellant is aggrieved by administrative decision," the CAG answered: "Decision permits the erection of addition to (or accessory to) non-conforming building with substandard rear yard, thereby increasing congestion and density of development in Georgetown Historic District." Asked to "state briefly the allegations of error in administrative decision," the CAG said: "Decision improperly relieves owner of F.A.R. [floor area ratio] and rear yard requirements in the C-1 Zone and allows a rear addition to a non-conforming structure reducing depth of rear yard . . . . Also permits unauthorized use in C-1 Zone, i.e., fabrication of ceramics."

Neither answer is adequate. Not only is the logical nexus between the backyard kiln in question and "increasing congestion and density of development" unexplained, the relationship of the CAG to the "Georgetown Historic District" designation is not mentioned, nor is there any allegation that CAG members live in the area of petitioner's kiln or are affected in any way by its construction.

I do not believe such an application is sufficient to establish aggrievement under @ 8102. Nor could the inadequacy of the application information [**45] have been cured by the record before the Board. n15

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n15 The only neighbors, other than Mr. Gottesman, who appear in the record, are the twelve who submitted letters to the Board in support of petitioner. They all say she was a good neighbor and that they did not believe her studio or the kiln was harmful. Her next door neighbor, in fact, said, "The shop in no way is offensive to me or to anyone else, in fact, it is an asset to the block. I see no reason why it should not be allowed to remain in business."

Another neighbor said, "We have come to regard this studio as one of the valued cultural institutions of our neighborhood. We would be sorry to see Ms. Goto unable to continue with her fine neighborhood cultural service."

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Although the Board says, in its final order, that "to accept the position [on standing] advanced by Miss Goto would be to effectively negate the appeals process," I disagree. The appeal procedure under @@ 8102 and 8206 need not necessarily bar cases such as this. On the contrary, establishing [**46] proper standing before the onset of [*932] a BZA hearing will ensure that the questions before the Board are "framed with the necessary specificity . . . contested with the necessary adverseness, and pursued with the necessary vigor." Flast v. Cohen, supra at 106. Although Congress could have extended automatic standing to groups that seek to represent the public interest, such as the CAG, it did not, and this court may not.

There is no factual support in the record for establishing standing for Gottesman. He filed no complaint; he testified for CAG at the July 21, 1976 hearing and orally moved to intervene as a party at the end of the hearing. His objections to the kiln are general and unrelated to any injury to him. The Board made no finding that Gottesman was a "person aggrieved;" he was allowed to intervene because "he was the man next door." I would not confer automatic standing upon an adjoining property owner without some allegation of injury to that specific property. Courts have frequently denied standing to adjoining property owners who failed to make a sufficient showing of special or pecuniary damages. See, e.g., Stephens v. Tate, 147 Ga. App. 366, [**47] 249 S.E.2d 92 (1978); Waltham Motor Inn, Inc. v. LaCava, 3 Mass. App. Ct. 210, 326 N.E.2d 348 (1975); Housing Authority of the City of Melbourne v. Richardson, 196 So.2d 489 (Fla. Dist. Ct. App. 1967); Kalvatis v. Village of Port Chester, 235 N.Y.S.2d 44 (1962). See also Western Michigan University Board of Trustees v. Brink, 81 Mich.App. 99, 265 N.W.2d 56, 58 n.1 (1978) ("If adjoining landowners could suffer special damages, then they can easily plead them.")

Since the CAG did not establish its standing n16 as required under the Zoning Regulations, I would hold the Board's denial of petitioner's motion to dismiss for lack of jurisdiction was plainly erroneous.

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n16 See DeLevay v. District of Columbia Rental Accommodations Commission, D.C.App., 411 A.2d 354 (1980), for a recent discussion of standing to bring an appeal to the RAC pursuant to RAC Regs. @ 5.30 (an interpretation of the "aggrieved party" language in the Rental Accommodations Act, D.C. Code 1978 Supp., @ 45-1652(g).

