Law Offices
HOLLAND & KNIGHT LLP

2099 Pennsylvania Avenue, N.W.
Suite 100
Washington, D.C. 20006-6801

202-955-3000
FAX 202-955-5564
www.hklaw.com

Annapolis
Atlanta
Bethesda
Boston
Bradenton
Chicago
Fort Lauderdale
Jacksonville
Lakeland
Los Angeles
Melbourne
Miami
New York
Northern Virginia
Orlando
Providence
St. Petersburg
San Antonio
San Francisco
Seattle
Tallahassee
Tampa
Washington, D.C.
West Palm Beach

International Offices:
Caracas*
Mexico City
Rio de Janeiro
São Paulo
Tel Aviv*
Tokyo

*Representative Office

January 30, 2003

DENNIS R. HUGHES
202-419-2448
drhughes@hklaw.com

RECEIVED
D.C. OFFICE OF ZONING
2003 JAN 30 AM 11:15

Hand Delivery and E-Mail

Board of Zoning Adjustment
Room 210
441 4th Street, N.W.
Washington, D.C. 20001
Attention: Richard Nero

RE: BZA Appeal No. 16849

Dear Members of the Board:

Pursuant to Section 3121 of the Zoning Regulations, enclosed please find proposed Findings of Fact and Conclusions of Law and Opinion submitted on behalf of Mr. and Mrs. Melvyn J. Estrin, beneficiaries of the Estrin House Trust, owner of the premises at 2221 30th Street, N.W.

Please do not hesitate to contact the undersigned with any questions.

Sincerely,

Dennis R. Hughes

Dennis R. Hughes

Enclosure
cc: Melvyn Estrin (first class mail)
Robert Lehrman (first class mail)

WAS1 #1155034 v1

BZA
Case No. 16849
Exhibit No. 35

Board of Zoning Adjustment
District of Columbia
CASE NO.16849
EXHIBIT NO.35

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND OPINION

Appeal No. 16849 of Robert Lehrman pursuant to §§3100 and 3101 of the Zoning Regulations from the administrative decision of Michael Johnson, Zoning Administrator, dated October 10, 2001 effecting the issuance of building permits (Nos. B439404 and B435446) allegedly causing the illegal removal of trees protected under the Tree and Slope Protection Overlay District (§1511) in the TSP/R-1-A District, at premises 2221 30th Street, NW (Square 2198, Lot 6).

HEARING DATE: **September 24, 2002**
DECISION DATE: **September 24, 2002**

DISMISSAL ORDER

FINDINGS OF FACT AND PROCEDURAL HISTORY:

1) Mr. and Mrs. Melvyn J. Estrin are beneficiaries of the Estrin House Trust, the owner of the premises ("Owner") at 2221 30th Street, NW (the "Property"). Mr. Robert Lehrman ("Appellant") lives at 2900 Benton Place, NW.

2) Owner received Building Permit No. B435446, dated March 7, 2001, from the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"), Building and Land Regulation Administration ("BLRA"), to expand certain portions of the residential premises on the Property and to undertake various interior and exterior remodeling of same. Construction began at the Property on or around June or July of 2001.

3) On or about July 19, 2001, after the adjoining neighbor at 2940 Benton Place expressed concerns that a tulip poplar tree on the Property was leaning in an unsafe manner over her yard, and following certification by a tree expert as to the unsafe condition of the tree, the tree was removed.

4) At or around the same time, a second tree, located at the center of the Property, was inadvertently damaged as a result of construction activity. The parties disagree as to causation and the condition of this second tree. Owner states that the second tree was damaged when removal of a wall of the former structure caused a scrape on this tree, which scrape revealed an infestation of silverfish. Owner further states that the tree has been rehabilitated from the infestation and scrape was treated and deep-root fed and is currently in a healthy condition. Appellant states that the second tree

was damaged by Owner's demolition and construction activities on the Property and is fatally damaged. No assertion has been made by Appellant that this tree is not in a healthy condition.

5) On or around July 26, 2001, Appellant, through his counsel, sent a letter to Zoning Administrator Michael D. Johnson (the "Zoning Administrator") requesting that a stop work order be issued for the construction under the March 7, 2001 building permit as violative of the Woodland Normanstone Trees and Slope Protection Overlay District ("WNTSP") provisions of the Zoning Regulations.

