BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

Appeal of Robert Lehrman, from decision of Zoning Administrator Allowing Building Permit Causing the Illegal Removal of Trees Protected by The Woodland Normanstone Tree and Slope Overlay District, at the premises 2221 30th Street, N.W. (Square 2198, Lot 6)	) BZA No. 16849

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APPELLANT'S OPPOSITION TO OWNER'S MOTION TO DISMISS

Appellant Robert Lehrman hereby opposes the "Motion to Dismiss" filed by Mr. And Mrs. Melvyn Estrin ("the Owner").[1] This motion alleges that Mr. Lehrman lacks standing to bring this appeal and that this appeal is untimely, is barred by the equitable doctrine of "laches," and is "moot." For the reasons set forth below, this motion is without merit.

I. Mr Lehrman Is an Aggrieved Person and Therefore Has Standing to Bring this Appeal

The Owner argues that Mr. Lehrman is not an "aggrieved person" within the meaning of the Zoning Regulations, and thus lacks standing to prosecute this appeal. Motion to Dismiss, at 4. The Owner bases this argument on an assertion that Mr. Lehrman's property is 300 feet away the Estrin property, and that the affected trees on the Estrin property are not visible from Mr. Lehrman's property . These assertions are incorrect both as a matter of fact and a matter of law.

First, as a factual matter, Mr. Lehrman's property line is within 100 feet of the Estrin property line, not 300 feet as the Owner states. Moreover, the Owner's assertion that old growth trees on the Estrin property are not visible from the Lehrman property is also false. Mr. Lehrman can see the old growth trees on the Estrin property from his home.

[1] While the certificate of service indicates that the motion was served on Appellant's counsel by mail on March 20, 2002, this motion was not received by counsel until April 1, 2002.

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EXHIBIT NO.21

The Owner's standing challenge also misrepresents the applicable law. The zoning regulations provide that "[a]ny person aggrieved by any order, requirement, decision, determination or refusal made by an administrative officer or body . . in the administration or enforcement of the Zoning Regulations may file a timely appeal with the Board . . ."11 DCMR § 3112.2. Mr. Lehrman, as a neighboring resident who owns property in close proximity to the Estrin's property, qualifies as a person "aggrieved" by a zoning decision. There is no support for the Owner's suggestion that only "adjoining" landowner can be persons "aggrieved" under these regulations. Rather, the courts have recognized that "neighboring property owners" have standing to enjoin zoning violations. Lund v. Watergate Investors Ltd. Partnership, 728 A.2d 77, 83 (D.C. 1999).

Nor do the zoning regulations establish any mandatory distance within which an appellant or other "affected person" must live in order to be entitled to file an appeal with the Board of Zoning Adjustment. Instead, the applicable zoning rules governing party status in appeals and applications provide that any person can participate as a party in a zoning proceeding, so long as they have interests that are more "distinctly or uniquely affected in character or in kind by the proposed zoning action than those of other persons in the general public." 11 DCMR §§ 3106.2, 3106.3. See Concerned Citizens of Brentwood v. D.C. Board of Zoning Adjustment, 634 A.2d 1234, (D.C. 1993) (persons residing within 200 feet of subject property should have been granted party status in zoning proceeding).

Here, Mr. Lehrman is a nearby neighbor whose property line is not only within the same square as the Estrin property but is located within 100 feet of the Estrin property line. The old growth trees on the Estrin property are visible from Mr. Lehrman's property, and the Owner's

unlawful destruction of these protected trees will damage Mr. Lehrman's use and enjoyment of his property in a manner that is distinct and not shared by the community at large.

Further, the protections to old growth trees afforded by the Woodland Normanstone Overlay District ("WNOD") contribute importantly to the distinctive and unique character of the Woodland-Normanstone neighborhood, enhancing the value of Mr. Lehrman's own property as well as his enjoyment and use of it. As a landowner within WNOD, Mr. Lehrman is himself obligated to comply with the tree removal restrictions imposed by the zoning regulations on tree and slope protection districts. The burden of complying with these restrictions is offset by the reciprocal advantage he enjoys by virtue of the fact that old growth trees on neighboring properties are similarly protected. That reciprocity of benefit and burden is undermined when the District fails to enforce these restrictions. Mr. Lehrman, as a complying landowner within the WNOD, who manages his own property in conformance with the legally mandated tree removal restrictions, has therefore been specially damaged by his neighbor's willful refusal to comply with those same restrictions.

Indeed, Mr. Lehrman's extraordinary perseverance in attempting to secure administrative enforcement of the WNOD tree removal restrictions should be sufficient to demonstrate that he possesses an interest in the subject matter of this appeal and should leave no doubt that his interests differ from that of the general public. These actions, and his closely proximity to the Estrin property, presumptively demonstrate Mr. Lehrman's unique and distinct interest in this matter. He is therefore an "aggrieved person" within the meaning of 11 DCMR § 3112.2.

