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Attached is Request to Intervene and Opposition Statement with respect to Darrel J. Grinstead. Original and nine will follow tomorrow (Oct. 10) by messenger

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Board of Zoning Adjustment
District of Columbia
CASE NO.16764
EXHIBIT NO.24

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Re: Appeal of Darrel J. Grinstead, Esquire

BZA Appeal No. 16764
Public Hearings: September 25 & October 16, 2001
ANC 3F

REQUEST TO INTERVENE AND
OPPOSITION STATEMENT OF PROPERTY OWNER,
WILLIAM WAHABI AND MOUZELLA ADEMILLUYI

I. REQUEST TO INTERVENE

William Wahabi and Mouzella Ademilluyi (the "Intervenor") is the owner of 2944 Chesapeake Street, N.W. (Square 2256, Lot 30)(the "Property"). As property owner, Messrs. Wahabi and Ademilluyi, through recently retained counsel,[1/] respectfully requests to intervene in this appeal as a party in opposition pursuant to 11 DCMR 3106.2.

The Intervenor submits the following opposition to this appeal and respectfully requests that the Board deny the appeal as untimely, legally barred, and without merit.

II. SUMMARY OF OPPOSITION

As set forth in detail by the Intervenor, the following conclusions are inescapable:

1. This appeal was untimely and must be dismissed for lack of jurisdiction.

2. This appeal is barred by the doctrine of estoppel and must be dismissed.

3. This appeal is barred by the doctrine of laches and must be dismissed.

1/ Undersigned counsel was retained by Mr. Wahabi on Friday, October 5, 2001 and did not appear or participate in the Board's initial hearing on September 25, 2001.

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4. This appeal must be judged solely on the objective and well-defined standards of the existing Zoning Regulations.

5. This project has been the subjected to repeated scrutiny and has been found by Department of Consumer and Regulatory Affairs ("DCRA") to be in compliance with each and every provision of the Zoning Regulations.

6. The Intervenor has acted at all times in good faith, based on detailed and accurate information provided to the District, in order to ensure compliance with the Zoning Regulations and in reasonable and expensive reliance upon the approvals granted by the District.

III. STATEMENT OF FACTS

In July 2000, the Intervenor acquired the Property which was a vacant, pie-shaped lot (formerly Lot 856) with a lot area of 6,723.0 square feet located in the Chesapeake Street cul-de-sac. The Property was acquired from the former owner of the adjacent property at 2934 Chesapeake Street, N.W. (Lot 859). The Property is zoned R-1-A. The Appellant, Darrel J. Grinstead, is the owner of the house (Lot 852) immediately to the west of the Property. The Intervenor has constructed a single-family dwelling on the Property. Construction of the exterior of the 3-story house, containing 5 bedrooms, 4 ½ bathrooms and two-car garage, is essentially completed.

The following detailed chronology is critical to establishing the facts and legal rights of Intervenor in this case:

July 24, 2000: Intervenor acquires the Property.

Late Sept. 2000: Intervenor and Appellant meet to discuss plans. Appellant questions location of structure in relationship to side property line. No other issues raised.

October 6, 2000: Intervenor obtains Building Permit No. B430003 for "Grading, Excavation, Footing and Foundation Walls."

October 7, 2000: Appellant writes to Mr. Armando Lourenco, then Administrator of the Building and Land Regulation Administration ("BLRA") within the Department of Consumer and Regulatory Affairs ("DCRA"). Appellant acknowledges that a building permit application was pending for the Property. After reviewing the plans on file with DCRA, Appellant alleges the existence of numerous violations of the Zoning Regulations, including minimum lot size, height, lot occupancy, rear yard, side yard, and minimum street frontage.

October 13, 2000: Intervenor obtains Building Permit No. B430178 to construct a "New Custom Home."

Mid-October 2000: Intervenor began site clearing and excavation at the Property. Appellant's Statement at p. 3.

October 2000: Intervenor began construction of single-family dwelling. Appellant's Statement at p. 3.

February 19, 2001: Appellant writes to Michael Johnson, the Zoning Administrator. Appellant admitted that construction has been ongoing and requests a Stop Work Order and site inspection.

