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February 24, 2004

By Hand Delivery

Mr. Geoffrey Griffis
Chairperson
District of Columbia Board of Zoning Adjustment
441 4th Street, N.W.
Room 210
Washington, DC 20001

Re: Appeal of Henry P. Sailer (BZA Appeal No. 17054)

Dear Chairperson Griffis and Members of the Board:

Attached please find an original and twenty copies of the Intervenor's Proposed Findings of Fact and Conclusions of Law. If you have any questions regarding this submission, please contact the undersigned at 202-663-8879.

Respectfully submitted,

John T. Epting /ADH

John T. Epting

Document #: 1382256 v.1

BZA
Case No. 17054
Exhibit No. 54

Board of Zoning Adjustment
District of Columbia
CASE NO. 17054
EXHIBIT NO. 54

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

Appeal of Henry P. Sailer, et al.	)	**Appeal No. 17054**

INTERVENOR'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Appeal No. 17054 of Henry P. Sailer, et al, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator in the issuance of Building Permit No. B448548 to Brian Logan dated January 29, 2003, for the construction of a new single-family detached dwelling. Appellant alleges that the Zoning Administrator erred by issuing the building permit without applying the applicable provisions (subsection 1567, Lot Occupancy and Ground Coverage Restrictions, subsection 1568 Tree Removal Restrictions, etc.) of the Chain Bridge Road/University Terrace Overlay (CBUT). The CUBT/R-1-A zoned subject premises is located at 3101 Chain Bridge Road, N.W. (Square 1427, Lot 870 (now Lot 30)).

HEARING DATES: **October 21, 2003; February 3, 2004**

DECISION DATES: **November 25, 2003; March 2, 2004**

DECISION AND DISMISSAL ORDER

This appeal was filed on July 2, 2003 by Henry P. Sailer, Lisa S. Kelly, Steven S. Wolf, Arthur L. Levi, Veronica and Bruce Steinwald, Veronique LaGrange, and Benoit Blarel, challenging on various grounds the Zoning Administrator's decision to approve the issuance of a permit to construct a single family home at 3101 Chain Bridge Road, N.W. They also appeal the issuance of ancillary permits related to the construction of the house. Appellants represented themselves at the public hearing of October 21, 2003, but were represented by counsel at the public hearing on February 3, 2004. As a preliminary matter, the Board granted in part the

Owner's Motion to Dismiss on the ground that the appeal was untimely filed. Following a public hearing on February 3, 2004, the Board denied the appeal, affirming the Zoning Administrator's decisions on the remainder of the issues.

PRELIMINARY AND PROCEDURAL MATTERS

Parties. The appellants in this case are Henry P. Sailer, Lisa S. Kelly, Steven S. Wolf, Arthur L. Levi, Veronica and Bruce Steinwald, Veronique LaGrange, and Benoit Blarel (the "Appellants"). ANC 3D is an automatic party to the appeal under 11 DCMR § 3106.2. Leon Paul, Zoning Technician from the Department of Consumer and Regulatory Affairs ("DCRA") and Lisa Bell and Laura Gilbert, of DCRA's General Counsel's Office, appeared on behalf of the Zoning Administrator. Brian Logan, the owner of the subject property (the "Owner"), located at 3101 Chain Bridge Road, N.W. (the "Property") is automatically a party under 11 DCMR § 3106.2. Mr. Logan is represented by ShawPittman LLP.

Notice of Appeal and Notice of Public Hearings. By memoranda dated July 3, 2003, the Office of Zoning advised the Zoning Administrator, the Office of Planning, ANC 3D, the Owner, the D.C. Office of Planning, and the Ward 3 council member of the filing of the appeal.

The Board initially scheduled a public hearing on the appeal for October 21, 2003. In accordance with 11 DCMR § 311.314, the Office of Zoning mailed to the Appellants, the Zoning Administrator, ANC 3D, and Owner's counsel, notice of the hearing on July 31, 2003. Notice of the public hearing was also published in the D.C. Register on August 8, 2003 at 50 D.C. Reg. 6430.

In the Owner's Motion to Dismiss dated October 7, 2003, the Owner alleged the appeal should be dismissed as untimely filed. The Board heard oral argument on the motion from the Owner, the Appellants, and counsel for the Zoning Administrator during the public hearing on

October 21, 2003. A decision on the motion was scheduled for November 4, 2003, was rescheduled for November 18, 2003, and was again rescheduled for November 25, 2003. During a special public meeting on November 25, 2003, the Board (voting 4-1-0) dismissed as untimely the appeal of all issues on appeal except those relating to permit issued for the construction of an in-ground pool (Building Permit Number B451476) and a permit revising the Building Permit to show a pervious driveway to the accessory garage (Building Permit Number B452193).

The Board scheduled a public hearing on the remaining issues on appeal for January 27, 2004. Notice of the public hearing was published in the D.C. Register on December 5, 2003 at 50 D.C. Reg. 10321. The public hearing was rescheduled for February 3, 2004 and concluded on that date.

Appellants' Case. The Appellants claim the Zoning Administrator committed the following reversible errors in issuing a permit for an in-ground pool (Building Permit Number B451476) and a permit revising the Building Permit to show a pervious driveway to the accessory garage (Building Permit Number B452193):

a) The accessory building does not meet the use and access requirements for a garage set forth in 11 DCMR §§ 2500.5 and 2117.8.
b) The driveway to the house is not fourteen feet wide, as required by 11 DCMR § 2117.8.
c) The driveway to the accessory building and the drive courts are not paved with impervious surfacing as required by 11 DCMR § 2117.4.
d) The error in issuing a permit for a pervious driveway, if corrected, would cause the impervious surfacing on the Property to exceed the maximum 50% provided in 11 DCMR § 1567.2.

e) The swimming pool intrudes into the rear yard in violation of 11 DCMR §§ 199.1, 404.1, and 2503.

f) Permits No. B541476 and B 452193 were not reviewed for compliance with the Chain Bridge Road/University Terrace Overlay.

g) Ongoing construction on the Property has fatally damaged trees in his yard in violation of the Chain Bridge Road/University Terrace Overlay, 11 DCMR § 1568.

h) A set of stairs intrudes into the side yard in violation of 11 DCMR §§ 199.1, 404.1, and 2503.2.

