GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 16764 of Darrel J. Grinstead, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of Denzil L. Noble, Deputy Administrator, Department of Consumer and Regulatory Affairs, in the issuance of a building permit (#B430178) issued on October 13, 2000 to William Wahabi, permitting the construction of a new house allegedly not complying with height, lot occupancy, lot area, rear and side yard requirements in a R-1-A District at premises 2944 Chesapeake Street, N.W. (Square 2256, Lot 30).

HEARING DATES: **September 25, 2001; October 16 and 23, 2001**

DECISION DATE: **December 4, 2001**

DRAFT ORDER

PRELIMINARY AND PROCEDURAL MATTERS:

This Appeal was brought by Darrel J. Grinstead, Esquire, by and through his zoning counsel, James T. Draude, Esquire. Mr. Grinstead ("Appellant") is the owner of the property (2964 Chesapeake Street, N.W.) immediately abutting the subject property. At the September 25, 2001 hearing date, Mr. William Wahabi, the subject property owner appeared and requested Intervenor status and a continuation of the hearing based on a last minute filing by the Appellant and need to retain counsel. The Board granted both requests and the hearing was continued until October 16, 2001. As a preliminary matter, on October 16, 2001, the Intervenor requested dismissal of the Appeal because it was not timely filed and was also barred by the doctrines of laches and estoppel. The Board deferred action of Intervenor's request finding that the facts of

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the case must be heard and Appellant given an opportunity to respond in writing before addressing the issues of timeliness, laches and estoppel.

The hearing was continued until October 23, 2001 to allow completion of the testimony at which time Intervenor renewed his request to dismiss the Appeal as untimely. After discussion, the Board denied Intervenor's timeliness motion, but again deferred action on the laches and estoppel issues.

At the hearings, the Appellant and his architect, Stephen W. Gresham testified. The Board denied Mr. Gresham recognition as an expert witness on D.C. zoning issues. Messrs. Michael D. Johnson and Olutoye Bello testified on behalf of the Zoning Administrator's office. The Board recognized Mr. Bello as an expert witness in D.C. zoning matters. The Intervenor and his architect, Mr. Richard Lessard, AIA, testified at the hearings. The Board recognized Mr. Lessard as the architect or record for the project and an expert witness in D.C. zoning matters.

Upon consideration of the entire record, including supplemental filings by the parties, and the advice of Corporation Counsel, the Board has reconsidered its earlier denial and determined that the Appeal was not timely filed and is also barred by laches.

FINDINGS OF FACT:

1. The subject property is located at 2944 Chesapeake Street, N.W. in a cul-de-sac (Square 2256, Lot 30) in the Forest Hills neighborhood of Ward 3.

2. The subject property is an irregularly shaped lot which has a lot area of 6,720.3 square feet and was created as Lot 30 (former Lot 856) by a Subdivision recorded in the records of the D.C. Surveyor on May 4, 2000.

3. The subject property is zoned R-1-A. The Appellant has incorrectly alleged that the property is subject to the Tree and Slope Protection Overlay.

4. The Zoning requirements applicable to the subject property are summarized in the following chart:

Zoning Requirement	R-1-A	§ 401.2[1/]	Provided
Minimum Area	7,500 sf	6,000 sf	6.720.3 sf
Minimum Lot Width	75 ft	60 ft	67.80
Minimum Lot Occupancy	40%	N/A	32.1%
Minimum Rear Yard	22.50 ft	N/A	22.30
Minimum Side Yard	8 ft	N/A	8 ft
Off-Street Parking	1 space	N/A	2 spaces
Height	40 ft/3 stories	N/A	37.25/3 stories

5. By confirmation letter dated March 14, 2000 and signed by Michael D. Johnson the Zoning Administrator determined that the subject property complied with the provisions of 11 DCMR § 401.2 and the existing Lot 856 (with a lot area greater than 6,000 sf and average lot width greater than 60 ft.) could be subdivided into a record lot and a single-family detached dwelling constructed as a matter-of-right, subject to compliance with all other provisions of the Zoning Regulations. The Lot area of the subject property is 6,720.3 square and average lot width as calculated by the Zoning Administrator and Intervenor is approximately 67.80 feet.

