LEXSEE 423 a2d 917

TAIKO GOTO, PETITIONER, v. DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT. MILTON M. GOTTESMAN, CITIZENS ASSOCIATION OF GEORGETOWN, INTERVENORS

No. 13491

District of Columbia Court of Appeals

423 A.2d 917; 1980 D.C. App. LEXIS 402

April 26, 1979, Argued

November 5, 1980, Decided

PRIOR HISTORY:
[1]**

Petition for Review of a Decision of the District of Columbia Board of Zoning Adjustment

COUNSEL:

Whayne S. Quin, with whom Norman M. Glasgow and Norman M. Glasgow, Jr. were on the briefs, for petitioner.

Leo N. Gorman, Assistant Corporation Counsel, with whom Louis P. Robbins, Acting Corporation Counsel at the time the brief was filed, and Richard W. Barton, Deputy Corporation Counsel at the time the brief was filed, were on the brief, for respondent.

Milton M. Gottesman, with whom Courts Oulahan was on the brief, for intervenors.

JUDGES:

Kelly, Gallagher, and Ferren, Associate Judges. Opinion for the court by Associate Judge Ferren. Associate Judge Kelly concurs in part and dissents in part.

OPINIONBY:

FERREN

OPINION:

[*918] Petitioner Taiko Goto seeks review of an order of the Board of Zoning Adjustment (the Board or BZA) which reversed an earlier determination by the Zoning Administrator that Goto could build a kiln at the rear of her pottery shop without a permit. She contends the Board should have held that principles of laches and estoppel barred the Citizens Association of Georgetown (CAG) and Milton Gottesman from appealing the Zoning Administrator's decision to the BZA. **[**2]** We agree as to laches and reverse. n1

n1 We accordingly need not deal with Goto's contention that the Board erred in concluding that she required a permit because the kiln is a "building" or building addition and because a gas pipe connecting the kiln to the shop building constitutes a "communication" between buildings within the meaning of District of Columbia Zoning Regulations § 1202 (1979).

I.

Since 1974, Taiko Goto has leased a store at 2605 P Street, N.W., in Georgetown, for use as a ceramics workshop. The area is zoned C-1, which permits "neighborhood shopping." District of Columbia Zoning Regulations § 2101.14 (1979). In early 1974, Goto wished to build a gas-fired kiln in the **[*919]** rear yard of her shop. She consulted with Mr. Krassensky, Chief of the Mechanical Section, Engineering Branch, Bureau of Building, Housing and Zoning (now a branch of the Building Division of the Building and Zoning Regulation Administration). n2 Krassensky told Goto that she could build the kiln without a permit **[**3]** if the kiln were set back from the walls of the existing structure and used

BZA
Case No. 16998
Exhibit No. 24
Board of Zoning Adjustment
District of Columbia
CASE NO. 16998
EXHIBIT NO. 24

less gas than a residence. Goto began constructing the kiln in November 1974.

n2 Effective July 3, 1975, the Department of Housing and Community Development of the District of Columbia government employed all the officials who were involved in the controversy concerning Goto's kiln. The Corporation Counsel's office provided the court with organizational charts showing the hierarchy of the officials involved in this case as follows:

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

Director

Building and Zoning Regulation

Administration

Administrator -- *Dripps*

Building Division

Engineering Branch Chief -- *Osborg*

Mechanical Section Chief -- *Krassensky*

Zoning Division Administrator -- *Fahey*

Zoning Review Branch Chief -- *Bottner*

Soon thereafter, Milton Gottesman, the owner of the adjacent property to the rear of Goto's shop, and Eva Hinton, Chairperson of CAG's Committee on Zoning and Planning, complained of the **[**4]** kiln to James J. Fahey, the Zoning Administrator. *See* note 2 *supra*. Fahey investigated the complaint and orally advised Goto to stop construction until she obtained a permit, and to submit plans for the kiln to his office. Goto submitted plans showing the kiln attached to the main building. Joseph Bottner, Chief of the Zoning Review Branch (under Fahey), *see* note 2 *supra*, advised her that the BZA would have to approve construction of the kiln.

Goto amended the plans to show the kiln as a separate structure and submitted them next to Howard A. Osborg, Chief of the Engineering Branch, Inspection (now Building) Division. *See* note 2 *supra*. Osborg determined that a permit was not required for the kiln and made a notation to that effect, dated April 30, 1975, on a letter to the owner of the property leased by Goto for her shop. Fahey, the Zoning Administrator, appealed Osborg's decision to Fahey's superior, William Dripps, Chief of the Bureau of Building, Housing and Zoning (now Building and Zoning Regulation Administration). *See* note 2 *supra*. In May 1975, Dripps sustained Osborg's determination that Goto could construct the kiln without a permit. Gottesman **[**5]** and Hinton had notice of this decision by June 1975. Goto completed the kiln and began to operate it by August 1975. n3

n3 Goto initially used propane gas to fire the kiln. By February 1976, after public hearings, the Public Service Commission granted Goto permission to use natural gas (this service was not automatic for new hookups). Goto obtained natural gas service by April 1976.

On November 18, 1975, Gottesman and Hinton met with Dripps, who reiterated his opinion that the kiln required no permit. At Hinton's request, Fahey wrote a letter on January 6, 1976, reflecting Dripps' position. n4 Hinton (on behalf of CAG) filed an appeal with the BZA on March 4, 1976, contesting the decision in Fahey's letter. Gottesman intervened as an appellant at the end of the first public hearing on July 21, 1976.

n4 Fahey's letter of January 6, 1976, informed Hinton:

This office has reviewed the kiln located at the rear of 2605 P Street, N.W. It has been determined that the kiln is not a building, but an accessory structure and, therefore permitted to be located within the rear yard.

[6]**

Goto did not learn of the appeal until May 25, 1976, when she heard of it from the owner of her leased property, who had received notice, and from her attorney, who read about the appeal on a BZA agenda. Goto's attorney made a motion to dismiss the BZA proceedings for lack of jurisdiction, **[*920]** as well as on grounds that laches barred CAG's appeal and that Goto's reliance on the prior decisions of District officials estopped the Board from requiring a permit. More specifically, Goto contended that the Board lacked jurisdiction to hear the appeal because (1) it was not timely filed, (2) CAG did not comply with the rules of the Board regarding authorization of the appeal, and (3) CAG was not a "person aggrieved" by Fahey's January 6 decision letter, within the meaning of the District of Columbia Zoning Act, D.C. Code 1973, § 5-420, and Zoning Regulations § 8102.1 (1979). Before the first public hearing, the Board denied the motion as to the jurisdictional grounds. The Board then considered Goto's kiln on three days of hearings between July 1976 and April 1977. In its final order of March 28, 1978, the

Board reaffirmed its jurisdictional ruling, rejected the defenses of [**7] laches and estoppel, and concluded that a permit was required for construction of the kiln. Goto petitions for review of the Board's decision. *See* D.C. Code 1973, § § 11-722, 17-303; *id.* 1978 Supp., § 1-1510.

II.

We first consider the three jurisdictional issues which Goto raised initially in her motion to dismiss the proceedings before the Board.

A. Goto contended that Hinton lacked authority to bring an appeal on behalf of CAG because the organization had not authorized her to do so. Hinton failed to attach to the appeal form a letter from CAG authorizing Hinton to act on its behalf, although the form directed: "If appeal is filed by agent of the appellant, Form 1 (Notice of appeal) shall be accompanied by a letter signed by the appellant authorizing the agent to act on his behalf in this appeal." Goto argues that this deficiency in the filing of the appeal deprived the Board of jurisdiction.

We cannot agree. Although the Zoning Regulations dictate that appeal forms must be complete at the time of filing, n5 the error here was not substantial. On February 26, 1976, before the appeal was filed, CAG, by resolution, authorized Hinton to act in its behalf in filing an [**8] appeal against *Dripps'* oral decision to allow construction of the kiln. Because it was *Fahey's* written decision (reflecting Dripps' view) that CAG apparently wished to contest, on June 21, 1976, CAG ratified Hinton's filing of the appeal against Fahey. This action eliminated any doubt that Hinton had authority to act as CAG's agent. The purpose of the BZA's authorization-letter requirement -- *i.e.*, that the Board should not be party to unauthorized appeals -- was adequately fulfilled in this case.

n5 The Zoning Regulations provide:

> Each appeal or application to the Board shall be made on the appropriate form provided by the *Board* and all information required by such form shall be furnished by the appellant or applicant at the time of filing the appeal.
>
> District of Columbia Zoning Regulations § 8203.1 (1979) (emphasis in original).

B. Goto also contended that CAG was not a "person aggrieved" within the meaning of the Zoning Act n6 and Regulations n7 and thus was not entitled to [**9] appeal [*921] Fahey's decision that no permit was required to build the kiln. The Board rejected her argument, stating in its final order:

> The Association and Mr. Gottesman are both "persons aggrieved" within the meaning of the Zoning Regulations. Mr. Gottesman lives immediately behind the subject site. The Association represents residents of both the immediate and the general area, and has had a long standing history of appearing in zoning matters before the Board.
>
> We need not deal with the issue of the CAG's standing as a "person aggrieved" before the Board n8 because Gottesman, the intervenor-appellant, had standing to support the appeal. n9

n6 The statute provides:

> Appeals to the Board of Adjustment may be taken by any person aggrieved, or organization authorized to represent such person, or by any officer or department of the government of the District of Columbia or the Federal Government affected, by any decision of the inspector of buildings granting or refusing a building permit or granting or withholding a certificate of occupancy, or any other administrative decision based in whole or part upon any zoning regulation or map adopted under sections 5-413 to 5-428.
>
> D.C. Code 1973, § 5-420. [**10]

n7 The regulations track the language of the statute:

> The Zoning Act of June 20, 1938 (52 Stat. 797), as amended, provides that appeals to the Board of Zoning Adjustment may be taken by any person aggrieved, or organization authorized to represent such person, or by any officer or department of the government of the District of Columbia or the Federal Government affected, by 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 [in] whole or part upon any zoning regulations or zoning maps adopted pursuant to the Zoning Act.
>
> District of Columbia Zoning Regulations § 8102.1 (1979).

n8 We do not reach the question -- addressed in Judge Kelly's opinion, *post* slip op. at 27-34 --

concerning the breadth of the "person aggrieved" requirement in the zoning context. As set forth in notes 6 and 7 *supra*, the Zoning Act and Regulations permit only a "person aggrieved" to appeal a decision of a zoning administrator to the BZA. *Cf. DeLevay v. District of Columbia Rental Accommodations Commission, D.C.App., 411 A.2d 354, 359 (1980)* (regulation permitting appeal from Rental Accommodations Office to Commission by "any person adversely affected" exceeds statutory authorization of appeal by "aggrieved party"). Because we conclude that Gottesman had standing to appeal to the BZA, we need not determine whether the "person aggrieved" language of the zoning laws is broad enough to allow appeal of a zoning decision to the BZA by CAG, a neighborhood organization, absent an allegation of specific injury to its members. We note that the issue of standing to appeal an administrative decision to higher administrative authority is primarily one of statutory construction. *See id. 411 A.2d at 358-60.* Administrative appeals do not necessarily depend on the elements of standing that judicial review would require. *See* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.08, at 239-40 (1958); 3 A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 37.03, at 37-40 & n.2, 37-49 (4th ed.) (April 1979).

