GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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Appeal No. 16849 of Robert Lehrman, pursuant to §§ 3100 and 3101 of the Zoning Regulations from the administrative determination of Michael Johnson, Zoning Administrator, dated October 10, 2001 stating that the holder of permit Nos B439404 and B435446 did not effect the illegal removal of trees in violation of 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) and the reaffirmation of that determination made by the BLRA Administrator, dated December 10, 2001.

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

DECISION AND DISMISSAL ORDER

Robert Lehrman ("Appellant") filed an appeal with the Board of Zoning Adjustment on January 17, 2002, challenging the determination of the Zoning Administrator and the BLRA Administrator that the holder of permit Nos B439404 and B435446 did not violate the Tree and Slope Protection Overlay District, § 1511 of the Zoning Regulations. Mr. Lehrman was originally represented by counsel, but represented himself at the hearing. Mr. Estrin, the owner of the premises ("Owner") at 2221 30th Street, NW (the "Property"), was represented by Whayne S. Quin, Esquire, from the law firm of Holland & Knight LLP. As a preliminary matter, before the scheduled public hearing for this case, the Board granted the Owner's Motion to Dismiss on the ground that the appeal was not filed in a timely manner.

Notice of Appeal and Notice of Public Hearing. By memoranda dated April 9, 2002, the Office of Zoning advised the Zoning Administrator, the Office of the Corporation Counsel, the Owner, Advisory Neighborhood Commission ANC 3C, 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.

The Board originally scheduled a public hearing on the appeal for April 9, 2002. Pursuant to 11 DCMR § 3113.14, the Office of Zoning, on February 25, 2002, mailed to the Appellant, the Zoning Administrator, ANC 3C, and Owner's counsel, notice of hearing. Notice of public hearing was also published in the *D.C Register* on July 19, 2002, at 49 DCR 6792. The hearing was rescheduled for September 24, 2002.

In its Motion to the Board dated March 20, 2002, the Owner alleged that that the appellant lacked standing, the appeal was filed untimely, and was barred by laches and mootness.

ANC Report. In its report dated March 25, 2002, ANC 3C states that, at its regularly scheduled public hearing, with a quorum present, the ANC voted to support the appeal on the grounds that

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a violation of the Tree and Slope Overlay occurred on the subject property. The report did not address any jurisdictional issues.

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.

Prior to the scheduled hearing date, the Board, through the Office of Zoning, asked Appellant for additional copies of materials, including: copies of all relevant building permit applications, permits, stop work orders, site plans, a chronology of all permitting and construction activities on site and any other fact relevant to the timeliness of the appeal and whether laches applies to the appeal, and any other materials that could assist the Board in its decision-making.

On the day of the scheduled hearing, Owner requested that the Board dismiss the appeal for lack of jurisdiction and requested a preliminary hearing on its motion. The Board did not address the Appellant's request for a stay, having disposed of the case by granting the Owner's motion to dismiss as a preliminary matter.

Hearing and Decision. On September 24, 2002, the Board voted to grant the property Owner's motion to dismiss the appeal based upon timeliness.

FINDINGS OF FACT

1. Appellant resides at 2900 Benton Place, NW., adjacent to the Property.

2. The trees at issue in this case are visible from Appellant's property.

3. It is undisputed that Appellant's property and Owner's property are subject to the provisions of the Woodland Normanstone Tree and Slope Protection overlay ("WNTSP").

4. The WNTSP, 11 DCMR § 1511 *et seq.*, is designed to protect the park-like setting of designated neighborhoods and includes limitations on the removal of healthy trees, depending upon their sizes. The penalty for any such removal is a prohibition on the issuance of a building permit for a seven-year period, unless the Board of Zoning Adjustment grants a special exception.

5. 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 the same. The construction began at the Property on or around June or July of 2001.

6. On or around July 19, 2001, a tulip poplar tree on the Property was removed.

7. At or around July 19, 2001, a second tree, located at the center of the Property, was damaged, allegedly as a result of construction activity.

8. Because the Board did not reach the merits of the appeal, the Owner's proffered explanation for these events are not relevant to this order.

