BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

Appellant	)	
Southeast Citizens for Smart Development, Inc.	)	BZA No. 16935
ANC6B	)	

Appellant's Points and Authorities
In Opposition to Motion to Dismiss

Side Yards:

Date SCSD chargeable with notice – July 8, 2002, date of reissued permits.

- Until Pritchard, unclear whether 405.3 applied; "free-standing wall" not previously defined

In Pritchard (BZA No. 16811):

- Zoning Administrator, Mr. Toye Bello, testified at length that 405.3 did not apply
- BZA Order determined that 405.3 does apply

Pritchard Decision Made Public on June 4, 2002

- Zoning Administrator knew in July, when revised permits issued, that Pritchard case made 405.3 applicable for free-standing walls; i.e., that a lot line wall is a free-standing wall, and a lot line wall for a one family dwelling must have a common division wall with an existing building (or one being built concurrently) - or an 8' setback from the property line.
- That fact/event should have caused ZA not to issue revised permits, but rather, to inform developer of need to seek an area variance, through the special exception process.

Timeline is telling:

- In June, Zoning Administrator knew not to issue permits - *see* Pritchard
- In July, Zoning Administrator did issue permits *contra* Pritchard

Subsequent notice to ANC via October 17, 2002 letter from Administrator Love to Chairman Jarboe, notes that its decision, which sets out the Zoning Administrator's basis for the reissued permits, could be appealed. This indicated that DCRA regarded side yards as an open issue.

BZA
Case No. 16935
Exhibit No. 29

Board of Zoning Adjustment
District of Columbia
CASE NO.16935
EXHIBIT NO.29

Developer raised issue of its compliance with SFH regulations in first case, i.e. BZA 16935; it can't now complain that its allegation of zoning compliance, when scrutinized by BZA, is false.

- In BZA 16791, Developer raised its alleged compliance with SFH regulations to claim matter of right development for youth residential care homes. BZA discussed Developer's claim for more than two pages and noted inconsistencies with single family dwellings

- BZA heard that argument, rejected it, and explained why four homes "did not have characteristics of one-family dwellings" BZA 16791, at 24.

- BZA's discussions in 16791 put ZA on notice to look at the issues BZA raised when considering revised permit applications

Timeline is Telling:

- Revised Applications Filed July 2, 2002 (Tuesday of Fourth of July holiday week)

- Permit review and approvals began immediately on July 2, including 1) Zoning approval by Toye Bello; 2) DPW, and 3) Water/Sewer Design

- July 3 Approval of Electrical (Wednesday)

- July 8 Approvals of 1) Environmental, including erosion control and stormwater management, 2) Mechanical, 3) Plumbing, 4) D.C. Fire Department, and 5) Structural Engineering - Permits Re-issued same day (Monday).

Appeal date of August 1, 2002, is timely because it is within 60 days of July 8, 2002.

Parking:

Date SCSD is chargeable with notice – no sooner that 7/8/02, date of reissued permits.

The re-issued permits on their face were different than the original permits with regard to driveway work. Therefore the timeliness of the appeal is calculated from the date of the reissued permit. See Woodley Park.

Even if there were no changes to the permits, the Doctrine of "Exceptional Circumstances" applies. See Sisson v. District of Columbia Board of Zoning Adjustment, 805 A.2d 964 (D.C. 2002). Factors to be considered include: lack of consistency and accuracy; piecemeal application process; errors and omissions misleading as not reflecting all existing and planned improvements; work beyond the scope of permit.

- Lack of consistency in Applications, Drawings, and Permits

Parking designed for phase I changes compliance in phase II; Cf. different drawings between Phase I & II (with same date of April 6, 2001), changes to alley access, changes in parking spaces to design previously considered by BZA as "not comparable to that which would be provided for four one-family dwellings". See BZA 16791, at 25.

- Lack of accuracy in Applications, Drawings, and Permits

Applications for initial permits inconsistent with first permits, revised applications and revised permits. See boxes 12 & 54 of applications and compare with permits; see also, EISF intake form of revised permits, at item 4, re: "residential project"; contract agreement scope of work does not include driveway.

- Piecemeal nature of application process - makes discerning full extent of construction project difficult, must be considered as a whole.

  Phased Construction limits the ability to understand project scope and/or know when appeal may be warranted

- Errors and Omissions

  Driveway changes between phases I and II, Permits and Applications differ

- Work beyond the Scope of Permit

  Applications and Permits do not include driveway work, but driveway work done and now DCRA claims it complies with zoning requirements. Individual permits fail to reflect the entire scope of driveway work

- Sisson distinguished Woodley Park case

Negotiation process is key fact. Long-term, Direct Negotiations with developer gave civic assoc. "full actual notice of the aspects of the building project relating to height, setback, and use." (Sisson, at 971.) Negotiation process rendered "unreasonable" the timing of the appeal [i.e., one year after building permit issuance] as to height, setback, and use."

Permit application process here "lacked the kind of close collaboration with neighbors that was present in Woodley Park". Woodley Park civic association waited until developer sought certificate of occupancy to file appeal with BZA. Here, in BZA 16935, no collaboration with developer, difficult for SCSD to obtain even public information, such as plat. SCSD appealed immediately after issuance of revised permits and response from DCRA indicated that no written Zoning Administrator's decision as to basis of approval of driveway or side yard issues would be forthcoming before 60 day appeal window expired.

In Sisson, problemmatic permit history, and some permits faulty on face, "constitute the very circumstances that were beyond [appellant's] control, . . . and make applicable the `extraordinary circumstances' exception. Here, four permits are faulty on their face as to driveway scope of work.

Other Cases Cited in Motion to Dismiss

Waste Management – case is highly distinguishable, especially on facts. Three year delay of appeal to BZA by appellant/property owner; appellant chose to pursue other "more promising" avenues in interim; appellant could have taken an appeal and applied for a variance or a special exception simultaneously

Goto – case is distinguishable because it deals with laches, which has not been raised here.

Mendelsohn – case shows that were there is a revision, party is chargeable with knowledge 60 days after issuance of revised permits. We do not dispute the 60 day requirement, which is why we appealed w/in 60 days of the re-issued permits.

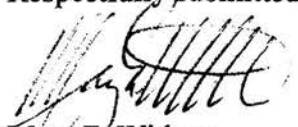
Woodley Park Community Assoc. – As noted above, negotiations and exchange of information with developer for more than a year by community was key to decision that delay of one year for filing BZA appeal was untimely. No such negotiations or information from developer here. Nor has SCSD been able to readily obtain all information claimed public, such as plat, which is key document to determine developer's and DCRA's claims of compliance with zoning regulations.

Accordingly, Appeal dated August 1, 2002 is timely filed because it is within 60 days of July 8, 2002, date of reissued permits.

Conclusion

Based upon the foregoing points and authorities, Appellant requests the Board to deny the owner's Motion to Dismiss, conduct an appeal hearing as scheduled, and grant the appeal.

Respectfully submitted,



Mary F. Withum
Counsel
SCSD, Inc.
701 14th St., SE
Washington, DC 20003

Charles SISSON, Petitioner,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, Respondent,

Mildred R. CRARY, Intervenor.

No. 00-AA-97.

District of Columbia Court of Appeals.

Argued Nov. 9, 2001.
Decided Aug. 29, 2002.

Homeowner sought review of decision by the Board of Zoning Adjustment that zoning administrator erroneously issued building permits for garage and home. The Court of Appeals, Reid, J., held that: (1) neighbor timely appealed issuance of building permits more than two months earlier, and (2) evidence supported Board's conclusion.

Affirmed.

1. Administrative Law and Procedure ⇐413

The Court of Appeals accords great deference to an agency's interpretation of its own administrative regulations and will uphold that construction unless clearly erroneous or inconsistent with the regulations.

2. Zoning and Planning ⇐605

The Board of Zoning Adjustment's judgment is entitled to additional deference where it is interpreting its own internal rule of procedure, rather than the zoning regulations.

3. Zoning and Planning ⇐358.1

The timely filing of an appeal with the Board of Zoning Adjustment is mandatory and jurisdictional.

4. Zoning and Planning ⇐358.1

A "timely appeal" to the Board of Zoning Adjustment is an appeal within a reasonable time. D.C. Mun.Regs. tit. 11, § 3315.2.

See publication Words and Phrases for other judicial constructions and definitions.

5. Zoning and Planning ⇐358.1

At least in the absence of exceptional circumstances that substantially impair the ability of an aggrieved party to appeal and are outside the party's control, two months between notice of a decision and appeal therefrom are the limit of timeliness for an appeal to the Board of Zoning Adjustment. D.C. Mun.Regs. tit. 11, § 3315.2.

6. Zoning and Planning ⇐442

Homeowner's multiple building permits based on applications that were often incomplete or misleading as to plans for garage, rear addition, and front porch created exceptional circumstances that substantially impaired neighbor's ability to appeal and were outside of her control, and, thus, neighbor timely appealed issuance of building permits more than two months earlier; because of the cumulative, piecemeal nature of the applications, the full extent of the construction project could not be discerned as each individual permit was issued, and the neighbor was not chargeable with notice of the entire scope of work until all permits were issued. D.C. Mun. Regs. tit. 11, § 3315.2.

7. Zoning and Planning ⇐762

The defenses of estoppel and laches are judicially disfavored in the zoning context because of the public interest in enforcement of the zoning laws.

8. Zoning and Planning ⇐762

Laches is rarely applied in the zoning context except in the clearest and most compelling circumstances.

9. Zoning and Plan

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10. Equity ⇐67

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. **Zoning and Planning** ⇐642

While the Court of Appeals gives deference to the Board of Zoning Adjustment's findings with respect to laches, the question whether the facts, taken together, are sufficient to sustain the defense of laches is one of law to be answered de novo by the appellate court.

10. **Equity** ⇐67

To determine the validity of a laches defense, the Court of Appeals looks to the entire course of events.

11. **Equity** ⇐72(1)

Laches is not a valid defense, unless the defendant has been prejudiced by delay and that delay was unreasonable.

12. **Equity** ⇐84

In the absence of an analogous statute of limitations, the party asserting laches has the burden of establishing that the defendant has been prejudiced by delay and that delay was unreasonable.

. **Zoning and Planning** ⇐442

Neighbor's delay of several months before appealing building permits for homeowner's addition and garage renovation was not unreasonable, and, thus, laches did not bar appeal to Board of Zoning Adjustment; the delay resulted from the fact that the homeowner applied for separate building permits for each component of the construction on his property.

14. **Estoppel** ⇐52(5)

Application of estoppel is limited to situations when the equities are strongly in favor of the party invoking the doctrine.

15. **Zoning and Planning** ⇐377

To make out a case of estoppel barring neighbor's appeal of building permits issued to homeowner, homeowner needed to show that: (1) he acted in good faith, (2) he acted on affirmative acts of the Department of Consumer and Regulatory Affairs, (3) he made expensive and permanent improvements in reliance thereon, and (4) the equities strongly favored him.

16. **Zoning and Planning** ⇐377

Homeowner did not act in good faith in presenting the proposed renovations to his property in piecemeal fashion, in demolishing his old garage and constructing a new garage without proper permits, or in building a new garage that was larger than the approved garage addition, and, thus, neighbor was not estopped from appealing issuance of building permits.