1/ 11 DCMR § 401.2 provides:

> 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.

6. Under 11 DCMR § 407.1, the Zoning Administrator is authorized to permit a deviation from the applicable area requirements. In an R-1-A zone, the following deviations are permitted:

Rear Yard	10%	2.5 ft
Side Yard	10%	.8 ft

7. In determining compliance with the side yard requirements, 11 DCMR § 2502.8 authorizes a chimney to project into any side yard for a distance not to exceed two feet. A chimney on the east side of the house projects 1.44 feet into the required side yard and therefore the 6.56 foot side yard complies with the Zoning Regulations.

8. In R-1-A zone, building height both in linear feet and number of stories is "measured from the finished grade level at the middle of the front of the building to the ceiling of the top story." 11 DCMR § 199.

9. "Front" is not defined in the Zoning Regulations and therefore it must be defined in accordance with Webster's Unabridged Dictionary. 11 DCMR § 199.2(g). Each of the parties have offered slightly different versions of a definition of "front" from several different Webster's Unabridged Dictionaries. However, each of these competing definitions are more similar, than different. Each definition, including the one relied upon by the Zoning Administrator, share a common and fundamental element that the "front" of building faces or directs forward or toward the property line that abuts the street. As testified to by the Zoning Administrator, the subject property has only one front, and in this case the front extends the entire width of the building - 41 feet from one side of the building to the other side, as depicted in the elevation drawing which was part of the approved building permit application. Intervenor's expert witness, Mr. Lessard, testified in a similar manner to his interpretation of what constitutes the "front". Photographs of

the "front" requested by the Board and submitted by the parties, demonstrate the full dimension of the "front", although Appellant's photographs partially obscure the front as a result of existing foliage and the angle of the camera.

10. As measured from the middle of the 46 foot "front," the building constructed is three (3) stories in height and approximately 37.25 feet to the ceiling of the top story shown on the plans submitted as part of the original approved building permit application and the Intervenor's as-built drawings. From the measuring point, the existing finished grade, which will be maintained, is approximately 3' - 2" from the ceiling of the adjacent building and therefore constitutes a non-story "cellar". Above this non-story "cellar" are the permitted three (3) stories. At the hearing, the Zoning Administrator and Intervenor's architect both testified that the existing grade o the subject property was excavated to provide to the required one off-street parking space and a second extra space in the garage. Under the Appellant's definition of "front" (and his measuring point in the middle of the right side garage), one of the garage parking spaces could be eliminated and backfilled to the pre-existing grade which would result in a 3-story, less than 40 foot house without any change (or reduction in actual height) to the completed structure.

11. As approved in the building permit, the rear yard with the proposed bay window was within the 22.50 feet permitted under 11 DCMR § 407.1. Intervenor, has acknowledged that as built, the rear bay window projects into the rear yard 0.30 feet more than permitted and authorized by the building permit. Intervenor has stated he is seeking a new or revised building permit to reduce the depth of the rear window by approximately 4 inches to establish the minimum rear yard of 22.50 feet.

12. On July 27, 2000, a building permit application was filed with DCRA for construction of a "New Custom Home" at the subject property.

13. On October 7, 2000, the Appellant, having apparently reviewed the construction plans provided by Intervenor, wrote to Mr. Armando Lourenco at DCRA challenging the pending building permit's compliance with the Zoning Regulations, including height, lot area, lot occupancy, side and rear yards, and house size. At the same, Appellant was also trying to contact officials at DCRA by telephone to discuss this matter.

14. The Building permit application was personally completed Mr. Olutoye Bellow on behalf of the Zoning Administrator's office to establish full compliance with the Zoning Regulations. The building permit application received unusually strict scrutiny by Mr. Bello based on the volume of telephone and other complaints which were being received before issuance of the building permit.