Appellants presented testimony from arborist Edward Milhous, who testified that some of the trees on the subject property have been damaged by the piling of dirt and excessive pruning. Appellants also presented the testimony of David Murphy, an adjacent development liaison for the National Park Service. Mr. Murphy testified that the NPS would like any additional trees to be located in the rear yard of the subject property and that the NPS anticipates that additional development will probably occur within the required rear yard. Appellants also submitted a declaration by Edgar T. Nunley, the former Chief of the Zoning Review Branch of the District of Columbia Department of Consumer and Regulatory Affairs. Appellants requested that Mr. Nunley be granted status as an expert witness. The Owner and the Zoning Administrator, through counsel, objected to the admission of the declaration and the granting of status as an expert witness because Mr. Nunley was not present at the hearing and available for cross examination. The Board admitted the declaration into evidence but denied the request for expert status. In the declaration, Mr. Nunley stated that the Zoning Administrator erred in issuing Permit No. B452193 to revise the plat of Building Permit No. B448548 to show a pervious driveway. Mr. Nunley stated that he had never seen a permit issued for a pervious driveway and

that no provision exists in the Zoning Regulations for the issuance of a permit for a pervious driveway. Mr. Nunley also stated that the zoning technician who reviewed the permit, Mr. Leon Paul, was not qualified to review permit applications for compliance with the zoning regulations.

Zoning Administrator's Case. Mr. Paul, a zoning technician with the Zoning Review Branch, testified about his review of the applications for the subject permits and his application of the provisions of the CB/UT Overlay. He also described the zoning requirements for a rear yard and the use and access requirements for garages and parking spaces that are not required parking spaces.

Property Owner's Case. The Owner presented testimony from Armando Lourenco, an expert in building and zoning regulatory matters. Mr. Lourenco testified that the portion of the pool located in the rear yard is a permitted encroachment because it has a height of four feet or less and that the stairs located in the side yard are permitted for the same reason. He also testified that the driveway serving the one required parking space meets the requirements of § 2117.8. Mr. Lourenco stated that the parking space located in the garage does not require driveway access because it is a covered parking space and is an accessory parking space. He also testified that the fourteen foot width requirement applies only to parking spaces serving any use other than a one-family dwelling. With regard to the 50% maximum impervious surface limit, Mr. Lourenco testified that the calculations performed by Mr. Logan's architect are based on conservative assumptions and included some areas that are not required to be designated as impervious. The Owner, through counsel, objected to any testimony about trees as relating to permits and activities previously held untimely.

Public Agency Reports. There are no public agency reports in this case.

ANC Report. In its report dated October 3, 2003, ANC 3D states that, during its regularly scheduled public meeting and with a quorum present, the ANC voted to request that the Board give "serious, favorable consideration to the complaints filed by" the Appellants. The AND also requested that the Board impose severe penalties on DCRA and the Owner if it determines the permits were issued in violation of the CB/UT Overlay. In a letter dated October 22, 2003, the ANC did not take a position on whether the appeal was timely filed.

Closing of the Record. The record closed at the conclusion of the February 3, 2004, hearing, with the exception of the Board's request that the Zoning Administrator provide a statement regarding their definition of the word "pervious" and the responses of Mr. Logan and the Zoning Administrator to the Declaration of Mr. Edgar Nunley submitted by Appellants and that the Owner provide the written statement of their zoning expert Armando Lourenco.

Decision Meeting. At the decision meeting of March 2, 2004, the Board (voting _____) denied the appeal of building permits B451476 and B452193 and all other issues related to the appeal.

FINDINGS OF FACT

The Property and the Appellants

1. The Property is located at 3101 Chain Bridge Road, N.W., Lot 30, Square 1427 and is owned by Brian Logan. The Property is located in a portion of the R-1-A District that is subject to the Chain Bridge Road / University Terrace Overlay.

2. The Appellants are the Owner's neighbors. Arthur S. Levi owns a home at 3045 Chain Bridge Road, which is immediately to the west of the subject property. He currently lives in France and rents his house to tenants. Henry P. Sailer lives at 3111 Chain Bridge Road, which is immediately to the east of the subject property. Veronica and Bruce Steinwald live next door to

Mr. Sailer to the east – one house removed from the subject property. Drs. Kelly and Wolf live at 3117 Chain Bridge Road, immediately to the east of the Steinwalds, and two houses down from the subject property. Veronique LaGrange and Benoit Blarel live at 3106 Chain Bridge Road, directly across the street from the subject property. (Record Exhibit ("Ex.") 3).

Timeliness

3. The Property is visible from each of the Appellants' Properties.

4. The CB/UT Overlay, 11 DCMR § 1565 et. seq. is designed to preserve and enhance the park-like setting of the Chain bridge Road/University Terrace area by regulating alteration or disturbance of terrain , destruction of trees, and ground coverage of permitted buildings and other impervious surfaces, and by providing for widely spaced residences.

5. The Owner applied for a permit to remove trees from his property on May 9, 2001. He filed the following forms required by the District of Columbia Department of Consumer and Regulatory Affairs: a Tree & Slope Information Form, an Affidavit: Tree & Slope Protection (TSP) Overlay Districts, and a report from a certified arborist. (Ex. 25, Tabs C-E.)