17. **Zoning and Planning** ⇐385

Evidence supported conclusion of the Board of Zoning Adjustment that zoning administrator erroneously issued building permits for rear addition and garage in Wesley Heights Overlay District; the work increased nonconformity with respect to setbacks and lot occupancy, and the larger garage would accommodate two cars. D.C. Mun.Regs. tit. 11, § 2117.8(b, c).

18. **Zoning and Planning** ⇐605, 703

In reviewing a decision of the Board of Zoning Adjustment, the Court of Appeals must determine whether (1) the agency has made a finding of fact on each material contested issue of fact; (2) substantial evidence of record supports each finding; and (3) conclusions legally sufficient to support the decision flow rationally from the findings.

19. **Zoning and Planning** ⇐618

The Court of Appeals cannot substitute its judgment for that of the Board of Zoning Adjustment.

Maureen E. Dwyer, with whom Paul J. Kiernan, Washington, was on the brief, for petitioner.

Charles L. Reischel, Deputy Corporation Counsel, filed a first and second statement in lieu of brief.

Before SCHWELB, REID, and WASHINGTON, Associate Judges.

REID, Associate Judge:

This case concerns a challenge to the Zoning Administrator's issuance of several construction permits regarding petitioner Charles Sisson's renovation of his home and garage. Mildred Crary, Mr. Sisson's neighbor, appealed the issuance of the permits to the Board of Zoning Adjustment ("BZA"), which ruled in her favor.[1] Mr. Sisson primarily contends that Ms. Crary's BZA appeal is jurisdictionally and procedurally barred because of untimeliness and laches. He also contends that the BZA erred with respect to its decision on the merits. We affirm the decision of the BZA, which (a) denied Mr. Sisson's motion to dismiss Ms. Crary's appeal; and (b) found that the Zoning Administrator erred by issuing the building permits to Mr. Sisson.

FACTUAL SUMMARY

Responding to Mr. Sisson's requests, the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") issued five building permits to him between January 29, 1998, and October 5, 1998, covering a rear two-story addition, the garage, and the front porch.[2] Mr. Sisson's home is located in the Northwest quadrant of the District of Columbia, within the Wesley Heights Overlay District ("WHOD"). Residential properties within the WHOD are subject to particularized zoning regulations.

The BZA made extensive factual findings regarding Mr. Sisson's permit applications and the regulatory requirements for the issuance of the requested permits. Although Mr. Sisson's property is actually zoned as WHOD/R-1-A, his permit applications generally were reviewed erroneously as R-1-A or R-1-B, rather than as WHOD/R-1-A.[3] Furthermore, Mr. Sisson's piecemeal application process and his tendency to complete, or substantially complete, work before obtaining a permit made it difficult to determine the full scope of the renovation project.

The first permit issued by DCRA in response to Mr. Sisson's request, dated January 29, 1998, related to a proposed "two-story addition" to the rear of the home. This permit application apparently was examined under the R-1-B zoning classification instead of the WHOD/R-1-A regulations. The BZA found that:

> Plans submitted by [Mr. Sisson] as part of his application for the first permit did not reflect all of the construction work that [he] planned to perform at the site. [His] project was developed in a piecemeal manner and the various applications were often incomplete or otherwise misleading in that they did not always reflect [Mr. Sisson's] plans for the garage, rear addition, and front porch consistently and accurately.

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1. Ms. Crary did not file an appellate brief in this case.

2. In actuality, the Department issued a sixth permit to Mr. Sisson on October 11, 2000, although that permit is not before the court for review at this time.

3. The R-1-A and WHOD/R-1-A zoning classifications specified requirements for minimum lot area, minimum lot width, lot occupancy, floor area ratio, minimum front yard, minimum rear yard, minimum side yard, and off-street parking; and the R-1-A and WHOD/R-1-A classifications contained different requirements for lot occupancy, floor area ratio, and minimum front yard. The applicable zoning requirements for Mr. Sisson's renovation had to be considered in light of the existing dimensions of his home and ga

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The second permit issued by DCRA, dated February 9, 1998, concerned an addition to Mr. Sisson's garage. The permit was issued pursuant to the R–1–A, rather than the WHOD/R–1–A regulations. The BZA's factual findings establish that "the second permit authorized an addition to an existing garage"; Mr. Sisson "demolished [the existing garage] without authorization"; and constructed a new garage "that was larger than the approved garage addition."

A third permit for the construction of a new garage, dated May 27, 1998, replaced the February 1998 permit, and "was issued after the new garage was already substantially completed." Moreover, "[t]he large size of the new garage also exceeded the dimensions allowed by the third building permit." [4]

DCRA issued a fourth permit, dated August 17, 1998, to repair a roof allegedly situated over Mr. Sisson's porch. The permit was issued pursuant to the R–1–B g regulations, rather than the appropriate WHOD/R–1–A regulations. In addition, even though this permit covered repairs to an existing porch roof, "at the time the permit was issued, the porch was open and did not have a roof." The fifth and final permit, dated October 5, 1998, was issued to build a "new porch roof." In this court, "Mr. Sisson concedes that the BZA did not commit reversible error in finding that the two front porch permits (August and October 1998) were not appropriately issued ... [and does] not contest[ ] the validity of BZA's rejection of the front porch permits."

Ms. Crary filed her BZA appeal on September 18, 1998, approximately two weeks prior to the issuance of the fifth and final permit in this case. In response to Mr. Sisson's contention that Ms. Crary's appeal was barred by untimeliness, the BZA stated:

> The Board concludes that the Appeal was timely with respect to all five permits. [Mr. Sisson] submitted five separate applications for building permits that all related to work performed on a single property. Because of the cumulative, piecemeal nature of the applications, the full extent of [Mr. Sisson's] construction project could not be discerned as each individual permit was issued and therefore they must be considered as a whole.... The Board is not persuaded that the first permit put [Ms. Crary] on notice of all the work to be done on [Mr. Sisson's] property or, therefore, that the work allegedly violated the Zoning Regulations.
>
> Other factors also support our conclusion that [Ms. Crary] was not "chargeable with notice" as soon as the first permit was issued. [Mr. Sisson's] various permit applications contained errors of omission or were otherwise misleading in that they did not reflect all existing and planned improvements accurately and consistently.... Because of these errors, zoning violations arising from the failure to comply with lot occupancy and setback requirements of the Wesley Heights overlay, in particular, were not apparent until the work was substantially completed on [Mr. Sisson's] property. Moreover, some work was performed beyond the scope of the permit, as with the demolition of the existing garage and the construction of a new garage larger than the dimensions specified on the permit, and two of the permits (the

4. A new permit was required when structural impediments prevented Mr. Sisson from completing the addition to the garage as originally planned. After discovering the structural problem, however, Mr. Sisson continued construction without first obtaining a new permit. When the DCRA received Ms. Crary's complaint about Mr. Sisson's construction, an investigation was conducted, resulting in a Stop Work Order.

> third and fifth) were issued for work that was undertaken prior to receiving the permits. Therefore, the Board concludes that [Ms. Crary] was not chargeable with notice of the entire scope of work performed at [Mr. Sisson's] property until all of the permits were issued.[5]

With respect to Mr. Sisson's argument regarding laches, the BZA declared: "Any delay in filing the appeal was not unreasonable but resulted from the fact that [Mr. Sisson] applied for separate building permits for each component of the construction on his property." Thus, there was no "unexcused delay." As for the merits of Ms. Crary's Appeal, the BZA asserted, in part:

> The Board concludes that the work performed on [Mr. Sisson's] property increased its nonconforming aspect with respect to setbacks and lot occupancy.
>
> As [the Zoning Administrator] acknowledged at the public hearing, the permits for the garage should not have been issued if the garage did not provide access in conformance with the zoning regulations. The two-car garage [which Mr. Sisson constructed] is accessible only through an easement that, at a width of eight feet, is narrower than the minimum width of 14 feet specified in the zoning regulations for a driveway with two-way circulation serving a parking space.
>
> The Board concludes that the Zoning Administrator erred in issuing the five building permits to [Mr. Sisson]. The Zoning Administrator's decisions were not based on complete and accurate information about [Mr. Sisson's] property, reflecting all existing and planned improvements. The zoning Administrator also failed to apply the correct zoning classification, which resulted in the issuance of permits that did not conform to applicable zoning provisions, especially the Wesley Heights Overlay District, in several material respects. The violations stemming from erroneously issued permits were compounded in this case by the fact that some work, with respect to the garage and front porch, was not performed strictly in compliance with the permits.

Ms. Crary filed her appeal on September 18, 1998, prior to the issuance of the fifth permit on October 5, 1998, for a new porch roof. At a February 17, 1999, hearing, Ms. Crary sought to amend her BZA appeal to include two permits not addressed in her original notice of appeal. The BZA granted the amendment.

ANALYSIS

[1–3] Mr. Sisson continues to press his jurisdictional and procedural arguments in this court. In addition, he contends that his new garage and the two-story rear addition to his home do not violate the zoning regulations. "We accord great deference to an agency's interpretation of its own administrative regulations, and we will uphold that construction unless clearly erroneous or inconsistent with the regulations.... Moreover, the agency's judgment ... is entitled to additional deference [where] it was interpreting its own interior rule of procedure rather than the Zoning Regulations." *Dupont Circle Citizens Ass'n v. District of Columbia Zoning Comm'n*, 431 A.2d 560, 565 (D.C.1981) (citations and references omitted); *see also Waste Mgmt. of Md., Inc. v. District of Columbia Bd. of Zoning Adjustment*, 783 A.2d 1117, 1122 (D.C.2001) (citing *Gordon v. District of Columbia Bd. of Zoning Adjustment*, 423 A.2d 917, 924 (D.C.1980)

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5. Both the Zoning Administrator and Ms. Crary's attorney had difficulty locating the third and fourth permit in DCRA's records. In fact, Ms. Crary did not locate the permit until January 1999.

6. The applicable BZA rul
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tations omitted). However, we are required to "[h]old unlawful and set aside any action or findings and conclusions found to be . . . [a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] in excess of statutory jurisdiction, authority, or limitations or short of statutory jurisdiction, authority, or limitations or short of statutory rights." D.C.Code § 2-510(a)(3)(A),(C) (2001). Furthermore, "[t]he timely filing of an appeal with the BZA is mandatory and jurisdictional." *Mendelson v. District of Columbia Bd. of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C.1994) (referencing *Woodley Park Cmty. Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 490 A.2d 628, 635 (D.C.1985)) (other citations omitted).

[4, 5] We turn first to Mr. Sisson's argument that the BZA should have dismissed Ms. Crary's appeal on the ground that it was untimely. The underlying events critical to this issue occurred around 1998. In 1998, BZA regulations required a "timely" appeal. While there was no time limitation specified in statute or regulation, our case law generally held that the filing had to be within a "reasonable period" after the appellant was chargeable with notice of the decision that was the subject of the appeal. As this Court said in *Woodley Park Cmty. Ass'n, supra*, "[b]ecause the rules of the BZA adopt no specific time limit on appeals, a standard of reasonableness is applied in determining whether an appeal is timely." [6] 490 A.2d at 636 (citation and references omitted). More recently, we have stated that "[a]t 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." *Waste Mgmt. of Md., supra*, 775 A.2d at 1122 (emphasis in the original).