6) As explained by letter to Appellant from J. Gregory Love, BLRA Administrator,(the "BLRA Administrator"), dated September 14, 2001, a stop work order was issued at the Property by the BLRA Construction Inspection Branch because demolition of the existing building was beyond the scope of the plans approved for Building Permit No. B435446. By the same letter, the BLRA Administrator stated that the Zoning Administrator was "reviewing the other zoning issues related to construction not in accordance with approved plans, including the one related to the removal of trees in violation of the Zoning Regulations, DCMR 11, Section 1514. A review of our records confirms that no prior request for tree removal was made as required by the Tree and Slope Protection Form that was attached to the construction permit application. Therefore, I have instructed the Zoning Administrator to make an expeditious determination on this matter."

7) By letter to Owner dated October 10, 2001, with copy to Appellant, the Zoning Administrator concluded, in response to the issues raised in Appellant's July 26, 2001 letter, that "while there may be a question as to whether the Tree and Slope Protection Overlay Zone is even applicable to an area outside the zone of construction, I find, based upon the information that I received and the investigation conducted, that there was an unsafe condition which warranted the removal of the tree under Section 1514.1(b) of the Zoning Regulations. Further, based upon my review, site inspection and understanding of the issues raised, I conclude that there is no violation of the Zoning Regulations and no further enforcement action is required regarding this matter."

8) In response to the earlier stop work order, Owner obtained Building Permit No. B439404, dated October 16, 2001, which revised Permit No. B435446 and granted permission to replace masonry cinder block walls as per plan.

9) In the three months subsequent to the Zoning Administrator's ruling of October 10, 2001, Appellant, although advised by legal counsel, did not file an appeal. Rather, Appellant communicated with various representatives of the BLRA to seek reversal of the Zoning Administrator's determination. By

letter to counsel for Appellant dated November 5, 2001, the BLRA Administrator noted that "[a]t the behest of your client, Robert Lehrman, I am in the process of re-evaluating the Zoning Administrator's determination. If a different interpretation is made, you will be so advised."

10) As a result of conversations between Appellant and David A. Clark, DCRA Director, a second stop work order was issued by BLRA at the Property on November 21, 2001.

11) By letter dated December 7, 2001, Acting Zoning Administrator Toye Bello notified counsel for Owner that the second stop work order was lifted and that no further enforcement action is necessary. In the same letter, the Acting Zoning Administrator noted that "[t]he Department stands by the resolution of the previous complaint of illegal tree removal as encapsulated inn(sic) the Zoning Administrator Opinion dated October 10, 2001, in which the [Zoning] Administrator found no cause for further enforcement action."

12) By letter dated December 10, 2001, the BLRA Administrator issued a letter to Appellant once again confirming the Zoning Administrator's proper application of the Zoning Regulations as well as addressing a variety of zoning and building code issues related to the Property. The BLRA Administrator noted that "the second stop work order was issued solely to address [the Appellant's] concern that construction activity continued to willfully cause fatal damage to protected trees. This stop work order has also been lifted as there was no evidence upon which [the BLRA Administrator] could justify the continuance of said order."

13) Appellant filed the present Appeal on January 17, 2002 -- 99 days after the date of the Zoning Administrator's October 10, 2001, ruling.

14) The Appeal was originally scheduled for public hearing on April 9, 2002. By Motion to the Board dated March 20, 2002, Owner requested that the Board dismiss the Appeal for lack of jurisdiction and requested a preliminary hearing on its Motion. On March 26, 2002, Appellant filed a prehearing statement and a request to the Board to stay the building permit for the Property. On April 4, 2002, Appellant filed a Motion in opposition to Owner's Motion for dismissal of the Appeal. Owner filed, on April 5, 2002, an Opposition to Appellant's stay request, and on April 8, 2002 a Reply to Appellant's Motion in opposition. The Appeal was rescheduled for a hearing date on September 24, 2002.

15) At the public hearing, Owner, through counsel, as a preliminary matter, urged that dismissal of the Appeal for lack of jurisdiction was required, as set forth in the record, because: (1) Appellant was not aggrieved as required by the Zoning Act and §3112.2 of the Zoning Regulations; (2) because the Appeal

was not timely filed by Appellant; (3) because the Appeal was barred by the equitable doctrine of laches, and (4) because the Appeal was moot. Because the arguments raised by Owner involve the authority of the Board to exercise jurisdiction over the Appeal, the Board addressed Owner's Motion to Dismiss prior to entertaining Appellant's Motion for Stay or the parties' arguments on the merits.