6. The Owner received Building Permit No. B432497 dated August 8, 2001 (the "Tree Permit") from the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") Building and Land Regulation Administration ("BLRA") for removal of trees located on the Property. (Ex. 25, Tab F.)

7. The Owner renewed the Tree Permit on August 6, 2002 and February 5, 2003 (collectively, the "Tree Permits"). (Ex. 25, Tab F.)

8. On November 27, 2001, the Owner submitted an application to construct a new single family house on the Property. On January 29, 2003, the Owner received Building Permit No.

B448548 dated January 29, 2003 to construct a "new single-family house as per plat and plans" (the "Main Building Permit"). (Ex. 25, Tab A.)

9. The Owner received Building Permit No. B448687 dated February 5, 20003 from BLRA for an emergency raze of the existing house on the Property. (Ex. 25, Tab G.)

10. The Owner demolished the existing house on the Property on February 8, 2003. During the demolition activities, the excavation contractor also removed a certified diseased tree and the other permitted trees. (Ex. 25 at 4.)

11. No trees have been removed from the Property since February 8, 2003. All of the existing trees on the property are alive and are being treated by an arborist certified by the ISA.

12. Appellant Henry P. Sailer was aware of the demolition activities on February 8th when he heard the noise of the equipment and activities. (Transcript of Hearing of October 21, 2003 at 163.) Appellant Arthur Levi became aware of the demolition activities on February 8, 2003, when his tenant called Mr. Levi in Paris and informed him that the large pin oak had been taken down. (Affidavit of Arthur Levi, Ex. 22, Tab 2.)

13. The Chain Bridge Road/University Terrace Preservation Committee (the "Committee") was aware of the tree removal activities on February 8, 2003. On that date, representatives of the Committee contacted DCRA by e-mails and telephone to request that they issue a Stop Work Order. On February 12, 2003, counsel for the Committee wrote a letter to DCRA detailing the permit history on the Property, including permit numbers, and application and issuance dates. (Ex. 29, Tab 1.)

14. The Committee represents the Chain Bridge Road/University Terrace Association (the "Association"). The Association does not have membership meetings, but it represents the residents' interests in enforcing the CB/UT Overlay. The Appellants were working with and

corresponding with the Association and members of the Committee. (Transcript of October 21, 2003 at 196.)

15. Inspector Stanley Neal from DCRA visited the Property on February 10, 2003, and issued a Stop Work Order "as per Sydney Lester & Bob Kelly Zoning Administrator Tree Slop [sic] Overlay DCMR – 1519.1." (Ex. 25, Tab J.)

16. The demolition equipment remained on the property from February 8, 2003 until March 10th, 2003, and was visible from the street and from neighboring houses. (Ex. 25 at 6.)

17. On February 13, 2003, the Owner's counsel sent a letter to Denzil Noble, the Acting Zoning Administrator, explaining that Mr. Neal had cited the wrong section of the Zoning Regulations and that the Stop Work Order was groundless. The Owner's counsel informed Mr. Noble that the demolition and tree removal work had been undertaken under validly issued permits and in compliance with the CB/UT Overlay. (Ex. 25 at 5.)

18. In March of 2003, an article appeared in the Palisades News describing the demolition activities of February 8, 2003. The article alleged that the removal of the large pin oak was a violation of the overlay and that permits had been mistakenly issued. On the same page, the Property is included in the "Residential Construction Zoning Alert," which notes that a building permit had been issued for "3101 Chain Bridge Rd., new home, $ 1,250,000, Brian Logan." (Ex. 25, Tab O.)

19. Members of the Committee met with Bob Kelly, the Zoning Administrator on March 12, 2003, to discuss the Stop Work Order. Mr. Kelly informed them that the Stop Work Order was still in effect and that he was corresponding with the property owner about it. (Ex. 29, Tab 4 at 2.)

20. The Owner received a letter from Mr. Noble on March 21, 2003, releasing the Stop Work Order. (Ex. 25, Tab L.)

21. Construction commenced on the Property on March 24, 2003. (Ex. 25 at 5.)

22. Appellant Mr. Levi contacted Mr. Leon Paul, a Zoning Technician with DCRA by e-mail in late March or April. Mr. Levi stated that he disagreed with some of the comments Mr. Paul had made when reviewing the plat and plans for the Main Building Permit. (Transcript of October 21, 2003 at 190-192.) Mr. Levi also argued that the Owner's architect had not adequately responded to Mr. Paul's comments on the plans. (Transcript of October 21, 2003 at 199.)

23. The Appellants were aware that construction had commenced in March, but were not aware that that Stop Work Order had been lifted. (Transcript of October 21, 2003 at 158.) Instead of filing an appeal, Appellants and members of the Committee communicated with DCRA officials attempting to find out whether and why the Stop Work Order was lifted. They did not find out any detailed information about the Stop Work Order until June 27, 2003 (Transcript of October 21, 2003 at 165.)

24. The application, plat, and plans for the Main Building Permit were on file and available to the public at DCRA between February and June of 2003. In July of 2003, the plans were unavailable due to renovations of the basement of DCRA's office building. None of the Appellants personally attempted to obtain the plans from DCRA until late August or September of 2003. (Transcript of October 21, 2003 at 194-95.)

25. Appellants did not receive a full set of plans until September, 2003. However Dr. Levi obtained a copy of the building plat for the Property from the Committee in late April, and provided it to the other Appellants. (Transcript of October 21, 2003 at 162.) The building plat

showed the full extent of construction to be performed on the property, including the house, the pool, and the accessory structure.

26. The Owner obtained Building Permit No. B451476 on May 20, 2003 for the construction of an in-ground pool (the "Pool Permit"), as shown on the original building plat. (Ex. 25, Tab N.)