[6] Ms. Crary's case, as the BZA implicitly determined, falls under the principle of "exceptional circumstances substantially impairing the *ability* of an aggrieved party to appeal—circumstances outside of the party's control." *Id.* Application of this principle supports the Board's conclusion that the timing of Ms. Crary's BZA appeal was not unreasonable, precisely because circumstances beyond her control impacted the timeliness of her filing. As the BZA determined, "[b]ecause of the cumulative, piecemeal nature of the applications, the full extent of [Mr. Sisson's] con-

6. The applicable BZA rule stated:

> 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.

11 DCMR § 3315.2 (1995). This provision was recodified in 1999 as 11 DCMR § 3112.2 (1999), 46 D.C.Reg. 7900 (1999). A notice of proposed rulemaking modifying this provision was published on May 24, 2002, 49 D.C.Reg. 4814 (2002), but apparently has not yet become final. The proposed rule would require an appeal to be filed "within sixty days (60) from the date the person appealing . . . had notice or knowledge of the decision complained of, or reasonably should have had notice or known of the decision complained of, whichever is earlier." 49 D.C.Reg. at 4884. However, it also states:

> The [BZA] may extend the sixty (60) day deadline for the filing of an appeal only if the appellant demonstrates that:
>
> (1) There are exceptional circumstances that are outside of the appellant's control and that could not have been reasonably anticipated that substantially impaired the appellant's ability to file an appeal to the Board; and
>
> (2) The extension of time will not prejudice the parties to the appeal . . .

49 D.C.Reg. at 4885.

struction project could not be discerned as each individual permit was issued and therefore they must be considered as a whole." Thus, "[Ms. Crary] was not chargeable with notice of the entire scope of work performed at [Mr. Sisson's] property until all of the permits were issued." The factual record supports this conclusion.

Not only were most of the permits issued under the wrong zoning classification, but each of the individual permits failed to reflect the entire scope of Mr. Sisson's proposed renovations. The first permit, issued in January 1998, covered a proposed two-story addition to Mr. Sisson's home, but did not authorize any garage or front porch modifications. The second permit, relating only to the garage construction, contained information that was not entirely consistent with that provided in conjunction with the first permit. Indeed, during the hearing on Ms. Crary's appeal, the BZA questioned Mr. Sisson at length about relevant omissions in his permit application. Those omissions related to the overall construction renovations at his home. Ultimately, the District issued a Stop Work Order when it appeared that Mr. Sisson's renovations did not comport with the permit issued to him by the DCRA. In fact, although his "permit authorized an addition to an existing garage," Mr. Sisson "demolished [the existing garage] without authorization," and ultimately constructed a new garage, for which he had no permit, "that was larger than the approved garage addition." Mr. Sisson then applied for a new permit relating to the garage after the District issued the Stop Work Order. He obtained the secondary garage permit, the third of the five, on May 27, 1998, at a time when the new garage was substantially complete. In fact, even the secondary permit raises questions, as evidenced by discrepancies between the permit itself and the actual construction of the garage, particularly with respect to its physical location. While the secondary garage permit authorized a "[n]ew garage to be located on same spot as previous garage," when questioned directly about this issue by the Vice Chair of the BZA, Mr. Sisson confirmed very little other than that the old and new garages shared a common wall. As to the porch, Mr. Sisson concedes that the fourth and fifth permits at issue in this case "were not appropriately issued."

Mr. Sisson argues that this court's approach in *Woodley Park Cmty. Ass'n, supra*, should control the timing of Ms. Crary's appeal to the BZA in this case, and that under that decision, her appeal was untimely. There, as in Mr. Sisson's case, the appellants before the BZA challenged permits issued on separate dates concerning different aspects of the relevant construction project, but did not file separate BZA appeals at the time each permit was issued. Rather than assessing the timeliness question in terms of the cumulative nature of the hotel project, however, this court analyzed the timeliness of the appeal on the issues of "height, setback, and accessory use" as a discrete matter, separate and apart from the timeliness of the challenge relating to parking issues. Mr. Sisson urges the court to adopt the *Woodley Park* approach in his case, rather than the analysis followed by the BZA in this [illegible].

Significantly, "[t]his court is not to substitute its judgment for that of the agency and ... the decision of the BZA will be upheld provided there is a rational basis for it." *Gladden v. District of Columbia Bd. of Zoning Adjustment*, 659 A.2d 253 (D.C.1995) (quotation omitted). Moreover, *Woodley Park* does not compel a decision different from that reached by the BZA, because it is distinguishable. We note first that the issue here pertains to renovations on private residential property and a challenge by a single individual, whereas *Woodley Park* involved [illegible]

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struction of a hotel and community association Furthermore, the partie engaged in negotiation force on which the Wood nity Association was rep gotiations lasted for ma which the hotel constru discussed at length. (negotiations provided th ample opportunity to b informed about and to r lating to height, setbac use. "Thus, by October the full building permit [appellants before the BZ notice of the aspects of th relating to height, setbac ertheless, one year elap issuance of the building filing of the appeal on O *Woodley Park Cmty. A* A.2d at 637. Under thos cumstances, the court co challenge relating to heig use was not timely filed.

Unlike the facts that court's approach to the m tion in *Woodley Park*, Mr engage in a thorough neg during which Ms. Crary v informed about all of M struction plans on his pro there was no lengthy, int give effort by Mr. Sisson with Ms. Crary and the loc associations on his consti In contrast, the negotiat Woodley Park rendered the timing of the appeal setback, and use.[7]

Given the factual history permit applications, which l persistent and close coll

We reiterate that the Court ark when the "reasonable

ion of a hotel and a challenge by a community association on other grounds. Furthermore, the parties in *Woodley Park* engaged in negotiations through a task force on which the Woodley Park Community Association was represented. The negotiations lasted for many months, during which the hotel construction project was discussed at length. Consequently, the negotiations provided the BZA appellants ample opportunity to become thoroughly informed about and to raise objections relating to height, setback, and accessory use. "Thus, by October 6, 1978—the date the full building permit was issued—the [appellants before the BZA] had full actual notice of the aspects of the building project relating to height, setback, and use. Nevertheless, one year elapsed between the issuance of the building permit and the filing of the appeal on October 12, 1979." *Woodley Park Cmty. Ass'n, supra*, 490 A.2d at 637. Under those particular circumstances, the court concluded that the

ge relating to height, setback, and use was not timely filed.

Unlike the facts that gave rise to the court's approach to the multi-permit question in *Woodley Park*, Mr. Sisson did not engage in a thorough negotiation process during which Ms. Crary would have been informed about all of Mr. Sisson's construction plans on his property. In short, there was no lengthy, intense and extensive effort by Mr. Sisson to collaborate with Ms. Crary and the local neighborhood associations on his construction project. In contrast, the negotiation process in *Woodley Park* rendered "unreasonable" the timing of the appeal as to height, setback, and use.[7]

Given the factual history of Mr. Sisson's permit applications, which lacked the kind of persistent and close collaboration with neighbors that was present in *Woodley Park*, the BZA reasonably concluded:

> Plans submitted by [Mr. Sisson] as part of his application for the first permit did not reflect all of the construction work that [he] planned to perform at the site. [Mr. Sisson's] project was developed in a piecemeal manner and the various applications were often incomplete or otherwise misleading in that they did not always reflect [his] plans for the garage, rear addition, and front porch consistently and accurately.

Significantly, the problematic permit history surrounding Mr. Sisson's renovations, coupled with the fact that some of the permits issued by the BZA were faulty on their face, constitute the very circumstances that were beyond Ms. Crary's control, *see Waste Mgmt. of Md., supra*, 775 A.2d at 1122, and make applicable the "extraordinary circumstances" exception in *Waste Mgmt.* Consequently, we affirm the BZA decision that Ms. Crary's appeal was timely.

[7-9] We turn next to Mr. Sisson's argument that Ms. Crary's appeal was procedurally barred by laches and estoppel. At the outset, we reiterate a fundamental notion that has controlled our treatment of these doctrines in prior cases: "[T]he defenses of estoppel and laches are judicially disfavored in the zoning context because of the public interest in enforcement of the zoning laws." *Beins v. District of Columbia Bd. of Zoning Adjustment*, 572 A.2d 122, 126 (D.C.1990) (citing *Goto, supra*, 423 A.2d at 925) (other citation omitted). Laches "is rarely applied [in the zoning context] 'except in the clearest and most compelling circumstances.'" *Id.* (quoting *Wieck v. District of Columbia Bd. of Zoning Adjustment*, 383 A.2d 7, 11 (D.C.1978) (citation omitted)). While we give defer-

7. We reiterate that the Court decided *Woodley Park* when the "reasonableness" test controlled the jurisdictional timeliness question.

ence to the BZA's findings with respect to laches, " '[w]hether the facts, taken together, are sufficient to sustain the defense of laches ... is a question of law,' to be answered *de novo* by the appellate court." *Id.* (quoting *American Univ. Park Citizens Ass'n v. Burka*, 400 A.2d 737, 741 (D.C.1979) (alterations in the original)).

[10–12] "[T]o determine the validity of a laches defense, we look to the entire course of events." *Goto, supra*, 423 A.2d at 925 n. 16 (reference and citation omitted). "Laches will not provide a valid defense, however, unless two tests are met: the defendant has been prejudiced by delay and that delay was unreasonable. In the absence of an analogous statute of limitations, the party asserting the defense has the burden of establishing *both elements.*" *American Univ. Park Citizens Ass'n, supra*, 400 A.2d at 740 (citations omitted) (emphasis added).

[13] The record before us does not reflect "the clearest and most compelling circumstance[ ]" requiring the application of the laches doctrine. *Beins, supra*, 572 A.2d at 126. Indeed, we agree with the BZA's conclusion that the first element of laches, unreasonable delay, is not present in this case.[8] As "the entire course of events," *see Goto, supra*, 423 A.2d at 925 n. 16, and the BZA factual record in the case show, the BZA properly determined that: "Any delay in filing the appeal was not unreasonable but resulted from the fact that [Mr. Sisson] applied for separate building permits for each component of the construction on his property." Consequently, we affirm the BZA's decision that the doctrine of laches does not apply in this case.

[14, 15] We have also previously set forth the elements of estoppel, while noting that the doctrine is "not judicially favored," *Wieck, supra*, 383 A.2d at 10 (references and citations omitted), and that its application is " 'limited [to] situations where the equities are strongly in favor of the party invoking the doctrine.' " *Id.* (quoting *District of Columbia v. Stewart*, 278 A.2d 117, 119 (D.C.1971) (citation and footnote omitted)). To make out a case of estoppel Mr. Sisson must show that: "(1) acting in good faith, (2) on affirmative acts of [the DCRA], (3)[he] ma[de] expensive and permanent improvements in reliance thereon, and (4) the equities strongly favor [him]." *Wieck, supra*, 383 A.2d at 11 (referencing *District of Columbia v. Cahill*, 60 App.D.C. 342, 344, 54 F.2d 453, 454–55 (1931)).