9. 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, alleging that the construction was in violation of the WNTSP provisions of the Zoning Regulations.

10. 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."

11. 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." The Board finds that this letter addressed both alleged violations, one involving the tree already cut down, and one involving the injured but still standing tree, where the Zoning Administrator specifically addressed the tree already cut down and conducted a site inspection to determine whether there were any other violations of the Overlay.

12. In response to the earlier stop work order, Owner obtained Building Permit No. B439104, dated October 16, 2001, which revised Permit No. B435446 and granted permission to replace masonry cinder block walls as per plan.

13. In the three months subsequent to the Zoning Administrator's ruling of October 10, 2001, Appellant did not file an appeal. Rather, Appellant communicated with various representatives of the BLRA to seek reversal of the Zoning Administrator's determination.

14. 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."

15. 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.

16. 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."

17. 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.

18 Appellant filed the present appeal on January 17, 2002 -- 99 days after the date of the Zoning Administrator's October 10, 2001, ruling, and 39 days after the date of the BLRA administrator correspondence confirming the Zoning Administrator's ruling.

19. The Board finds that the Appellant knew or should have known of the adverse decision of DCRA as of October 10, 2001, the date of the Zoning Administrator's full and final determination with respect to the issues presented on this appeal

20. The December 10, 2001, letter from the BLRA Administrator merely reaffirmed the October 10, 2001 decision.

21. Because no exceptional circumstances existed that could have impaired the Appellant's ability to file this appeal within two months after October 10, 2001, *the* Board finds that the appeal is untimely.

CONCLUSIONS OF LAW

The Owner argued that the Board lacks jurisdiction to hear this appeal because: (1) Appellant was not aggrieved as required by the Zoning Act and §3112.2 of the Zoning Regulations and therefore lacked standing; (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.

Standing

In support of its argument that Appellant lacks standing, Owner contended, at the hearing and through his pre-hearing submissions, that the instant appeal is not proper because Appellant is not an "aggrieved" person within the meaning of §3112.2. Owner submitted 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.

The Owner further claimed that Appellant has not suffered any injury as a result of the Zoning Administrator's ruling 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 subject Property.

The Board concludes, however, that the Appellant qualifies as an "aggrieved" person within the meaning of §3112.2 because of the proximity between Appellant's property and the Property and Appellant's testimony that the tree canopy from the Property can be seen from Appellant's property. Therefore, the Board concludes that Appellant does have standing to bring the instant appeal.

Timeliness

As of the date that this appeal was filed, the Zoning Regulations did 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 of Maryland, Inc., v. District of Columbia Board of Zoning Adjustment*, 775 A.2d 1117, 1122 (D.C. 2001), the Court of Appeals re-affirmed that the timeliness requirement is jurisdictional and that if an appeal is not timely filed, the Board lacks jurisdiction to consider it. There, the Court articulated 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.)

In support of its argument that dismissal is required because the instant appeal was not timely filed, the Owner contended that Appellant waited more than three months from the date of the Zoning Administrator's October 10, 2001 determination to file the instant appeal with the Board, more than a month beyond what the Court of Appeals, in *Waste Management,* has determined is the reasonable limit of timeliness. Appellant, in turn, argued that its appeal was timely because it was filed within 60 days after Mr. Love's December 10, 2001 letter. Therefore, the Board must decide which of the two communications start the two-month time period for the Appellant to file its appeal.

The Board's decision in *Appeal of Robert E. Love*, BZA Appeal No. 14054 (1984) is dispositive of this issue. The appellant in *Love* received a letter on December 6, 1982, from DCRA, advising him that plans approved by the disputed building permits were in compliance with the Zoning Regulations. The appellant in *Love* "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." *Love*, Findings of Fact No. 13. As a result of these efforts, an additional DCRA letter, dated August 12, 1983, was sent. However, because the letter was only a "reaffirmation of the facts" stated in the December, 1982 correspondence, the Board held that the December letter began the time for filing the appeal. The Board dismissed the appeal as untimely.