March 7, 2001: Stop Work Order issued pending receipt by Intervenor of a wall check certificate. No violations of Zoning Regulations were cited in Stop Work Order.

May 14, 2001: Mr. Denzil Noble, Deputy Administrator of BLRA wrote to Appellant in response to his letters of October 7, 2000 and February 19, 2001. Mr. Noble reported to Appellant that a re-review of the approved plans found compliance with the Zoning Regulations, except an initial wall test which found a side yard of 7.97 feet - 3/100 of a foot (0.36 inches) less than the minimum eight (8) feet. [A second wall check adjusted the side yard to the minimum eight (8) feet required.]

June 28, 2001: More than eight and a half (8 ½) months after first identifying alleged violations of Zoning Regulations, Appellant files Appeal No. 16674. Actual construction had been underway for seven and one-half (7 ½) months.

July 5, 2001: Board provided written notice of the Appeal to Intervenor.

IV. LEGAL ARGUMENT

A. Appellant's Appeal is Untimely

Section 3315.2 of the Zoning Regulations requires that an appeal to the Board must be "timely" filed. 11 DCMR §3315.2. The requirement for a timely appeal is jurisdictional and as a result, an untimely appeal strips the Board of power to entertain the merits of the case. Because the Zoning Regulations do not set forth a specific time limit on appeals, a standard of reasonableness is applied in determining whether an appeal is timely. Mendelson v. Board of

Zoning Adjustment, 645 A.2d 1090, 1093 (1994); Goto v. District of Columbia Board of Zoning Adjustment, 423 A.2d 917, 923 (D.C. 1980). Under this "reasonableness standard", the time for filing an appeal "commences when the party appealing is chargeable with notice or knowledge of the decision complained of." Id.; see also Woodly Park Community Association v. District of Columbia Board of Zoning Adjustment, 490 A.2d 628, 636 (D.C. 1985). Very recently, the Court of Appeals has defined the reasonableness standard. Absent exceptional circumstances, the Court established two (2) months as the outer limit of timeliness. Waste Management of Maryland, Inc. v. District of Columbia Board of Zoning Adjustment, ___ A.2d ___ (D.C. 2001). It is without dispute that Appellant had actual knowledge of the decision appealed from no later than October 2000 -- eight (8) months before filing this Appeal. Taken together, Appellant's October 7, 2000 letter identifying the alleged zoning violations and the start of construction shortly thereafter, demonstrate actual knowledge triggering the obligation to file this Appeal within two (2) months. Appellant's failure to act or preference for other remedies while construction of the house continued is fatal.

B. Appellants' Are Barred By the Doctrine of Laches

Laches is "a species of estoppel,[2/] being defined as the omission to assert a right for an unreasonable and unsatisfactorily explained length of time under circumstances prejudicial to the party asserting laches." Weick, 383 A.2d at 11. The two elements of laches are the unreasonableness of the delay and the resulting prejudice to the party asserting the defense. See e.g. American University Park Citizens Association v. Burka, 400 A.2d 737, 741. The "entire course of events," not merely the period from the zoning official's decision to the filing of an appeal, is relevant when determining the validity of a laches defense. Goto 423 A.2d at 925, n.16.

As illustrated above in Section III (Chronology) and timeliness discussion, Appellant was charged with notice of the alleged violations set forth in its appeal at the latest in October 2000. Despite this knowledge, Appellant (a lawyer himself and represented by experienced zoning

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[2/] The elements of estoppel are: (1) expensive and permanent improvements, (2) made in good faith, (3) in justifiable and reasonable reliance upon , (4) affirmative acts of the District government, (5) without notice that the improvements might violate the zoning regulations, and (6) equities that strongly favor the party asserting the defense. Weick v. District of Columbia Board of Zoning Adjustment, 383 A.2d 7, 11 (D.C. 1978); Rafferty v. District of Columbia Zoning Commission, 662 A.2d 191, 194 (1995). It is not clear whether estoppel can bar an appeal brought by a neighboring landowner, as is the case in the instant matter. See Goto, 423 A.2d at 925 n.15. As illustrated in this section, if estoppel were applicable in this case, Intervenor has met all the necessary requirements for this defense in that it has made expensive and permanent improvements to the Property in good faith reliance on the acts and representations of the Zoning Administrator in issuing it the building permit, as well as the Zoning Administrator's repeated and numerous decision that the construction and proposed plans were legal. As a result of the extensive governmental review of the property, prosed construction and building permits, the Intervenor was justified in its belief that its actions with regard to the property did not violate the Zoning Regulations.

counsel) unreasonably delayed the filing of his appeal until June 28, 2001 by which time Intervenor had expended large sums of money, time and labor in improving the property.