[16] On the record before us, we cannot say that Mr. Sisson acted in good faith in presenting the proposed renovations to his property in piecemeal fashion, or in demolishing his old garage and proceeding to construct a new garage without proper permits, or in building a new garage "that was larger than the approved garage addition." Nor can we conclude that Mr. Sisson initially relied on DCRA-issued permits that authorized him to demolish his existing garage and construct a new garage of larger dimensions than those approved for a garage addition. And, the record does not support Mr. Sisson's implicit assertion that the equities strongly favor him in this case. Thus, we see no reason to disturb the BZA's decision not to apply the estoppel doctrine to bar Mr. Crary's appeal.[9]

[17, 18] Finally, Mr. Sisson contends that: 'Even if the appeal was untimely and otherwise barred by the doctrines of laches and estoppel, the BZA therefore the [BZA] did not support its conclusion that the rear addition and garage were in violation of the regulations applicable in the [WHOD/R–1–A] zone. In reviewing a BZA decision, we must determine whether the agency has made sufficient findings of fact on each material contested issue of fact; (2) whether substantial evidence in the record supports each finding; and (3) whether conclusions legally sufficient to support the decision flow rationally from the findings.' " *Mendelson v. District of Columbia Bd. of Zoning Adjustment*, 645 A.2d at 1094 (quoting *Citizens Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 605 A.2d 1992) (quoting *Levy v. District of Columbia Bd. of Zoning Adjustment*, 739, 746 (D.C.1990))) (other citations omitted).

We are satisfied that: (1) the Board's conclusion—that the Zoning Administrator erred by issuing the five permits that are the subject of this case—is supported by its material findings of fact and substantial evidence of record, (2) and (3) that the conclusion flows rationally from the findings. Not all of Mr. Sisson's contentions were scrutinized

8. Since the first element of the laches doctrine is not satisfied, we need not address the second.

9. Furthermore, as we indicated in *Goto, supra*, 423 A.2d at 925 n. 15, and reiterated in *Rafferty v. District of Columbia Zoning Comm'n*, 583 A.2d 169, 176 (D.C.1990) (*Rafferty I*), "[i]t is not clear that estoppel will lie in a case brought by a *neighboring* landowner, or, arguably, that defense may be asserted [at all] against the municipality which rendered the

decision on which a party re at 925, n. 15 (references omitt

10. Section 2117.8 of 11 DC pertinent part:

A driveway which provide quired parking spaces sh lowing standards:

....

(b) A driveway serving a o ing or flat or which o only one parking space than seven feet (7 ft.) in

(c) A driveway serving any one-family dwelling or

[17, 18] Finally, Mr. Sisson argues that: "Even if the appeal were not untimely and otherwise barred by the doctrines of laches and estoppel, the testimony before the [BZA] did not support the conclusion that the rear addition and the garage were in violation of the regulation[s] applicable in the [WHOD/R-1-A]." "In reviewing a BZA decision, we must determine '(1) whether the agency has made a finding of fact on each material contested issue of fact; (2) whether substantial evidence of record supports each finding; and (3) whether conclusions legally sufficient to support the decision flow rationally from the findings.'" *Mendelson v. District of Columbia Bd. of Zoning Adjustment*, *supra*, 645 A.2d at 1094 (quoting *Glenbrook Rd. Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 605 A.2d 22, 31 (D.C. 1992) (quoting *Levy v. District of Columbia Bd. of Zoning Adjustment*, 570 A.2d 739, 746 (D.C.1990))) (other citations omitted).

We are satisfied that: (1) the Board's conclusion—that the Zoning Administrator erred by issuing the five permits that are the subject of this case—is supported by its material findings of fact and substantial evidence of record, (2) and that its legal conclusion flows rationally from its findings. Not all of Mr. Sisson's permit applications were scrutinized under the WHOD/R-1-A regulations. As the BZA indicated:

> A more significant oversight [of the Zoning Administrator] was the failure to recognize that [Mr. Sisson's] property is located within the Wesley Heights Overlay District. Thus, the more stringent WHOD provisions were not applied, and permits were issued that purported to allow work that does not comply with relevant lot occupancy and setback requirements. The oversight was compounded by the fact that the full scope of the work planned for [Mr. Sisson's] property was not depicted consistently and accurately on all permit applications, thus precluding an assessment of each individual permit application within the context of all existing and planned improvements.

The BZA also recognized that "[Mr. Sisson's] property is nonconforming because its lot area, lot width, and setbacks are smaller than the minimums prescribed in the WHOD/R-1-A zone, and because its lot occupancy is higher than the prescribed maximum." This meant, as the BZA found, "that the work performed on [Mr. Sisson's] property increased its nonconforming aspect with respect to setbacks and lot occupancy."

[19] Despite these BZA conclusions, Mr. Sisson asserts that the BZA erred in its application of the regulation set forth at 11 DCMR § 2117.8,[10] and in its finding of

decision on which a party relied." 423 A.2d at 925, n. 15 (references omitted).

10. Section 2117.8 of 11 DCMR provides in pertinent part:

> A driveway which provides access to required parking spaces shall meet the following standards:
>
> ....
>
> (b) A driveway serving a one-family dwelling or flat or which otherwise serves only one parking space shall be not less than seven feet (7 ft.) in width;
>
> (c) A driveway serving any use other than a one-family dwelling or flat, *or* which serves more than (1) parking space shall be as follows:
>
> (1) Not less than twenty-five feet (25 ft.) from a street intersection as measured from the intersection of the curb line extended;
>
> (2) Not less than twelve feet (12 ft.) in width if designed for on[e]-way circulation or fourteen feet (14 ft.) if designed for two-way circulation; and
>
> (3) Not more than twenty-five feet (25 ft.) in width.

11 DCMR 2117.8 (1995) (emphasis added).

fact No. 14.[11] On the record before us, we cannot say that the BZA erroneously applied its regulation by citing subsection (c) of 11 DCMR 2117.8, rather than subsection (b) in accordance with Mr. Sisson's view. Subsection (c) applies to a "driveway ... which serves more than one (1) parking space" and which involves "two-way circulation." The Zoning Administrator's testimony before the BZA showed clear concern for ingress and egress as well as access to and from a public street or alley through a recorded easement. In addition, the Zoning Administrator recognized that the larger garage would accommodate two cars, and that there would be two-way circulation to and from Mr. Sisson's garage. We defer to an agency's reasonable interpretation of its regulations that is consistent with its governing statute. *See Dupont Circle Citizens Ass'n, supra*, 431 A.2d at 565. Given the language of the regulation and the Zoning Administrator's testimony at the BZA hearing, if we decided that subsection (b) of 11 DCMR § 2117.8 applied instead of subsection (c), we would be substituting our judgment for that of the BZA. That we cannot do. *See Gladden, supra*, 659 A.2d at 253.

Based upon our review of the record before us, the BZA's penultimate conclusion flows rationally from its findings and is amply supported by evidence of record:

> The Board concludes that the Zoning Administrator erred in issuing the five building permits to [Mr. Sisson]. The Zoning Administrator's decisions were not based on complete and accurate information about [Mr. Sisson's] property, reflecting all existing and planned improvements. The Zoning Administrator also failed to apply the correct zoning classification, which resulted in the issuance of permits that did not conform to applicable zoning provisions, especially the Wesley Heights Overlay District, in several material respects. The violations stemming from erroneously issued permits were compounded in this case by the fact that some work, with respect to the garage and front porch, was not performed strictly in compliance with the permits.

Consequently, we do not have grounds to reverse the BZA regarding its determination on the merits of Ms. Crary's appeal.

Accordingly, for the foregoing reasons, we affirm the Order of the Board of Zoning Adjustment.

So ordered.



SIBLEY MEMORIAL HOSPITAL, Petitioner,

v.

District of Columbia DEPARTMENT OF EMPLOYMENT SERVICES, Respondent,

Abdul Ghafoor, Intervenor.

No. 99-AA-864.

District of Columbia Court of Appeals.

Submitted Nov. 9, 2000.

Decided Aug. 29, 2002.

Employer appealed Department of Employment Services' decision to reverse

11. Finding of fact No. 14 stated:

> A driveway providing access to required parking spaces must meet certain standards, including that a driveway serving more than one parking space must be at least 12 feet wide if designed for one-way circulation or at least 14 feet wide if designed for two-way circulation. 11 DCMR § 2117.8.

denial of temporary total
fits for workers' compensa
back condition. The Cou
Ruiz, J., held that employer
presumption that claimant
compensable.

Affirmed.

1. Workers' Compensation

In workers' compensati
the final decision of the D
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be reviewed by the Court of

2. Workers' Compensation

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3. Workers' Compensation

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4. Workers' Compensation

An order remanding a w
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5. Workers' Compensation

A workers' compensation
entitled to a rebuttable presu
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to create an easement in favor of Pearce. This was based on three factors. First, the 1913 deed is very specific in describing the easement and its beneficiaries. Second, the boundaries of the easement are clearly defined and easily found on the property. Third, the walkway had been used by Pearce and her predecessors for over 180 years. *Pearce v. Katkish*, 112 Wash.D.L. Rptr. 433, 436 (March 5, 1984).

Katkish argues that the words "subject to" are words of qualification and thus are insufficient to create an easement. For support he points us to *Procacci v. Zacco*, 324 So.2d 180 (Fla.Dist.Ct.App.1976). The trial judge found that *Procacci* was distinguishable.

[1, 2] There are no particular words of art necessary to create an easement by express grant. 3 *Powell on Real Property* ¶ 407 (1984). Therefore, we must determine the meaning of the deed by looking at its plain language and the surrounding circumstances. *See* 26 C.J.S. *Deeds* § 86 (1956). Looking at the language and the circumstances, we agree with the trial judge that the important factors are: (1) the specificity of the intent of the deed to create an easement for the benefit of the Pearce property; (2) the boundaries of the easement were spelled out in detail and easily found, and (3) the actions of the parties in interest prior to and subsequent to the conveyance. We agree that the 1913 deed created an easement in favor of the Pearce property. *See Jakobson v. Chestnut Hill*, 106 Misc.2d 918, 436 N.Y.S.2d 806 (1981).

[3] We also reject the argument that a grantor cannot, by one and the same conveyance, grant a fee simple estate to one party while reserving an easement to a third person. *See Baltic Investment Co. v. Perkins*, 154 U.S.App.D.C. 380, 475 F.2d 964 (1973). We adopt what we believe to be the more enlightened view that "by a single instrument of conveyance, there may be created an estate in land in one person and an easement in another." *Restatement of Property* § 472 comment b (1944). *See also Willard v. First Church of Christ, Scientist*, 7 Cal.3d 473, 476, 498 P.2d 987, 989, 102 Cal.Rptr. 739, 741 (1972) (rejecting the old rule as "clearly an inapposite feudal shackle"); *Townsend v. Cable*, 378 S.W.2d 806, 808 (Ky.1964) ("We have no hesitancy in abandoning this archaic and technical rule. It is entirely inconsistent with the basic principle followed in the construction of deeds, which is to determine the intention of the grantor."); and *Garza v. Grayson*, 255 Or. 413, 467 P.2d 960, 961 (1970) (rejecting the old rule as being "narrow and highly technical").*

Affirmed.



WOODLEY PARK COMMUNITY ASSOCIATION, Petitioner,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, Respondent.

Washington-Sheraton Corporation, Intervenor.

WASHINGTON-SHERATON CORPORATION, Petitioner,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, Respondent.

Nos. 83-1276, 84-10.

District of Columbia Court of Appeals.
Argued Dec. 12, 1984.
Decided April 11, 1985.

Community group appealed a permit granted to hotel developer for additional

* We find no merit to Katkish's contention that there were material facts still in dispute. *See Nader v. de Toledano*, 408 A.2d 31 (D.C.1979); Super.Ct.Civ.R. 12-I(k), 56(c).