For completeness, we note that the question of CAG's standing to appeal to the BZA is conceptually separate from the question of its standing to petition this court for review of a BZA decision adverse to its interests. If, for example, an agency imposes sanctions on a person not party to a complaint, that person may petition for review here in spite of -- indeed because of -- the absence below. *See Ammerman v. District of Columbia Rental Accommodations Commission, D.C.App., 375 A.2d 1060, 1063 (1977).* Nonetheless, when a person has the opportunity to present a complaint to an agency having jurisdiction, the failure to do so may preclude a petition for review of agency action by the court. *See DeLevay, supra at 358.* We note, finally, that when agency action in other contexts has adversely affected CAG's interests, this court has entertained CAG's petition for review. *See Citizens Ass'n of Georgetown v. Simonson, 131 U.S. App. D.C. 152, 153, 403 F.2d 175, 176 (1968)* (per curiam), *cert. denied, 394 U.S. 975, 22 L. Ed. 2d 755, 89 S. Ct. 1454 (1969)* (Congressional direction to Alcoholic Beverage Control Board to consider "the wishes of the persons residing or owning property in the neighborhood" in issuing licenses and CAG's allegation that many members reside or own property within neighborhood establishes nexus between plaintiff's interests and adverse action of defendants required to support judicial review of relicensing of saloon); *Citizens Ass'n of Georgetown v. District of Columbia Alcoholic Beverage Control Bd., D.C.App., 288 A.2d 666, 669 (1972)* (CAG has standing to seek D.C. Court of Appeals review under § 1-1510 of issuance of liquor license) (citing *Simonson, supra*). *See generally Basiliko v. Government of the District of Columbia, D.C. App., 283 A.2d 816 (1971);* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § § 22.00-.21 (1976 & Supp. 1980). *See also* French, *Broadened Concepts of Standing in the Local District of Columbia Courts, 23 How. L.J. 255 (1980).* **[**11]**

n9 The Zoning Regulations contain no provision for intervention. The Board presumably allowed intervention pursuant to its Supplemental Rules of Practice and Procedure, which provide:

> At the time of the hearing on the appeal, the Board may in its discretion and for good cause shown, permit interested persons to intervene in the appeal for such general or limited purpose as the Board may specify.
>
> Supplemental Rules of Practice and Procedure Before the Board of Zoning Adjustment, 22 DCRR § 2.4 (1972).

The cases cited in the text below generally construe FED. R. CIV. P. 24, which regulates intervention in federal courts:

> "Ordinary interveners [in administrative proceedings], as distinguished from public interest ones, are treated about the way interveners in a civil action in a federal court are treated." K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, *supra* § 8.11, at 293.

[*922] As a rule, an intervenor joins a preexisting dispute and cannot cure a jurisdictional defect in the original case. Intervention ordinarily will be denied if the intervenor is the only party **[**12]** who fulfills jurisdictional prerequisites. *See, e.g., McClune v. Shamah, 593 F.2d 482, 486 (3d Cir. 1979)* (district court properly denied motion of limited partnership to intervene in suit by limited partners when original plaintiffs lacked standing to assert claims); *Gebhard v. GAF Corp., 59 F.R.D. 504, 507-08 (D.D.C. 1973)*

(motion of employee to intervene in age discrimination suit by fellow employees denied when original plaintiffs failed to satisfy jurisdictional prerequisite of filing timely notice with EEOC); *cf. Lidie v. California, 478 F.2d 552, 555 (9th Cir. 1973)* (motion of food stamp applicants to add other plaintiffs properly denied when original plaintiffs were not qualified to represent class). In other words, an intervenor cannot come into a case that is not really there.

The courts, however, have established a narrow exception to this rule. In order to avoid excessive technicality, expense, and delay, a court in limited circumstances may treat an intervenor's claim as a separate action and decide the matter, while dismissing the original action. A court, accordingly, may invoke this exception only if there is an independent jurisdictional basis for **[**13]** the intervenor's claim and failure to adjudicate the claim would result in unnecessary delay. *See, e.g., Miller & Miller Auctioneers, Inc. v. G.W. Murphy Industries, Inc., 472 F.2d 893, 895-96 (10th Cir. 1973)* (district court lacked interpleader jurisdiction over original defendant but still had jurisdiction to award judgment to intervenor-defendant); *Atkins v. State Board of Education, 418 F.2d 874, 876 (4th Cir. 1969)* (per curiam) (original plaintiff failed to show standing to bring desegregation suit; case remanded so that parents of schoolchildren could intervene); *Fuller v. Volk, 351 F.2d 323, 328-29 (3d Cir. 1965)* (district court lacked jurisdiction over original plaintiffs; case remanded to determine whether court had independent basis for jurisdiction over intervenor-plaintiffs); *Hunt Tool Co. v. Moore, Inc., 212 F.2d 685, 688 (5th Cir. 1954)* (permissive intervention with independent jurisdictional grounds survives dismissal of original suit); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1920, at 613 (1972).

We are persuaded that Gottesman's intervention falls within this exception. First, because Gottesman's property adjoined Goto's, the Board **[**14]** had a basis for jurisdiction over Gottesman's claim independent of its jurisdiction over CAG's appeal. Generally, persons wishing to contest zoning determinations must demonstrate some damage -- damage greater than that suffered by the general public -- to satisfy the "person aggrieved" requirement. *See* 3 A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 37.03, at 37-52 & n.35 (4th ed.) (April 1979). Members of the Board, however, apparently assumed that, as the adjoining property owner, Gottesman did not have to claim any special damage to intervene in this case. n10 We agree. A property owner has a sufficient interest in the zoning of adjoining property to permit an appeal on the basis of that interest alone, without **[*923]** additional allegations of interest or injury. *See Weiner v. City of Los Angeles, 68 Cal.2d 697, 706, 441 P.2d 293, 300, 68 Cal. Rptr. 733, 740 (1968)* (en banc); *Gnau v. Seidel, 25 Md. App. 16, 25-26, 332 A.2d 739, 744-45 (Ct. Spec. App. 1975);* 3 A. RATHKOPF, *supra* § 37.03, at 37-46 to -47; Comment, *Standing to Appeal Zoning Determinations: The "Aggrieved Person" Requirement, 64 MICH. L. REV. 1070, 1079 & n.63 (1966).* Accordingly, any **[**15]** defect in CAG's jurisdictional assertions, *see* note 8 *supra*, does not apply to Gottesman.

n10 The following colloquy occurred at the end of the July 21, 1976, hearing:

MR. HARPS [of the Board]: That will be for my file. Anything I request you must also send to Mr. Gottesman and Mrs. Hinton.

MR. QUIN [Goto's attorney]: There is only one party here and you are identifying them both?

MR. HARPS: Mr. Gottesman is the man next door and I cannot eliminate him from this case. He is the man next door.

MR. QUIN: He did not take the appeal.

MR. HARPS: You cannot get any closer.

MR. HATTON: The Board will determine who are the parties.

MS. CUMMINGS [of the Board]: He can be made a party.

MR. GOTTESMAN: I can pay the fee and become a party. I move to intervene as a party.

MR. HARPS: Granted. I do not think the Board will reverse me on that.

Second, failure to adjudicate Gottesman's claim would result in unnecessary delay in the resolution of this case. In reliance on advice of Building Division **[**16]** officials, Goto began building her kiln in November 1974. She completed and began operating it in August 1975, five years ago. CAG instituted its appeal in March 1976, and Gottesman intervened in July of that year. The Board issued its final order on March 28, 1978. To dismiss the case for lack of jurisdiction at this late stage would only further protract this lengthy proceeding and disserve the interests of justice.

Third, permitting the case to proceed on the strength of Gottesman's standing does not prejudice any party. *See United States Steel Corp. v. EPA, 614 F.2d 843, 846 & n.4 (3d Cir. 1979)* (intervenor-plaintiff permitted to proceed after dismissal of original plaintiff when

defendant on notice of intervenor's claims); *Atkins, supra at 876* (case remanded to permit intervention by new plaintiffs when change would not cause prejudice). Gottesman has been involved in a timely fashion. *See* note 10 *supra*. As an immediate neighbor, he would be a proper appellant before the Board. Furthermore, the interests of Gottesman and CAG have been closely identified with each other throughout this proceeding. Gottesman testified as a witness for CAG before he intervened; **[**17]** Gottesman and CAG filed a single brief in this court. In these circumstances, no party can claim lack of notice of Gottesman's participation or claims.

Finally, no evidence of record suggests that Gottesman intervened in order to save the Board's jurisdiction, although in retrospect his entry may have had that effect. *See* note 8 *supra*. *Compare United States Steel Co., supra at 846* (intervention after dismissal of original plaintiff permitted when intervenor was attempting only to protect own interests, not to cure jurisdictional defect) *with McClune, supra at 486* (intervention properly denied when directed toward forestalling defendants' argument that original plaintiffs lacked standing to assert certain claims). The parties appear to have assumed CAG's standing. Gottesman has participated in this proceeding from the beginning. There is no indication that this case presents an effort to create sham jurisdiction.

We accordingly treat CAG's pleadings as those of Gottesman and conclude that the Board had jurisdiction to consider the appeal.