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490 A.2d 628 printed in FULL format.

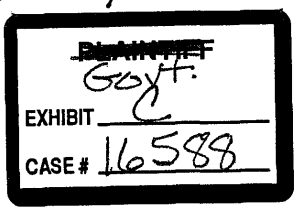
WOODLEY PARK COMMUNITY ASSOCIATION, PETITIONER, v. DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT, WASHINGTON-SHERATON CORPORATION, INTERVENOR, WASHINGTON-SHERATON CORPORATION, PETITIONER, v. DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT

One year delay Not reasonable One month delay was reas.

Nos. 83-1276, 84-10

District of Columbia Court of Appeals

490 A.2d 628; 1985 D.C. App. LEXIS 365



December 12, 1984, Argued
April 11, 1985, Decided

PRIOR HISTORY: [**1]

On Petition for Review of a Decision of the District of Columbia Board of Zoning Adjustment

CORE TERMS: parking, space, hotel, negotiation, zoning, regulation, traffic, building permit, joint statement, setback, height, occupancy, calculation, laches, loop, substantial evidence, accessory use, rebuilding, permanent, estoppel, revised, timeliness, notice, off-street, convention, motion to dismiss, certificate, variance, planned, drawing

COUNSEL: William H. Carroll for Woodley Park Community Association.

Richard B. Nettler, Assistant Corporation Counsel, with whom Inez Smith Reid, Corporation Counsel, John H. Suda, Principal Deputy Corporation Counsel, Charles L. Reischel, Deputy Corporation Counsel, and Lutz Alexander Prager, Assistant Corporation Counsel, were on the brief, for respondent.

Whayme S. Quin with whom Norman M. Glasgow, Jr., Larry B. Blackwood, Thomas G. McGarry, James Bruce Davis and Hershel Shanks, were on the briefs, for Washington-Sheraton Corporation.

JUDGES: Pryor, Chief Judge, and Nebeker and Mack, Associate Judges.

OPINIONBY: PRYOR

OPINION: [*630] In this case, the Woodley Park Community Association ("WPCA") petitions for review of the District of Columbia Board of Zoning Adjustment's denial, in part, of its challenge to permits issued to the Washington-Sheraton Corporation ("WSC") for construction and occupancy of the Washington Sheraton Hotel. n1 In a consolidated appeal, WSC, intervenor below, cross-petitions for review of the denial by the Board of Zoning Adjustment ("BZA") of its motion to dismiss [**2] WPCA's appeal; in addition, it challenges the BZA's ruling respecting the number of required parking spaces.

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n1 Prior to renovation in 1979, the name of the hotel was the Sheraton-Park Hotel.

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In its presentation to the BZA, WPCA challenged permits issued to the WSC by the Zoning Administrator claiming that the building and roof structures of the hotel violate the height and setback requirements of the residential district in which it is located, the convention center use of the hotel is not an accessory use, the number of parking spaces provided is less than the number required, no valid parking plan was submitted, and the parking spaces are not reasonably accessible and convenient to users. WSC moved to dismiss WPCA's appeal, asserting that the appeal was both untimely filed, and also barred by the doctrines of laches and estoppel.

In its order, the BZA denied WSC's motion to dismiss the appeal, finding it timely and not barred by laches or estoppel. On the merits, the BZA rejected WPCA's claim as to height, [**3] setback, accessory use, and [*631] inaccessibility of parking spaces. The BZA did accept WPCA's contention that the number of parking spaces required by the Zoning Administrator was incorrect, and ordered an increase of seventy spaces, to a total of 649. Because the projected number of parking spaces was deemed incorrect, the BZA concluded that the parking plan was defective. n2

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n2 The BZA ordered WSC to submit revised plans to the Zoning Administrator, within 60 days, showing where and how the required 649 spaces would be provided. The BZA further ordered that if a suitable plan for 649 spaces was not submitted, appropriate action would be taken "to see that the Sheraton shall not operate or occupy more rooms or suites of rooms than the number for which it has provided sufficient parking . . . ." WSC has complied with the BZA order that 649 spaces be provided.