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3. Zoning and Plannin

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4. Zoning and Planning

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truction. The board of zoning adjustment rejected claims as to height, setback, accessory use, and accessibility of parking spaces but did accept contention that the number of parking spaces was insufficient. Community group petitioned for review of findings on height, setback and accessory use, and parking and developer cross petitioned, renewing motion to dismiss. The Court of Appeals, Pryor, C.J., held that: (1) appeals by community group to all issues except number of parking spaces were not timely; (2) claims of community group were not barred by laches or estoppel; (3) evidence was sufficient to support determination that only 60 units of hotel were exempt from parking provisions of zoning regulations as having existed since 1958; and (4) conclusion that prior zoning order was unenforceable because building to which it applied no longer existed was supported by substantial evidence.

Denial of motion to dismiss as to height, setback, and accessory use reversed; otherwise affirmed.

Zoning and Planning ⇐354

Question of timeliness of appeal of decision concerning zoning regulations is jurisdictional; board of zoning adjustment is without power to consider appeals not timely made.

Zoning and Planning ⇐358

In absence of statutory appeal period, standard of reasonableness is applied in determining whether appeal to board of zoning adjustment is timely.

Zoning and Planning ⇐358

In determining reasonableness in filing appeal to board of zoning adjustment, to determine whether appeal was timely filed, courts have consistently held that time for appeal commences when party appealing is chargeable with notice or knowledge of decision complained of.

Zoning and Planning ⇐605

In reviewing a determination of board of zoning adjustment that appeal was proper, Court of Appeals accords great deference to agency's interpretation of its own administrative regulations and will uphold that construction unless clearly erroneous or inconsistent with the regulations.

5. Zoning and Planning ⇐442

Appeal by community group to board of zoning adjustment of decision to grant permits for hotel construction, made one year after issuance of building permit, was not reasonable, and therefore not timely even if developer had been less than fully candid in negotiations by misrepresenting its plans, since hotel developer's behavior did not eliminate community group's responsibility for negotiating choices it made, where it continued to negotiate with developer rather than appealing.

6. Equity ⇐72(1)

In order to make a claim for laches, party must establish omission to assert a right for an unreasonable and unsatisfactorily explained length of time under circumstances prejudicial to party asserting laches.

7. Zoning and Planning ⇐442

Appeal by community group building permit granted for hotel, on grounds of inadequate parking, was not barred by laches where appeal was filed only one month after group was chargeable with notice of zoning administrator's recomputation of parking requirements and party developing hotel was not prejudiced by delay.

8. Zoning and Planning ⇐24

Elements required to establish estoppel to challenge zoning decision are: party acting in good faith, on affirmative acts of municipal corporation, who makes expensive and permanent improvements realized thereon, and equities strongly favor party invoking the doctrine.

9. Zoning and Planning ⇐440

Community group was not estopped from appealing grant of building permit to hotel developer, on grounds of inadequate parking, where hotel developer did not establish expensive and permanent improve-

ments made in reliance on zoning administrator's recomputation of parking requirements and the calculations and approvals were subject in any event to board of zoning adjustment review and possible modification.

10. Zoning and Planning ⇐435

Board of zoning adjustment's conclusion that hotel had 60 permanent residential units in 1958, at time zoning regulations on parking became effective, thus exempting those units, was supported by sufficient evidence in light of testimony by individual who sought to have building declared landmark that he believed it had that many units, given absence of contrary evidence.

11. Zoning and Planning ⇐703

In reviewing board of zoning adjustment's findings, Court of Appeals applies the substantial-evidence test which requires: there must be findings of each contested issue of facts, decision must rationally follow from the facts, and there must be sufficient evidence supporting each finding. D.C.Code 1981, § 1–1509(e).

12. Zoning and Planning ⇐435

Board of zoning adjustment's conclusion that prior order had not required hotel to construct a particular number of parking spaces and was also unenforceable was supported by substantial evidence in light of testimony that only statements included as conditions to variances are enforceable, reference to parking was in a finding of fact and was vague and that evidence main portion of previous building, to which order had referred, had been demolished.

William H. Carroll, Charlestown, Mass., for Woodley Park Community Ass'n.

Richard B. Nettler, Asst. Corp. Counsel, Washington, D.C., with whom Inez Smith Reid, Corp. Counsel, John H. Suda, Principal Deputy Corp. Counsel, Charles L. Reischel, Deputy Corp. Counsel, and Lutz Alexander Prager, Asst. Corp. Counsel, Washington, D.C., were on the brief, for respondent.

Whayne S. Quin, Washington, D.C., with whom Norman M. Glasgow, Jr., Larry B. Blackwood, Thomas G. McGarry, James Bruce Davis and Hershel Shanks, Washington, D.C., were on the briefs, for Washington-Sheraton Corp.

Before PRYOR, Chief Judge, and NEBEKER and MACK, Associate Judges.

PRYOR, Chief Judge:

In this case, the Woodley Park Community Association ("WPCA") petitions for review of the District of Columbia Board of Zoning Adjustment's denial, in part, of its challenge to permits issued to the Washington-Sheraton Corporation ("WSC") for construction and occupancy of the Washington Sheraton Hotel.[1] In a consolidated appeal, WSC, intervenor below, cross-petitions for review of the denial by the Board of Zoning Adjustment ("BZA") of its motion to dismiss WPCA's appeal; in addition, it challenges the BZA's ruling respecting the number of required parking spaces.

In its presentation to the BZA, WPCA challenged permits issued to the WSC by the Zoning Administrator claiming that the building and roof structures of the hotel violate the height and setback requirements of the residential district in which it is located, the convention center use of the hotel is not an accessory use, the number of parking spaces provided is less than the number required, no valid parking plan was submitted, and the parking spaces are not reasonably accessible and convenient to users. WSC moved to dismiss WPCA's appeal, asserting that the appeal was both untimely filed, and also barred by the doctrines of laches and estoppel.

In its order, the BZA denied WSC's motion to dismiss the appeal, finding it timely and not barred by laches or estoppel. On the merits, the BZA rejected WPCA's claim as to height, setback, accessory use, and

1. Prior to renovation in 1979, the name of the hotel was the Sheraton-Park Hotel.

:cessibility of parking spaces. The BZA accept WPCA's contention that the number of parking spaces required by the Zoning Administrator was incorrect, and ordered an increase of seventy spaces, to a total of 649. Because the projected number of parking spaces was deemed incorrect, the BZA concluded that the parking plan was defective.[2]

In this court, WPCA challenges the BZA's findings on height, setback, accessory use, and parking; in a similar fashion, WSC renews its motion to dismiss. While supporting the BZA's other findings on the merits, WSC challenges the BZA's calculation of the required number of parking spaces as not based on substantial evidence in the record.

For the reasons stated herein, we find the challenge before the BZA on the issues of height, setback, and accessory use to be untimely. Therefore, as to these issues, we reverse the BZA's denial of WSC's motion to dismiss. We find WPCA's appeal on parking to be timely, and we further hold that consideration of this issue is not [illegible] by laches or estoppel. On the merits of the parking issue, we conclude that substantial evidence in the record supports the BZA's calculation of the required number of spaces at the Washington Sheraton Hotel, and we therefore affirm this aspect of the BZA order.

I

In the early part of December 1976, Mr. Leslie Norden Schwiebert, Managing Director of the Sheraton-Park Hotel, met with representatives of WPCA to inform them of plans for reconstruction of the Hotel. The reconstruction program, anticipated to cost $45 million, contemplated the construction of a new hotel building behind the then-existing main building, and expansion of exhibit and conference facilities. At the meeting, Schwiebert stated that WSC wanted to avoid a BZA appeal by WPCA as had occurred with a 1973 rebuilding plan. He also stated that he knew that the "doubling" of convention space would be of concern to the community, but he thought that existing garage parking supplemented by a surface lot would adequately handle traffic generated by the additional convention use. Finally, Schwiebert sought WPCA's assistance in providing for a unified review of WSC's rebuilding plans by community organizations and individuals.

In response to this request, a Task Force on the Rebuilding of the Sheraton-Park Hotel ("Task Force") was organized.[3] A series of meetings between Task Force members and WSC representatives was held in late December 1976, and in early January 1977. At these meetings, WSC representatives presented drawings and outlined plans for the rebuilding program.

Central to these discussions was a drawing of the completed project prepared by the architectural firm retained by WSC. This drawing depicted a final hotel structure set back from Woodley Road and preserving the parklike front of the hotel. In connection with the building and grounds depicted in the drawing, WSC representatives advised the Task Force that there would be 900 off-street parking spaces and parking for 35 to 40 buses at the hotel and an inner loop that would allow traffic to enter the hotel site on 24th Street, N.W., and to exit via Calvert Street or Woodley Road. They also represented that an additional 150 to 200 parking spaces could be

The BZA ordered WSC to submit revised plans to the Zoning Administrator, within 60 days, showing where and how the required 649 spaces would be provided. The BZA further ordered that if a suitable plan for 649 spaces was not submitted, appropriate action would be taken "to see that the Sheraton shall not operate or occupy more rooms or suites of rooms than the number for which it has provided sufficient parking...." WSC has complied with the BZA order that 649 spaces be provided.

3. The Task Force included representatives of Advisory Neighborhood Commission 3C, the Cleveland Park Citizens Association, the Saint Thomas Apostle Parish Council, and WPCA.

provided in lieu of grass in the northwest corner of the property.[4]

Members of the Task Force were sharply divided on the question of whether to pursue negotiations with WSC. The rebuilding plans were presented to the Woodley Park community at a town meeting on January 27, 1977.[5] Based on WSC's representations, the community urged the Task Force to attempt resolution of community concerns over the rebuilding through negotiation and mutual agreement with WSC.

On February 21, 1977, the Task Force sent a report on the rebuilding to WSC. The cover letter to this report succinctly stated the Task Force's awareness of the choice it had made in pursuing negotiations:

> While we continue to hold the view that the Sheraton Convention Hotel complex is a "non-conforming structure" as well as a "non-conforming use", the community is generally supportive of your plans. Our report is an outline for resolving the community's concerns by agreement with the Sheraton Corporation.

The report addressed Task Force concerns in three areas: perceived benefits to the community, perceived losses to the community, and matters requiring "additional review ... and continued dialogue...." Topics addressed included traffic (pedestrian and vehicular), parking, landscaping and environment, recreation and amenities, and construction. As reflected in the report, the Task Force was not concerned exclusively with issues such as parking and traffic posing a threat to the quality of community life: the Task Force sought also to maximize benefits to the Woodley Park community offered by the project.[6]

During the negotiations, the Task Force report evolved into a proposed WSC and Task Force Joint Statement on Rebuilding Project ("Joint Statement"). The goal of the negotiations was to reach agreement on the Joint Statement and have the document signed by both parties. From February 21, 1977 through May 18, 1979, nine drafts of the Task Force report and Joint Statement were exchanged. The Joint Statement, however, was never signed.

As negotiations between WSC and the Task Force proceeded, they focused increasingly on the issue of parking.[7] Be-

4. The Task Force was also informed by Mr. William Middleton, a member of the Municipal Planning Office, that the proposed plans did not appear to violate any zoning regulations.