27. On May 21, 2003, the Appellants, and one additional neighbor, sent a letter to the Owner requesting a meeting. The letter states that they have reviewed the construction documents filed with DCRA and that the proposed two-story accessory building does not meet the definition of a garage. Their primary complaint was that the accessory building cannot be a garage unless it is accessible by a driveway. The Appellants also took issue with information included in a memorandum from the Owner's architect to Mr. Leon Paul, the permit reviewer. (Ex. 25, Tab Q.)

28. Appellants each filed a separate "Notice of Intent to File an Appeal." The earliest Notice was filed by Veronique LaGrange and Benoit Blarel on May 31, 2003. (Ex. 1.)

29. The Owner obtained Building Permit No. B 452193 on June 13, 2003, revising the Building Permit to show a pervious drive to the accessory garage. (Ex. 25, Tab A.)

30. The Appellants did not actually file their appeal until July 2, 2003, 153 days after DCRA issued the Main Building Permit, 144 days after the Owner razed the existing building, and 100 days after construction recommenced on the Property.

31. The Board finds the Appellants knew or should have known that DCRA had issued the Tree Permits and the Main Building Permit as of February 8, 2003, when the trees were removed and the existing home on the Property was razed.

32. There were no exceptional circumstances that could have impaired the Appellants' ability to file this appeal within sixty days of February 8, 2003.

33. The appeal was timely as to the Pool Permit and the Revised Permit.

The Pool Permit

34. As part of the application for the Main Building Permit, the Owner submitted a building plat dated November 14, 2001 (the "Initial Plat"). The Initial Plat showed the proposed house, a "new 2 story accessory building garage/studio," a pool, and all of the proposed driveways, steps, and walkways. The Initial Plat also depicted the measurements of the rear and side yards.

35. The Owner's pool contractor submitted the Initial Plat along with structural drawings as part of the application for the Pool Permit. There were no changes in the dimensions and location of the pool after DCRA approved and issued the Main Building Permit. (Ex. 38, Tab C.)

36. Section 199.1 defines the depth of rear yard as "the mean horizontal distance between the rear line of a building and the rear lot line, except as provided elsewhere" in the Zoning Regulations. 11 DCMR § 199.1.

37. In a residence district, a rear yard must be provided for each structure. The minimum rear yard for the Property, which is located in the R-1-A Zone District, is 25 feet. 11 DCMR § 404.1.

38. A structure that is no more than 4 feet above grade at any point may occupy a required rear yard. 11 DCMR § 2503.2.

39. A structure is "anything constructed ... the use of which required permanent location on the ground, or anything attached to something having a permanent location on the ground ...." 11 DCMR § 199.1. Under this definition a swimming pool is a structure.

40. The swimming pool is an infinity pool in which some of the water from the main pool structure is allowed to spill over the lip of the pool into a reservoir below. The function of the reservoir is to catch the overflow and re-circulate it into the main swimming pool. (Ex. 38 at 4.)

41. The Initial Plat shows that the rear wall of the main swimming pool is approximately 6 feet above grade. The structural plans show that the lower reservoir is only 4 feet above grade. The Initial Plat shows that the rear wall of the main swimming pool is 25'3" measured from the mean horizontal distance from the rear line of the rear wall of the pool and the rear lot line. (Ex. 38, Tab C.)

42. The Board credits the testimony of the Owner's zoning expert Mr. Lourenco. Mr. Lourenco testified that the pool does not intrude into the rear yard in violation of 199.1, 404.1, and 2503 because it is less than 4 feet above grade at any point. Mr. Lourenco testified that structures less than 4 feet above grade at any point are permitted in a rear yard under § 2503.2.

43. The Appellants presented no expert testimony to demonstrate that the Pool Permit or the location of the pool violates the requirements of § 2503.

44. The Board finds that Mr. Paul reviewed the location and size of the pool during the review of the Main Building Permit, and that none of the application materials relevant to the CB/UT Overlay for the pool changed between the review of the Main Building Permit and the review of the Pool Permit. Thus, the Pool Permit did not require a separate review for compliance with the CB/UT Overlay.

The Revised Permit

45. The Initial Plat shows the two story accessory building to be located on the Property behind the main house and adjacent to the pool and the drive court. The building is termed a "garage/studio." As depicted on the Initial Plat, the accessory building is surrounded by terraces and plantings and is not accessible by vehicle from the driveway or the drive court. The Owner intended to use the accessory building as a private garage/artist studio with a second story domestic quarters.

46. A private garage is a permitted accessory building in the R-1-A Zone District. 11 DCMR § 204.1. A private garage in a residence district may be located within a rear yard. 11 DCMR § 2300.2(a). An artist studio is a permitted use in a private garage so long as it meets the requirements of 11 DCMR § 2300.3. An accessory private garage located in an R-1-A Zone District may have a second story used for sleeping or living quarters of domestic employees of the family occupying the main building, so long as it is no more than 20 feet in height and is not located within the required rear yard. 11 DCMR § 2500.5.

47. Leon Paul, a Zoning Technician with DCRA, reviewed the Main Building Permit. As set forth above, in late March or April of 2003, he received correspondence from Appellant Mr. Levi regarding the use of the two-story accessory building. Mr. Levi also told Mr. Paul that he suspected the ongoing construction on the Property did not comply with the Main Building Permit. (Transcript of October 1, 2003 at 108.) On May 20, 2003, Mr. Paul and Allen James, a Zoning Inspector visited the Property to inspect the construction. (Ex. 25, Tab P.) Mr. Paul did not see anything that was inconsistent with the approved plans.

48. The Appellants complained to Mr. Paul that the two-story accessory building was not really a garage with domestics quarters above, but, in fact, an illegal pool house. Their primary

problem with the structure was that a vehicle could not access the parking space located within the garage because there was no driveway. (Transcript of February 3, 2004 at 116.)