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In this court, WPCA challenges the BZA's findings on height, setback, accessory use, and parking; in a similar fashion, WSC renews its motion [**4] to dismiss. While supporting the BZA's other findings on the merits, WSC challenges the BZA's calculation of the required number of parking spaces as not based on substantial evidence in the record.

For the reasons stated herein, we find the challenge before the BZA on the issues of height, setback, and accessory use to be untimely. Therefore, as to these issues, we reverse the BZA's denial of WSC's motion to dismiss. We find WPCA's appeal on parking to be timely, and we further hold that consideration of this issue is not barred by laches or estoppel. On the merits of the parking issue, we conclude that substantial evidence in the record supports the BZA's calculation of the required number of spaces at the Washington Sheraton Hotel, and we therefore affirm this aspect of the BZA order.

I

In the early part of December 1976, Mr. Leslie Norden Schwiebert, Managing Director of the Sheraton-Park Hotel, met with representatives of WPCA to inform them of plans for reconstruction of the hotel. The reconstruction program, anticipated to cost $45 million, contemplated the construction of a new hotel

building behind the then-existing main building, and expansion of exhibit and conference [**5] facilities. At the meeting, Schwiebert stated that WSC wanted to avoid a BZA appeal by WPCA as had occurred with a 1973 rebuilding plan. He also stated that he knew that the "doubling" of convention space would be of concern to the community, but he thought that existing garage parking supplemented by a surface lot would adequately handle traffic generated by the additional convention use. Finally, Schwiebert sought WPCA's assistance in providing for a unified review of WSC's rebuilding plans by community organizations and individuals.

In response to this request, a Task Force on the Rebuilding of the Sheraton-Park Hotel ("Task Force") was organized. n3 A series of meetings between Task Force members and WSC representatives was held in late December 1976, and in early January 1977. At these meetings, WSC representatives presented drawings and outlined plans for the rebuilding program.

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n3 The Task Force included representatives of Advisory Neighborhood Commission 3C, the Cleveland Park Citizens Association, the Saint Thomas Apostle Parish Council, and WPCA.

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[**6]

Central to these discussions was a drawing of the completed project prepared by the architectural firm retained by WSC. This drawing depicted a final hotel structure set back from Woodley Road and preserving the parklike front of the hotel. In connection with the building and grounds depicted in the drawing, WSC representatives advised the Task Force that there would be 900 off-street parking spaces and parking for 35 to 40 buses at the hotel and an inner loop that would allow traffic to enter the hotel site on 24th Street, N.W., and to exit via Calvert Street or Woodley Road. They also represented that an additional 150 to 200 parking spaces could be [*632] provided in lieu of grass in the northwest corner of the property. n4

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n4 The Task Force was also informed by Mr. William Middleton, a member of the Municipal Planning Office, that the proposed plans did not appear to violate any zoning regulations.

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Members of the Task Force were sharply divided on the question of whether to pursue negotiations with [**7] WSC. The rebuilding plans were presented to the Woodley Park community at a town meeting on January 27, 1977. n5 Based on WSC's representations, the community urged the Task Force to attempt resolution of community concerns over the rebuilding through negotiation and mutual agreement with WSC.

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n5 The meeting was attended by approximately 135 Woodley Park residents.

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On February 21, 1977, the Task Force sent a report on the rebuilding to WSC. The cover letter to this report succinctly stated the Task Force's awareness of the choice it had made in pursuing negotiations:

While we continue to hold the view that the Sheraton Convention Hotel complex is a "non-conforming structure" as well as a "non-conforming use", the community is generally supportive of your plans. Our report is an outline for resolving the community's concerns by agreement with the Sheraton Corporation.