5. The meeting was attended by approximately 135 Woodley Park residents.

6. For example, while concerns about parking and traffic are discussed prominently in the report, also mentioned are "recreation and amenities." Among the concerns listed under the latter topic are the following:

> A. Perceived Benefits to the Community
>
> * * * * * *
>
> 18. There will be two permanent swimming pools (and additional wading pools) available for neighborhood membership.
>
> 19. The new hotel will have a full range of entertainment, recreation, health and shopping facilities for which neighborhood access will be encouraged.
>
> * * * * * *
>
> C. Matters Requiring Additional Review by Hotel and Continued Dialogue with Community
>
> * * * * * *
>
> 29. Provide year-round swimming facilities.
>
> 30. Provide ice-skating rink.
>
> 31. Provide tennis facilities.
>
> 32. Provide for roof top restaurant.

7. A comparison of early drafts of the Joint Statement shows that the two sides sharply disagreed on the number of parking spaces to be provided. According to WPCA, WSC's initial representation was that the development plans for the hotel included 900 off-street parking spaces. By February 21, 1977, the Task Force apparently believed that WSC planned to provide 980 off-street parking spaces. Thus, their February 21, 1977 report requested that WSC, "increase the planned overnight 980 parking spaces by 220 to provide a total of 1200 parking spaces...." WSC's response on March 18, 1977, however, contained no specific representation as to the number of off-street parking spaces to be provided. In fact, at no time did a WSC draft of the Joint Statement contain a commitment to provide a specific number of parking spaces. In their November 2, 1977 draft of the Joint Statement, for example, WSC stated only that

cause parking and traffic were a primary concern, in March 1977, WSC agreed to undertake a traffic study to evaluate existing problems as well as new problems posed by the development.[8]

In August 1977, WSC applied to the District of Columbia for a building permit to start the new construction. As part of the application, WSC submitted building plans which included 798 parking spaces. On April 27, 1978, the Chief of the Zoning Review Board approved WSC's application for a full building permit, including the 798 parking spaces. As part of the permit review process, employees of the Zoning Office prepared an internal memorandum called a "calculation sheet," which indicated that to meet the requirements of the zoning regulations, WSC would have to provide 751 parking spaces.[9] This calculation sheet, however, was not made a part of the building permit which was issued on October 6, 1977.[10]

In early December 1977, while WSC's building permit application was pending, Task Force members met with Mr. James J. Fahey, Zoning Administrator, to discuss their concerns about the proposed building plans. At the meeting, Mr. Fahey informed Task Force members that, while he had not completed review of WSC's building plans, his preliminary opinion was that they did comply with the zoning regulations.

Following the meeting, the Task Force sent Fahey a letter dated December 5, 1977, summarizing its concerns. According to the Task Force, the proposed convention hotel complex did not comply with the setback or rear yard requirements of the zoning regulations, exceeded the height permitted in the R–5–B Zone, and would "result in a structure that continues a nonconforming use ...," that is, the convention use would be another primary use rather than an accessory use.[11] The letter forthrightly stated the Task Force's opinion as follows: "we do not believe the proposed new building meets fundamental requirements of the zoning regulations...."

In the letter, the Task Force articulated the difficult choice it faced between continuing negotiations and pursuing an administrative challenge to the building permit:

> We are hopeful that these discussions (with WSC) ... will enable the community and Sheraton to achieve their respective objectives. However, many intangible aspects of this process ... compel the community to avoid sleeping on its rights and to seek further assurance that its concerns will be alleviated.

At this point, the Task Force chose to continue negotiations rather than to file an appeal.[12]

> [t]he hotel recognizes that we have not provided the requested 1200 spaces. We will do everything possible to get maximum use out of our parking facilities and to minimize street parking.

8. In June 1977, Barton-Aschman Associates, Inc. was retained by WSC to conduct a study to develop recommendations for minimizing the impact of hotel-generated traffic on residential areas of Woodley Park. General agreement on the study elements was reached in August 1977, and a draft of the Barton-Aschman study was delivered to WSC and the Task Force on February 5, 1979.

9. 11 DCMR § 7202.1 (1977) requires that hotels provide one parking space for every two sleeping rooms or suites. WSC's building permit application represented that the completed structure would contain 1502 units. Thus, the zoning office calculated that 751 parking spaces would be required at the new hotel.

10. It is clear, therefore, that in negotiations with WSC, the Task Force sought to have WSC provide parking spaces in excess of the number required under the zoning regulations.

11. As a nonconforming primary use, the convention facilities at the hotel would not be permitted as a matter of right under zoning regulations.

12. Among the factors that influenced the Task Force's decision to continue negotiations, according to WPCA, were the following: WSC's replacement of its November 7, 1977 letter with a new response dated December 8, 1977; agreement by WSC representatives to document rep-

During 1978, negotiations between WSC and the Task Force continued. On January 27, 1978, the Task Force sent WSC a response to their December 8, 1977 draft of the Joint Statement. In April 1978, WSC responded, with a draft containing important changes in its representations. First, as to the parking issue, WSC's draft dropped all mention of a specific number of spaces.[13] Second, WSC's draft dramatically weakened the representation as to the on-site traffic loop, a major concern of the Task Force.[14]

On September 13, 1978, the Task Force responded to WSC's April draft. This response recognized the weakened position as to the traffic loop and objected to it. More importantly, the Task Force recognized the parties' inability to agree on the parking issue and returned a draft of the Joint Statement that reflected a willingness to complete negotiations on the document despite sharp differences on parking.[15]

In September 1978, therefore, the Task Force again directly confronted the difficult choice of continuing negotiations or pursuing an administrative appeal. The Task Force articulated the dimensions of this choice in the cover letter to WSC accompanying their September 13, 1978 draft of the Joint Statement:

> [G]iven the complexity of the issue ... it is extremely unlikely that the Hotel owners and the community could ever come to agreement on a precise number of parking spaces that the Hotel should provide.
>
> This places us in somewhat of a quandary. In its entirety, the joint statement is a pretty good document, reflecting diligence, perseverance, and good-faith efforts by both parties to resolve differing perspectives. Yet parking is so important, the question has to be asked,—what good is agreement on the other points if the community is going to get hurt on the parking issue. After somewhat intense deliberations we decided to pursue the joint statement for several reasons. While of a lesser magnitude than parking spaces, the other issues are important to area residents. And, while we can't mutually define the needed number of spaces, the Hotel and community are in accord on the principle of the Hotel's maximizing off-street parking.

Thus, despite the fact that the Task Force had full knowledge both that sharp differences on the parking issue existed and that problems had emerged regarding the traffic loop, it decided to continue negotiations.

On October 6, 1978, a building permit for the hotel was issued.[16] Construction work began immediately.

resentations in a formalized "Joint Statement;" a promise by WSC to include its representations to the community as a condition of any sale of the property; and impending completion of the Barton-Aschman Traffic study. Also militating against an appeal was the fact that the Task Force had been told in January 1977 (by Mr. Middleton) and in December 1977 (by Mr. Fahey) that WSC's building plans appeared to comply with D.C. Zoning Regulations.

13. Earlier drafts had explicitly mentioned the Task Force request for 1200 spaces, even while rejecting it. This draft stated only, "[t]he Hotel will do everything possible to get maximum use out of its parking facilities and to minimize street parking."

14. Unlike previous WSC drafts of the Joint Statement, which appeared to assume that a traffic loop would be provided, the April draft stated that the results of the Barton-Aschman study "will be reviewed with the community and taken into account in reaching the final decision on this on-site loop."

15. In its draft of the Joint Statement, the Task Force included separate sections outlining the Task Force's and WSC's positions on parking. The Task Force first set forth its position that WSC was legally obligated—because of prior BZA actions and an increase in hotel rooms—to provide 1103 parking spaces. The Task Force then stated WSC's position that "its planned 750 parking spaces not only fulfill city regulatory requirements, but also will provide the number of parking spaces required to meet peak demand."

16. The full building permit was approved on April 28, 1978. An initial permit for excavation had been issued on January 6, 1978, and a foundation building permit was issued March 3, 1978.

In late February and early March 1979, the Task Force and WSC reviewed the draft of the Barton-Aschman study of parking and traffic problems submitted February 5, 1979. The study concluded that an estimated 850 parking spaces were necessary and that only approximately 750 were planned. Also during this period, the Task Force learned for the first time of the calculation sheet prepared by zoning officials, indicating that only 751 spaces were required to comply with the zoning regulations.[17]

Increasingly convinced that WSC representations could not be relied upon, the Task Force undertook a count of the number of parking spaces at the hotel. The Task Force's physical count of spaces revealed that only 595 spaces existed.

As a result of the traffic study, information about the calculation sheet, and the physical count of spaces, WPCA informed WSC that it could not continue negotiations until furnished with a plan showing the precise location of parking spaces to be included at the hotel. On May 31, 1979, WSC furnished plans showing 750 spaces. Of these spaces, 225 were on the front lawn of the property, and 525 were in the garages.[18]

In June 1979, the Task Force met with the Zoning Administrator to report on the status of negotiations and to share its concerns about WSC plans. The Zoning Administrator acknowledged that the drawing of parking spaces furnished on May 31, 1979 and the physical count of spaces conducted by the Task Force indicated that WSC had not provided parking spaces in accordance with information submitted along with its building permits. The Zoning Administrator informed the Task Force that he could take no action, however, until WSC applied for an occupancy permit.

In August 1979, as part of its application for certificates of occupancy for the new building, WSC submitted revised plans to the Zoning Administrator providing for 595 parking spaces, over two hundred fewer than had been approved as part of the building permit. According to WSC's revised plans, the completed hotel would contain 1366 units, not 1502 as represented earlier. In addition, WSC asserted that no parking spaces were required for the 209 units in the Wardman Tower, because this structure had been constructed before applicable zoning regulations went into effect in 1958. Thus, WSC claimed that after the 209 Wardman Tower units were subtracted from the hotel's total of 1366 units, only one space for every two of the remaining 1157 units would be required to comply with the zoning regulations. The Zoning Administrator agreed with WSC and revised the computation sheet to reflect that only 579 parking spaces were required, and that 595 were being provided.

On September 12, 1979, WSC was issued occupancy permits for 320 of 945 new units. One month later, on October 10, 1979, WPCA filed its appeal with the BZA.

II

[1] The threshold issue presented is whether WPCA's administrative appeal of building and occupancy permits issued to WSC was timely. The question of timeliness is jurisdictional. *Goto v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 917, 923 (D.C.1980). Consequently, if WPCA's appeal was not timely filed, the BZA was without power to consider it. *Id.*

[2, 3] The Supplemental Rules of Practice and Procedure before the Board of

17. Also at this time, the Task Force learned that WSC's final plans for the hotel did not include the traffic loop.

18. The Task Force believed that the location of the 225 parking spaces spread across the front lawn of the hotel contradicted earlier representations by the WSC that the parklike front of the hotel would be preserved. Moreover, the number of spaces listed by WSC in the parking garages was higher than the physical count of spaces in the garages obtained by the Task Force.

Zoning Adjustment ("Supplemental Rules") provide, in part:

> Any person aggrieved by any order, requirement, decision, determination, or refusal made by any administrative officer or body ... in the administration or enforcement of the Zoning Regulations, may file a *timely* appeal with the Board.

