District of Columbia Court of Appeals
DOCKETING STATEMENT

Appeal No. _____

1) Full caption: William Wahabi and Mouzella Ademilluyi v. District of Columbia Board of Zoning Adjustment

2) Party filing appeal or petition: _____

3) Superior Court or Agency Docket No.: BZA Appeal No. 16764

4) Superior Court Judge: _____

5) Timeliness of Appeal or Petition for Review:

a) Date of entry of judgment or order appealed from: 5/ /2002

b) Filing date of any post-judgment motion: N/A

c) Date of entry of order deciding post-judgment motion: N/A

d) Date notice of appeal or petition filed: 6/21/2002

e) Statute or Rule fixing time limit for filing appeal or petition: 11 DCMR 3125.9, Rule 1

6) Appeal from Superior Court:

a) Is the order appealed from a final order (i.e., does it dispose of the action as to **all** claims by **all** parties)?

_____yes _____no

b) if no:

i) Did Superior Court direct the entry of judgment in accordance with Super. Ct. Civ. R. 54 (b)?

_____yes _____no

If yes, give the date_____

or ii) Is the order properly appealable as the grant or denial of an injunction under D.C. Code §11-721 (a) (2) (a)? _____yes _____no

or iii) Has the order been certified for appeal under D.C. Code §11-721 (d)? _____

c) If none of the above applies, what is the basis for jurisdiction? _____

7) Has any other notice of appeal or petition for review been filed in this case? _____yes X no

If yes, give date and D.C.C.A. case number: _____

8) Has this appeal or petition previously been before the Court?

_____yes X no If yes, give the D.C.C.A. Case number _____

9) Are there any appeals or petitions involving the same underlying order, or to counsel's knowledge, involving substantially the same issues, currently pending before this Court? _____yes X no

If yes, give D.C.C.A. case number and issue(s): _____

10) Does this case turn on the validity or correct interpretation or application of a particular statute in case?

X yes _____no If yes, give popular name and citation of statute and/or case.

District of Columbia Zoning Regulations, 11 DCMR

11) State concisely the principal issue(s) in this appeal or petition: Board's decision was arbitrary and capricious and decision was not based on substantial evidence in violation of DCAPA

BZA
Case No. 16764
Exhibit No. 54

Board of Zoning Adjustment
District of Columbia
CASE NO.16764
EXHIBIT NO.54

12) Does this appeal or petition present any n question of law? ____ yes ____X__ no

If yes, what is that question: _____

13) Nature of relief sought below: (does not apply to criminal cases)

- ☐ damages — amount sought $_____ amount received $_____
- ☐ injunctive relief: ☐ temporary ☐ preliminary ☐ permanent
  ☐ granted ☐ denied
- ☐ declaratory relief: ☐ granted ☐ denied
- ☐ attorney fees: amount sought $_____ amount received $_____
- ☒ other specify: BZA Appeal

14) Nature of Disposition Below:

- ☐ bench trial
- ☐ jury verdict
- ☐ summary judgment
- ☐ grant/denial of injunction
- ☐ default judgment
- ☒ agency order
- ☐ dismissal
  - ☐ forum non conveniens
  - ☐ lack of jurisdiction
  - ☐ failure to state a claim
  - ☐ failure to prosecute
- ☐ other (specify) _____

15) Do you intend to order any portion of the transcript for the appeal or petition? ___X___ yes _____ no

a) If yes, have all arrangements been made for its preparation? _____ yes ___X___ no

b) If yes, date ordered _____

c) If no, why not see Certificate of Service

d) Estimated date of completion _____

e) Estimated number of pages: _____

f) Name of court reporter(s): _____

16) Attach copy of Order or Judgment from which appeal or petition taken.

17) Name, addresses and telephone numbers of trial or agency counsel for all parties: _____

18) Should a settlement conference be scheduled in this appeal or petition? _____ yes ___X___ no

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I certify that the above information is accurate to the best of my knowledge.

John Patrick Brown, Jr.

Signature (attorney for appellant or *pro se* party)

(Type or Print)

NAME John Patrick Brown, Jr., Esquire

ADDRESS Greenstein DeLorme & Luchs, P.C.

TELEPHONE NUMBER 1620 L Street, N.W.

Washington, D.C. 20036 202-452-1400

Certificate of Service

I certify that a copy of the foregoing was mailed, postage prepaid, this _____ date of _____, 19_____, to:

Name _____ Name _____

Address _____ Address _____

(attach an additional sheet if necessary)

Signature _____

Type or print name _____

4-0692-2 wd-207

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Docketing Statement was served by first-class mail, postage prepaid, this 21st day of June 2002, upon:

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184714

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, and rear and side yard requirements in an R-1-A District at premises 2944 Chesapeake Street, N.W. (Square 2256, Lot 30).

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

DECISION DATE: December 4, 2001

DECISION AND ORDER

Darrel J. Grinstead filed an appeal with the Board of Zoning Adjustment on June 28, 2001, challenging on various grounds the decision of the Department of Consumer and Regulatory Affairs (DCRA) to issue a building permit for the construction of a one family detached dwelling at 2944 Chesapeake Street, N.W., property owned by William Wahabi and Mouzella Ademilluyi. The appellant, a neighboring property owner, is represented in these proceedings by James T. Draude from Driscoll & Draude. Assistant Corporation Counsel Marie Claire Brown appeared on behalf of DCRA. John Patrick Brown, Jr., of Greenstein DeLorme & Luchs, P.C., represents Messrs. Wahabi and Ademilluyi. After a public hearing, the Board granted the appeal in part with respect to the building height and minimum rear yard requirements and denied the appeal in all other respects.