The report addressed Task Force concerns in three areas: perceived benefits to the community, perceived losses to the community, and [**8] matters requiring "additional review . . . and continued dialogue . . . ." Topics addressed included traffic (pedestrian and vehicular), parking, landscaping and environment, recreation and amenities, and construction. As reflected in the report, the Task Force was not concerned exclusively with issues such as parking and traffic posing a threat to the quality of community life: the Task Force sought also to maximize benefits to the Woodley Park community offered by the project. n6

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n6 For example, while concerns about parking and traffic are discussed prominently in the report, also mentioned are "recreation and amenities." Among the concerns listed under the latter topic are the following:

A. Perceived Benefits to the Community

* * *

18. There will be two permanent swimming pools (and additional wading pools) available for neighborhood membership.

19. The new hotel will have a full range of entertainment, recreation, health and shopping facilities for which neighborhood access will be encouraged.

* * *

C. Matters Requiring Additional Review by Hotel and Continued Dialogue with Community.

* * *

29. Provide year-round swimming facilities.

30. Provide ice-skating rink.

31. Provide tennis facilities.

32. Provide for roof top restaurant.

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[**9]

During the negotiations, the Task Force report evolved into a proposed WSC and Task Force Joint Statement on Rebuilding Project ("Joint Statement"). The goal of the negotiations was to reach agreement on the Joint Statement and have the document signed by both parties. From February 21, 1977 through May 18, 1979, nine drafts of the Task Force report and Joint Statement were exchanged. The Joint Statement, however, was never signed.

As negotiations between WSC and the Task Force proceeded, they focused increasingly on the issue of parking. n7 Because [*633] parking and traffic were a primary concern, in March 1977, WSC agreed to undertake a traffic study to evaluate existing problems as well as new problems posed by the development. n8

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n7 A comparison of early drafts of the Joint Statement shows that the two sides sharply disagreed on the number of parking spaces to be provided. According to WPCA, WSC's initial representation was that the development plans for the hotel included 900 off-street parking spaces. By February 21, 1977, the Task Force apparently believed that WSC planned to provide 980 off-street parking spaces. Thus, their February 21, 1977 report requested that WSC, "increase the planned overnight 980 parking spaces by 220 to provide a total of 1200 parking spaces . . . ." WSC's response on March 18, 1977, however, contained no specific representation as to the number of off-street parking spaces to be provided. In fact, at no time did a WSC draft of the Joint Statement contain a commitment to provide a specific number of parking spaces. In their November 2, 1977 draft of the Joint Statement, for example, WSC stated only that

the hotel recognizes that we have not provided the requested 1200 spaces. We will do everything possible to get maximum use out of our parking facilities and to minimize street parking.

[**10]

n8 In June 1977, Barton-Aschman Associates, Inc. was retained by WSC to conduct a study to develop recommendations for minimizing the impact of hotel-generated traffic on residential areas of Woodley Park. General agreement on the study elements was reached in August 1977, and a draft of the Barton-Aschman study was delivered to WSC and the Task Force on February 5, 1979.

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In August 1977, WSC applied to the District of Columbia for a building permit to start the new construction. As part of the application, WSC submitted building plans which included 798 parking spaces. On April 27, 1978, the Chief of the Zoning Review Board approved WSC's application for a full building permit, including the 798 parking spaces. As part of the permit review process, employees of the Zoning Office prepared an internal memorandum called a "calculation sheet," which indicated that to meet the requirements of the zoning regulations, WSC would have to provide 751 parking spaces. n9 This calculation sheet, however, was not made a part of the building permit which was issued on October 6, 1977. n10

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n9 11 DCMR @ 7202.1 (1977) requires that hotels provide one parking space for every two sleeping rooms or suites. WSC's building permit application represented that the completed structure would contain 1502 units. Thus, the zoning office calculated that 751 parking spaces would be required at the new hotel. [**11]

n10 It is clear, therefore, that in negotiations with WSC, the Task Force sought to have WSC provide parking spaces in excess of the number required under the zoning regulations.