1. Unreasonableness of Appellants' Delay in Filing Their Appeal.

Implicit in the requirement that a party not unreasonably delay the filing of the appeal is the duty of an injured party to act diligently in investigating its complaints. See Goto, 423 A.2d at 926. In the instant matter, Appellant -- who is an attorney -- did not act diligently in his investigation leading up to the filing of his appeal. Appellant apparently waited more than four (4) months to even send a follow-up letter to DCRA after receiving no response to his original October 7, 2000 letter. At the same time that Appellant was waiting for a DCRA reply, Intervenor was continuing to construct the allegedly illegal house. Appellant offers no explanation for his unexcused delay in filing his appeal.

Appellant was aware of the decision by DCRA that there were no zoning violations well in advance of the filing of its appeal. Furthermore, Appellant was aware that time was of the essence since construction at the property was underway. Despite his knowledge of the alleged violations and the District's response thereto, Appellant failed to take any action other than to contact DCRA on two (2) occasions by letter. The appropriate and legally required action would have been for Appellant to file its appeal to preserve his rights.

Appellant's delay in filing is unexplained. In light of the Appellant's position as an attorney, his knowledge of the importance of timely filing requirements and standards of reasonableness, his delay in filing is unreasonable.

2. Allowing Appellants to Proceed With Their Appeal After Appellants' Inexcusable Delay in the Filing of the Appeal Would Result in Prejudice to Intervenor.

The Court of Appeals for the District of Columbia has recognized that "the principal element in applying the doctrine of laches is the resulting prejudice to the defendant, rather than the delay itself." Goto, 423 A.2d at 925. Fairness, however, will bar the application of the doctrine of laches where the result would be unjust. Beins v. District of Columbia Board of Zoning Adjustment, 572 A.2d 122, 126 (1990).

In the instant matter, Intervenor proceeded with its construction of the new house upon justified reliance on the District's issuance of building permits and decisions that the construction did not violate the Zoning Regulations. Meanwhile, Appellant "stood by and watched [Intervenor] spend time and money months before pressing [its] objections with the BZA." Goto, 423 A.2d at 926. Intervenor is prejudiced by the subject appeal, not only by its expenditures to date, but also by the fact that, as a result of Appellant's delay, construction has proceeded beyond a point where revisions can be made to the plans which would satisfy Appellant without demolishing most of the new construction.

V. ZONING COMPLIANCE

A. The Project Complies With the Three-Story And Forty Foot Height Restrictions.

In the R-1-A zone in which this property is located, building height is subject to a dual standard: a) forty (40) feet; and b) three (3) stories.

For purposes of both measurements, the measuring point is defined as the "**finished grade level at the middle of the front of the building to the ceiling of the top story.**" 11 DCMR 199.1 (emphasis added).

"Story" is defined as the "the space between two (2) successive floors in a building or between the top floor and the ceiling or underside of the roof framing ... For purposes of determining the maximum number of permitted stories, **the term 'story' shall not include cellars,** stair or elevator penthouse or other roof structures; ... 11 DCMR 199.1 (emphasis added).

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

Based on these standards, the height of the building is:

1. 36.50 feet as measured from the finished grade at the center of the front to the ceiling of the top story. As measured to the peak of the roof, the building is less than thirty-eight (38) feet high.

2. Three stories. The ceiling of the lower level is two (2) feet above the finished grade. The top of the third floor is approximately 36.50 feet above the finished grade.