II Mr. Lehrman's Appeal Was Timely Filed.

The Owner also claims that Mr. Lehrman's appeal is not "timely" because it was filed

more than 90 days after the initial determination of the Zoning Administrator, made by letter dated October 10, 2001. However, the Owner ignores the fact that Mr. Lehrman promptly sought reconsideration of the Zoning Administrator's determination from Mr. Gregory Love, Administrator of the Building and Land Regulation Administrator, and Mr. Love provided his decision by letter dated December 10, 2001. Mr. Lehrman's appeal, filed on January 19, 2002, was filed within 60 days of the issuance of Mr. Love's determination, and is thus timely.

The zoning regulations do not specify a particular time limit for filing appeals, but instead state only that appeals must be "timely" filed. 11 DCMR § 3112.2. 11. As the Court of Appeals has noted, the practice before this Board is to apply "a standard of reasonableness" to determine whether an appeal is timely. Waste Management of Maryland, Inc. v. D.C. Board of Zoning Adjustment, 775 A.2d 117, 1121 (D.C. 2001) (delay of three years not reasonable); Woodley Park Community Ass'n v. D.C. Board of Zoning Adjustment, 490 A.2d 628, 636 (D.C. 1985) (delay of one year not reasonable). However, the Court has also stated that, "in the absence of exceptional circumstances substantially impairing the *ability* of an aggrieved party to appeal – circumstances outside the party's control – we conceive of two months between notice of a decision and appeal therefrom as the limit of timeliness." Waste Management of Maryland, Inc., 775 A.2d at1122 (emphasis in original).

Here, Mr. Lehrman's appeal was clearly timely as it was filed within 60 days of Mr. Love's December 10, 2001 letter. Mr. Love's December 10, 2001 letter is plainly a "determination . . .made by an administrative officer . . . on the administration or enforcement of the Zoning Regulations. " 11 DCMR § 3112.2. Indeed, Mr. Love's letter plainly states that "[t]he following is my determination:" Moreover, Mr. Love's determination addressed both the old

growth tree near the Jordan property that was removed by the Owner as well as the fatally damaged tulip poplar at the center of the Estrin property. Accordingly, Mr. Love's December 10, 2001 letter constitutes a new determination as to both regulated trees that can be appealed to this Board independently of the Zoning Administrator's letter of October 10, 2001, and Mr. Love's letter so advised Mr. Lehrman of his right to file an appeal.

Indeed, Mr. Lehrman could not have appealed the Zoning Administrator's determination of October 10, 2001 to the BZA, since the Zoning Administrator failed to make any determination on a key issue raised by Mr. Lehrman – whether the Owner had unlawfully caused fatal damage to the old growth tulip poplar at the center of the Estrin property. Instead, the October 10, 2001 determination related exclusively to the tree near the Jordan property that was removed by the Owner. The Zoning regulations only permit an aggrieved person to file an appeal from an "order, requirement, decision, determination or refusal made by an administrative officer or body, including the Mayor of the District of Columbia, on the administration or enforcement of the Zoning Regulations. " 11 DCMR § 3112.2. Clearly, Mr. Lehrman could not have filed an "appeal" of the Zoning Administrator's decision of October 10, 2001 with respect to the fatally damaged tulip poplar at the center of the property since the October 10, 2001 determination did not address that issue. This issue was not addressed by the until Mr. Love issued his decision on December 10, 2001. Mr. Lehrman's appeal, filed within 60 days of that decision, is plainly timely.

III Mr. Lehrman's Appeal Is Not Barred by Laches.

The Owner also argues that Mr. Lehrman's appeal is barred by the equitable doctrine of "laches" because Mr. Lehrman should have filed his appeal in July, 2001, when Mr. Lehrman learned that protected trees had been fatally damaged. Motion to Dismiss, at 8. In order to make

out a claim of laches, a party must establish "omission to assert a right for an unreasonable and unsatisfactorily explained length of time under circumstances prejudicial to the party asserting laches." Woodley Park Community Ass'n, 490 A.2d at 639. The Owner cannot demonstrate that either of these elements are met under the facts of this case.

First, Mr. Lehrman did not delay in filing his appeal. As noted above, Mr. Lehrman's appeal was filed within 60 days of the final zoning determination. This appeal could not, as the Owner suggests, have been filed in July 2001, when the Owner unlawfully destroyed protected trees, because the initial zoning determination was not even issued until October 10, 2001. Thus there was no "determination" to appeal in July 2001; indeed, as noted above, there was no determination with respect to the fatally damaged tulip poplar at the center of the Estrin property until December 10, 2001.