C. Finally, there is the question whether CAG's appeal was timely filed. The question of timeliness is jurisdictional; if the **[**18]** appeal was not timely filed, the Board was without power to consider it. *See Bertrand v. Zoning Board of Review, 99 R.I. 329, 331-32, 207 A.2d 604, 605 (1965).*

By rule, the Board requires appeals to be filed in merely a "timely" manner. n11 When an administrative agency has not adopted a specific time limit on appeals, a reviewing court should apply a standard of reasonableness. n12 *See State ex rel. Housing* **[*924]** *Authority v. Wind, 337 S.W.2d 554, 558 (Mo. Ct. App. 1960); Cave v. Zoning Board of Appeals, 49 A.D.2d 228, 231, 373 N.Y.S.2d 932, 935 (App. Div. 1975).*

n11 The BZA's Supplemental Rules of Practice and Procedure 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 ....
>
> Supplemental Rules of Practice and Procedure Before the Board of Zoning Adjustment, 22 DCRR § 2.21 (1972) (emphasis added).

n12 We agree, however, with cases and commentators that a specific time limit on appeals would serve the salutary purpose of increasing certainty and predictability for all parties to Board proceedings. *See Keating v. Zoning Bd. of Appeals, 325 A.2d 521, 523-25 (Me. 1974); Ehrenberg v. Persons, 8 A.D.2d 18, 21, 185 N.Y.S.2d 369, 372 (App. Div. 1959)* (per curiam); 3 A. RATHKOPF, *supra* § 37.04, at 37-53 to -54.

[19]**

In considering whether CAG's appeal was timely filed, the Board began to run the clock with Fahey's letter of January 6, 1976, although CAG had oral notice of that decision six months earlier. In its final order, the BZA concluded: ["The] written ruling dated January 6, 1976 was the first action which could be appealed to the Board." The BZA cites nothing in its order indicating that appeal lies only from a written decision, nor do the regulations explicitly establish such a requirement. According to the Zoning Act and 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 [in] whole or part upon any zoning regulations or zoning maps adopted pursuant to the Zoning Act." District of Columbia Zoning Regulations § 8102.1 (1979); *see* D.C. Code 1973, § 5-420; notes 6-7 *supra*. In similar circumstances, courts in other jurisdictions have concluded that a verbal decision is an appealable order which begins the running of the time for appeal. *See State ex rel. Beacon Court Inc. v. Wind, 309 S.W.2d 663, 665-66 (Mo.* **[**20]** *Ct. App. 1958); Hunter v. Board of Appeals, 4 A.D.2d 961, 962, 168 N.Y.S.2d 148, 150-51 (App. Div. 1957)* (mem.).

We conclude, however, that we cannot appropriately overrule the Board's construction of the Act and Regulation. Administrative determinations regarding an agency's internal procedures are entitled to due respect and should not be reversed unless "clearly wrong." *Capitol Hill Restoration Society v. Zoning Commission, D.C.App., 380 A.2d 174, 181-82 (1977), overruled on other grounds, Citizens Association of Georgetown v. Zoning Commission, D.C.App., 392 A.2d 1027 (1978)* (en banc); *see Leefer v. Administrator, National*

Aeronautics & Space Administration, 177 U.S. App. D.C. 62, 66, 543 F.2d 209, 213 (1976) (per curiam) (agency interpretation of its regulations honored unless "plainly erroneous or inconsistent with the regulations") (quoting *Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414, 89 L. Ed. 1700, 65 S. Ct. 1215 (1945)).* Applying that test, we conclude it was not clearly wrong for the Board to calculate timeliness of CAG's appeal by reference to the written order; thus, we defer to that interpretation. *See Gueory v. Hampton, 167 U.S. App.* **[**21]** *D.C. 1, 4-5, 510 F.2d 1222, 1225-26 (1974); Wasserman v. Udall, 234 F. Supp. 651, 654 (D.D.C. 1964).* n13 Our deference is reinforced by our concern that we cannot foresee how different interpretation of the Act and Regulation, linking timeliness of an appeal to oral notice of a decision, would affect how the BZA functions in future cases. *See Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 674-79, 94 L. Ed. 1194, 70 S. Ct. 876 (1950).* n14

n13 *Cf. People's Counsel v. Public Serv. Comm'n, D.C.App., 414 A.2d 520 (1980)* (per curiam). There we held that the time for filing an appeal from a decision of the Public Service Commission runs from the release of the printed copy of the decision rather than from a verbal announcement at a "sunshine hearing." *Id. at 521.* In *People's Counsel*, the Commission had offered no interpretation of the statutory terms at issue, leaving the question to this court in the first instance. *Id.* In that case, we accordingly were required to construe a statute, performing a task more appropriate to a court than an agency, and our construction did not interrupt the prior practice of the agency. **[**22]**

n14 We should not be understood, however, to hold that the BZA *must* interpret timeliness by reference to a written decision within the Department of Housing and Community Development.

Given that calculation of the timeliness of CAG's appeal began with the January 6 Fahey letter, the Board reasonably concluded that the appeal two months later was timely. *See Keating v. Zoning Board of Appeals, 325 A.2d 521, 524-25 & n.5 (Me. 1974)* (60 days is a reasonable appeal period). We cannot hold this conclusion "arbitrary, capricious, an abuse of discretion, **[*925]** or otherwise not in accordance with law." D.C. Code 1978 Supp., § 1-1510 (3)(A). We conclude that the Board had jurisdiction.

III.

Goto claims that the Board is estopped from enforcing the Zoning Regulations against her because she relied to her detriment on the assurances of District officials that the kiln could be constructed without a permit. She also contends that the claim of Gottesman and CAG is barred by laches because they waited to appeal until after she had undertaken significant work on the kiln. Although the **[**23]** courts disfavor the affirmative defenses of estoppel and laches because of the public interest in enforcement of the zoning scheme, *see Wieck v. District of Columbia Board of Zoning Adjustment, D.C.App., 383 A.2d 7, 10 (1978)* (citing cases), we conclude that the appeal was barred by laches in this case. n15

n15 The same elements of prejudice cited by Goto to support her laches defense give weight to her argument that the District is estopped from reversing its agents' earlier decision that a permit is not required. In order to establish a defense of equitable estoppel, Goto would be required to prove that (1) acting in good faith, (2) on affirmative acts of the District, (3) she made expensive and permanent improvements in reliance, and (4) the equities are strongly in her favor. *See Wieck, supra at 11; District of Columbia v. Cahill, 60 App. D.C. 342, 343, 54 F.2d 453, 454 (1931).*

Goto arguably has met all these requirements. Her estoppel claim presents a problem, however. It is not clear that estoppel will bar a case brought by a neighboring landowner; arguably, that defense may be asserted only against the municipality which rendered the decision on which a party relied. *See Wright v. DeFatta, 129 So.2d 614, 619 (La. Ct. App. 1961); Lichte v. Heidlage, 536 S.W.2d 898, 901 (Mo. Ct. App. 1976).* The District itself did not become involved in enforcing Zoning Regulations against Goto until after the BZA proceedings, *i.e.*, until the BZA rendered a decision adverse to Goto which became the official position of the District. The estoppel defense thus may not have been available to Goto until the proceedings in this court, in which she could argue that the BZA could not compel her to observe zoning requirements that other agents of the District were estopped to enforce.

Given our conclusion that laches barred the appeal, we need not resolve these issues.

[24]**

Laches will bar the claim of Gottesman and CAG if they delayed unreasonably in bringing their appeal to the Board, to Goto's prejudice. n16 "The principal element in applying the doctrine of laches is the resulting prejudice to the defendant, rather than the delay itself." 4 A. RATHKOPF, *supra* at 67-12 (1967) (footnote omitted). *See generally American University Park Citizens Association v. Burka, D.C.App., 400 A.2d 737, 740 (1979); Wieck, supra at 11.*

> n16 Laches presents a question distinct from that of the timeliness of CAG's appeal, discussed in Part II.C., *supra*. In deciding that jurisdictional question, we look only to the period from the zoning official's decision to the filing of the appeal. *See* Supplemental Rules of Practice and Procedure Before the Board of Zoning Adjustment, 22 DCRR § 2.21 (1972); note 11 *supra*. In contrast, to determine the validity of a laches defense, we look to the entire course of events. *See, e.g., American Univ. Park Citizens Ass'n v. Burka, D.C. App., 400 A.2d 737, 740-45 (1979); Wieck, supra at 11-13.* Moreover, laches may bar consideration of an appeal which, for jurisdictional purposes, would be timely, just as laches may bar an equitable claim brought within an applicable statute of limitations. *See Amidon v. Amidon, D.C.App., 280 A.2d 82, 84 (1971).*

[25]**

We look, first, to the record before the Board as to the timing of the claim in order to determine whether there was any unreasonable delay. Goto began work on the kiln in November 1974; Gottesman and Hinton learned by June 1975 that Dripps had decided no permit was necessary. During that seven-month period, Gottesman and CAG were working within the administrative process to attempt to prevent construction of the kiln; that delay is reasonable and cannot be held against them. *See Larkin v. Tsavaris, 85 So.2d 731, 733 (Fla. 1956); Morris v. Borough of Haledon, 24 N.J. Super. 171, 178, 93 A.2d 781, 784 (Super. Ct. App. Div. 1952).*

The critical period was from June 1975 to March 1976. Hinton and Gottesman were aware of Dripps' ruling by June 1975. The record reveals no reason why they waited until November 1975 to discuss that decision with Dripps. That unexcused delay of five months was compounded by an additional **[*926]** two months during which they requested (the record does not show when) and received a written decision. There is no record indication that bureaucratic delay was responsible for the two-month lag between the meeting on November 18, 1975, and the **[**26]** written decision of January 6, 1976. Finally, the delay of still another two months between that letter decision and the filing of the appeal on March 4, 1976, adds to the unreasonableness of the timing of CAG's action. Accordingly, although we have held that the appeal was timely filed, *see* Part II.C. *supra*, we cannot agree with the Board's conclusion that "the appellants have diligently objected to the kiln ...." During the nine months between their discovery of Dripps' decision and the filing of the appeal, Gottesman and CAG had knowledge of their rights and an opportunity promptly to assert them.

The second element of the laches equation is prejudice to Goto resulting from the delay. *See American University Park Citizens Association, supra at 740.* As the Board itself found, Goto spent approximately $2,000 of the $5,000 to build the kiln after Osborg, *see* note 2 *supra*, told her in April 1975 that no permit was required. She also expended time and money seeking a natural gas hookup at a hearing before the Public Service Commission. *See* note 3 *supra*. Essentially, therefore, the neighbors stood by and watched Goto spend time and money months before **[**27]** pressing their objections before the BZA.