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In early December 1977, while WSC's building permit application was pending, Task Force members met with Mr. James J. Fahey, Zoning Administrator, to discuss their concerns about the proposed building plans. At the meeting, Mr. Fahey informed Task Force members that, while he had not completed review of WSC's building plans, his preliminary opinion was that they did comply with the zoning regulations.

Following the meeting, the Task Force sent Fahey a letter dated December 5, 1977, summarizing its concerns. According to the Task Force, the proposed convention hotel complex did not comply with the setback or rear yard requirements of the zoning regulations, exceeded the height permitted in the R-5-B Zone, and would "result in a structure that continues a nonconforming use . . .," that is, the convention use would be another primary use rather than an accessory use. n11 The letter forthrightly stated the Task Force's [**12] opinion as follows: "we do not believe the proposed new building meets fundamental requirements of the zoning regulations . . . ."

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n11 As a nonconforming primary use, the convention facilities at the hotel would not be permitted as a matter of right under zoning regulations.

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In the letter, the Task Force articulated the difficult choice it faced between continuing negotiations and pursuing an administrative challenge to the building permit:

We are hopeful that these discussions (with WSC) . . . will enable the community and Sheraton to achieve their respective objectives. However, many intangible aspects of this process . . . compel the community to avoid sleeping on its rights and to seek further assurance that its concerns will be alleviated.

At this point, the Task Force chose to continue negotiations rather than to file an appeal. n12

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n12 Among the factors that influenced the Task Force's decision to continue negotiations, according to WPCA, were the following: WSC's replacement of its November 7, 1977 letter with a new response dated December 8, 1977;

agreement by WSC representatives to document representations in a formalized "Joint Statement;" a promise by WSC to include its representations to the community as a condition of any sale of the property; and impending completion of the Barton-Aschman Traffic study. Also militating against an appeal was the fact that the Task Force had been told in January 1977 (by Mr. Middleton) and in December 1977 (by Mr. Fahey) that WSC's building plans appeared to comply with D.C. Zoning Regulations.

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[**13]

[*634] During 1978, negotiations between WSC and the Task Force continued. On January 27, 1978, the Task Force sent WSC a response to their December 8, 1977 draft of the Joint Statement. In April 1978, WSC responded, with a draft containing important changes in its representations. First, as to the parking issue, WSC's draft dropped all mention of a specific number of spaces. n13 Second, WSC's draft dramatically weakened the representation as to the on-site traffic loop, a major concern of the Task Force. n14

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n13 Earlier drafts had explicitly mentioned the Task Force request for 1200 spaces, even while rejecting it. This draft stated only, "the Hotel will do everything possible to get maximum use out of its parking facilities and to minimize street parking."

n14 Unlike previous WSC drafts of the Joint Statement, which appeared to assume that a traffic loop would be provided, the April draft stated that the results of the Barton-Aschman study "will be reviewed with the community and taken into account in reaching the final decision on this on-site loop."

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[**14]

On September 13, 1978, the Task Force responded to WSC's April draft. This response recognized the weakened position as to the traffic loop and objected to it. More importantly, the Task Force recognized the parties' inability to agree on the parking issue and returned a draft of the Joint Statement that reflected a willingness to complete negotiations on the document despite sharp differences on parking. n15

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n15 In its draft of the Joint Statement, the Task Force included separate sections outlining the Task Force's and WSC's positions on parking. The Task Force first set forth its position that WSC was legally obligated -- because of prior BZA actions and an increase in hotel rooms -- to provide 1103 parking spaces. The Task Force then stated WSC's position that "its planned 750 parking spaces not only fulfill city regulatory requirements, but also will provide the number of parking spaces required to meet peak demand."