15. On October 13, 2000, Building Permit No. B430178 ("Building Permit") was issued to Intervenor.

16. Construction at the subject property began in October 2000 shortly after issuance of the Building Permit. Appellant immediately became aware of the construction occurring next door at the subject property.

17. On February 19, 2001, having received no response for four and a half months to his October 7, 2000 letter, Appellant wrote directly to Mr. Michael D. Johnson, the Zoning Administrator, to "renew the appeal I filed with your office on October 7, 2000 regarding the illegal structure that is being built" at the subject property. During this 4-1/2 month period, Appellant acknowledged that construction continued.

18. On May 14, 2001, Mr. Denzil Noble wrote to the Appellant and confirmed that "[a] re-review of approved [building permit] plans by Mr. Toye Bello, Chief, Zoning Technician concluded that no other issues of non-compliance exist."

19. On June 28, 2001, the Appellant filed this Appeal which on its face challenges the May 14, 2001 decision by Denzil Noble that "residence under construction complies with all zoning regulations." In docketing the Appeal, the Board staff correctly noted that the decision appealed was the issuance of the Building Permit on October 13, 2000. The Appeal was filed eight and half (8-1/2) months after the Building Permit was issued, construction began, and Appellant had actual knowledge of the pending permit application, issuance of the permit and the beginning of authorized construction.

20. The Intervenor testified that after receiving the Building Permit, he had no direct contact or communication with Appellant and was unaware of the Appellant's continuing objection to the Building Permit until he received the Notice of the Appeal from the Board dated July 5, 2001.

21. The Intervenor also testified that at the time the Appeal was filed, the house was substantially completed, except the interior finishes, and that more than $500,000 had been expended in construction costs to that point.

22. The Board finds that the operative event and actual decision that is the subject of this Appeal is the issuance of the Building Permit on October 7, 2000, not the May 14, 2001 letter from Mr. Noble to Appellant.

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 § 3202.2. The Board's powers with regard to appeals include to decide allegations of error in any decision made by DCRA in carrying out or enforcement of any

zoning regulation. D.C. Code § 5-424. In this case, the Board has determined that the decision which is the focus of this Appeal is the October 13, 2000 issuance of the Building Permit to the Intervenor.

The Zoning Regulations provide that an appeal must be "timely." 11 DCMR § 3315.2. 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. Goto v. District of Columbia Board of Zoning Adjustment, 423 A.2d 923 (D.C. 1980). Most recently, in Waste Management v. Board of Zoning Adjustment, 775 A.2d, 1117, 1122 (D.C. 2001), the Court of Appeals established two (2) months as the standard for judging the timeliness of this Appeal, absent circumstances beyond the appealing party's control. 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 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).

The Board concludes that the Appeal was untimely with respect to the issuance of the October 13, 2000 Building Permit. In this case, the Appellant is clearly complaining about the building permit (and its compliance with the Zoning Regulations) which was issued on October 13, 2000, not the Noble Letter. Equally clear is that the Appellant knew of and reviewed the pending building permit application prior to authoring his first letter to DCRA on October 7, 2000. In addition to this detailed knowledge of the building permit, the Appellant stood by beginning in October 2000 and watched construction (which he had previously determined in his own mind was in violation) to progress to substantial completion without pursuing his duty to

appeal. Nothing or no one prevented the Appellant from filing an appeal, he simply chose to make telephone calls and write letters to DCRA for which he received no response for seven (7) months. In Waste Management, the court made it clear that the fact that the complaining party "chose to concentrate on avenues that reasonably may have appeared more promising than an appeal does not excuse delay in filing an appeal." On February 19, 2001, construction at the site had been under way for four (4) months, but Appellant chose to write another letter to DCRA and await an uncertain response. Almost three (3) months (and substantial and expensive construction) passed before Appellant received a response from DCRA which said that the underlying permit which was issued on October 13, 2000 was in compliance with the Zoning Regulations. The Appellant (an attorney represented by counsel) had the requisite actual knowledge or notice and failed to fulfill his duty to act in a timely manner.