Under similar circumstances, courts in other jurisdictions have concluded that equity requires the barring of a claim. In *Hill v. Board of Adjustment, 122 N.J. Super. 156, 299 A.2d 737 (Super. Ct. App. Div. 1972),* for example, homeowners relied on a building inspector's grant of a permit to build a garage. *Id. at 158, 299 A.2d at 738.* The homeowners began construction and had spent $3,500 of an estimated cost of $6,000 when, four months later, neighbors alerted the building inspector that the garage construction violated the side-yard requirement. *Id. at 159, 299 A.2d at 738.* The Board of Adjustment granted a variance to the homeowners. *Id.* The court held that the neighbors' appeal was barred by estoppel and laches. *Id. at 162-63, 299 A.2d at 740-41.* Similar, and occasionally even shorter, delays have been held to bar claims in light of a party's reliance on a zoning official's decision, to his or her prejudice. *See Medical Arts, Inc. v. Rohrbaugh, 293 So.2d 366, 369 (Fla. Dist. Ct. App. 1974)* (laches bars appellee-neighbors' suit filed three months after issuance of building permit and two months after complaint **[**28]** to City Council when appellant had spent considerable sums on construction before suit filed); *Black v. Barnes, 215 Ga. 827, 829, 114 S.E.2d 38, 39 (1960)* (laches bar plaintiff-neighbor's suit filed three months after commencement of construction when defendant had undertaken substantial building activity and financial commitment); *Oeth v. Felty, 421 S.W.2d 860, 860-62 (Ky. 1967)* (laches bars plaintiff-neighbors' suit filed six months after issuance of permit to erect

television transmission tower when neighbor moved for rehearing only after tower partially built and filed suit only after tower completed); *Maroney v. Friere, 74 Misc.2d 339, 341, 343 N.Y.S.2d 183, 185 (Sup. Ct. 1973)* (laches bars petitioner-neighbors' suit filed four months after issuance of building permit when respondents had entered into building contract in interim).

Goto's actions in reliance on the assurances of zoning officials were reasonable, in contrast with the unexplained delays by her neighbors in instituting an appeal, to Goto's substantial prejudice.

IV.

We conclude that the Board had jurisdiction over this appeal. Nonetheless, the Board's conclusion that Gottesman's and CAG's claim was **[**29]** not barred by laches was "unsupported by substantial evidence in the record of the proceedings before the court." D.C. Code 1978 Supp., § 1-1510(3)(E). We therefore set aside the BZA's order reversing the decision of the Zoning Administrator dated January 6, 1976.

So ordered.

CONCURBY:
KELLY (In Part)

DISSENTBY:
KELLY (In Part)

DISSENT:

[*927] KELLY, Associate Judge, concurring in part and dissenting in part:

I agree with the majority opinion's holding as to laches but would reverse for lack of jurisdiction in the Board.

The Board's final order in this case held that petitioner's kiln was a "building" and a "building addition" under § 1202 of the Regulations, and not an "accessory structure" which would have automatically been permitted within the C-1 zone. n1 Variances from the floor area ratio, rear yard and open court requirements were thus necessary.

n1 The Board interpreted the term "building," defined as a "structure having a roof supported by columns or walls for the shelter, support or enclosure of persons, animals, or chattel" in § 1202 of the Zoning Regulations, to include the kiln. It rejected petitioner's argument that a kiln is *not* for sheltering, supporting, or enclosing pots but for *firing*, or "cooking" them, and that it is thus most comparable to a backyard barbecue. The Board also found that the gas pipes running from the main building to the kiln constituted such "communication" between them as to make them one building, despite the following language in the Regulations: "The existence of communication between separate portions of a structure below the main floor shall not be construed as making such structure one building" (§ 1202) and despite the absence of any statutory or case law referring to pipes or plumbing as a means of "communication" between buildings. ("Communication" normally appears to be used as an equivalent term for "access.") In my judgment, the Board's interpretation of the terms "building" and "communication" are not only contrary to common sense but also plainly erroneous and inconsistent with the Zoning Regulations. *See Dietrich v. District of Columbia Board of Zoning Adjustment, D.C.App., 320 A.2d 282, 286 (1974).*

[30]**

The Board found merit neither in petitioner's argument that the BZA was estopped by petitioner's good faith detrimental reliance on the actions of the District of Columbia officials nor in her contention that the defense of laches barred the CAG from bringing its appeal. n2

n2 I note in passing that the Board's conclusions and findings of fact seem insufficient to defeat what the Board itself seems to concede is a prima facie case of estoppel against the municipality, which is a cognizable defense to Zoning Board jurisdiction in the District of Columbia. *See Wieck v. District of Columbia Board of Zoning Adjustment, D.C.App., 383 A.2d 7 (1978); District of Columbia v. Stewart, D.C.App., 278 A.2d 117 (1971); District of Columbia v. Cahill, 60 App.D.C. 342, 54 F.2d 453 (1931);* and *see Smith v. District of Columbia Board of Zoning Adjustment, D.C.App., 342 A.2d 356 (1975).*

The Board concluded that

Ms. Goto did indeed receive the approval of the government of the District of Columbia to construct the kiln.

And that

The total cost of building the kiln was approximately $5,000, of that total cost, approximately $2,000 was expended after Ms.

Goto received an indication from the permit authorities in April of 1975 that no permit was required.

Unless the Board found, as it did not, that petitioner's reliance was insufficiently detrimental or not reasonable and in good faith, or that the balance of equities does not favor the petitioner here, it would be difficult to affirm the Board's conclusion that estoppel was an insufficient defense. *See Wieck v. District of Columbia Board of Zoning Adjustment, supra at 11:*

The necessary elements [of 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 .... Furthermore, the reliance of the party must be justifiable .... [Citations omitted.]

And *see Smith v. District of Columbia Board of Zoning Adjustment, supra at 359:*

[The] Board must make findings as to (a) whether there was reasonable and good faith reliance by petitioners ... and (b) the extent to which they were on notice that the [structure] might violate the Zoning Regulations.

[31]**

The BZA also found that the CAG had standing before it as a "person aggrieved" within the meaning of the Zoning Regulations, § 8102, and as an "appellant" alleging error under § 8206.

In reviewing the BZA's decision, or the decision of any administrative agency with quasi-judicial powers, this court must, before reaching the standards of review set forth in § 1-1510 of the District of Columbia Administrative Procedure Act, make two threshold determinations. First, as any court, it must ascertain the adequacy of its own jurisdiction. *Reid v. United States, 211 U.S. 529, 53 L. Ed. 313, 29 S. Ct. 171 (1909); Minnesota v. Hitchcock, 185 U.S. 373,* **[*928]** *46 L. Ed. 954, 22 S. Ct. 650 (1902).* Second, almost as a conceptual prerequisite to its own exercise of jurisdiction, it must assure itself that there was a proper assertion of jurisdiction by the agency (or court) below. Normally, this court is bound by the BZA's interpretation of its own regulations unless it is plainly erroneous or inconsistent with the Regulations. *Dietrich v. District of Columbia Board of Zoning Adjustment, D.C.App., 320 A.2d 282, 286 (1974).* However, an agency's faulty interpretation of its **[**32]** governing jurisdictional regulations can never be harmless error. Our inherent judicial authority in matters of statutory construction requires us to consider *de novo* the propriety of an agency's exercise of jurisdictional power under its statutory grant of authority. Furthermore, this inquiry needs no prompting; it must be done by this court sua sponte. n3 Although a presumption of regularity attaches to jurisdictional questions, it may be disproved by extrinsic evidence or by the record itself. *Pardo v. Wilson Line of Washington, Inc., 134 U.S. App.D.C. 249, 252, 414 F.2d 1145, 1148 (1969).*

n3 Petitioner raised the issue of jurisdiction in her motion to dismiss, which was summarily denied before the first hearing began. *See Smith v. District of Columbia Board of Zoning Adjustment, supra at 359 n.8,* where we suggested that defenses to an agency's exercise of jurisdiction be heard before proceeding to the merits, "in the interest of judicial economy, [so] that this court [need] not be compelled to reach the merits ... if petitioners will prevail in their defense ...." The jurisdictional question was raised there, as here, in a motion to dismiss, but there based solely on the defenses of estoppel and laches.

[33]**

The crucial jurisdictional question before us, in my opinion, is whether the CAG, appellant below, had proper standing to come before the Board and contest the Zoning Administrator's January 6, 1976, decision in Miss Goto's favor. n4 I recognize that over the years CAG has brought many important cases in the interest of its members, but this is the first time this point has been squarely presented.

n4 The name of Mr. Gottesman, intervenor both here and before the BZA, does not appear anywhere on the March 4, 1976, appeal form. He was not granted leave to intervene on the side of the CAG until July 21, 1976, the day of the first BZA hearing. There is nothing in the record that argues that his relationship to the CAG is the basis for the CAG's appeal.

The Board's jurisdiction is set forth in D.C. Code 1973, § 5-420, which codifies section 8, chapter 534 of the congressional Act of June 20, 1938. n5 The Act empowers the Zoning Commission to adopt Zoning Regulations pursuant to it and also give the BZA the

power [**34] to "make special exceptions" and "pass upon disputed questions ... as they arise in the administration of the Regulations." It then sets forth the Board's jurisdiction to hear "appeals ... taken by any person aggrieved [etc.]" (the language is identical to § 8102 of the Regulations) and gives the Board four categories of powers "upon appeals": (1) to "hear and decide appeals where it is alleged by any appellant that there is error ..." (identical to § 8206), n6 (2) to hear and decide requests for special exceptions, (3) to grant hardship variances, and (4) to assume "all the powers of the officer or body from whom the appeal [*929] is taken" necessary to "exercise the above mentioned powers." n7

n5 The 1938 Act is found in Pub. L. No. 684, 52 Stat. 797.

n6 "Appeals from Administrative Decisions," § 8102, says, in pertinent part:

> The Zoning Act of June 20, 1938 (52 Stat. 797), as amended, provides that appeals to the Board of Zoning Adjustment may be taken by any person aggrieved, or organization authorized to represent such person ... by any decision of an administrative officer ... or any other administrative decision based in whole or part upon any zoning regulations or zoning maps ....

Under § 8206, the Board

> shall hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination or refusal made by any administrative officer or body ... in the administration or enforcement of these regulations.

At the first BZA hearing on this action, Board Member Cummings could not distinguish the two provisions. She complained, "There are two sections under which one could appeal and I could never get them straight and I could never understand why there were two sections." [**35]

n7 The BZA's powers under (2) and (3) were codified in the Regulations under § § 8207.11 and 8207.2 ("Original Jurisdiction"), while (4) was codified in § 8208 ("Administrative Powers").