49. The Zoning Regulations provide that a "private garage" is "a building or other structure, or part of a building or structure, not exceeding nine hundred square feet (900 ft.^{2}) in area, used for the parking of one (1) or more motor vehicles and having no repair or service facilities." 11 DCMR § 199.1.

50. The Board finds the accessory building is a "private garage" under the definition in § 199.1. It does not exceed 900 square feet, it can be used for parking a motor vehicle, and has no repair or service facilities.

51. Mr. Paul testified that he determined that the garage as shown on the Initial Plat includes a parking space on the lower level but that the Zoning Regulations do not address the access requirements for the space. However, in order to "smooth over the whole construction and alleviate some of the complaints," Mr. Paul and the Owner agreed that the Owner would revise the plans to show the parking space in the garage as accessible by a vehicle. (Transcript of February 3, 2003 hearing at 116.)

52. The Owner's architect submitted a permit application on June 13, 2003. Under "Type of Proposed Work," he checked the box marked "Other" and filled in "Amend Plat of Existing Permit." Under "Description of Proposed Work" he wrote "Revise Permit # B448548 to show pervious drive to accessory garage structure." DCRA issued the Revised Permit on that day. (Ex. 25, Tab A.)

53. As part of the application for the Revised Permit, the Owner's architect submitted a building plat dated June 5, 2003 (the "Revised Plat"). The Revised Plat made three changes to the Initial Plat. The Initial plat showed a pervious terrace adjacent to the accessory garage and

did not show that the accessory garage was accessible by a vehicle from the driveway. The Revised Plat added a driveway ramp leading from the gravel drive court to a lower drive court adjacent to the accessory garage. The Revised Plat also changed the "pervious terrace" to a "pervious drive court." Second, the Revised Plat reduced the size of the chimney located on the western side of the house from 2.5 feet to .9 feet. Finally, the Revised Plat revised some of the measurements. It corrected the width of the side yard from 12.3 feet to 11.3 feet. As a result of the new pervious driveway, the Revised Plat shows a reduced width of the drive court and the reduced lengths of the stairway leading from the pool to the pervious lower drive court. (Ex. 25 at 6.)

54. The Board credits the testimony of Mr. Lourenco with regard to the parking requirements for a one-family dwelling. He testified that the owner of a one-family dwelling is required to provide one off-street parking space. 11 DCMR § 2101.1. The parking space may be located within a permitted garage or carport, or on an open area of the lot within either the rear yard or side yard. 11 DCMR § 2116.2.

55. Mr. Lourenco testified that a driveway that provides access to "required" parking space for a one-family dwelling must be no less than 7 feet wide. 11 DCMR § 2117.8. In addition, it must be accessible from an improved street or alley via graded and unobstructed private driveways that form an all-weather impervious surface.

56. Mr. Paul testified that he determined the required parking space was not located in the accessory building and it was an extra space that is not "required." Thus, he concluded that there are no access requirements. The Board finds Mr. Paul's determination was reasonable.

57. The Revised Plat shows an impervious paved main drive entry leading from Chain Bridge Road to a driveway. At the point the driveway enters the side yard, it is paved with

impervious drive tracks that measure 7 feet between the outside edges of the paved tracks. The driveway continues through the side yard of the house to a paved drive and pervious drive court behind the house. The Revised Plat shows a drive ramp leading from the drive court to the lower drive court adjacent to the accessory garage. The drive ramp is 7 feet wide and 23 feet long. The Revised Plat shows the drive ramp as "pervious."

58. The Board credits the testimony of Mr. Paul and the Mr. Lourenco that the parking space located in the accessory building is not a "required" parking space, and, thus, is not subject to the requirements of §§ 2117.4. The Board also finds that, because the driveway serves a single-family dwelling, it is only required to be 7 feet wide under § 2117.8.

59. Section 1567.2 of the CB/UT Overlay provides that the maximum impervious surface coverage on a lot is fifty percent (50%).

60. The lot area of the Property is 15,654 square feet. The Owner is therefore allowed 7827 square feet of impervious surface coverage. The Owner calculated the total impervious surface coverage on the Property as 7818 square feet – approximately 10 square feet less than allowed. This includes: the roofed building coverage of the house and the accessory building; the pool and surrounding terraces; all curbs, retaining walls, and stairs; and the above ground walkway connecting the house to the pool area.

61. The Board finds that the Appellants have failed to identify a section of the Zoning Regulations that required the drive ramp to be impervious. Further, the Board finds the Owner's calculation of the impervious surface coverage on the Property is reasonable and conservative.

62. The Board finds that Mr. Paul reviewed the Revised Permit for compliance with the impervious surfacing limit of the CB/UT Overlay. The Board credits the testimony of Mr. Paul

that there was virtually no change in the impervious surface between the Initial Plat and the Revised Plat.

63. The Board finds the testimony of Appellants' witness Mr. Nunley, who was not accorded expert status, is vague. Although Mr. Nunley stated that the Revised Permit was issued in error, he failed to cite any Zoning Regulation to contradict the decision of the Zoning Administrator. Further, the Board finds Mr. Nunley's characterization of Mr. Paul to be inappropriate and inaccurate.

64. The Board credits the testimony of Mr. Paul and Mr. Lourenco that the Revised Permit was issued in accordance with the Zoning Regulations and the provisions of the Chain Bridge/University Terrace Overlay.

Ongoing Tree Removal Activities

65. Appellants' tree expert Edward Milhous testified that the Owner had piled dirt near some of the trees on his property and that such activity eventually could damage or kill the trees. Mr. Milhous also testified that the Owner's arborist, The Care of Trees, had excessively pruned some of the trees located on the Property, which could eventually kill the trees. Mr. Milhous testified that he was not granted access to the Property and did not inspect the trees. Rather, he viewed the trees from an adjacent lot.