PRELIMINARY AND PROCEDURAL MATTERS

Notice of Appeal and Notice of Public Hearing. By memoranda dated July 5, 2001, the Office of Zoning advised the Zoning Administrator; the Office of the Corporation Counsel; William Wahabi, the owner of the property that is the subject of the appeal; Advisory Neighborhood Commission (ANC) 3F, the ANC for the area within which the property is located; the ANC Commissioner for the affected Single-Member District; the affected Ward Councilmember; and the D.C. Office of Planning of the filing of the appeal.

The Board scheduled a public hearing on the appeal for September 25, 2001. Pursuant to 11 DCMR § 3113.14, the Office of Zoning, on August 16, 2001, mailed the appellant, the Zoning Administrator, and ANC 3F notice of hearing. The property owner,

Mr. Wahabi, was copied with the notice sent to the appellant. Ex. 17. Notice of the public hearing was also published in the *D.C. Register* on August 24, 2001, at 48 DCR 7998.

Mr. Wahabi appeared at the September 25 hearing. He advised the Board that up to that point, he did not fully appreciate the nature of the proceedings and therefore was not prepared to address the issues on appeal. As neither the appellant nor the Zoning Administrator objected to a continuance, the Board rescheduled the hearing for October 16. At the conclusion of the October 16 hearing, the case was continued to October 23.

Dispositive Motions. The property owner, William Wahabi, filed a motion to dismiss the appeal on the grounds that it was untimely and barred by the doctrines of laches and estoppel. After consideration of the factual circumstances of the case and the parties' legal arguments, the Board denied the motion.

Appellant's Case. The appellant, Darrel J. Grinstead, owns the property at 2964 Chesapeake Street, immediately to the west of the subject property. He testified and also presented testimony by Steve Gresham, an architect. The appellant contends that the proper measuring point for building height is the middle of the 35-wide façade that contains the dwelling's main entrance, such that the building violates the maximum number of stories and height limitations. He also argued that dwelling fails to comply with maximum percentage of lot occupancy limitations, minimum rear and side yard requirements, and minimum lot dimension requirements. The appellant also complained about minimum street frontage, but abandoned this issue during the course of the proceedings.

DCRA's Case. DCRA presented testimony by then-Zoning Administrator, Michael D. Johnson, as well as by Toye Bello, of the Office of the Zoning Administrator. They testified that the lot and dwelling meet all applicable zoning regulations. They stated that the "front" of the building for purposes of measuring building height is the full 46-foot wide span of the building, which includes a north facing façade located at the rear of the building.

Property Owners' Case. William Wahabi, the property owner, and his architect, Richard Lessard, who qualified as an expert in residential architecture, presented testimony and arguments in support of DCRA's position. Mr. Wahabi also described the construction schedule.

ANC Report. Robert V. Maudlin, the affected Single-Member District Commissioner, presented the ANC report at the hearing. In its report dated September 18, 2001, ANC 3F states that at a duly-noticed public meeting with a quorum present, the ANC voted to support the appeal. The ANC characterizes the issues on appeal as whether DCRA erred in reviewing the building permit application for 2944 Chesapeake

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Street and in issuing the permit; whether the building has been constructed in accordance with the DCRA-approved plans; and whether the building complies with the Zoning Regulations with respect to height, height of ceiling of the lower level above the adjacent grade, and side and rear yard setback requirements. The ANC recommends that to address these issues, the Board direct DCRA to retain an independent surveyor to measure the building for purposes of determining whether the building complies with the Zoning Regulations. Since the property owner submitted a location survey dated September 25, 2001, a DCRA survey was unnecessary.

At the October 16, 2001, hearing, the Board waived the seven-day advance filing deadline in 11 DCMR § 3115.1 to accept the ANC's October 16 written report concerning building height. In this report, the ANC recommends that the Board find that height should be measured at the middle of the 35-foot wide "front" of the dwelling such that the dwelling does not comply with the number of stories and height limitations. As discussed below in the conclusions of law and opinion, the Board concurs with ANC 3F that the building height should be measured at the middle of the 35-foot wide front of the building, and that measured at that location, the building exceeds the maximum number of stories and height limitations.

Closing of the Record. The record closed at the conclusion of the hearing on October 23, 2001, with the exception of specific materials requested by the Board and the parties' proposed findings of fact and conclusions of law.

Decision Meeting. On October 23, 2001, the Board voted to deny the property owner's motion to dismiss the appeal based on untimeliness. At its decision meeting on December 4, 2001, the Board voted to deny the property owner's motion to dismiss based on the doctrine of laches. The Board granted the appeal in part with respect to the issues on appeal involving the number of stories and building height limitations and the rear yard setback. The Board denied the appeal with respect to the maximum percentage of lot occupancy limitation and the minimum side yard requirement. But for the number of stories and height limitations and the minimum rear yard requirement, the Board determined that the property would meet the minimum lot dimension requirements so as to constitute a "buildable lot."