The Act sets forth two cumulative (not alternative) requirements for appeals to the BZA: first, a showing of aggrievement, and, second, either invoking the Board's original jurisdiction under § § 8207.11 or 8207.2 or its appellate jurisdiction under § 8206 by "alleging error" in an administrative order, etc. Thus, all applicants to the Board's jurisdiction, whether original or appellate, must include a § 8102 showing that they are aggrieved.

Presuming that the CAG is technically an "organization," rather than a "person" under § 8102, it bears the additional burden of showing that it is "authorized to represent [an aggrieved] person." There is nothing in the record before us to support such a finding.

Even assuming that the CAG is a "person," the CAG, and the BZA in its ultimate conclusions, made no adequate showing that it was an "aggrieved" one. n8 Given the apparent confusion regarding the interpretation [**36] of the term "aggrieved person" within the Zoning Regulations, I briefly examine its provenance and use in this jurisdiction and its application (particularly to neighborhood associations) in zoning board of appeals cases elsewhere.

n8 The Board found that "[The] Citizens Association of Georgetown is a neighborhood citizens' association composed of many residents of the area, including the immediate vicinity of the site which is the subject of this appeal. The Association has often appeared before both the Board of Zoning Adjustment and the Zoning Commission to represent the views of its members on zoning issues and to protect its community from negative influences." There was no evidence in the record to support these findings, which appear to be based entirely upon facts of which the Board took administrative notice. Aside from the propriety of adopting the CAG's self-depiction as a fighter against "negative influences," I question its unsupported finding that the CAG has members residing in the immediate vicinity and, if there are such members nearby, that it is authorized to represent their interests.

[**37]

The term "aggrieved person" is not unfamiliar language in the District of Columbia. It is used to demarcate the standing required for judicial review of agency action in both the District of Columbia Administrative Procedure Act [DCAPA] n9 and in the analogous provision in the Federal Act. n10

n9 D.C. Code 1978 Supp., § 1-1510.

n10 *5 U.S.C. § 702* (1970).

In *Basiliko v. Government of the District of Columbia, D.C.App., 283 A.2d 816, 818 (1971),* this court first construed the "aggrieved person" language in the DCAPA, adopting a three-part standing test that required a showing of injury in fact, caused by agency action which was arbitrary, capricious, or in excess of statutory authority, and within the zone of interests to be protected by the statute. n11

n11 *See Ballerina Pen Co. v. Kunzig, 140 U.S.App.D.C. 98, 101, 433 F.2d 1204, 1207 (1970), cert. denied sub nom. National Industries for Blind v. Ballerina Pen Co., 401 U.S. 950, 28 L. Ed. 2d 234, 91 S. Ct. 1186 (1971)* (citing the test in the 1970 Supreme Court companion cases, *Barlow v. Collins, 397 U.S. 159, 164-65, 25 L. Ed. 2d 192, 90 S. Ct. 832 (1970),* and *Association of Data Processing Service Associations v. Camp, 397 U.S. 150, 153-55, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970)).*

[38]**

The underlying concern in limiting standing is generally "that the questions ... be framed with the necessary specificity, that the issues ... be contested with the necessary adverseness and that the litigation ... be pursued with the necessary vigor ...." *Flast v. Cohen, 392 U.S. 83, 106, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968).*

"The question of standing depends primarily upon the existence of a logical and adequately direct nexus between the plaintiff's interests and the adverse action of the opposing party or parties." *Citizens Association of Georgetown v. Simonson, 131 U.S.App.D.C. 152, 153, 403 F.2d 175, 176 (1968), cert. denied sub nom. 3259 M Street, Inc. v. Citizens Association of Georgetown, 394 U.S. 975, 22 L. Ed. 2d 755, 89 S. Ct. 1454 (1969).*

[*930] Standing restrictions are generally devised "not so much [out of] fear of a plethora of parties in interest as [out of] apprehension that standing might be abused by a person with no *legitimate* interest in the proceedings but with a desire only to delay the [agency action] for some private selfish reason." *Office of Communication of United Church of Christ v. FCC, 123 U.S.App.D.C. 328,* **[**39]** *335, 359 F.2d 994, 1001 (1966)* (emphasis in original). And see legislative history cited, *id. at 335 n.12, 359 F.2d at 1001 n.12.*

Since the "aggrieved person" language that Congress employed in the District of Columbia Zoning Regulations, § 8102, cannot, under any canons of statutory construction, be treated as surplusage or as adventitious terminology, especially given the established history of the term in federal law, the question becomes how to apply the term in Board of Zoning Adjustment cases. Since there has been no automatic "aggrieved person" standing statutorily granted to citizens associations in these cases, n12 I look to the use of the term elsewhere, as it applies to organizations and as used in zoning appeals.

n12 *Compare Citizens Association of Georgetown v. Simonson, supra at 153, 403 F.2d at 176,* where Congress explicitly *directed* the Alcoholic Beverage Control Board to consider "the wishes of the persons residing or owning property in the neighborhood" in issuing liquor licenses. *Simonson* also involved the CAG, which there, unlike here, alleged *in its complaint* "that many of its members reside or own property within the neighborhood" and was shown to be "an authorized spokesman organized to promote [the neighbors'] interests for its individual members." *Id.* Nor was *Simonson* a case construing "aggrieved person" terminology. *Cf. Kopff v. District of Columbia Alcoholic Beverage Control Board, D.C.App., 381 A.2d 1372, 1376-77 (1977)* (Advisory Neighborhood Commission members have individual standing as area residents to seek court review of ANC's statutorily granted rights).

[40]**

"A mere 'interest in a problem,' no matter how long standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient itself to render an organization 'adversely affected' or 'aggrieved' within the meaning of the APA [*5 U.S.C. § 702].*" *Sierra Club v. Morton, 405 U.S. 727, 739, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972)* (quoted in *United States v. Richardson, 418 U.S. 166, 177, 41 L. Ed. 2d 678, 94 S. Ct. 2940 (1974)).*

In zoning review cases, where aggrieved person language is frequently employed, n13 the test is generally whether the applicant for relief "show[s] a sufficient interest in the subject matter of the application that he will actually be injured by the governmental action. ... The rule that one without some right, title or interest in property cannot apply for relief, rests on the theory that hardship ... cannot be incurred by a person who is without some valid attachment to the land to which the application relates. ROHAN, ZONING AND LAND USE CONTROLS § 51.02[1] (1979). "In a sense, every citizen of the community has a stake in the

ion of each zoning dispute, and may be ed' by administrative [**41] decisions which he as erroneous. But it seems unlikely that the en ... could have intended to give standing to a broad class of persons.' ANDERSON, AMERICAN LAW OF ZONING § 21.06 (1968). *See also* 3 A. RATHKOPF, LAW OF ZONING AND PLANNING § 37.03 (4th ed. 1979).

n13 Most state enabling statutes have been modeled after the Standard State Zoning Enabling Act of 1926 which provides for appeals to the zoning board "by any person aggrieved" (§ 7).

The cases generally require a "specific, personal and legal interest," *Krejpcio v. Zoning Board of Appeals, 152 Conn. 657, 211 A.2d 687, 689 (1965),* and, more than a general interest in the viability of the community zoning plan, "a pecuniary interest injuriously affected." *Tyler v. Board of Zoning Appeals, 145 Conn. 655, 145 A.2d 832, 835 (1958).* One test is the person's "'direct', 'immediate', 'pecuniary' and 'substantial' interest in the subject matter of the litigation ...." *Baker v. Zoning Hearing Board of West Goshen Township* [**42] , *27 Pa. Commw. 602, 367 A.2d 819, 822 (1976).*

Property owners' associations cannot be characterized as "aggrieved" unless they [*931] "successfully demonstrate[] that those whom [they] represent have a significant interest in the matter." ROHAN, *supra* at § 51.02[2]. *See Vitolo v. Chave, 63 Misc. 2d 971, 314 N.Y.S.2d 51 (1970),* RATHKOPF, *supra* at § 37.03[5], and *see* ANDERSON, *supra* at § § 21.05 to 21.10. A property owners' association that does not own land affected by a [zoning] board decision is not a person aggrieved by such a decision. *Lido Beach Civic Association v. Board of Zoning Appeals, 13 App. Div. 2d 1030, 217 N.Y.S.2d 364 (1961); accord, Stocksdale v. Barnard, 239 Md. 541, 212 A.2d 282, 284 (1965)* ("an appeal is not authorized by an association as a party aggrieved [even] by reason of its members being aggrieved").

In light of the general consensus in federal law and in zoning appeals cases that "aggrieved" organizations must represent their members' concrete interests in a contested administrative decision, and in view of the specific language in § 8102 of our Regulations that these appeals be made by an "organization [**43] *authorized to represent [an aggrieved] person,*" and the lack of any per se standing exemptions in the regulations for citizens groups such as the CAG, n14 I would hold that the BZA must, before asserting jurisdiction, establish both "the existence of a logical and adequately direct nexus," *Citizens Association of Georgetown v. Simonson, supra at 153, 403 F.2d at 176,* between the interests of its members and the administrative decision it is contesting, and its own authority to represent those interests. Furthermore, these "interests" must be specific and significant, viewed under the standards we enumerated in *Basiliko v. Government of the District of Columbia, supra at 818.*

n14 D.C. Code 1973, § 5-420 exempts citizens associations "created for civic purposes and not for profit" only from paying the filing fee required in appeals to the BZA.

The record before us is devoid of anything but vague, generalized assertions of injury. When asked on the BZA's application form for appeals to "state manner [**44] in which *appellant* is aggrieved by administrative decision," the CAG answered: "Decision permits the erection of addition to (or accessory to) non-conforming building with substandard rear yard, thereby increasing congestion and density of development in Georgetown Historic District." Asked to "state briefly the allegations of error in administrative decision," the CAG said: "Decision improperly relieves owner of F.A.R. [floor area ratio] and rear yard requirements in the C-1 Zone and allows a rear addition to a non-conforming structure reducing depth of rear yard .... Also permits unauthorized use in C-1 Zone, i.e., fabrication of ceramics."

Neither answer is adequate. Not only is the logical nexus between the backyard kiln in question and "increasing congestion and density of development" unexplained, the relationship of the CAG to the "Georgetown Historic District" designation is not mentioned, nor is there any allegation that CAG members live in the area of petitioner's kiln or are affected in any way by its construction.