66. Appellant Dr. Wolf testified that the Owner's construction activities had fatally damaged some of the trees on the Property. However, he admitted that no trees on the Property had been taken down since February 8, 2003, and all were alive.

67. The Owner's arborist, Andrew Lawler from The Care of Trees, submitted a letter stating that no additional trees had been removed during the construction phase of the project. Mr. Lawler also stated that it had performed maintenance on the existing trees on the Property

including, root pruning prior to excavation, crown clean pruning and three site visits for subsurface soil injection of liquid bio-root stimulants.

68. The Board credits the statements of Mr. Milhous, Dr. Wolf, and the Care of Trees that the Owner has not removed trees from the Property since February 8, 2003. The Board finds that Mr. Milhous was not able to adequately assess the trees on the Property because he viewed them from an adjacent lot. The Board credits the statement of The Care of Trees that no trees have been removed since February 8, 2003 and that the Owner is attempting to preserve the trees remaining on the Property.

CONCLUSIONS OF LAW AND OPINION

The Owner argued that the Board lacks jurisdiction to hear this appeal because it was not timely filed by the Appellants. Because the arguments raised by the Owner involve the authority of the Board to exercise jurisdiction over the appeal, the Board addressed the Owner's Motion to Dismiss as a preliminary matter.

Timeliness of Appeal

The District of Columbia Court of Appeals has held that "[t]he timely filing of an appeal with the BZA is mandatory and jurisdictional." *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994). The rules of the BZA require that all appeals be filed within 60 days of the date the person filing the appeal had notice or knew of the decision complained of, or reasonably should have had notice or known of the decision complained of, whichever is earlier. 11 DCMR § 3112.2 (a). This 60-day time limit may be extended only if the appellant shows that: (1) "There are exceptional circumstances that are outside the appellant's control and could not have been reasonably anticipated that substantially

impaired the appellant's ability to file an appeal to the Board; and (2) "The extension of time will not prejudice the parties to the appeal." 11 DCMR § 3112.2 (d).

In Waste *Management of Maryland v. District of Columbia Board of Zoning Adjustment*, 775 A.2d 1117, 1122 (D.C. 2001), the District of Columbia Court of Appeals held that the time period is calculated to allow the aggrieved party time to evaluate the feasibility of filing an appeal and to obtain counsel – not to allow the aggrieved party to wait until it is convenient to file the appeal. "This conception of the reasonableness standard does not countenance delay in taking an appeal when it is merely convenient for an appellant to defer making that decision." *Id.* That is because "deadlines for taking appeals serve important ends," such as providing the permittee a period after which it may proceed safely in accordance with the permit. *Id.*

The District of Columbia Court of Appeals addressed the kind of "exceptional circumstances" that warrant the extension of the limitations period for filing an appeal in *Sisson v. District of Columbia Board of Zoning Adjustment*, 805 A.2d 964 (D.C. 2002). In *Sisson*, the court reiterated its holding in *Waste Management* that an appellant must file a timely appeal "in the absence of exceptional circumstances substantially impairing the *ability* of an aggrieved party to appeal – circumstances outside the party's control ...." *Id.* at 969 (emphasis in original). A neighbor appealed five permits granted to Mr. Sisson over a nine month period for various renovations to his home. *Id.* at 966-67. The court found that the neighbor had demonstrated exceptional circumstances beyond her control because of the "cumulative, piecemeal nature of the applications," which prevented her from discerning the cumulative impact of the applications. *Id.* at 969 (quoting the BZA).

Generally, the party appealing a building permit is chargeable with notice of the permit on the date DCRA approves and issues it. *Mendelson v. District of Columbia Board of Zoning*

Adjustment, 645 A.2d 1090, 1093 (D.C. 1994). The mere fact that an appellant does not actually know that permits have been issued is not sufficient to constitute "exceptional circumstances" if the appellant should have known about the issuance. In *Georgetown Residents Alliance v. District of Columbia Board of Zoning Adjustment*, 816 A.2d 41 (D.C. 2003), the District of Columbia Court of Appeals held that an appeal filed seven months after the permits had issued was untimely. *Id.* at 49 - 50. In *Georgetown* a citizens' group appealed permits for the construction of a fence, shed, and play equipment to be used by Georgetown University in conversion of a building into a child development center. *Id.* at 44. The court determined that all of the permits had been issued on the same date and that they had became appealable on that date. Although the citizens' group argued that it had not known that the permits had issued at the time, the court found sufficient evidence to determine that the group was "chargeable with notice" of them. *Id.* at 49 - 50.

In support of his argument that the appeal should be dismissed as untimely, the Owner contended the Appellants knew or should have known about the Tree Permits on February 8, 2003, when the trees were taken down and the existing house was razed. The Owner argued that Appellants also should have known that new construction would be commencing on the Property on that date. The Owner argued that, at the latest, Appellants should have known about the Main Building Permit in March, when the article appeared in the Palisades News and construction commenced on the Property. Appellants argued that the appeal was timely because the Stop Work Order tolled the limitations period. In the alternative, Appellants argued exceptional circumstances existed because they were unable to obtain a full set of plans from DCRA.

The Board finds the Appellants could not have been aware of the Main Building Permit on January 29, 2003, the date on which it was issued, because there were no activities on the

Property on that date that could have indicated its issuance. However, the Board finds the Appellants should have known about the Tree Permits and the Main Building Permit on February 8, 2003. Each of the Appellants homes is located within sight of the Property. Mr. Sailer admitted that he was aware of the demolition on February 8, 2003 when he heard the noise. Mr. Levi admitted that he was aware of the demolition activities of February 8, 2003, even though he no longer resided in the home, or even in the United States. Indeed, the Appellants' activities appear to have been spear-headed by Mr. Levi from his home in Paris, France. The Association and the Committee, which represents the Appellants' interests in enforcing the CB/UT Overlay, was aware of the Main Building Permit and had obtained copies of it and the application as early as February 13, 2003. The Appellants could have obtained information about the Main Building Permit from the Association if they were unable to obtain it from DCRA. Indeed, Appellants testified that Mr. Levi obtained a copy of the Initial Plat from Judith Lanius, former chair of the Committee.