The Owner's suggestion that Mr. Lehrman somehow lacked diligence in attempting to secure the protections due to old growth trees within the WNOD is wholly unsubstantiated, and directly contradicted by the record before the Zoning Administrator and the permitting officials. As noted in his pre-hearing submission, by letter dated May 28, 1999, Mr. Lehrman specifically advised Mr. Estrin of the protections to old growth trees afforded by the WNOD. Mr. Lehrman enclosed with his letter a copy of the zoning regulations governing tree and slope protection overlay districts, and advised Mr. Estrin of the necessity of taking "proactive steps in advance, both in your design plans and in your construction site conditions to protect the trees and their fragile root systems." *See* Prehearing Submission, Exhibit 2 . And yet, the Owner's own demolition contractors informed Mr. Lehrman that they had been given no directions concerning the need to protect the mature trees on the site.

Moreover, immediately upon learning of that protected trees had been unlawfully destroyed as a result of the Owner's willful disregard for the tree removal restrictions, Mr. Lehrman commenced and expended considerable efforts, both through counsel and through his own efforts, to secure "stop work" orders to prevent construction on the site from going forward. Mr. Lehrman has been in constant contact with permitting and zoning officials, making repeated telephone calls and writing numerous letters, consistently since August 2001. As a result of Mr. Lehrman's efforts, permitting officials learned that the owner's construction activities exceeded the scope of permitted work and two "stop work" orders were issued. Once again, Mr. Lehrman's attentions and efforts were appropriately directed at permitting officials rather than the Board, since, until October 2001, there was no zoning determination to appeal. Indeed, it is difficult to imagine what more Mr. Lehrman could have done to secure enforcement of the zoning regulations.

As to the second prong of the laches test, the Owner makes the unsubstantiated assertion that Mr. Lehrman's "six month" delay in filing an appeal has resulted in "significant expense." This claim is particularly outrageous in light of the Owner's flagrant disregard for the law and affirmative misrepresentations to permitting officials. The Owner made patently false statements on the permit application, claiming that the construction activities would involve no "ground disturbing" activity or razing of buildings, when in fact the construction involved substantial ground disturbing actions as well as complete demolition of the existing structure on the site, which directly resulted in the destruction of protected old growth trees. The Owner was well aware of Mr. Lehrman's concerns. See Motion to Dismiss, Exhibit 9. Any "expenses" that may have been incurred by the Owner are attributable to the Owner's own false statements, resulting in

multiple "stop work orders," and not any "delay" by Mr. Lehrman in filing this administrative appeal.

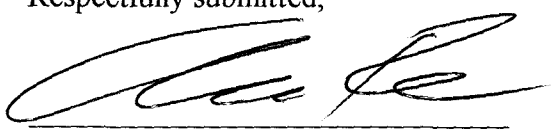
Indeed, the irony of the Owner's invocation of the equitable doctrine of laches should not escape attention, in view of the circumstances of this case and the Owner's own misrepresentations to permitting officials and flagrant and willful disregard for the legal protections accorded to old growth trees within the WNOD. It is a well-established maxim that equity does not come to the aid of those with unclean hands. Ross v. Fiero, 659 A.2d 234 (D.C. App. 1995). The Owner's attempt to deflect attention away from his own derelictions, and to hurl unsubstantiated charges of "delay" at Mr. Lehrman should not be countenanced.

IV. Mr. Lehrman's Appeal is Not Moot..

Finally, it is clear that Mr. Lehrman's appeal is not moot. As noted above, the Owner's construction plans incorporated absolutely no measures or efforts to protect the trees and their fragile root systems from construction activities. The remaining undamaged old growth tree on the property continues to be unfenced and unprotected from ongoing construction activities. (Moreover, if, as the Owner alleges, the damaged tree in the center of the Estrin property is still "healthy," this tree's health will be short-lived as a result of the Owner's ongoing construction activities, which likewise incorporate no fencing or other protection for this tree.). For that reason, Mr. Lehrman has requested this Board to issue a stay of the building permit so that additional unprotected old growth trees are not destroyed. Review by this Board of the building permit pursuant to 11 DCMR § 1515 will ensure that protective measures are taken to ensure that the existing old growth trees on the Estrin property are not fatally damaged as a condition of BZA approval. Id. § 1515.2(b).

Accordingly, for the foregoing reasons, the Owner's Motion to Dismiss is without merit and should be denied.

Respectfully submitted,



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April 4, 2002

CERTIFICATE OF SERVICE

I hereby certify that, on April 4, 2002, a copy of the foregoing Opposition to Motion to Dismiss was served by first class mail, postage pre-paid, on:

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