FINDINGS OF FACT

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The Subject Property

1. The property that is the subject of this appeal is located at 2944 Chesapeake Street, N.W. (Square 2256, Lot 30), in an R-1-A District.

2. The property is a pie-shaped lot, with a lot area of 6,723 square feet. The front lot line is an arc, 39.27 feet long, along the cul-de-sac at the end of Chesapeake Street. The average width of the lot, calculated using ten-foot intervals, is 67.80 feet. The rear property line is 91.42 feet long. The western side lot line is 109.99 feet long, while the eastern side lot line is 108.13 feet long.

3. The subject dwelling is L-shaped, 35 feet wide along its front-most portion, with an 11-foot wide rear wing.

The Building Permit and Timeliness of Appeal

4. On June 27, 2000, Mr. Wahabi filed an application with DCRA for a building permit to construct a new one-family dwelling on the property, then a vacant lot. The application described the number of stories as three, plus a cellar.

5. In late September 2000, Mr. Grinstead learned of the permit application from his ANC Commissioner. Mr. Grinstead testified that he visited DCRA once or twice before he was finally able to view the building plans that were on file, sometime in late September or early October.

6. On October 5, 2000, Mr. Wahabi filed an application for a permit for grading, excavation, and footing and foundation walls. The application described the number of stories as three plus cellar. The following day, DCRA issued Building Permit No. B430003 for "Grading, Excavation, Footing and Foundation Walls." Mr. Grinstead did not learn of this permit until after the fact.

7. On October 7, 2000, Mr. Grinstead wrote to Armando Lourenco, then-Administrator of DCRA's Building and Land Regulation Administration (BLRA), with a copy sent to then-Zoning Administrator Michael Johnson as well as to Mr. Wahabi, alleging numerous problems with the permit application, including minimum lot size, height, lot occupancy, rear yard, side yard, and minimum street frontage. Mr. Grinstead followed up with a number of telephone calls to DCRA, but his calls were not returned and his letter went unanswered.

8. On October 13, 2000, DCRA issued Mr. Wahabi Building Permit No. B430178 to construct a "New Custom Home." The permit described the building as three stories. Mr. Grinstead did not learn of this permit until after the fact.

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9. Mr. Wahabi started construction shortly after the issuance of the two building permits.

10. Once excavation began, Mr. Grinstead contacted Mr. Wahabi directly. They met the sometime the first or second week of October 2000 to review the plans. At that time, Mr. Grinstead advised Mr. Wahabi that he believed that the lot was unbuildable and that the dwelling was too large for the lot, too high, and violated zoning regulations. He also advised Mr. Wahabi that he planned to oppose the construction. Mr. Wahabi declined to make any concessions regarding the height and size of the house.

11. Shortly afterward, following an incident in which certain neighbors refused to move one or more cars blocking access to the Wahabi property, Mr. Grinstead and several other neighbors confronted Mr. Wahabi with their objections. They advised Mr. Wahabi that they intended to do everything they could to stop the dwelling from being built as planned. Mr. Grinstead again resumed his efforts to contact DCRA regarding the status of the building permit, but was unable to get a response.

12. On February 19, 2001, Mr. Grinstead wrote to the Zoning Administrator, with a copy to the Mayor's Office and Mr. Wahabi, requesting DCRA to conduct a site inspection and to issue a stop work order. He wrote that in addition to his earlier objections,

> the most apparent violation as construction has proceeded is the height of the building, which has grown to four stories in violation of the zoning requirements for houses in this R-1-A district. The ground floor is clearly a story, the ceiling of which protrudes more than four feet above the adjacent finished grade. Above that are three more stories, which soar far above the roofs of adjacent houses.

Ex. 3.

13. On February 28, 2001, both the Mayor's Office and DCRA acknowledged receipt of Mr. Grinstead's February 19 letter, and indicated that the letter had been forwarded to appropriate DCRA officials for response.

14. Shortly afterward, the Zoning Administrator telephoned Mr. Grinstead, and advised him that he had not heard anything about his concerns before that point and that he would have someone look into the situation right away.

15. On March 7, 2001, DCRA issued a stop work order pending a wall check survey. The survey was completed on March 30, 2001. Mr. Grinstead testified that during this period of time, it was clear to him that the matter was under active review by DCRA because there were surveyors out taking measurements.

16. It is a common practice that if DCRA discovers an error in a building permit, DCRA may issue a stop work order and/or a subsequent remedial or corrective permit to correct the error.

17. However, when he did not hear any further response from DCRA, Mr. Grinstead again began making calls to DCRA, which were not returned.

18. Finally, around May 20, 2001, Mr. Grinstead received a letter dated May 14, 2001 from BLRA Deputy Administrator Denzil Noble, responding to Mr. Grinstead's earlier letters. The letter stated that upon review of the approved plans and the wall check survey, BLRA found the dwelling in compliance with the Zoning Regulations. The letter also stated that Mr. Grinstead had a right to appeal BLRA's decision to the Board of Zoning Adjustment.

19. Mr. Grinstead felt that DCRA's response did not address his concerns regarding building height. He then consulted an attorney and determined to appeal the issuance of the permit.