The Stop Work Order did not toll the sixty-day limitations period for the appeal. Section 3112 of the Zoning Regulations, which governs administrative appeals, does not provide authority for tolling of the limitations period. Appellants have failed to cite any authority that would allow such tolling. Moreover, the existence of the Stop Work Order does not constitute exceptional circumstances impairing Appellants' ability to file an appeal, particularly Appellants themselves were not involved in seeking the Stop Work Order. Appellants claim they were waiting to file an appeal until they found out whether the Stop Work Order had been lifted. However, Appellants testified that they did not find out about the status of the Stop Work Order until June 27, 2003 – well after they wrote a letter to the Owner discussing their concerns about the accessory building on May 21, 2003 and well after they filed their first "Notice of Intent to

File an Appeal" on May 31, 2003. Appellants clearly had knowledge of the Main Building Permit and the Tree Permits before the found out that the Stop Work Order had been lifted. Further, the Appellants had no basis for relying on the Stop Work Order because it was the Association, not the Appellants, who obtained it.

Appellants also argue that exceptional circumstances impaired their ability to file an appeal within the limitations period because numerous permits were issued and because they were unable to obtain plans from DCRA. First, they contend that, as in *Sisson*, the permits were obtained in a piecemeal fashion and that they could not have known of the entire scope of the work to be performed until the Revised Permit was issued on June 13, 2003. The Board disagrees. The Initial Plat, which was publicly available at DCRA from February until June of 2003, shows the full scope of the work to be performed under the Main Building Permit, including the house, the swimming pool, the accessory building, and the proposed landscaping. The application materials for the Tree Permit also were available at DCRA. Members of the Committee and the Association obtained copies of the application for the Main Building Permit as early as February 13, 2003. Presumably, Appellants also could have obtained these materials. In *Sisson*, on the other hand, the Owner applied for numerous separate permits for a garage, rear addition, and front porch. *Sisson,* 805 A.2d at 967. The permit applications contained errors and were misleading, and two of the permits were issued for work that was undertaken prior to receiving the permits. *Id.* at 967-68.

Appellants claim an exceptional circumstance existed because they were unable to obtain the plans from DCRA. However, the record shows that none of the Appellants personally attempted to obtain the plans from DCRA until September of 2003 – two months after they filed this appeal. Furthermore, Mr. Levi obtained a copy of the Initial Plat from Judith Lanius of the

Association in April of 2003. This indicated that Ms. Lanius presumably was able to obtain the plans from DCRA. Although Mr. Paul testified that the plans were not available in July of 2003 due to renovation of DCRA's basement, Appellants could have obtained the plans during February, March, and April, during the relevant limitations period.

The record in this case shows the Appellants were waiting to file an appeal until it was convenient. Mr. Sailer and Mr. Levi were aware of the activities on the Property on February 8, 2003. The demolition equipment remained on the Property until March, indicating that the activities on the Property were not complete. Construction recommenced on the Property on March 24th. Mr. Levi obtained a copy of the Initial Plat in April. Unfortunately, the Appellants chose to rely on the Stop Work Order instead of filing an appeal. The Stop Work Order did not, however, impair the Appellants' ability to file an appeal. This Board has held that the pursuit of alternative remedies does not constitute exceptional circumstances. *See Appeal of Robert E. Love*, BZA Appeal No. 14054 (1984) and *Appeal of Robert Lehrman*, BZA Appeal No. 16849 (2002). The Appellants' reliance on the Stop Work Order is particularly questionable give the fact that they were not instrument in requesting that it be issued.

The Board finds the appeals of the Pool Permit, issued on May 20, 2003, and the Revised Permit, issued on June 13, 2003, were filed within 60 days of their issuance as required by 11 DCMR § 3112.2. Accordingly, issues relating to those permits are properly before the Board.

Ongoing Tree Removal Activities

During the public hearing of February 3, 2004, Appellants attempted to introduce evidence and present testimony regarding ongoing activities of the Owner that Appellants claim threaten trees located on the Property. The Owner objected to this testimony and evidence as outside the scope of the appeal. As Appellants' expert Mr. Milhous testified, the trees at issue

are still alive. The Board finds that it does not have jurisdiction under § 3112.2 to address potential or threatened tree removals. The Board can address only those that tree removals that come to fruition and are the result of an order, requirement, decision , determination, or refusal made by an administrative officer or body. 11 DCMR § 3112.2.

Merits of Issues Remaining on Appeal

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended; D.C. Code § 6-641.07(g)(1) (2001)), to hear and decide appeals where it is alleged by an appellant that an administrative officer erred in any administrative decision based in whole or in part upon any Zoning Regulation or Zoning Map. The timely filed aspects of this appeal are properly before the Board pursuant to 11 DCMR §§ 3100.2, 3101.5, and 3200.2. The notice requirements of 11 DCMR § 3112 for the public hearing on the appeal have been met.

The Appellants appeal the decision of the Zoning Administrator to approve the issuance of a building permit for installation of an in-ground pool and the issuance of a revised building permit to show a pervious driveway to the accessory building.