22 DCRR § 2.21 (1972) (emphasis added). Because the rules of the BZA adopt no specific time limit on appeals, a standard of reasonableness is applied in determining whether an appeal is timely. *Goto v. District of Columbia Board of Zoning Adjustment, supra,* 423 A.2d at 923; *see also State ex rel. Housing Authority v. Wind,* 337 S.W.2d 554, 558 (Mo.App.1960); *Cave v. Zoning Board of Appeals,* 49 A.D.2d 228, 231, 373 N.Y.S.2d 932, 935 (1975), *app. denied,* 38 N.Y.2d 710, 382 N.Y.S.2d 1030, 346 N.E.2d 829 (1976). In applying the reasonableness standard, courts have consistently held that the time for filing an appeal commences when the party appealing is chargeable with notice or knowledge of the decision complained of. *E.g., Arkae Development, Inc. v. Zoning Board of Adjustment,* 312 N.W.2d 574, 577 (Iowa 1981); *State ex rel. Green's Bottom Sportsmen, Inc. v. St. Charles County Board of Adjustment,* 553 S.W.2d 721, 724–25 (Mo.App. 1977); *Ostrowsky v. City of Newark,* 102 N.J.Eq. (1 Backes) 169, 174–75, 139 A. 911, 913 (1928); *Pansa v. Damiano,* 14 N.Y.2d 356, 359–60, 251 N.Y.S.2d 665, 668, 200 N.E.2d 563, 565 (1964); *Hartunian v. Matteson,* 109 R.I. 509, 519–25, 288 A.2d 485, 490–93 (1972).[19]

[4] Here, the BZA found that WPCA's appeal as to all issues was "reasonably asserted" and filed in a "timely manner." In reviewing this determination, we are mindful that "[w]e accord great deference to an agency's interpretation of its own administrative regulations, and we will uphold that construction unless clearly erroneous or inconsistent with the regulations." *Dupont Circle Citizens Association v. District of Columbia Zoning Commission,* 431 A.2d 560, 565 (D.C.1981); *see also Sheridan-Kalorama Neighborhood Council v. District of Columbia Board of Zoning Adjustment,* 411 A.2d 959, 961 (D.C. 1979).[20] For purposes of clarity, our review of the BZA's findings on the issue of timeliness is in two sections. The first section addresses the timeliness of WPCA's appeal on the number of parking spaces required at the hotel. The second section addresses the timeliness of the appeal as to the issues of height, setback, and use.

A.

Review of the dispute over parking at the Washington Sheraton Hotel clearly shows that the BZA did not err in finding WPCA's appeal on this issue to be timely. WSC's original building plans were submitted to the Zoning Administrator in August 1977. These plans, approved as part of the building permit, provided for 798 parking spaces at the hotel. On October 6, 1978, the full building permit for construction of the hotel was issued.

In August 1979, as part of its application for a certificate of occupancy, WSC submitted revised plans to the Zoning Administrator. These plans provided for only 595 parking spaces. The Zoning Administrator agreed with WSC's assertions that only 579 parking spaces were required to meet the requirements of the zoning regulations. On September 12, 1979, WSC was issued a partial occupancy certificate that incorporated these new parking calculations. WPCA's appeal was filed with the BZA on

19. Under the zoning regulations, an appeal will lie from "any decision of an administrative officer granting or refusing a building permit or granting or withholding a certificate of occupancy or any other administrative decision based [i]n whole or part upon any zoning regulations or zoning maps adopted pursuant to the Zoning Act." 11 DCRR § 8102.1 (1977).

20. The BZA's conclusion is entitled to additional deference because the agency was interpreting its own internal rule of procedure rather than the zoning regulations. *Dupont Circle Citizens Ass'n v. District of Columbia Zoning Comm'n, supra,* 431 A.2d at 565.

October 12, 1979, one month after the certificate of occupancy was issued.

WPCA was "chargeable with notice" of the Zoning Administrator's approval of revised plans requiring only 595 spaces at the Washington Sheraton Hotel only as of September 12, 1979.[21] Thus, WPCA's appeal was filed only one month after receiving notice of the Administrator's decision dramatically reducing the required number of parking spaces.[22] This interval of one month between notice and filing of an appeal was reasonable. *Goto v. District of Columbia Board of Zoning Adjustment, supra,* 423 A.2d at 924 (delay of two months in filing appeal reasonable); *see also Keating v. Zoning Board of Appeals,* 325 A.2d 521, 524–25 (Me.1974) (60 days is reasonable appeal period). We, therefore, find no error in the ruling that this aspect of WPCA's appeal was timely.

B.

[5] The chronology of events relating to the timeliness of the appeal of height, setback, and use contrasts sharply with that on parking. In December 1976, and January 1977, members of the Task Force met with representatives of WSC to review plans for the proposed hotel redevelopment. As to the issues of height, setback, and use, the plans presented at these meetings were substantially similar to those objected to in WPCA's appeal.

Soon after reviewing the development plans, the Task Force recognized that possible grounds for appeal existed on the issues of height, setback, and use. On February 21, 1977, the Task Force sent WSC its initial report on the plans. In this report, the Task Force articulated its "view that the Sheraton Convention Hotel complex is a 'non-conforming structure' as well as a 'non-conforming use'...." Later, on December 5, 1977, the Task Force wrote to the Zoning Administrator and outlined objections to the development plans on the basis of violations of setback, rear yard, and height regulations, as well as an incorrect determination that hotel convention activities constituted an accessory use.

Thus, by October 6, 1978—the date the full building permit was issued—the Task Force had full actual notice of the aspects of the building project relating to height, setback, and use. Nevertheless, one year elapsed between the issuance of the building permit and the filing of the appeal on October 12, 1979. During this time, construction work on the hotel was commenced and substantially completed.

On this factual record, we conclude that as to height, setback, and use, the one-year delay from the issuance of the building permit to the filing of the appeal was not reasonable. *See Maroney v. Friere,* 74 Misc.2d 339, 340, 343 N.Y.S.2d 183, 185 (N.Y.Sup.Ct.1973) (delay of 127 days unreasonable); *In re Building Permit and Zoning,* 29 N.C.App. 749, 751, 225 S.E.2d 647, 649 (delay of 14 months unreasonable), *cert. denied,* 290 N.C. 661, 228 S.E.2d 451 (1976). Thus, we find the BZA's conclusion that the WPCA's appeal as to these issues was timely to be "not in accordance with law." D.C.Code § 1–1510(a)(3)(A) (1981). Consequently, the BZA lacked jurisdiction to consider WPCA's appeal of these issues.

WPCA argues, however, that WSC's conduct during negotiations renders its appeal timely as to all issues. WPCA claims that throughout negotiations, WSC misrepresented its actual final plans for parking and traffic circulation at the hotel. An earlier appeal was not filed, WPCA ex-

21. WPCA was aware in June 1979, of the substantial likelihood that WSC would not provide the number of parking spaces called for in the building plans. However, WPCA was not chargeable with notice of the Zoning Administrator's approval of the reduction in the required number of spaces until the occupancy permit was issued.

22. At no time during negotiations did WPCA receive notice that WSC planned to provide fewer spaces than the 798 called for in the building permit. Thus, nothing that transpired during negotiations provided WPCA with notice earlier than September 12, 1979, of the lower number of spaces to be provided.

plains, because of WSC misrepresentations that misled the Task Force into believing that its concerns on parking and traffic circulation would be accommodated. According to WPCA, once it became known that WSC's representations were misleading, an appeal was promptly filed. WPCA asserts that viewed in the context of WSC's conduct,[23] its delay in filing its appeal was reasonable, and its appeal was, therefore, timely.[24] We disagree.

The record underlying this appeal reveals two parties—WSC and the Task Force—engaged in complex and difficult negotiations over matters of great concern to both sides. WSC initiated negotiations, at least in part, to avert a lengthy and time-consuming appeal of its development plans. WPCA participated in negotiations in order to minimize harm and maximize benefits to its community from the hotel expansion.[25] Both sides hoped to realize gains if negotiations were successful, and faced potential losses if negotiations failed.

Proceeding concurrently with these negotiations was the lengthy administrative process undertaken by the WSC to obtain approvals for permits required for renovation of the hotel. Throughout its dealings with WSC, WPCA faced the difficult choice of continuing negotiations with the goal of reaching an agreement responsive to community concerns, or pursuing the alternate route of an administrative challenge to WSC's development plans. WPCA was fully aware of this choice throughout the negotiations.

WPCA chose to continue negotiations until June 1979, when they elected to pursue an administrative appeal.[26] In deciding to continue negotiations until this late date, WPCA was fully aware of the sharp differences that existed between the parties on parking, and that problems had emerged in regard to the traffic loop. Indeed, as early as September 12, 1978—one month before the building permit was issued—the Task Force informed WSC of its decision to continue negotiations despite a failure to agree on parking. This choice, WPCA stated, was made after "intense deliberations" and because of other issues "important to area residents."

WSC engaged in hard bargaining during negotiations with the Task Force.[27] Nevertheless, WSC's behavior does not eliminate WPCA's responsibility for the negotiating choices it made. WPCA cannot now escape the harsh consequences of its one-year delay in appealing because WSC—its adversary in difficult negotiations—was less than fully candid. While the circumstances presented here certainly make WPCA's one-year delay in appealing the building permit understandable, they do not make it reasonable for purposes of timeliness.

III

Because we have concluded that only the appeal as to parking is timely, we need

23. In its reply brief, WPCA characterizes WSC's conduct as follows: "WSC initiated, nurtured and manipulated discussions and negotiations with WPCA for the express purpose of deterring WPCA from seeking review by the BZA of its applications to build and occupy the Sheraton Washington."

24. While it is difficult to determine the BZA's precise reasoning for finding the appeal as to these issues timely, it does appear that some elements of this argument were accepted. The BZA concluded:

> The [WPCA] expected that it would be satisfied by the Sheraton as to the number of parking spaces, which was its principal concern. Upon discovering that the District of Columbia was on record as stating that only 579 spaces were required, and only 595 spaces were to be provided, the appeal was promptly filed.

25. *See supra* note 6 (quoting, in pertinent part, the February 21, 1977 Task Force Report on perceived benefits and losses to the community from the proposed development plans).

26. The appeal was not actually filed until October 1979, because the Zoning Administrator informed the Task Force that nothing could be done until WSC applied for certificates of occupancy.

27. We note, however, that the BZA concluded, "[i]t is difficult for the Board to determine whether either party was not acting in good faith."

consider only whether the appeal as to this issue is barred by laches and estoppel. We find the doctrines of laches and estoppel inapplicable to WPCA's appeal on the parking issue.

[6, 7] In order to make out a claim for 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.' " *Wieck v. District of Columbia Board of Zoning Adjustment*, 383 A.2d 7, 11 (D.C.1978) (quoting 3 RATHKOPF, LAW OF ZONING AND PLANNING 67–1 (3d ed. 1972)) (emphasis added); *see also Goto v. District of Columbia Board of Zoning Adjustment, supra*, 423 A.2d at 925. We find neither element of laches present in this situation.

As discussed above, WPCA filed its administrative appeal on the issue of parking only one month after becoming chargeable with notice of the Zoning Administrator's recomputation of parking requirements. More importantly, WSC was not prejudiced by the one-month delay because it was not until September 12, 1979, that it received authorization from the Zoning Administrator to provide a lesser number of parking spaces than called for in the original building plans. Nothing in the record indicates that WSC acted in reliance on this authorization prior to the time WPCA filed its appeal.