The Intervenor argues that the Appeal is barred by laches. "Laches is a species of estoppel, 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." Wieck v. District of Columbia Board of Zoning Adjustment, 383 A.2d 7, 11 (D.C. 1978), quoting 3 RATHKOPF, LAW OF ZONING AND PLANNING, at 67-1 (3d ed. 1972). "Laches is the principle that equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant." American University Park Citizens Association v. Burka, 400 A.2d 737, 740 (D.C. 1979), quoting Russell v. Todd, 309 U.S. 280, 287, 84 L. Ed. 754, 60 S. Ct. 527 (1940). 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 at 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 v. District of Columbia Board of Zoning Adjustment, 42 A.2d at 925, n.16.

The Board finds that Intervenor's laches defense is meritorious and should be granted. While the unreasonableness of the delay of over eight (8) months is well-established, most critical to the laches defense is the prejudice which has been suffered by Intervenor as a result of the delay. Goto v. District of Columbia Board of Zoning Adjustment, 423 A.2d 917, 925 (D.C 1980)(also, noting that appeal could be timely for BZA jurisdictional purposes, but untimely and unduly prejudicial for laches purposes). Intervenor, despite some original complaints from Appellant, received a valid building permit on October 13, 2000. This permit authorized the construction which was started and proceeded. The Appellant's complaints without any action, the lengthy passage of time, and D.C. inspection and approvals establish an entirely reasonable basis for continuing the approved construction. It would be unreasonable to expect every project to halt when faced with an initial complaint from a neighbor who then takes no other action.

During the eight (8) months before the appeal was filed, Intervenor spent at least $500,000 in construction costs. On June 28, 2001, when this appeal was finally filed, the house was substantially completed. Not only had Intervenor reasonably invested a substantial sum of money in the construction, but in doing so made improvements that cannot now, more than a year later, be modified without enormous expense and practical difficulty, if not impossibility.

Turning to the merits of the Appeal, the Board concludes that the Building Permit issued to the Intervenor on October 13, 2000 complies with the Zoning Regulations applicable to the subject property in the R-1-A zone. As set forth in the Findings of Fact and incorporated herein, the single-family dwelling approved and actually constructed on the subject property complies with each of the area requirements with one minor exception. Based on the wall check provided

by Intervenor, the rear bay window was actually constructed 0.30 projecting into the minimum required yard. While this is a violation of the Zoning Regulations, it is not an appealable error by the Zoning Administrator in approving the Building Permit, and as such is not properly at issue in this Appeal. However, it is the Intervenor's obligation to bring the rear bay window into compliance by obtaining a revised or new building permit to remove that portion of the rear bay window that projects into the minimum rear yard approved by the Zoning Administrator.

The Motion to Dismiss the Appeal based on timeliness and laches is **GRANTED**, and the Appeal **DENIED** on its merits.

Vote: 5 - 0.

Respectfully submitted,

GREENSTEIN DELORME & LUCHS, P.C.

By: _____
Jacques B. DePuy

By: _____
John Patrick Brown, Jr.

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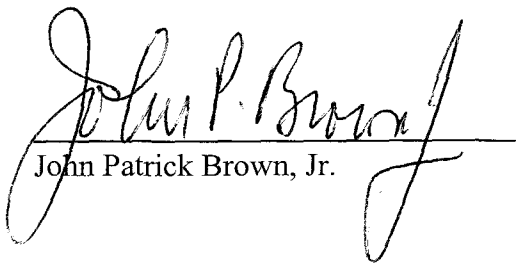
CERTIFICATE OF SERVICE

The foregoing Draft Order was served by telecopier, this 27th day of November, 2001 upon:

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