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In September 1978, therefore, the Task Force again directly confronted the difficult [**15] choice of continuing negotiations or pursuing an

administrative appeal. The Task Force articulated the dimensions of this choice in the cover letter to WSC accompanying their September 13, 1978 draft of the Joint Statement:

Given the complexity of the issue . . . it is extremely unlikely that the Hotel owners and the community could ever come to agreement on a precise number of parking spaces that the Hotel should provide.

This places us in somewhat of a quandary. In its entirety, the joint statement is a pretty good document, reflecting diligence, perseverance, and good-faith efforts by both parties to resolve differing perspectives. Yet parking is so important, the question has to be asked, -- what good is agreement on the other points if the community is going to get hurt on the parking issue. After somewhat intense deliberations we decided to pursue the joint statement for several reasons.

While of a lesser magnitude than parking spaces, the other issues are important to area residents. And, while we can't mutually define the needed number of spaces, the Hotel and community are in accord on the principle of the Hotel's maximizing off-street parking.

Thus, [**16] despite the fact that the Task Force had full knowledge both that sharp differences on the parking issue existed and that problems had emerged regarding the traffic loop, it decided to continue negotiations.

On October 6, 1978, a building permit for the hotel was issued. n16 Construction work began immediately.

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n16 The full building permit was approved on April 28, 1978. An initial permit for excavation had been issued on January 6, 1978, and a foundation building permit was issued March 3, 1978.

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[*635] In late February and early March 1979, the Task Force and WSC reviewed the draft of the Barton-Aschman study of parking and traffic problems submitted February 5, 1979. The study concluded that an estimated 850 parking spaces were necessary and that only approximately 750 were planned. Also during this period, the Task Force learned for the first time of the calculation sheet prepared by zoning officials, indicating that only 751 spaces were required to comply with the zoning regulations. n17

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n17 Also at this time, the Task Force learned that WSC's final plans for the hotel did not include the traffic loop.

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[**17]

Increasingly convinced that WSC representations could not be relied upon, the Task Force undertook a count of the number of parking spaces at the hotel. The Task Force's physical count of spaces revealed that only 595 spaces existed.

As a result of the traffic study, information about the calculation sheet, and the physical count of spaces, WPCA informed WSC that it could not continue negotiations until furnished with a plan showing the precise location of parking spaces to be included at the hotel. On May 31, 1979, WSC furnished plans showing 750 spaces. Of these spaces, 225 were on the front lawn of the property, and 525 were in the garages. n18

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n18 The Task Force believed that the location of the 225 parking spaces spread across the front lawn of the hotel contradicted earlier representations by the WSC that the parklike front of the hotel would be preserved. Moreover, the number of spaces listed by WSC in the parking garages was higher than the physical count of spaces in the garages obtained by the Task Force.

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[**18]

In June 1979, the Task Force met with the Zoning Administrator to report on the status of negotiations and to share its concerns about WSC plans. The Zoning Administrator acknowledged that the drawing of parking spaces furnished on May 31, 1979 and the physical count of spaces conducted by the Task Force indicated that WSC had not provided parking spaces in accordance with information submitted along with its building permits. The Zoning Administrator informed the Task Force that he could take no action, however, until WSC applied for an occupancy permit.

In August 1979, as part of its application for certificates of occupancy for the new building, WSC submitted revised plans to the Zoning Administrator providing for 595 parking spaces, over two hundred fewer than had been approved as part of the building permit. According to WSC's revised plans, the completed hotel would contain 1366 units, not 1502 as represented earlier. In addition, WSC asserted that no parking spaces were required for the 209 units in the Wardman Tower, because this structure had been constructed before applicable zoning regulations went into effect in 1958. Thus, WSC claimed that after the 209 Wardman [**19] Tower units were subtracted from the hotel's total of 1366 units, only one space for every two of the remaining 1157 units would be required to comply with the zoning regulations. The Zoning Administrator agreed with WSC and revised the computation sheet to reflect that only 579 parking spaces were required, and that 595 were being provided.

On September 12, 1979, WSC was issued occupancy permits for 320 of 945 new units. One month later, on October 10, 1979, WPCA filed its appeal with the BZA.

II

The threshold issue presented is whether WPCA's administrative appeal of building and occupancy permits issued to WSC was timely. The question of timeliness is jurisdictional. Goto v. District of Columbia Board of Zoning Adjustment, 423 A.2d 917, 923 (D.C. 1980). Consequently, if WPCA's appeal was not timely filed, the BZA was without power to consider it. Id.

The Supplemental Rules of Practice and Procedure before the Board of
[*636] Zoning Adjustment ("Supplemental Rules") provide, in part:

Any person aggrieved by any order, requirement, decision, determination, or refusal made by any administrative officer or body . . . in the administration or enforcement [**20] of the Zoning Regulations, may file a timely appeal with the Board.

22 DCRR @ 2.21 (1972) (emphasis added). Because the rules of the BZA adopt no specific time limit on appeals, a standard of reasonableness is applied in determining whether an appeal is timely. Goto v. District of Columbia Board of Zoning Adjustment, supra, 423 A.2d at 923; see also State ex rel. Housing Authority v. Wind, 337 S.W.2d 554, 558 (Mo. App. 1960); Cave v. Zoning Board of Appeals, 49 A.D.2d 228, 231, 373 N.Y.S.2d 932, 935 (1975), app. denied, 38 N.Y.2d 710 (1976). In applying the reasonableness standard, courts have consistently held that the time for filing an appeal commences when the party appealing is chargeable with notice or knowledge of the decision complained of. E.g., Arkae Development, Inc. v. Zoning Board of Adjustment, 312 N.W.2d 574, 577 (Iowa 1981); State ex rel. Green's Bottom Sportsmen, Inc. v. St. Charles County Board of Adjustment, 553 S.W.2d 721, 724-25 (Mo. App. 1977); Ostrowsky v. City of Newark, 102 N.J. Eq. 169, 174-75, 139 A. 911, 913 (1928); Pansa v. Damiano, 14 N.Y.2d 356, 359-60, 200 N.E.2d 563, 565, 251 N.Y.S.2d 665, 668 (1964); [**21] Hartunian v. Matteson, 109 R.I. 509, 519-25, 288 A.2d 485, 490-93 (1972). n19

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n19 Under the zoning regulations, an appeal will lie from "any decision of an administrative officer granting or refusing a building permit or granting or withholding a certificate of occupancy or any other administrative decision based in whole or part upon any zoning regulations or zoning maps adopted pursuant to the Zoning Act." 11 DCRR @ 8102.1 (1977).

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Here, the BZA found that WPCA's appeal as to all issues was "reasonably asserted" and filed in a "timely manner." In reviewing this determination, we are mindful that "we accord great deference to an agency's interpretation of its own administrative regulations, and we will uphold that construction unless clearly erroneous or inconsistent with the regulations." Dupont Circle Citizens Association v. District of Columbia Zoning Commission, 431 A.2d 560, 565 (D.C. 1981); see also Sheridan-Kalorama Neighborhood Council v. District of Columbia Board of Zoning Adjustment, 411 [**22] A.2d 959, 961 (D.C. 1979). n20 For purposes of clarity, our review of the BZA's findings on the issue of timeliness is in two sections. The first section addresses the timeliness of WPCA's appeal on the number of parking spaces required at the hotel. The second section addresses the timeliness of the appeal as to the issues of height, setback, and use.

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n20 The BZA's conclusion is entitled to additional deference because the agency was interpreting its own internal rule of procedure rather than the zoning regulations. Dupont Circle Citizens Ass'n v. District of Columbia Zoning Comm'n, supra, 431 A.2d at 565.

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