16) In support of its argument that dismissal is required for Appellant's lack of standing, Owner contended, at the hearing and through its pre-hearing submissions, that the instant Appeal is not proper because Appellant is not an "aggrieved" person within the meaning of §3112.2. In its Motion to Dismiss, Owner submitted to the Board that in order for Appellant to qualify as an "aggrieved" person within the meaning of the Zoning Regulations, Appellant must demonstrate that he has an interest that will be more significantly, distinctively, or uniquely affected in character or kind than those of other persons in the general public.

17) Owner further submitted at the hearing and in its pre-hearing submissions that Appellant has not suffered any injury as a result of the Zoning Administrator's opinion and that, even if such injury could be said to have been suffered, it was no different than that suffered by the general public, given the distance of Appellant's property from the Property.

18) Appellant asserted in his Opposition to Owner's Motion to Dismiss that he qualifies as an "aggrieved" person within the meaning of the Zoning Regulations as a neighboring resident who owns property in close proximity to the Property, who is also subject to the provisions of the WNTSP, and because the trees on the Property are visible from Appellant's property. No allegation of injury was made.

19) In support of its argument that dismissal is required because the instant Appeal was not timely filed, Owner contended, at the hearing and through its pre-hearing submissions, that Appellant waited more than three months from the date of the Zoning Administrator's determination to file the instant Appeal with the Board, more than a month beyond what the Court of Appeals, in Waste Management of Maryland, Inc., v. District of Columbia Board of Zoning Adjustment, 775 A.2d 1117, 1122 (D.C. 2001), has determined is the reasonable limit of timeliness. Owner further contends that the instant Appeal is even further untimely given that the purpose of requiring timely filing is to allow an appellant sufficient time to evaluate options and the efficacy of proceeding further, when Appellant, through counsel, initiated contact with the Zoning Administrator with respect to this underlying matter, in July, 2001 and maintained constant dialogue regarding this matter with various parties thereafter.

20) Through its pre-hearing submissions, Appellant also referenced the holding of the Court of Appeals in Waste Management, asserting in its Opposition to Owner's Motion to Dismiss that "[Appellant's] appeal was filed within 60 days of Mr. Love's December 10, 2001 letter. Appellant argues that the December 10, 2001 letter of the BLRA Administrator is the appropriate administrative decision of the Zoning Regulations from which to appeal to the Board."

21) At the public hearing, Owner brought to the Board's attention, as a controlling precedent, the BZA Order in Appeal No. 14054 in which the Board extensively dealt with the issue of "timeliness" under a similar set of facts. The question of whether the appeal in that case was timely was raised by the Office of Corporation Counsel on behalf of the Zoning Administrator. Subsequent to the issuance of building permits, the appellant in that case, after meeting with the Zoning Administrator, received a letter advising appellant that the plans were in compliance with the Zoning Regulations. Appellant "chose not to file an appeal before the Board of Zoning Adjustment at that time," but rather "attempted to resolve the problem through letters to and meetings with staff and members of the City Council, other D.C. Departments and the Mayor." BZA Order No. 14054, Findings of Fact No. 13.

As a result of the efforts of the appellant in that case, an additional letter was sent to appellant eight months after the original ruling by the Zoning Administrator which confirmed the previous ruling. The appeal was filed 5 days after this later letter.

22) The Board, in BZA Appeal No. 14054, reviewed the pertinent provisions of the Zoning Regulations, as well as four previous orders of the Board, noting that "persons faced with the potential of filing appeals should act promptly to preserve their rights. If subsequent actions can resolve the matter before the Board acts on the appeal, the appellant always has the right to withdraw the appeal." The Board then concluded that "the appellant's attempt to resolve the issues through other means was by his own choice." Finally, the Board found that "the Zoning Act and Zoning Regulations clearly state where an appeal regarding the administration or enforcement of the Zoning Regulations is to be taken. The appellant's choice of pursuing other possible remedies now forecloses his right to appeal to this Board." The appeal was dismissed for lack of jurisdiction.

23) At the public hearing, in considering how to dispose of the Motion to Dismiss on the grounds that the appeal was not timely filed, the Board members also discussed a decision in an appeal (No. 16764) referred to as the Grinstead appeal. In Grinstead, which was an appeal from the issuance of a building permit, no ruling in writing was made on issues raised by the appellant until

seven months after the building permit was issued. The appeal was filed thirty-eight days later. Between the time of the building permit issuance and the ruling in writing, the appellant challenged the building permit and a stop work order was issued pending review of the plans and a wall check survey. No dispositive ruling was made on the issues until the ruling in writing and appellant did not consult with an attorney until after the ruling was received.