I do not believe such an application is sufficient to establish aggrievement under § 8102. Nor could the inadequacy of the application information [**45] have been cured by the record before the Board. n15

n15 The only neighbors, other than Mr. Gottesman, who appear in the record, are the twelve who submitted letters to the Board in support of petitioner. They all say she was a good neighbor and that they did not believe her studio or the kiln was harmful. Her next door neighbor, in fact, said, "The shop in no way is

offensive to me or to anyone else, in fact, it is an asset to the block. I see no reason why it should not be allowed to remain in business." Another neighbor said, "We have come to regard this studio as one of the valued cultural institutions of our neighborhood. We would be sorry to see Ms. Goto unable to continue with her fine neighborhood cultural service."

Although the Board says, in its final order, that "to accept the position [on standing] advanced by Miss Goto would be to effectively negate the appeals process," I disagree. The appeal procedure under § § 8102 and 8206 need not necessarily bar cases such as this. On the contrary, establishing **[**46]** proper standing before the onset of **[*932]** a BZA hearing will ensure that the questions before the Board are "framed with the necessary specificity ... contested with the necessary adverseness, and pursued with the necessary vigor." *Flast v. Cohen, supra at 106.* Although Congress could have extended automatic standing to groups that seek to represent the public interest, such as the CAG, it did not, and this court may not.

There is no factual support in the record for establishing standing for Gottesman. He filed no complaint; he testified for CAG at the July 21, 1976 hearing and orally moved to intervene as a party at the *end* of the hearing. His objections to the kiln are general and unrelated to any injury to him. The Board made no finding that Gottesman was a "person aggrieved;" he was allowed to intervene because "he was the man next door." I would not confer automatic standing upon an adjoining property owner without some allegation of injury to that specific property. Courts have frequently denied standing to adjoining property owners who failed to make a sufficient showing of special or pecuniary damages. *See, e.g., Stephens v. Tate, 147 Ga. App. 366,* **[**47]** *249 S.E.2d 92 (1978); Waltham Motor Inn, Inc. v. LaCava, 3 Mass. App. Ct. 210, 326 N.E.2d 348 (1975); Housing Authority of the City of Melbourne v. Richardson, 196 So.2d 489 (Fla. Dist. Ct. App. 1967); Kalvatis v. Village of Port Chester, 235 N.Y.S.2d 44 (1962). See also Western Michigan University Board of Trustees v. Brink, 81 Mich.App. 99, 265 N.W.2d 56, 58 n.1 (1978)* ("If adjoining landowners could suffer special damages, then they can easily plead them.")

Since the CAG did not establish its standing n16 as required under the Zoning Regulations, I would hold the Board's denial of petitioner's motion to dismiss for lack of jurisdiction was plainly erroneous.

n16 *See DeLevay v. District of Columbia Rental Accommodations Commission, D.C.App., 411 A.2d 354 (1980),* for a recent discussion of standing to bring an appeal to the RAC pursuant to RAC Regs. § 5.30 (an interpretation of the "aggrieved party" language in the Rental Accommodations Act, D.C. Code 1978 Supp., § 45-1652(g).

[48]**

PAUL WIECK, PETITIONER, v. DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT

No. 10639

District of Columbia Court of Appeals

383 A.2d 7; 1978 D.C. App. LEXIS 417

May 12, 1977, Argued

February 1, 1978, Decided

PRIOR HISTORY:
[**1]

Petition for Review of an Order of the District of Columbia Board of Zoning Adjustment

COUNSEL:

Harley J. Daniels, with whom R. Robert Linowes was on the brief, for petitioner.

S. Perry Jones, Assistant Corporation Counsel, with whom John R. Risher, Jr., Corporation Counsel, Louis P. Robbins, Principal Deputy Corporation Counsel, and Richard W. Barton, Deputy Corporation Counsel, were on the brief, for respondent.

JUDGES:

Kern, Gallagher and Mack, Associate Judges. Opinion for the court by Associate Judge Gallagher. Dissenting opinion by Associate Judge Mack.

OPINIONBY:

GALLAGHER

OPINION:

[*8] This is a petition for review of an order of the Board of Zoning Adjustment (BZA) denying an appeal from a decision of the Chief of the Zoning Inspection Branch. n1 That decision, if upheld and enforced, would require petitioner to remove from a backyard structure -- which has been and is now used as a residential rental property -- those plumbing and electrical items which render the building suitable for human habitation. The building concededly does not comply with the applicable zoning regulation, but petitioner argues that the BZA erred in not finding the District of Columbia government [**2] (District) estopped from enforcing that regulation with respect to his property. The peculiar facts of this case are crucial to our decision and thus are recounted in detail.

n1 The petition is before us pursuant to D.C. Code 1973, § 11-722.

In June of 1967, a building permit was issued to petitioner's predecessor in interest, Cecile deRochefort, for the erection of an accessory structure -- a shed for the storage of garden tools -- at 3267 P Street, N.W. The shed was completed in October of that same year. The shed was built with aluminum siding and the value of the work set at $1,200.

The following month, on November 15, a second building permit was issued to Mrs. deRochefort for the stated purpose of repair, authorizing the construction of a new fireplace, partitions for a new bathroom, and some electrical wiring work -- the stated value of which was $260. The application for this permit stated the present use of the building as "Priv. Home" and the issued permit recites the occupational use as a dwelling. [**3] The drawing accompanying the application describes the work as being done to the "recreation room". The work [*9] described in the permit was done to the backyard structure which had been erected under the authority of the first permit issued to Mrs. deRochefort. Twice before work had commenced on the structure and at least twice during work on it, an inspector visited the site.

BZA
Case No. 16998
Exhibit No. 24

Several months after completion of the work described in the second permit, the Zoning Administrator sent a letter dated July 2, 1968, to Mrs. deRochefort informing her that the second permit had been issued erroneously due to a misstatement of fact in the permit application -- *i.e.*, that the present use of the building was as a private home. Furthermore, the letter ordered her "to remove those items of a plumbing and electrical nature which by their presence make the structure suitable for human habitation and discontinue use of the structure for human habitation." This order was based on her purported violation of a zoning regulation n2 in using the structure as a dwelling.

n2 The zoning regulation which was found to be violated by a habitable structure in the backyard is D.C. Zoning Reg. § 7601.3:

> An accessory building in any district shall not exceed one-story or 15 feet in height except in an R-1-A or R-1-B district an accessory private garage may have a second story used for sleeping or living quarters of domestic employees of the family occupying the main building. Any such two-story accessory building shall not exceed 20 feet in height and shall not be located within the required rear yard. Any such two-story accessory building shall also be set back from all side lot lines for a distance equal to the minimum width of a required side yard in the district in which it is located.

[4]**

After this order with its threat of enforcement, no other action on the part of the zoning authorities occurred until three years later in February 1971, at which time a letter almost identical to that of July 2, 1968, was sent to her. Again, despite this warning of potential penalties, no further enforcement action was taken. Under unclear circumstances, however, an inspector noted on July 12, 1971, that the "bldg. in question is now used as a tool shed only." n3

n3 The record does not reveal how the inspector obtained this information -- although presumably from an on-site inspection -- nor whether the statement referred to another validly existing tool shed on the property, rather than the rental property. Even assuming the statement does refer to the offending building, there is no indication that Mrs. deRochefort had complied with the order. The order required the removal of certain plumbing and electrical items which render the building suitable for human habitation, not just that its use be reverted to a tool shed. Furthermore, there is other evidence in the record which shows that the building had been used as a residential rental unit continuously from its illegal conversion through the date of Mr. Wieck's purchase.

[5]**

Petitioner purchased the property at 3267 P Street, N.W., in May 1974. On December 2, 1974, the Chief of the Zoning Inspection Branch sent a notice to petitioner advising him of the zoning violation and ordering him to dismantle the offensive structure, reverting its use to a tool shed in accordance with the first permit. Mr. Wieck appealed to the BZA from that order. At the BZA hearing, petitioner's counsel argued that the zoning officials were estopped from enforcing the zoning regulation violated by the backyard structure. In denying the appeal, the BZA declined to rule on the estoppel issue asserting that sufficient material facts -- particularly the testimony of Mrs. deRochefort, whom the BZA had no authority to subpoena -- were not introduced to enable it to weigh the equities of the parties involved.

The applicable standard of review is set out in D.C. Code 1973, § 1-1510. *See* § 11-722; *Hubbard v. District of Columbia Board of Zoning Adjustment, D.C.App., 366 A.2d 427,* (1976). Thus, this court has the power

> (3) to hold unlawful and set aside any action or findings and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise **[**6]** not in accordance with law; ... or (E) unsupported by substantial evidence in the record of the proceedings before the court. [§ 1-1510(3).]

Our duty on review of this BZA order is "to determine whether findings made 'are supported by and in accordance with reliable, probative, and substantial evidence in **[*10]** the whole administrative record, *Schiffmann v. ABC Board, D.C.App., 302 A.2d 235 (1973),* and whether the conclusions of the Board flow rationally from these findings, *Stewart v. BZA, D.C.App., 305 A.2d 516 (1973).' Marjorie Webster Junior College, Inc. v. BZA, D.C.App., 309 A.2d 314, 319 (1973)." Dietrich v. District of Columbia Board of Zoning Adjustment, D.C.App., 320 A.2d 282, 285 (1974).*

The BZA concluded, on the basis of its findings and the record, that the estoppel "issue raised by ... [petitioner] is not supported by sufficient facts to enable the Board to decide that issue." The Board then stated

vaguely that such an issue must be "decided by weighing the equities of the parties involved, based upon a factual determination by the Board as to the actions of those parties." In deciding not to rule on the asserted estoppel, the BZA [**7] relied principally upon its failure to determine why the second permit was issued. n4 The BZA erred, however, as there is sufficient evidence in the record to rule on petitioner's estoppel argument.

n4 The BZA's findings contain at least one apparent inconsistency. Finding No. 8 states that "[it] is not clear what transpired during the permit issuing process which allowed the facilities in question to be installed." Finding No. 12 states "[the] reason as to why permit No. B-163502 was issued allowing the conversion of the accessory building into habitable space is not clearly set out in the record of this case." In contrast, Finding No. 5 states "[the] record indicates that the permit which allowed the installation of the facilities in question was issued by mistake or misrepresentation." This court can only speculate as to the meaning of the BZA's inconsistency. Perhaps we are expected to assume the evidence is unclear only as to whether the permit was issued by mistake or by misrepresentation, as opposed to any other reason. We are not required to resolve this problem, since a determination of that fact would bear on a consideration of estoppel only with respect to petitioner's predecessor in interest, Mrs. deRochefort.