20. On June 28, 2001, Mr. Grinstead filed the instant appeal with the Board of Zoning Adjustment.

21. Based on the above, the Board finds that Mr. Grinstead was not aware until receipt of DCRA's May 14, 2001, letter, that DCRA had made a final determination with respect to the issues he had raised involving the permit and that any further administrative recourse would be to the Board of Zoning Adjustment. Mr. Grinstead had proceeded in good faith to address his concerns with DCRA. Once DCRA clarified the status of its review, Mr. Grinstead acted in a timely manner to file an appeal.

Laches

22. Based on the above findings, the Board also finds that there was no unreasonable delay in the filing of the appeal.

23. The Board does not credit Mr. Wahabi's testimony that he did not become aware of the building height issue until September 10, 2001. Mr. Grinstead had copied Mr. Wahabi on his October 7, 2000, and February 19, 2001, correspondence with DCRA, which had included complaints regarding building height. In addition, Mr. Grinstead had verbally complained to Mr. Wahabi that the building was too high when they met in early October 2000.

24. Mr. Wahabi began and continued construction despite notice that Mr. Grinstead and other neighbors were opposed to the project and that Mr. Grinstead intended to pursue his legal remedies to challenge the issuance of the permit.

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25. During the eight months between the issuance of the permit and the filing of the appeal, Mr. Wahabi spent over $500,000 in construction costs. When the appeal was filed, the dwelling was substantially completed.

26. Based on the above, the Board finds that any prejudice to Mr. Wahabi did not result from the timing of the filing of the appeal, but rather from Mr. Wahabi's decision to proceed with construction before resolution of the disputed zoning issues.

Estoppel

27. Apart from the evidence supporting the above findings, Mr. Wahabi did not introduce any evidence to support his argument that the doctrine of estoppel might bar an appeal by a neighboring landowner.

Maximum Height Limitation

28. The dwelling is in an L-shaped configuration. The façade that includes the main entrance is 35-feet wide. There is a wing at the rear of the dwelling that extends to the west. The 11-foot wide northern façade of the rear wing sets back approximately 33.93 feet from the front of the front porch, more than half of the full depth of the building.

29. The north façade of the rear wing faces the western property line. It does not abut or front on a property line that abuts the street.

30. The Zoning Administrator's decision that the building complies with the height and number of stories limitation depends on including the north façade of the rear wing is part of the front of the building, producing a "front" that is 46 feet wide.

31. Following the Zoning Administrator's approach, the height of the building is 37 feet, 2.5 inches, 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 38 feet high.

32. Also following the Zoning Administrator's approach, the ceiling of the lower level is three feet, two inches, above finished grade. The lower level would be considered a "cellar" and would not count as a story. The building would therefore be three stories in height.

33. The appellant, on the other hand, argues that the front of the building is limited to the 35-foot façade that includes the main entrance, with the middle of the front located in front of the garage door.

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34. The appellant's architect, Mr. Gresham, testified that the height from the finished grade in front of the garage door to the peak of the roof is 46 feet, 8 inches. Since the property owner's architect, Mr. Lessard, testified that the ceiling of the top story is three feet below the peak of the roof, the building height would be 43 feet, 8 inches.

35. The appellant also asserts that only that portion of the lower story that is west of the main entrance of the house appears to qualify as a cellar, with a ceiling less than four feet above grade. The portion east of the main entrance includes a garage at the front, as well as living space to the rear. Since the ceiling of the garage at the front of the house is more than four feet above the adjacent finished grade, the garage would be considered a "basement."

36. *Webster's Encyclopedic Unabridged Dictionary of the English Language* (1986) includes the following definitions of the word "front":

> 1. the foremost part or surface of anything.
>
> 2. the part or side of anything, as a house, which seems to look or to be directed forward . . . .
>
> . . . .
>
> 5. a property line along a street or the like: the entire block front; a fifty-foot front.

37. *Webster's Third New International Dictionary of the English Language Unabridged* (1986) includes the following definition:

> 2: something that confronts or faces forward: as a (1): a face of a building; esp: the face that contains the principal entrance.

38. The Zoning Administrator relied on the definition of "front" as "the part or side of anything, as a house, which seems to look or to be directed forward" and the portion of the building facing the property lot line that abuts the street.

39. The Board finds that the rear wing is not the foremost part of the building, where it would have the greatest impact on the public, but rather is oriented to the rear of the building. It does not face forward, but rather faces the western side lot line.

40. The Board finds that the front of the building is the façade that is shown on the drawings as 35 feet wide. The middle of that façade is east of the main entrance, in front of the garage. The finished grade at that location is the driveway. The height of the building from that point to the ceiling of the top story is 43 feet, 8 inches. Since the garage is a basement, with a ceiling higher than four feet above grade, the building is four

stories in height. The building therefore exceeds the 40-foot height and 3-story limitation in § 400.1.

Maximum Percentage of Lot Occupancy Limitation

41. The lot occupancy is 32.1 percent, well under the maximum 40 percent lot occupancy permitted in the R-1-A District under § 403.2.

42. The property is not located within a Tree and Slope (TSP) Overlay District as alleged by the appellant, and therefore not subject to the more stringent TSP lot occupancy limitation.

Minimum Rear Yard Requirement

43. The rear yard varies from 25.39 feet to 25.73 feet in depth, which exceeds the 25-foot minimum depth of rear yard requirement in § 404.1 for an R-1-A District.