24) In the instant case, no appeal was filed from the building permit dated March 2001. Rather, the issues raised by Appellant orally and in writing by letter dated July 26, 2001, through counsel, were decided, also in writing on October 10, 2001. At that time, Appellant was fully aware of the ruling by the Zoning Administrator who reviewed Appellant's assertions, analyzed the Zoning Regulations and visited the site. Appellant did not choose to appeal to the BZA but rather sought reversal of the ruling by asking the BLRA to further review the determination. The second stop work order was not issued until a month and a half after the Zoning Administrator's ruling. Appellant offered no testimony or evidence to suggest that his ability to appeal was "impaired," as provided in Waste Management.

25) The Board takes notice of the arguments put forth by the parties in their pre-hearing submissions with respect to questions raised by Owner concerning the equitable doctrine of laches and mootness as jurisdictional barriers to the Board's consideration of the instant appeal.

CONCLUSIONS OF LAW AND OPINION:

Based on the foregoing and the evidence of record, the Board concludes that it is faced with the following jurisdictional questions: (1) whether Appellant has standing to bring the instant Appeal; (2) if Appellant does have standing, whether the Appeal was timely filed; (3) even if Appellant has standing and the Appeal was timely filed, whether the Appeal is barred by laches; and (4) whether the Appeal is moot. Because of the disposition of this Appeal as discussed below, the Board does not reach jurisdictional arguments (3) and (4) or the case on the merits.

With respect to the jurisdictional question of standing, §3112.2 of the Zoning Regulations provides that "Any person aggrieved by any order, requirement, decision, determination or refusal made by an administrative officer or body, including the Mayor of the District of Columbia, in the administration or enforcement of the Zoning Regulations may file a timely appeal with the Board as may be provided by the Board." The Board concludes that while there is no evidence that Appellant has suffered any manner of unique injury in the instant case, Appellant qualifies as an "aggrieved" person within the meaning of §3112.2 as a result of the proximity between Appellant's property and the Property, including

Appellant's testimony that the tree canopy from the Property can be seen from Appellant's property and that Appellant lives within the Tree and Slope Protection Overlay District (WNTSP). Therefore, the Board concludes that Appellant does have standing to bring the instant Appeal.

With respect to the timeliness of the instant Appeal, §3112.2 of the Zoning Regulations requires that an appeal must be timely filed in order for the Board to gain jurisdiction over a matter. For the reasons set forth below, the Board concludes that the instant Appeal was not timely filed.

While the Regulations do not specify a particular number of days within which a decision must be appealed, the Board and the courts have long applied a standard of reasonableness which requires appeals to be brought within a "reasonable" period of time in order to invoke the appellate jurisdiction of the Board. The "reasonableness" of the timing of an appeal has historically been judged on a case-by-case basis depending on the circumstances and factors that caused the delay.

In Waste Management, the Court of Appeals re-affirmed that the timeliness requirement is jurisdictional and that if an appeal is not timely filed, the Board lacks power to consider it. There, the Court laid down a test for timeliness:

> Experience teaches that in the ordinary scheme of things, two months is ample time in which to decide whether to seek appellate review and act accordingly. At least 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."
> (Emphasis added.)

The Zoning Commission is in the process of formalizing this test through amendment to the Zoning Regulations. Zoning Commission Case No. 02-01, which was approved as final rulemaking by the Zoning Commission on September 9, 2002, amends §3112.2 of the Regulations to define a "timely appeal" as one filed within 60 days from the date Appellant knew, or reasonably should have known, of decision complained of, whichever is earlier. As did the Court in the Waste Management case, the Zoning Commission provides for extension of the 60-day deadline in exceptional circumstances out of an appellant's control and which could not have been anticipated by an appellant that substantially impair an appellant's ability to file an appeal with the Board. The Zoning Commission further limits the grant of an extension of the 60-day deadline to those situations where the extension will not prejudice the parties to an appeal.

In the instant case, the Zoning Administrator, as authorized and provided by the Zoning Enabling Act, made a determination and advised Appellant of same in a timely fashion. Based upon his review of all of the issues raised by Appellant, through counsel, a site visit and examination of the Zoning Regulations, the Zoning Administrator ruled in writing on October 10, 2001 that there was no violation of the Zoning Regulations, fully disposing of Appellant's issues. Nonetheless, Appellant waited more than three months from the time of the Zoning Administrator's October 10, 2001 determination to file his Appeal with the BZA, an additional month beyond what the Court of Appeals and the Zoning Commission have defined as the limit of timeliness.