[8, 9] The elements required to establish estoppel are: "a party (1) acting in good faith, (2) on affirmative acts of a municipal corporation, (3) makes expensive and permanent improvements in reliance thereon, and (4) the equities strongly favor the party invoking the doctrine." *Wieck v. District of Columbia Board of Zoning Adjustment, supra*, 383 A.2d at 11 (citation omitted). In this case, WSC fails to meet these requirements. In particular, as noted above, WSC did not establish "expensive and permanent improvements" made in reliance on the Zoning Administrator's recomputation of parking requirements. Moreover, estoppel cannot apply because the Zoning Administrator's September 1979, calculations and approval of WSC's applications for certificates of occupancy were subject in any event to BZA review and possible modification. *See Interdonato v. District of Columbia Board of Zoning Adjustment*, 429 A.2d 1000, 1004 (D.C. 1981) (petitioners could not justifiably rely on non-final BZA action still subject to review).

IV

Two claims of error are asserted in relation to the BZA's consideration of the merits of the parking issue. First, WSC claims in its cross-appeal that the BZA erred in finding that the Wardman Tower contained 60 units in 1958, thereby increasing the number of parking spaces required at the hotel. Second, WPCA claims that the BZA erred in ruling that the WSC was not required under prior BZA Order 6750 to provide 898 parking spaces. We consider these claims of error separately below.

A.

The Wardman Tower

The Zoning Regulations require, in general, that one parking space be provided for every two units at a hotel. 11 DCMR § 7202.1 (1977).[28] With several exceptions not relevant here, the regulations exempt buildings built before May 12, 1958—the effective date of the parking regulations—from this requirement. 11 DCMR § 7201.1

28. The zoning regulations require that one parking space be provided "for each two sleeping rooms or suites." 11 DCMR § 7202.1 (1977). As the Zoning Administrator interprets this regulation, a room that cannot be separately rented (*i.e.*, that does not have a bathroom) is not counted as a "room" for purposes of computing parking requirements. Thus, a suite could have ten rooms, but if those rooms were rentable only as a group, it would require only one parking space. To avoid confusion, we use the term "unit" to signify a separately rentable sleeping room or suite.

(1977); *see Page Associates v. District of Columbia*, 463 A.2d 649, 651 (D.C.1983).

In applying for certificates of occupancy for the hotel, WSC represented to the Zoning Administrator that the completed structure would contain 1366 units. WSC claimed that no parking spaces were required for the 209-unit Wardman Tower because that structure had been built prior to May 1958. In issuing the certificate of occupancy, the Zoning Administrator accepted this contention, and calculated the parking required based on a total of 1157 units. In its appeal to the BZA, the WPCA claimed that as of May 1958, the Wardman Tower contained only 60 units. WPCA argued, therefore, that in calculating parking requirements, only 60 units should be excluded from the hotel's total of 1366. Thus, the factual question before the BZA was the number of units contained in the Wardman Tower as of May 12, 1958.

[10, 11] In reviewing the BZA's findings on this question, we apply the "substantial evidence test." District of Columbia Administrative Procedure Act (DCAPA), D.C.Code § 1–1509(e) (1981).[29] That test requires that in each agency decision (1) there must be findings on each contested issue of fact; (2) the decision must rationally follow from the facts; and (3) there must be sufficient evidence supporting each finding. *Citizens Association of Georgetown, Inc. v. District of Columbia Zoning Commission*, 402 A.2d 36, 41 (D.C. 1979) (citations omitted). To be sufficient to support a finding, evidence must be "more than a mere scintilla [and must be] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938); *see also Vestry of Grace Parish v. District of Columbia Alcoholic Beverage Control Board*, 366 A.2d 1110, 1112 (D.C.1976).

The evidence presented to the BZA on both sides of this issue was meager. WPCA offered the testimony of Mr. Lindsley Williams, an area resident and former Area Neighborhood Commissioner, who had prepared an application in 1978 to designate the Wardman Tower a historical landmark. Mr. Williams testified that according to his "information and belief" the Wardman Tower "was used entirely as a residential hotel with approximately 60 permanent residential suites until early in the 1960's."[30] The Zoning Administrator testified that he had "no idea" how many rooms were in the Wardman Tower in 1958. He explained that his determination that the Wardman Tower contained 209 units in 1958 was based on plans showing 209 to be the current number, coupled with an inability to locate any evidence that a different number existed in 1958.[31] WSC, owner of

29. The DCAPA requires that every agency decision be accompanied by written "[f]indings of fact and conclusions of law ... supported by and in accordance with the reliable, probative, and substantial evidence." D.C.Code § 1-1509(e) (1981).

30. In support of his position, Mr. Williams cited a newspaper article which contained the following statement, "Mrs. Irwin ... is one of 60 permanent tenants at the Sheraton Park." WASHINGTON POST, Feb. 6, 1969. This article cannot be used as support for the BZA's finding for two reasons. First, the article was excluded from evidence because it was not filed with the BZA five days prior to the hearing as required by Board rules. Supplemental Rules, 22 DCRR § 2.31 (1972). Second, the article does not meet the requirements of "reliable, probative, and substantial evidence," D.C.Code § 1–1509(e) (1981); *see General Ry. Signal Co. v. District Unemployment Compensation Bd.*, 354 A.2d 529, 532 (D.C.1976), because it is a human interest feature not purporting to address the situation at the Wardman Tower in 1958, but only in 1969. Moreover, the article did not address the number of units at Wardman Tower, but only the number of tenants.

31. In this regard, the Zoning Administrator testified that he conducted an exhaustive search of city records in an attempt to determine the correct number of units in 1958. The Zoning Administrator checked records of the Fire Marshal's Office, the Building Inspector's Office in the Department of Housing and Community Development, the Permit Branch and the License Branch of the Department of Licenses, Investigations and Inspection, and the Assessor's Office in the Department of Finance and Revenue.

the Wardman Tower in 1958, presented no evidence on the issue to the BZA.

The BZA's conclusion that "the most reliable information seems to be that the Wardman Towers had sixty permanent residential units in 1958" based on Mr. Williams' testimony, is bolstered by the fact that the testimony was essentially unrebutted. Given the absence of contrary evidence, the record before the BZA was sparse. Nonetheless, we find the BZA's conclusion that the Wardman Tower contained 60 units in 1958 to be based on substantial evidence. *See Lynchburg Gas Co. v. Federal Power Commission*, 119 U.S.App.D.C. 23, 29, 336 F.2d 942, 948 (1964) (where proof of certain facts is unavailable or such proof as is available is highly speculative, courts give greater deference to agency expertise); *see also Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 28–29, 81 S.Ct. 435, 450, 5 L.Ed.2d 377 (1961); *Federal Communications Commission v. RCA Communications*, 346 U.S. 86, 96–97, 73 S.Ct. 998, 1005, 97 L.Ed. 1470 (1953).

BZA Order 6750

[12] WPCA claims error in the BZA's ruling that prior BZA Order 6750 (dated December 5, 1962) did not require WSC to provide 898 parking spaces. We find no error in the BZA's ruling on this issue.

In 1962, WSC applied to the BZA for a variance for the Sheraton-Park Hotel.[32] In granting the variance, the BZA issued Order 6750 which contained the following finding of fact:

> (4) A traffic report relating to the proposed addition ... was made part of the record before the Zoning Commission [in the above cited case]. *This report disclosed that the existing off-street parking spaces totaling 564 will be increased to 898* and that the present hotel rooms, excluding permanent suites, will be increased from 910 to 1100 rooms. [Emphasis added.] [33]

WPCA argued to the BZA that this prior order imposed a requirement on WSC to provide 898 parking spaces at the hotel.[34] This requirement, WPCA claimed, was still in effect.

The BZA rejected WPCA's contention on two grounds, both of which are challenged on appeal by WPCA. First, the BZA found "no legal requirement" in the prior orders to provide a specified number of spaces. The BZA reasoned:

> The Zoning Commission Order rezoned the property, and cannot be read to apply any conditions other than to permit what is allowed and required under R–5–C zoning. The BZA orders are vague, very short and do not specifically require a set number of spaces. In one case, the Order referenced instructions given outside the context of the hearing and not found in writing anywhere.

WPCA now claims that the BZA erred as a matter of law in finding that the prior order imposed no legal requirement as to parking. *See Gordon v. District Unemployment Compensation Board*, 402 A.2d 1251, 1254 (D.C.1979) (court does not defer to agency in reviewing conclusion on matter of law). We disagree.

The section of BZA Order 6750 relied upon by WPCA is found in a finding of fact contained in that order. In testimony to

None of these sources yielded any information that shed light on the number of units in Wardman Tower in 1958.

32. The variance was from the zoning regulation's setback requirement to permit an addition to the hotel. Also at this time, the BZA approved roof structures proposed for the hotel.

33. The variance was made subject to the following conditions:

> The building shall be erected substantially in accord with revised plans marked "Exhibit A—William E. Chase" dated December 5, 1962 and filed for the record on that date to comply with verbal instructions issued to the appellant by this Board immediately following the hearing of this case.

34. In support, WPCA cited testimony and evidence in the 1962 zoning applications indicating that the hotel would provide 898 parking spaces.

the BZA, the Zoning Administrator stated that the consistent policy of his office is that only statements included as conditions to variances impose legal requirements and are therefore enforceable. The Zoning Administrator explained that because the statement at issue in Order 6750 was contained in a finding of fact, it imposed no legal requirement. This testimony, coupled with the BZA's finding that the language cited in the order was vague, makes clear that the BZA's ruling that Order 6750 imposed no legal requirement as to parking was not in error as a matter of law.

The BZA further found Order 6750 unenforceable because the building to which it applied no longer exists. WPCA challenges this factual finding as not based on substantial evidence. Again, we disagree.

Evidence before the BZA showed that the main portion of the previous hotel building was demolished after construction of the new portion of the hotel. This evidence amply supports the BZA's conclusion that "[e]ven if any requirements had been imposed as a result of the previous orders, those requirements cease to be applicable when the building to which they were attached is demolished." Thus, the BZA's conclusion on this issue was supported by substantial evidence. *See Citizens Association of Georgetown, Inc. v. District of Columbia Zoning Commission, supra,* 402 A.2d at 41.

Accordingly, as to the issues of height, setback, and accessory use, we reverse the BZA's denial of WSC's motion to dismiss. The BZA's decision on the merits of the parking issue is affirmed.

So ordered.



Robert L. BALTIMORE, Appellant,

v.

B.F. GOODRICH COMPANY, Appellee.

No. 84-1214.

District of Columbia Court of Appeals.
Argued March 7, 1985.
Decided April 16, 1985.

Plaintiff brought action to recover damages for injuries sustained when he fell from car in a garage. The Superior Court, John J. Malloy, J., granted directed verdict in favor of garage owner, and plaintiff appealed. The Court of Appeals, Nebeker, J., held that plaintiff presented sufficient evidence from which reasonable juror could have inferred that individual, who had lifted car on hydraulic lift while plaintiff was retrieving personal articles from car, was employee of garage owner, garage owner was liable.

Reversed and remanded for a new trial.

Master and Servant ⇐332(1)

Plaintiff, who was injured in fall from car, presented sufficient evidence from which reasonable juror could have inferred that individual, who had lifted car on hydraulic lift while plaintiff was retrieving articles from car, was an employee of garage owner, thus garage owner was liable.

John T. Irick, Ronald E. Tucker and Albert L. Preston, Washington, D.C., were on the brief, for appellant.

R.G. Guziak, Washington, D.C., for appellee.

Before NEBEKER, BELSON and ROGERS, Associate Judges.

NEBEKER, Associate Judge:

Mr. Baltimore appeals the trial court's granting of a directed verdict in favor of