44. As originally permitted, the building included a bay that projected three feet, one inch, into the required 25-foot rear yard. This deviation exceeds Zoning Administrator's authority under § 407.1, which permits the Zoning Administrator to allow a ten percent deviation of the linear rear yard requirement (a 2.5-foot inch deviation in this case) through a minor flexibility ruling.

45. On November 28, 2001, while this appeal was pending, DCRA issued the applicant Building Permit No. B440549 to reduce the depth of the bay.

46. With the reduced rear bay, the depth of the rear yard is 22.70 feet, a 2.3-foot deviation. The Zoning Administrator has the authority under § 407.1 to permit this deviation, provided the Zoning Administrator determines that it does not impair the purpose of otherwise applicable regulations.

47. Mr. Wahabi originally intended to construct a rear deck of approximately 10 feet by 28 feet at the second story level; however, during the appeal proceedings, he advised the Board that he will not construct the deck.

48. Mr. Wahabi and the neighboring property owner to rear jointly own an outdoor tennis court, a small portion of which is located in the rear yard of the subject property. The tennis court is at grade.

49. There is a fence in the rear yard. The appellant did not introduce any evidence that the fence was not constructed in compliance with the D.C. Building Code.

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Minimum Side Yard Requirement

50. Both side yards are a minimum of eight feet in width. The wall test report indicates a 7.97 foot setback on the west side was revised by the same surveyor, following a second survey, to 8.03 feet.

51. There are chimneys on both the east and west side of the building. The chimney on the west side does not project into the required side yard; however, the chimney on the east side projects into the required side yard by 1.43 feet.

52. The appellant alleged that window wells are located on the west side of the house, within four feet, eight inches, of the property line. The window wells generally do not rise above the finished grade. None of the window wells exceed four feet in height.

53. There is a retaining wall located approximately three feet, six inches, from the east property line. The appellant did not provide any evidence that this retaining wall was not constructed in accordance with Building Code requirements.

Minimum Lot Dimension Requirements

54. The lot was in single ownership on November 1, 1957.

55. The lot is 6,723 square feet in area, which exceeds 80 percent (6,000 square feet) of the 7,500 square foot minimum lot area prescribed in § 401.3.

56. The average lot width, using any of three different methods for computing average lot width, exceeds 60 feet or 80 percent of the 75 foot minimum width prescribed in § 401.3.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799; D.C. Code § 6-641.07(g)(1) (2001)), to hear and decide appeals where an appellant alleges that an administrative officer erred in carrying out or enforcing the Zoning Regulations. This appeal is properly before the Board pursuant to 11 DCMR §§ 3100.2, 3101.5, and 3200.2. The notice requirements of § 3112 for the public hearing on the appeal have been met.

Timeliness of Appeal

Under 11 DCMR § 3112.2, an appeal to the Board must be timely filed. Mr. Wahabi urged the Board to dismiss the appeal as untimely. The question of timeliness is jurisdictional. If the appeal is not timely filed, the Board lacks authority to consider it.

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Because the Board's Rules of Practice and Procedure do not specify a time limit, a standard of reasonableness is applied in determining whether an appeal is timely filed. *Waste Management of Maryland, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 775 A.2d 1117, 1121-22 (D.C. 2001). As stated in *Waste Management*,

> Reasonableness is a standard that requires due consideration of attendant facts and circumstances that legitimately may bear on the particular appellant's ability to seek review.

Id. at 1122. For example, in applying the reasonableness standard, the time for filing an appeal begins when the appellant knew or should have known of the decision complained of. *Id.* In *Waste Management*, the court concluded that in the absence of exceptional circumstances outside of a party's control and substantially impairing the ability of that party to appeal, two months between notice of a decision and the appeal therefrom is the outer limit of timeliness. *Id.*

Unlike *Waste Management*, in which an appellant "chose to concentrate on avenues that reasonably may have appeared more promising than an appeal," *id.* at 1123, Mr. Grinstead pursued administrative review of the building permit through DCRA, the administrative agency charged with making a final decision on the issuance of the permit. It was not until May 14, 2001, that DCRA advised Mr. Grinstead that it, in fact, had made a final decision and that its decision could be appealed to the Board of Zoning Adjustment. If DCRA had found the Mr. Grinstead's allegations correct, then DCRA as customary, would have taken steps to cure the identified deficiencies, saving all involved the time and expense of an appeal to the Board. To rule otherwise would mean that DCRA would not be given the opportunity to correct its errors internally before the appeal process begins – an opportunity that promotes administrative efficiency, the prompt correction of errors, and the resolution of disputes.

For example, in *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093-94 (D.C. 1994), the Court held that the time for filing an appeal ran from the date that DCRA had issued a revised building permit in response to litigation and complaints concerning the initial permit, not from the date of the initial permit. Similarly in *Goto v. District of Columbia Bd. of Zoning Adjustment*, 423 A.2d 917, 919 (D.C. 1980), the Court ruled that time for filing an appeal ran from the date of the Zoning Administrator's written letter advising the appellant of DCRA's decision that a property owner could build a kiln at the rear of her pottery shop without a building permit, even though the appellant had notice of BLRA's oral ruling six months earlier. The Court stated that "During that seven-month period, [the appellants] were working within the administrative process to attempt to prevent the construction of the kiln; that delay is reasonable and cannot be held against them." *See also Woodley Park Community Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 490 A.2d 628, 636-37 (D.C. 1985) (time for filing an appeal ran from the date a certificate of occupancy incorporating new

parking calculations was issued, not from the date of the building permit); *Beins v. District of Columbia Bd. of Zoning Adjustment*, 572 A.2d 122, 127 n.5 (time for filing an appeal commenced on the date the Zoning Administrator orally rescinded a stop work order and notified the appellants of his decision by telephone, not from the date of the issuance of the permit two months earlier).