The Board likewise finds no evidence in the record upon which the Board could base a conclusion that there existed any "exceptional circumstances . . . outside [Appellant's] control," that "impaired" the ability of Appellant to appeal or to warrant extending the two-month deadline to nearly 100 days. Appellant unquestionably received the October 10, 2001 determination by the Zoning Administrator. The Board finds that there is no reason that Appellant could not have filed an appeal to this Board shortly after October 10, 2001. Appellant became involved in the proceedings as early as June and July, 2001 when he corresponded with Owner regarding the removal of the tree. Likewise, Appellant, with counsel, maintained close contact with the Zoning Administrator and the BLRA Administrator throughout the period in question prior to October 10, 2001.

With regard to the issuance of the second stop work order, issued by BLRA under the Building Code subsequent to the Zoning Administrator's October 10, 2001 determination, the Board concludes that said stop work order was not even anticipated by Appellant around the time of the ruling.

While the Board understands that Appellant wished and tried to reverse the October 10, 2001 ruling through efforts within the BLRA, there is no basis in the record to indicate that the Zoning Administrator would reverse his ruling. The Board concludes that these efforts do not rise to the level of an exceptional circumstance outside Appellant's control that "impaired" the ability to appeal earlier. As the Board has noted in a previous appeal, "persons faced with the potential of filing appeals should act promptly to preserve their rights. If subsequent actions can resolve the matter before the Board acts on the appeal, the appellant always has the right to withdraw the appeal." See Appeal No. 14054 of Robert E. Love, May 29, 1984.

Nor was the appeal period tolled while Appellant made additional complaints to the BLRA Administrator and to others within BLRA. Pursuant to Mayoral Executive Order, only the Zoning Administrator has the authority to make determinations with regard to alleged zoning violations. There is no provision in that Order, or elsewhere, for appeal to the BLRA Administrator. Page 185 of Reorganization Plan No. 1 of 1983, amending Commissioner's Order No. 69-96

dated March 7, 1969, as amended by Mayor's Order 78-42, dated February 17, 1978 and Reorganization Order No. 1 of 1982 dated July 6, 1982. As the Court noted in the Waste Management case, "the fact that Waste Management chose to concentrate on avenues that reasonably may have appeared more promising than an appeal does not excuse its delay in noting an appeal." (775 A.2d at 1123). Further, as this Board concluded in Appeal No. 14054, "[t]he Zoning Act and Zoning Regulations clearly state where an appeal regarding administration or enforcement of the Zoning Regulations is to be taken. The appellant's choice of pursuing other possible remedies now forecloses his right to appeal to this Board."

The Board concludes that this decision is also consistent with the determination of the Zoning Commission in Case No. 02-01, which limits the grant of any extension of the 60-day deadline to those situations where the extension would not prejudice the parties to an appeal. The Board concludes that Owner would be significantly prejudiced to now revisit issues that were resolved in a timely manner by the Zoning Administrator in October, 2001.

The Board concludes that the facts of this case are governed by the holdings in the Waste Management case and the extensive Board opinion and precedent in BZA Appeal No. 14054 (see findings [21] and [22]). Further, the facts of this case are significantly different from the facts in Appeal No. 16764 (Appeal of Darrel J. Grinstead). See findings [23] and [24]. There are substantial differences in this appeal where (1) the appeal was filed over three months after a written decision addressing Appellant's issues was given by the Zoning Administrator; (2) this is not a case appealing a building permit; (3) Appellant here was represented by an attorney before and at the time of the ruling by the Zoning Administrator; and (4) the precedent of Appeal #14054 was not cited and quoted in the Grinstead appeal.

For all these reasons, the Board concludes that the instant Appeal was not filed in a timely manner and must be dismissed for lack of jurisdiction.

Because the Board has concluded that the Board lacks jurisdiction to hear the instant Appeal, as it was not timely filed, the Board does not reach the remainder of Owner's arguments regarding laches and mootness.

It is therefore **ORDERED** that the **MOTION TO DISMISS** be **GRANTED**, and this appeal be **DISMISSED** for lack of jurisdiction.

VOTE: 3-2-0 (Geoffrey H. Griffis, Curtis L. Etherly, Jr., and David A. Zaidain to grant Owner's Motion and dismiss the Appeal, Carol J. Mitten and Anne M. Renshaw opposed)

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

ATTESTED BY: _____
Jerrily R. Kress, FAIA
Director

FINAL DATE OF ORDER: _____

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

1150177v2