Rear Yard

The R-1-A Zone District requires a rear yard with a minimum depth of 25 feet. 11 DCMR § 404.1. The "depth of rear yard" is to be measured as "the mean horizontal distance between the rear line of a building and the rear lot line...". 11 DCMR § 199.1. Section 2503.1 of the Zoning Regulations requires that "every part of a yard required under this title shall be open and unobstructed to the sky from the ground up." However, a structure that is no more than 4 feet above the grade may occupy the rear yard. 11 DCMR § 2503.2.

The Board finds the pool does not intrude into the rear yard in violation of 11 DCMR § 2503.2. The walls of the lower reservoir are less than 4 feet above the grade at all points. Accordingly, the lower reservoir is not considered a structure that intrudes into the rear yard in violation of § 2503.2. The edge of the pool itself has a height of more than 6 feet above grade. However, the rear wall of the pool is 25.3 feet from the rear lot line measured from the mean of the horizontal distance of the rear line of the pool wall. Accordingly, the plans provide an ample rear yard depth between the pool and the rear lot line.

Location, Dimensions, and Surfacing of Driveway

Under § 2101.1, each single-family dwelling must provide one parking space. A "parking space" is defined as "an off-street area accessible and of appropriate dimensions to be used exclusively for the temporary parking of a motor vehicle." 11 DCMR § 199.1. Each required parking space must be a minimum of 9 feet wide and 19 feet long. 11 DCMR §2115.1. The required parking space may be located within a permitted garage or carport, within a rear yard, or within a side yard. 11 DCMR § 2116.2 (a), (b). Only driveways that provide access to required parking spaces must meet the standards set forth in 11 DCMR § 2117.8. A driveway that provides access to a required parking space for a single-family dwelling must have a maximum grade of not more than 12% (§2117.8(a)) and must be at least 7 feet wide (§ 2117.8(b)).

The Board finds that drive ramp to the accessory building meets the requirements of § 2117.8. The Revised Plat shows a pervious drive ramp connecting the pervious drive court behind the house to the accessory building. The drive ramp is 7 feet wide and 23 feet long. The Board finds the garage within the accessory structure is accessory, and does not contain a "required" parking space under the Zoning Regulations. Accordingly, the Board finds there is no

provision requiring that the driveway to non-required spaces be impervious, and there is no requirement that a garage actually be used for parking vehicles on an exclusive basis.

A single family home only requires one parking space under § 2101.1. The Board find Mr. Paul reasonably determined that the required parking space for the Property is not located in the accessory garage but in the garage within the house. Under §199.1 "parking space" is defined as "an off-street area accessible and of appropriate dimensions to be used exclusively for the temporary parking of a motor vehicle." The Board finds the garage within the house meets that requirement.

The standards applicable to the Owner's driveway are found in § 2117.8 (a) and (b). Under subsection (a) the driveway serving a required parking space must have a maximum grade of not more than 12%, and under subsection (b) the driveway must be no less than 7 feet wide. In addition, under § 2117.4, the required parking space must be accessible from improved street s or alleys via a driveway that forms an all-weather impervious surface. The Board finds the portion of the Owner's driveway serving the required parking space has a maximum grade of 12 % and is 7 feet wide. Both are both well within the requirements of § 2117.8. The Board finds the drive tracks and the portion of the drive court leading to the identified required parking space located in the garage within the house are impervious. Thus, the driveway serving the required parking space meets the impervious requirement of § 2117.4. The Board also finds that the 14 foot wide driveway requirement does not apply to single family dwellings such as the Owner's.

Appellants contend the accessory garage does not comply with the access requirements of the Zoning Regulations. As discussed above, the Board has determined that the driveway complies with § 2117, including § 2117.8. Although Appellants argue that the garage does not comply with the access requirements, they have failed to cite any Zoning Regulation regulating

the type of opening or driveway that must be provided to a garage that does not provide a required parking space.

Maximum Impervious Surface Coverage

Section 1567.2 of the CB/UT Overlay provides that the maximum impervious surface coverage for a lot is fifty percent (50%). According to the Owner's calculations, the impervious surface coverage approved by the Revised Plat is less than 50%. Appellants do not dispute the Owner's calculations regarding the amount of approved impervious surface coverage. Rather, they argue the Owner was required to provide more impervious surface coverage on the lot, which, if provided, would cause the impervious surface coverage to exceed 50%. The Board concludes the Owner reasonably and conservatively calculated the approved impervious surface coverage on the lot. Further, the Board concludes the Owner is not required to provide additional impervious surface coverage.

Section 199.1 of the Zoning Regulations defines "impervious surface" as "an area that impedes the percolation of water into the subsoil and impedes plant growth." 11 DCMR § 199.1. As set forth above, the Board has determined that the drive courts and pervious driveway to the lower drive court do not service a required parking space, and, thus, are not required to be impervious. Some materials traditionally used for driveways are not impervious surfaces under the definition set forth in § 199.1. For example, gravel is not impervious because it does not impede the percolation of water into the subsoil. Accordingly, the Board finds the Owner could have a driveway that is paved with non-impervious surfacing as long as it serves non-required parking. 11 DCMR § 2117.4.

Great Weight

The Board is required under D.C. Code § 1-309.10(d) (2001) to give great weight to the issues and concerns raised in the recommendations of the affected ANC. In its report, ANC 3D requested that the Board give serious, favorable consideration to the issues raised by Appellants and that the Board impose severe penalties in the event it determines the permits were issued in error. The Board first notes that it is only authorized to determine whether the decision of the Zoning Administrator was erroneous and is not authorized to impose penalties on DCRA or the Owner. The Board has given serious, favorable consideration to the issues raised by Appellants. However, the Board finds Appellants' arguments have no merit under the Zoning Regulations.

DATED: February 24, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February, 2004 the foregoing "Intervenor's Proposed Findings of Fact and Conclusions of Law" was served by first class mail, on the following counsel of record:

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Document #: 1380365 v.1