Mr. Grinstead filed his appeal six weeks after receiving notice of DCRA's final determination that the building plans were in accordance with the Zoning Regulations and that Mr. Grinstead could appeal that determination to the Board. The Board concludes therefore that the appeal was timely filed.

Laches

Mr. Wahabi also asked the Board to dismiss the appeal on the grounds of laches. The equitable doctrine of laches prevents the enforcement of stale claims. In the context Board of Zoning Adjustment appeals, the doctrine asks whether the appellant has inexcusably slept on his rights so as to make a determination against the property owner unfair. *Beins*, 572 A.2d at 126; *Wieck v. District of Columbia Bd. of Zoning Adjustment*, 383 A.2d 7, 11 (D.C. 1978). Laches may bar a claim that for jurisdictional questions would be timely. The question of timeliness looks only to the period between notice of the zoning official's determination and the filing of the appeal, while laches is concerned with the entire course of events. *Beins*, 572 A.2d at 127; *Goto*, 423 A.2d at 925.

Fairness will bar application of the doctrine of laches if the result would be unjust. Moreover, laches is judicially disfavored in the zoning context because of the public interest in the enforcement of the zoning laws. It is only applied in the clearest and most compelling circumstances. *Beins*, 572 A.2d at 126; *Wieck*, 383 A.2d at 10.

Mr. Grinstead undertook to resolve his concerns about the dwelling before the issuance of the building permit. He continued throughout the construction process, having learned of the issuance of the permit after the fact, and was given reason to believe that his efforts were bearing fruit when he received a letter from DCRA that indicated that the matter was under review. With the DCRA stop work order in March 2001, Mr. Grinstead had reason to believe that his concerns were being addressed and that DCRA had not yet made a final decision. The reasonableness of this belief was confirmed by DCRA's letter dated May 14, 2001, indicating that it was not until that date that a final decision had been made and that Mr. Grinstead could appeal to the Board. In light of these facts, the Board concludes that Mr. Wahabi failed to prove that there was inexcusable delay.

Further, since Mr. Wahabi was on notice of Mr. Grinstead's objections, and in light of § 8 of the Zoning Act of 1938, D.C. Code § 6-641.07(f), (g)(1) and (4) (2001), which permit an aggrieved person to appeal a building permit alleged to violate the

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Zoning Regulations, Mr. Wahabi proceeded with construction at his own risk. For example, in *Beins*, 572 A.2d at 128, where a property owner invested substantially and to some extent irrevocably in a construction project before the aggrieved neighbors could protest to the Zoning Administrator and the Board of Zoning Adjustment, the Court recognized that it was not possible to quantify the prejudice traceable to any portion of the delay in the filing of an appeal. Similarly, in *Murray v. District of Columbia Board of Zoning Adjustment*, 572 A.2d 1055, 1058 (D.C. 1990), the Court stated that a property owner who made commitments for architectural plans upon receiving the Zoning Administrator's ruling, despite knowledge of neighborhood opposition, invites application of the self-created hardship doctrine and precludes application of estoppel given the likelihood that the Zoning Administrator's ruling will be appealed. Mr. Grinstead's objections intensified as construction progressed, with Mr. Grinstead and the neighbors advising the Mr. Wahabi that they intended to do everything they could to stop the construction. Any prejudice to the property owner therefore does not result from the timing of the filing of the appeal, but rather from the property owner's decision to undertake and complete construction before the disputed issues were resolved.

Estoppel

Mr. Wahabi also raises the doctrine of estoppel as a possible barrier to this appeal. As with laches, estoppel is judicially disfavored in the zoning context in light of "the important general public interest in the integrity and enforcement of the zoning regulations . . . ." *Wieck*, 383 A.2d at 10.

As acknowledged by the property owner, the law is not clear on whether estoppel can bar an appeal by a neighboring landowner. *Goto*, 423 A.2d at 925. Since the property owner failed to identify what the elements of estoppel against a neighboring landowner might be or to brief the issue of such estoppel in any detail other than to allude to the elements of estoppel against the government in a footnote, the Board concludes that the property owner has not met his burden of proof in showing that the appeal should be barred.

Moreover, under § 8 of the Zoning Act, any person aggrieved by any decision granting a building permit based in whole or in part on the Zoning Regulations may appeal to the Board. D.C. Code § 6-641.07(f), (g)(1) and (4). Thus, Mr. Wahabi is chargeable with notice that following issuance of the permit, an aggrieved person could challenge the permit in an appeal. Mr. Wahabi's decision to proceed despite his knowledge of neighborhood opposition and the likely appeal of the permit precludes equitable estoppel. *See Murray*, 572 A.2d at 1058.