Like the August 12th letter in *Love*, the December 10, 2001 letter from the BLRA Administrator in this case merely reaffirmed the conclusion reached earlier by the Zoning Administrator on October, 10, 2001. Therefore, the time for filing this appeal began on October 10, 2001.

Appellant waited more than three months from the October 10, 2001, to file his appeal with the BZA, an additional month beyond what the Court of Appeals has defined as the limit of timeliness, absent exceptional circumstances.

The Board 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 does not deny receiving 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, 2001 when he corresponded with Owner regarding the removal of the tree. Likewise, Appellant maintained close contact with the Zoning Administrator and the BLRA Administrator throughout the period in question prior to October 10, 2001.

After October 10, 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. 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.

With regard to the issuance of the second stop work order, issued on November 21, 2001 by BLRA under the Building Code, which was issued subsequent to the Zoning Administrator's

October 10, 2001, determination, the majority of this Board finds that such an order also does not create an exceptional circumstance. As discussed at the hearing (Transcript at 288-89), the December 10, 2001 letter from DCRA made it clear that the order was issued to ensure that existing activity was not jeopardizing the remaining trees in violation of the Overlay. It was not issued in direct response to the allegations of past violations, allegations that form the basis of this appeal. While it is not clear that the Appellant knew the reason for the issuance of the stop work order prior to the December 10, 2001, letter, neither was it clear that the stop work order was in response to his concerns of past violations.

In reaching this decision, the Board was divided, with two members indicating during the decision meeting that dismissing this case would be inconsistent with the Board's prior decision in *Appeal of Darrel J. Grinstead,* BZA Appeal No. 16764 (2001).

Grinstead involved an appeal filed seven months after the issuance of a building permit, but less than two months after Mr. Grinstead received his first and only letter from DCRA upholding the disputed building permit. The minority equate the following to Grinstead: 1) the October 10th letter in this appeal to the permit challenged in Grinstead; 2) the November 21, 2001 stop work order, the December 7, 2001 letter from the Acting Zoning Administrator, and numerous telephone exchanges in between to the period of internal DCRA resolution in Grinstead (i.e., the time during which the Appellant's letters to DCRA went unanswered), and 3) the December 10th letter in this appeal to the subsequent letter of final decision in the Grinstead case. The second stop work order is found by the minority to indicate that serious reconsideration of the Zoning Administrator's October 10th decision was underway and that a final decision had not, in fact, been made.

Based upon this ruling, the two members felt that the October 10, 2001 letter could not be a final decision where DCRA continued to review the allegations made by the Appellants. The minority thus appears to equate the October 10th letter in this appeal to the permit challenged in *Grinstead,* and to equate the December 10th letter in this appeal to the subsequent letter in the *Grinstead* case.

The majority does not find it appropriate to treat the October 10th letter as if it were no more than a bare bones permit. That letter, like the letter in *Grinstead* and the first letter in *Love,* fully addressed the issues raised. No purpose, other than delay, is served by permitting an appeal based upon follow-on correspondence.

To hold that the appeal period continues so long as a reevaluation is occurring would place holders of building permits in a state of chronic uncertainty and allow disgruntled individuals to endlessly extend the appeal period through repeated requests for DCRA to reevaluate its last stated position. While *Grinstead* recognized value in allowing DCRA to reevaluate its positions on zoning matters, the need for finality and the prompt resolution of zoning disputes dictates that such an internal process should be permitted only once, if at all.[1]

Thus, the December 10, 2001 letter from the BLRA Administrator did not begin the time for filing this appeal because it was simply a reaffirmation of the earlier decision and because, even

if it constituted more than a reaffirmation, the earlier October 10th letter fully addressed all issues raised and therefore was the only writing that could properly furnish the basis for this appeal.

Because of the disposition of this appeal on the grounds that it was not timely, the Board need not address the Owner's further assertions that the appeal is barred by the equitable doctrine of laches and is moot.

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
Each concurring member has approved the issuance of this Order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: MAY 0 8 2003

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. crb/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 16849

As Director of the Office of Zoning, I hereby certify and attest that on MAY 08 2003 a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY:

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Director, Office of Zoning