[**8]

Due to the important general public interest in the integrity and enforcement of zoning regulations, the affirmative defenses of estoppel and laches are not judicially favored. *See, e.g., Nathanson v. District of Columbia Board of Zoning Adjustment, D.C.App., 289 A.2d 881, 884 (1972); People v. County of Kern, 39 Cal. App. 3d 830, 115 Cal. Rptr. 67 (Dist.Ct.App. 1974).* Furthermore, as stated in *District of Columbia v. Stewart, D.C.App., 278 A.2d 117, 119 (1971):*

While estoppel may be applied to the District of Columbia in certain limited situations when the equities are strongly in favor of the party invoking the doctrine [*District of Columbia v. Cahill, 60 App.D.C. 342, 54 F.2d 453 (1931),* cited in footnote], the District of Columbia must first have authority to act before conduct of its employees can be the basis of an estoppel defense. *National Hospital Service Society, Inc. v Jordan, 76 U.S.App.D.C. 26, 128 F.2d 460,* cert. denied, *317 U.S. 664, 87 L. Ed. 534, 63 S. Ct. 65* . . (1942). [Footnote omitted.]

The Board argued here that the zoning officials had no authority to issue the second permit, n5 and that, therefore, under *District of* [**9] *Columbia v. Stewart, supra,* and *National Hospital Service Society, Inc. v. Jordan, supra,* the petitioner is barred from asserting estoppel. n6 In the leading case of [*11] *District of Columbia v. Cahill, 60 App.D.C. 342, 54 F.2d 453 (1931),* where estoppel was applied in a zoning suit, the court did not specifically consider the issue of the official's authority as bearing on the application of the doctrine against the District, but focused on the particular elements of estoppel and particularly on the relative equities of the two parties. We do not reach this issue, n7 however, since we find that petitioner has not conclusively proved all the elements of equitable estoppel.

n5 D.C. Zoning Reg. § 8103.1 provides that (except in limited situations not applicable here) building permits "shall not be issued for the proposed ... [work on] any *structure* unless such *structure* complies with the provisions of these regulations." Thus, the respondent argues that the zoning officials had no authority to issue the second building permit which concededly does not comply with the zoning regulations. [**10]

n6 In *Coffin v. District of Columbia, D.C.App., 320 A.2d 301, 305 (1974),* this court summarized when estoppel was available against the District, in light of *District of Columbia v. Stewart, supra; National Hospital Service Society, Inc. v. Jordan, supra;* and *District of Columbia v. Cahill, 60 App.D.C. 342, 54 F.2d 453 (1931):*

[As] a result of conduct by its employees, estoppel may be applied against the District provided it has underlying authority to act in the specific area and the equities are strongly in favor of the party invoking the doctrine.

There the court did not first decide the issue of authority and then proceed to a discussion of the equitable factors, but instead lumped the factors bearing on authority with the equitable considerations -- never specifically deciding whether the official's act was unauthorized or just defectively exercised authority. *Coffin, supra at 305.*

n7 Even if we were to reach this issue, on the record before us we would consider the issuance of the second permit as mistakenly exercised authority by the zoning officials rather than as an act wholly beyond the scope of their underlying authority. *See Coffin v. District of Columbia, supra at 305.* To find a lack of authority here would virtually abolish the doctrine of equitable estoppel as applied to the government, since any invalid official action could be characterized as unauthorized.

[11]**

The petitioner relies primarily on *Cahill* to establish estoppel. The necessary elements 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. *See, e.g., Cahill, supra at 344, 54 F.2d at 454-55.* Furthermore, the reliance of the party must be justifiable. *Nathanson v. District of Columbia Board of Zoning Adjustment, supra at 884.*

The record does not demonstrate petitioner's justifiable reliance on any affirmative acts of District zoning officials. Petitioner does not point to anything the zoning officials did upon which he relied to his detriment nor does the record disclose any reliance-provoking conduct. There is no evidence which indicates that petitioner knew of, much less relied upon, the issuance of the second permit. Rather, his reliance resulted from the inaction of the zoning officials -- the failure to enforce their two prior orders of 1968 and 1971. A failure to act is not equivalent to an affirmative act. Moreover, inaction ordinarily is not sufficient to raise an estoppel. *See* **[**12]** *City of Evanston v. Robbins, 117 Ill. App. 2d 278, 254 N.E.2d 536 (1970); Rye Beach Village District v. Beaudoin, 114 N.H. 1, 315 A.2d 181 (1974); Salt Lake County v. Kartchner, 552 P.2d 136 (Utah 1976).* n8

n8 *But see City of Chicago v. Exchange National Bank, 51 Ill.2d 543, 283 N.E.2d 878 (1972),* in which it was suggested that, if the city knew of the violation of the zoning ordinance by the vendor of a building, the vendee could rely on an estoppel defense.

Our inquiry has not ended, however, until we consider the application of laches to this situation. Although not specifically pleaded as a defense to enforcement before the BZA or before this court, the substance of a laches defense is apparent from the petitioner's equitable arguments -- particularly those focusing on the longlasting failure of the proper officials to enforce their previous orders and the consequent prejudice to petitioner from their present attempted enforcement.

"Laches is a species of estoppel, being defined as the omission **[**13]** to assert a right for an unreasonable and unsatisfactorily explained length of time under circumstances prejudicial to the party asserting laches." 3 RATHKOPF, LAW OF ZONING AND PLANNING, at 67-1 (3d ed. 1972). It is often claimed "where the inactivity of the officials charged with the enforcement of the ordinance has misled the owner into acts in violation of the ordinance ... or has misled persons into purchasing the property in ignorance of the illegality of the use or structure." *Id.* at 67-2. As previously stated, a claim of laches in the zoning context is not judicially favored and is rarely applied "except in the clearest and most compelling [circumstances,]" *Moore v. Bridgewater Township, 69 N.J. Super. 1, 173 A.2d 430 (App. Div. 1961).* Where a party can prove inexcusable delay which has resulted in substantial prejudice, however, laches may be found. *Amidon v. Amidon, D.C.App., 280 A.2d 82, 84 (1971).*

Here, the first enforcement order was sent to Mrs. deRochefort in July of 1968, the second order was sent to her in February of 1971, and the third order was sent to petitioner in December of 1974 -- amounting **[*12]** to a delay of almost six and one-half **[**14]** years. The record does not disclose any sufficient reasons for this delay.

If, at any time prior to May of 1974, when petitioner bought the P Street property, the zoning officials had followed up on the two prior enforcement orders, the petitioner might not have purchased the property, or if he had, he would not have done so in reliance on the presence of a valuable rental dwelling in the backyard. The petitioner purchased the property for $165,000 and presented some evidence that the offending building was an asset worth approximately $25,000. The BZA, however, found that petitioner failed to present "the precise measure of injury in dollars and cents which would result from his having to remove the facilities in question." Although petitioner did not present evidence of the "precise measure of injury" in that he did not demonstrate how much the actual removal of the facilities would cost, we believe petitioner's showing of injury -- from the loss of an income-producing property, the value of which was indubitably reflected in his purchase price -- to be sufficient to find substantial prejudice n9 to him as a result of the zoning officials' inexcusable delay.

n9 In *Cahill, supra,* the estimated potential loss was at least $6,135.

[15]**

In re Heidorn's Appeal, 412 Pa. 570, 195 A.2d 349 (1963) n10 is of interest. There, the Heidorns purchased a house in 1953, which had violated a 1942 local zoning ordinance ever since it had been built in 1950. A stone stoop and wooden overhang projected from the front door of the house in violation of an ordinance which imposed a 25 foot setback requirement. A similarly restrictive ordinance was enacted in 1958. In 1959 the Heidorns replaced the stoop and overhang with an aluminum awning which was about 12 feet wider and projected 3 1/2 more feet towards the front street. Shortly thereafter the municipal officials informed the Heidorns that their awning encroached on the setback territory. The Pennsylvania Supreme Court affirmed the lower court's holding "that since the Township had allowed approximately 10 years to pass without objecting to the ordinance violation, it was guilty of laches and could not now sustain a violation on the basis of the original ordinance of 1942." (Footnote omitted.) *In re Heidorn's Appeal, supra, 195 A.2d at 351.* The court dismissed as unwarranted the Township's concern over the precedential value of this case as affecting setback violations. **[**16]**

n10 *Cf. Westfield v. City of Chicago, 26 Ill. 2d 526, 187 N.E.2d 208 (1963); Town of Highland Park v. Marshall, 235 S.W.2d 658 (Tex. Civ. App. 1950). But see Haba v. Cuff, 28 Ohio Op. 2d 266, 280 Ohio App. 2d 266, 201 N.E.2d 343 (1963), cert. denied, 379 U.S. 964, 85 S. Ct. 656, 13 L. Ed. 2d 558, rehearing denied, 380 U.S. 927, 85 S. Ct. 883, 13 L. Ed. 2d 815 (1965); City of Fort Worth v. Johnson, 388 S.W.2d 400 (Tex. 1964).*

As the Pennsylvania Supreme Court stated in *In re Heidorn's Appeal, supra, 195 A.2d at 351:*

While courts are reluctant, and should be, to impose the sanction of laches on governmental divisions, equity cannot close its eyes to the sloth, indifference or official neglect of a municipal body any more than it can to the neglect of an individual where such neglect harms an innocent person.

Here the delay involved was six and one-half years and it was inexcusable since neither of the prior enforcement orders were actually pursued, let alone diligently **[**17]** pursued, and for no sufficiently demonstrated reasons. The substantial prejudice which would be imposed on petitioner, the *new* property owner, if enforcement were now upheld, involves the partial dismantling of a building which provides him with rental income, and for which he doubtless made a sizeable capital investment included in the purchase price for the P Street property. Any conceivable harm to the general public interest from not enforcing the zoning regulation in this case is not sufficient to outweigh the inequity of substantial prejudice to petitioner. Under these extraordinary and compelling circumstances, and with *actual* notice by the government being present for such a long period, we reverse **[*13]** the decision of the BZA as not being in accordance with law and hold that the District is barred from enforcing the applicable zoning regulation against petitioner due to laches. In zoning, as in other areas of the law, the government *can* be in the wrong. In zoning, the equities *can* be so compelling as to favor the individual property owner. Accordingly, the BZA order upholding the enforcement order of the Chief of the Zoning Inspection Branch is **[**18]** vacated and the cause remanded for disposition consistent with this opinion.