Maximum Height Limitation

This appeal involves interpretation and application of the phrase "middle of the front of the building," the measuring point under 11 DCMR § 199.1 for the "height of building" in those zone districts such as the R-1-A District where building height is limited to 40 feet. The definition of "height of building" in § 199.1 states that:

> In those districts in which the height of building is limited to forty feet (40 ft.), the height of the building may be measured from the finished grade level at the middle of the front of the building to the ceiling of the top story.

The term "story" is defined in § 199.1 as:

> the space between the surface of two (2) successive floors in a building or between the top floor and the ceiling or underside of the roof framing. The number of stories shall be counted at the point from which the height of the building is measured.
>
> For the purposes of determining the maximum number of permitted stories, the term "story" shall not include cellars, stair or elevator penthouses, or other roof structures; Provided, that the total area of all roof structures located above the top story shall not exceed one-third (1/3) of the total roof area.

The term "cellar," in turn, is defined in § 199.1 as "that portion of a story, the ceiling of which is less than four feet (4 ft.) above the adjacent finished grade. A "basement" is defined in § 199.1 as "that portion of a story partly below grade, the ceiling of which is four feet (4 ft.) or more above the adjacent finished grade."

The Zoning Administrator's decision that the Wahabi dwelling complies with the R-1-A height and story limitations depends on including the north façade of the rear wing as part of the "front of the building" to establish the measuring point.

The Zoning Regulations use the word "front" in contexts that indicate that the word refers to that part of a building that abuts the street. *See* 11 DCMR § 199.1 ("building, height of" and "street frontage"). In § 199.2, the Zoning Regulations incorporate the meanings given "Webster's Unabridged Dictionary" for the definition of terms not defined in the regulations. The regulations do not specify the edition to be used; therefore, the Board reviewed the definition of the word "front" in the two editions supplied by the parties. The Zoning Administrator testified, based on the dictionary definitions, that the part of the house that seems to look or to be directed forward and that portion of the building that faces the property line that abuts the street.

The part of the Wahabi dwelling that faces the property line abutting the street is the 35-foot wide façade that contains the main entrance. The rear wing, on the other

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hand, does not abut or front on a property line abutting the street. Rather, it faces the western side lot line abutting the Grinstead property. Moreover, the rear wing is set back well over half of the full depth of the building, where it appears more as an element the rear of the building than of the front of the building. The Board concludes therefore that the "front" of the building does not include the north façade of the rear wing. This conclusion is consistent with the other pertinent dictionary excerpts introduced by the parties, including the front as the foremost part of anything, the part of a house that seems to look or be directed forward, and the face of a building that contains the principal entrance.

The Zoning Administrator also testified that the rear wing is part of the front of the building because it can be seen from the street at any point of the front of the lot. However, as the photographs introduced in this case show, the view from the street depends on where one stands. The Zoning Administrator also testified that the "front" of the building is that part of the building that one can see from the middle of the front property line. However, as shown from the site plan marked with two sight lines drawn from the middle of the front property line, Ex. 23A, one cannot see the rear wing from the middle of the front property line.

The Board concludes that the front of the building, for purposes of establishing the building height measuring point, is the 35-foot wide façade that contains the main entrance and that is closest to the street. The middle of that façade is in front of the garage, and the finished grade at that point is the driveway. From that point, there is a basement, such that the number of stories is four. The height of the house from that point to the ceiling of the top story is 43 feet, 8 inches. The building therefore exceeds the R-1-A height limitation in § 400.1, both as to number of stories and building height measured in feet.

Therefore, the Board concludes that the Zoning Administrator erred in interpreting and applying the definition of "height of building" in § 199.1. While using the full span of a building to determine the measuring point at the "middle of the front of the building" may yield a valid measurement in most applications, in this case, it does not. As recognized in *Murray*, 572 A.2d at 1056-57, the Board has the authority to reject the Zoning Administrator's method of determining dimensions when the method yields an unnatural result. Given the configuration of the building, with the wing set back at the rear and facing the western side lot line, use of the full span of the building to establish the "middle of the front" results in a building that is greater than 40 feet and 3 stories in height, a building that is not in keeping with the character and scale of buildings permitted in the R-1-A District.

Maximum Percentage of Lot Occupancy Limitation

Under 11 DCMR § 403.2, a one-family dwelling in an R-1-A District may not exceed 40 percent lot occupancy. The dwelling, at 32.1 percent lot occupancy, meets this limitation. Since the property is not located within a Tree and Slope Overlay District, with a more restrictive lot

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occupancy limitation, the Zoning Administrator did not err in determining that the dwelling is within the allowed maximum percentage of lot occupancy.

Minimum Rear Yard Requirement

Under 11 DCMR § 404.1, the rear yard of a building in an R-1-A District must have a minimum depth of 25 feet. Subsection 407.1 authorizes the Zoning Administrator to permit a ten percent deviation from rear yard requirements, provided the building may not deviate from more than two of the sections identified in § 407 imposing area and linear restrictions and provided the Zoning Administrator determines that the deviation does not impair the purpose of otherwise applicable zoning regulations.

The permit application drawings for the dwelling showed that the bay projected into the rear yard by three feet, one inch, an extent greater than that that could be permitted by a Zoning Administrator minor flexibility ruling. With the reduced rear bay window as permitted by the remedial building permit issued on November 28, 2001, the rear yard is 22.70 feet deep, within the allowed ten percent deviation.