3. The lower level is a "cellar" and does not count as a story.

B. The Property Complies With The Applicable Lot Area and Lot Width Requirements.

The Appellant incorrectly relies on the generally applicable R-1-A standards for lot area of 7,500 square feet and lot width of 75 feet. However, as reviewed and confirmed in writing by the Zoning Administrator, the Property meets the special standards set forth in 11 DCMR 401.2.

Section 401.2 is as follows:

> Except as provided in §401.3 in the case of an unimproved lot in single ownership on November 1, 1957, which has an area or width of lot less than that specified in §401.3 for the district in which it is located and which does not adjoin another unimproved lot in the same ownership, a structure may be erected on the lot if both the area and width of lot are at least eighty percent (80%) of the area and

width of lot specified under §401.3; Provided, that the structure shall comply with all other provisions of this title.

As confirmed by the Zoning Administrator on March 14, 2000, the (a) lot area of 6,723 square feet exceeds the 6,000 square foot minimum (80% x 7,500 sq. ft.); and (b) average lot width exceeds the 60 feet (80% x 75 ft.) minimum. As more fully described below, the Property and the improvements which have been substantially completed comply in all other respects with the Zoning Regulations.

C. Side Yard

The subject lot is irregularly shaped and, as a result, the angles of the two (2) side yards do not align with the angles of the dwelling. In addition, the fences are not built on the property lines. For these reasons, as well as because of Appellant's misunderstanding of the Zoning Regulations, the arguments made by Appellant with respect to side yard violations are without merit. In addition, the photographs taken by Appellant are generally, in large part, misleading because the fences are not located on the property lines and because the Appellant has not taken his measurements from the correct points.

A chimney is permitted to encroach in a required side yard by up to two (2) feet. See §2502.8, Zoning Regulations. Although one of the chimneys constructed by Intervenor is two (2) feet, two (2) inches, the chimney does not encroach into the required side yard by such distance because the side yard is on an angle which is different from the angle of the structure.

The window wells generally do not rise above the finished grade. In no event do they exceed the permitted height for such structures of four (4) feet, see §2503.2, Zoning Regulations, and therefore, do not violate the applicable side yard restrictions.

Finally, in support of his allegation that Intervenor violated the side yard requirements, Appellant argues that a "retaining wall ... is located approximately 3 feet, 6 inches from the property line." Appellant's Supplemental Statement, p. 2. However, Appellant ignores §2503.3 of the Zoning Regulations which states that a "retaining wall ... may occupy any yard required under the provisions of this title." Clearly, the retaining wall does not violate the Zoning Regulations.

D. Rear Yard

Appellant argues that a deck of ten (10) feet by twenty-eight (28) feet "occupies the rear yard at the second story level." Appellant's Statement, p. 8. However, Intervenor no longer intends to construct the deck and, as a result, this issue is moot. [Had Intervenor gone forward with its deck plans, the deck would, nevertheless, have been in compliance with §2503.2 of the Zoning Regulations.]

Appellant argues that the rear yard is "less than 12 feet" when measured from the "adjoining tennis court fence." See Appellant's Supplemental Statement, p. 2. As was the case with Appellant's arguments regarding the side yard, the Appellant has measured from a fence which is not located on the property line, but substantially within the Property.

Therefore, the project complies with all applicable rear yard requirements.

VI. WITNESSES

In support of this opposition, Intervenor expects to present at least the following witnesses:

1. William Wahabi
2. Richard C. Lessard, AIA

VII. CONCLUSION

For the foregoing reasons this Appeal is untimely and the Board lacks jurisdiction, legally barred and without merit. The house which was approved by DCRA and constructed by Intervenor for eight (8) months while Appellant ignored the obvious and forfeited his claim, is in all respects in full compliance with the Zoning Regulations. Intervenor respectfully requests the Board to discuss this Appeal or deny it as without merit.

Respectfully submitted,

GREENSTEIN DELORME & LUCHS, P.C.

By: _____
Jacques B. DePuy

By: _____
John Patrick Brown, Jr.

Counsel for Intervenor

October 9, 2001

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CERTIFICATE OF SERVICE

The foregoing Request to Intervene and Opposition Statement was served by first-class mail, postage prepaid, this 4th day of October, 2001, upon:

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