So ordered.

DISSENTBY:
MACK

DISSENT:

MACK, Associate Judge, dissenting:

The majority has found, as indeed it must, that the illegal use of petitioner's building for residential purposes cannot be justified on a theory of estoppel. It seems to me incongruous, then, that the majority should sua sponte invoke laches to permit that same violation.

The majority recognizes that "[due] to the important general public interest in the integrity and enforcement of zoning regulations, the affirmative defenses of estoppel and laches are not judicially favored." *Ante* at 6. This is undoubtedly correct, for the general rule is that neither of these defenses is ever available against a municipality.

More specifically, it is hornbook law that even though a zoning authority issues a permit, and a landowner proves he relied thereon, if that permit was issued in violation of the zoning ordinances, the city can revoke the permit and enforce the ordinances. 8 E. McQUILLIN, MUNICIPAL CORPORATIONS §

25.153 (3d rev. ed. 1976); 1 R. ANDERSON, AMERICAN LAW OF ZONING § 6.13 (1968); 3 RATHKOPF, LAW OF ZONING AND PLANNING at **[**19]** 67-5 (3d ed. 1972). The policy considerations underlying this harsh rule are fully applicable to the instant case. Those considerations are:

(1) Lack of authority on the part of the administrative officer to issue a permit other than in strict accordance with the terms of the ordinance;
(2) The general public interest in the protection of the zoning ordinance which transcends the harm to the permittee;
(3) The actual or constructive knowledge of recipient of the permit of the illegality of its issuance; ...
(4) The inability of an official to grant exemptions to the provisions of the ordinance; [and]
(5) ... [The] issuance of a permit contrary to the provisions of the ordinance may be the result of fraud on the part of the applicant with concurring negligence or ignorance on the part of the official, or the result of a corrupt bargain. [3 RATHKOPF, LAW OF ZONING AND PLANNING, *supra* at 67-5 to 67-6, 67-8 (footnotes omitted).]

Moreover, if there are strong public policy reasons for not allowing estoppel as a defense to the enforcement of municipal ordinances, there are even stronger reasons for not allowing laches as a defense. For, where estoppel is **[**20]** invoked, a municipality has taken an affirmative action which misled someone. Where laches is involved, however, the only fault of the city is inactivity. Furthermore, such inactivity is not necessarily "wrong," as the majority suggests. It could result from an entirely justifiable decision to utilize scarce enforcement resources for more important matters. n1

n1 Obviously, the zoning board cannot attend to every conceivable violation. Congress itself has implicitly recognized this fact by enacting D.C. Code 1973, § 5-422, which allows private citizens to bring suit to enforce the zoning laws.

In any event, the inactivity in the instant case -- at most six years, and in my view of the facts, three years -- is hardly wrongdoing of a sufficiently serious nature to warrant the drastic remedy of nonenforcement of the law. Indeed, the courts have, virtually without exception, refused to apply the doctrine of laches in the zoning context in spite of far lengthier delays in enforcement. *See* 3 RATHKOPF, LAW **[**21]** OF ZONING AND PLANNING, *supra* at 67-5 n.3 citing

[*14] *Donovan v. City of Santa Monica (Cal.), 88 Cal. App. 2d 386, 199 P.2d 51* (20 years); *Appeal of Phillips (Conn.), 154 A. 238, 113 Conn. 40* (50 years); *Gregory v. City of Wheaton (Ill.), 23 Ill. 2d 402, 178 N.E.2d 358* (10 years); *City of Kansas City v. Wilhoit (Mo.), 237 S.W.2d 919; Universal Holding Co. v. North Bergen Township (N.J.), 55 N.J. Super. 103, 150 A.2d 44* (8 years); *Bartlett v. City of Corpus Christi (Tex. Civ. App.), 359 S.W.2d 122* (8 years); *Fabini v. Kammerer Realty Co., 14 Misc.2d 95, 175 N.Y.S.2d 964* (25 years plus); *Matter of Hepner, 152 N.Y.S.2d 984,* n.o.r. (14 years); *City of Yonkers v. Rentways, Inc., 304 N.Y. 499, 109 N.E.2d 597* (almost 20 years) erroneously granted tenants over 19-year period).

Aside from the lesser degree of municipal culpability, there is another reason why the defense of laches should be more disfavored than the defense of estoppel. Where estoppel is invoked, a landowner must show justifiable reliance. In the context of laches, however, the only reliance which a landowner can show is reliance on non-enforcement of the law, which, **[**22]** I suggest, is never justifiable. Nor does reliance on inactivity become any more justifiable in the case of a self-proclaimed innocent purchaser. As any treatise on the purchase of real property will indicate:

The buyer should ... ascertain if any relevant zoning ordinance permits the present use of the premises .... *He cannot properly assume that the existing use is permitted though long continued, because the municipal authorities may not be estopped from enforcing the zoning laws.* [FRIEDMAN, CONTRACTS AND CONVEYANCES OF REAL PROPERTY at 133 (2d ed. 1963) (footnote omitted; emphasis supplied).]

See also M. LIEBERMAN, EFFECTIVE DRAFTING OF CONTRACTS FOR THE SALE OF REAL PROPERTY at 170-71 (1954). And *see Hasage v. Philadelphia Zoning Board of Adjustment, 415 Pa. 31, 202 A.2d 61, 64 (1964),* where the same court which decided *In re Heidorn's Appeal, 412 Pa. 570, 195 A.2d 349 (1963),* cited by the majority, wrote:

It is argued that the applicants purchased the property thinking multiple-family dwelling was permissible, and, acting on such belief, made an investment of approximately $36,000. The answer to this is that they were duty bound **[**23]** to check the zoning status of the property before purchase, and could have required a certificate of such from the seller ....

Moreover, in this case, even if petitioner failed to check the zoning laws and failed to require a certificate at the time of sale, he may still have a remedy against the

seller. The city notified Mrs. deRochefort on two separate occasions that the building was being maintained in violation of the law. If she concealed her knowledge from petitioner, she is liable for fraud. *Eytan v. Bach, D.C.App., 374 A.2d 879, 880 (1977); Andolsun v. Berlitz Schools of Languages of America, Inc., D.C.App., 196 A.2d 926, 927 (1964).* It is Mrs. deRochefort, then, not the general public, who should make right any injury which petitioner might suffer from enforcement of the zoning laws.

Finally, turning from the equities of the matter to the law, there is one more difference between the defense of estoppel and the defense of laches in this context. There are a fair number of cases holding that, in extraordinary circumstances, the defense of estoppel may bar the enforcement of zoning laws. There are, by contrast, almost no cases allowing the defense of laches. **[**24]** None are cited by RATHKOPF, in the LAW OF ZONING AND PLANNING, *supra*. YOKLEY, in his treatise, flatly states that

> With respect to the question of laches, we consider it sufficient to say that the doctrine of laches has no application to the enforcement by a municipality of its ordinances. [E. C. YOKLEY, ZONING LAW AND PRACTICE § 10-8 at 451 (3d ed. 1965) (footnote omitted).]

[*15] The majority, however, has found a case on point. n2 That case is *In re Heidorn's Appeal, supra.* It was followed in one subsequent Pennsylvania decision, *Township of Haverford v. Spica, 16 Pa. Commw. 326, 328 A.2d 878 (1974),* where the delay in enforcement was 36 years. My own research has uncovered no other case in the entire country, let alone the District of Columbia, applying the doctrine of laches against a zoning authority. *See* in this respect, 1 R. ANDERSON, AMERICAN LAW OF ZONING, *supra*, § 6.12 at 333, where it is said:

> No right to a nonconforming use is gained where a use of land in violation of a zoning ordinance is maintained for a period of years. Apparent municipal acquiescence in an unlawful use does not prevent the municipality from urging the illegality **[**25]** when a right to nonconforming use is claimed, but a Pennsylvania court detected laches where a town had failed for 10 years to object to a building which violated a regulation. [Footnotes omitted.]

The case cited is, of course, *Heidorn's Appeal. See also,* RYAN, PENNSYLVANIA ZONING LAW AND PRACTICE § 8.3.4 (1970), where it is said:

> This 4-3 decision [*Heidorn*, once more] seems out of line with similar cases.

n2 The cases cited in footnote 10 of the majority's opinion either do not deal with laches or hold that there was no laches.

In any event, the sole case relied on by the majority is, in my view, distinguishable from the one at bar. The violation in *Heidorn* concerned an awning which encroached on setback territory. Setback restrictions are generally imposed for purely esthetic reasons. 1 R. ANDERSON, AMERICAN LAW OF ZONING, *supra* § 7.18. And, with respect to esthetics, the Pennsylvania court stated:

> The original homely overhang was there for the world to **[**26]** see and frown upon and if it did not offend the esthetic senses of the Township for some ten years, the present attractive awning and platform should not. The aluminum porch which now graces the front of the Heidorn home improves its appearance considerably and in no way impedes enjoyment by others of their property. There is not the slightest suggestion that the patio effect of the front of the Heidorn home is detrimental to the welfare, safety and health of the community. ...
>
> No citizen of the Township has objected to what the Heidorns have done. Some 75 house-owners in the immediate vicinage signed a petition urging retention of the patio. [*In re Heidorn's Appeal, supra* at , 195 A.2d at 351-52.]

By contrast, the petitioner in this case seeks to prevent the city from enforcing side yard, rear yard, lot area and parking restrictions. These requirements are aimed at preventing population congestion, and population congestion is precisely what the use of petitioner's building for residential purposes causes. Such requirements are not trivial.

> To limit the density of land use is to promote safety by keeping traffic congestion within manageable bounds, **[**27]** and the prevention of excessive land use tends to simplify the problem of providing essential municipal services and to promote public health. Indeed, the early zoning ordinances were, in large part, prompted by the overcrowding of urban land, and judicial approval of these ordinances was encouraged by an early appreciation of the health and safety hazards inherent in the intensive use of land in central city areas. [1 R. ANDERSON, AMERICAN LAW OF ZONING, *supra* § 7.06 at 486.]

Here, unlike in *Heidorn*, there is reason to believe that the violation in question is detrimental to the welfare, safety and health of the community. Moreover, the record reveals that several citizens so believed and complained to the zoning board.

I respectfully dissent.