The appellant also argued that an outdoor tennis court and fence located in the rear yard intrude into the required rear yard. The tennis court is located in part on an adjacent property. To the extent the tennis court is a "structure" as defined in § 199.1, it may occupy the required rear yard since it is at grade. See § 2503.2, which provides that "A structure, not including a building, no part of which is more than four feet (4 ft.) above the grade at any point may occupy any yard required under the provisions of this title." Under § 2503.3, a fence constructed in accordance with the D.C. Building Code may occupy any required yard. The appellant did not introduce any evidence that the fence was not constructed in accordance with the Building Code. Therefore, the provisions in § 2503 that limit structures in required open spaces do not apply, and neither the tennis court nor the fence intrude into the required rear yard. Finally, the property owner abandoned his plans, which were apparently not included in his permit application, to construct a second story deck in the rear yard.

Based on the above, the Board concludes that the Zoning Administrator erred in approving the permit with respect to the rear bay, which error was subsequently corrected in a remedial building permit.

Minimum Side Yard Requirement

Under 11 DCMR § 405.9, a building in an R-1-A District must have a minimum eight-foot side yard on each side. As shown by property owner's location survey, the dwelling complies with the minimum side yard requirement.

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There are several projections and structures in the required side yards. The chimney on the east side projects into the side yard; however, it is well within the two feet permitted under § 2502.8 as a matter of right. Under § 2503.2, "A structure, not including a building, no part of which is more than four feet (4 ft.) above the grade at any point may occupy any yard required under the provisions of this title." Since none of the window wells exceed four feet in height, they may occupy the required side yards. Under § 2503.3, a retaining wall constructed in compliance with the D.C. Building Code may occupy any required yard. As there is no evidence that the retaining wall was not properly constructed, the retaining wall may occupy the side yard. Therefore, the Board concludes that the Zoning Administrator did not err in determining that the dwelling met the side yard requirements.

Minimum Lot Dimension Requirements

Under 11 DCMR § 401.3, a lot in an R-1-A District must have a minimum lot area of 7,500 square feet and a minimum lot width of 75 feet. Under § 401.2:

> [I]n 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.

But for the height and rear yard requirements, the lot would comply with the 80 percent rule. By the conclusion of the Board's proceedings, the owner had corrected the rear yard problem. If the owner brings the dwelling into compliance with the height and number of story limitations, the lot will meet the requirements of § 401.2. Therefore, the Board concludes that the Zoning Administrator did not err in concluding that the property is a "buildable lot."

For the reasons stated above, it is hereby **ORDERED** that the appeal is **GRANTED** in part and **DENIED** in part. Pursuant to D.C. Code § 6-641.07(g)(4), the Zoning Administrator's decision to approve Building Permit No. B430178 is **REVERSED.**

Vote taken October 23, 2001, as to property owner's motion to dismiss based on timeliness of the appeal:

VOTE: 4 – 0 – 1 (Carol J. Mitten, Anne M. Renshaw, Geoffrey H. Griffis, and David W. Levy, to deny; the third mayoral appointee not sitting, not voting).

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Vote taken December 4, 2001, as to property owner's motion to dismiss based on laches:

VOTE: 4 – 0 – 1 (Carol J. Mitten, Anne M. Renshaw, Geoffrey H. Griffis, and David W. Levy, to deny; the third mayoral appointee not sitting, not voting).

Vote taken December 4, 2001, as to that part of the appeal relating to height limitations:

VOTE: 3 – 1 - 1 (Carol J. Mitten, David W. Levy, and Anne M. Renshaw, to grant; Geoffrey H. Griffis, opposed; the third mayoral appointee not sitting, not voting).

Vote taken December 4, 2001, as to that part of the appeal relating to the minimum rear yard requirement:

VOTE: 4 – 0 - 1 (Carol J. Mitten, Anne M. Renshaw, Geoffrey H. Griffis, and David W. Levy, to grant; the third mayoral appointee not sitting, not voting).

Vote taken December 4, 2001, as to that part of the appeal relating to maximum percentage of lot occupancy limitation:

VOTE: 4 – 0 – 1 (Carol J. Mitten, Geoffrey H. Griffis, Anne M. Renshaw, and David W. Levy, to deny; the third mayoral appointee not sitting, not voting).

Vote taken December 4, 2001, as to that part of the appeal relating to the minimum side yard requirement:

VOTE: 4 – 0 – 1 (Carol J. Mitten, Geoffrey H. Griffis, Anne M. Renshaw, and David W. Levy, to deny; the third mayoral appointee not sitting, not voting).

Vote taken December 4, 2001, as to that part of the appeal relating to the minimum lot dimension requirements:

VOTE: 4- 0 – 1 (Carol J. Mitten, Geoffrey H. Griffis, Anne M. Renshaw, and David W. Levy, to deny; the third mayoral appointee not sitting, not voting).

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

Each concurring member has approved the issuance of this Decision and Order.

FINAL DATE OF ORDER: _____

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.
MS/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

★ ★ ★

BZA APPEAL NO. 16764

As Director of the Office of Zoning, I hereby and attest that on MAY 2 2 2002, a copy of the foregoing Decision and Order in BZA Appeal No. 16764 was mailed first class, postage prepaid or delivered via inter-governmental mail, to each party and public agency who appeared and participated in the public hearing and who is listed below:

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BZA Application No. 16764

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ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning