GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 17054 of Henry P. Sailer, et. al., pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decisions of the Department of Consumer and Regulatory Affairs (DCRA) in the issuance of Building Permit No. B448548 dated January 29, 2003, Building Permit No. B451476 dated May 20, 2003, and Building Permit No. B452193 dated June 13, 2003, for the construction of a new single-family detached dwelling and pool, allegedly in violation of lot occupancy, rear yard, ground coverage, and tree removal requirements of the Zoning Regulations in the Chain Bridge Road/University Terrace Overlay (CBUT)/R-1-A zone, at premises 3101 Chain Bridge Road, N.W. (Square 1427, Lot 870).

HEARING DATES: October 21, 2003, January 27, 2004, February 3, 2004

DECISION DATES: November 4, 2003, November 18, 2003, November 25, 2003, March 2, 2004

DECISION AND ORDER

This appeal was filed with the Board of Zoning Adjustment (the Board) on July 2, 2003 challenging DCRA's decisions to approve a building permit dated January 29, 2003 to construct a single family home at 3101 Chain Bridge Road, N.W., a related pool permit dated May 20, 2003, and a revised building permit dated June 13, 2003. Following a public hearing in this matter, the Board voted to dismiss the appeal of the January 29, 2003 building permit as untimely, to deny the appeal as to the May 20, 2003 pool permit, and to grant the appeal as to the revised June 13, 2003 building permit.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Public Hearing

The Office of Zoning scheduled a hearing on the appeal for October 21, 2003. In accordance with 11 DCMR § 3113.4, the Office of Zoning mailed notice of the hearing to the Appellants, the ANC 3D (the ANC for the area concerning the subject property), the property owner, and DCRA.

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). Appellants initially represented themselves, but later retained Patton Boggs, LLP, as counsel. Brian Logan, the owner of the subject property (the Owner or Mr. Logan), was represented by

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Shaw Pittman, LLP. As the property owner, Mr. Logan is automatically a party under 11 DCMR § 3106.2.[1] DCRA was represented by Lisa Bell, Esq., Senior Counsel.

Persons/Entities in Support of the Appeal
The ANC and the Palisades Citizens Association (the Association) wrote in support of the appeal, and the Association's representative, Judith Lanius, testified in support of the appeal.

Preliminary Matters
Prior to the public hearing, the Owner filed a motion to dismiss the appeal as untimely. Appellants and the ANC opposed this motion; however, the Association took no position on the timeliness issue. DCRA joined in the Owner's motion to dismiss, and the Board heard oral argument from the parties on October 21, 2003. A decision on the motion was set for November 4, 2003, then rescheduled, first for November 18, 2003, then for November 25, 2003. During a special public meeting on November 25, 2003, the Board voted to dismiss the appeal of all issues, except those relating to the May 20, 2003 pool permit and the June 20, 2003 revised building permit. A hearing on these remaining issues was set for January 27, 2004, then rescheduled and held on February 3, 2004.

The Positions of the Parties on the Remaining Issues
The Appellants maintain that the pool permit was issued in error because the cachment tank of proposed pool would unlawfully extend into the rear yard and its stairs would unlawfully extend into the side yard. The Owner and DCRA contend that the proposed pool and stairs are permitted encroachments because they are within the maximum allowable height under the Zoning Regulations.

The Appellants also maintain that the revised building permit was issued in error because it allowed a "pervious" driveway to an accessory garage, and that both the driveway and garage violate various requirements of the Zoning Regulations. For example, Appellants maintain that the driveway and drive courts associated with the garage must be paved with impervious surfacing; and that even were this flaw to be corrected, the impervious surfacing would exceed the maximum allowed under the Regulations. The Owner and DCRA contend that since the parking space in the garage is not required parking under the Regulations, the legal requirements related to the driveway and garage (and cited by Appellants) are not applicable.

FINDINGS OF FACT

The Property
1. The subject property is located at 3101 Chain Bridge Road, N.W., Square 1427 in a portion of the R-1-A zone that is subject to the Chain Bridge Road/University Terrace (CBUT) Overlay. The CBUT Overlay (provided for at 11DCMR § 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.

[1] Mr. Logan also moved to intervene in the proceeding; however, the Board found that such relief was not necessary in view of his automatic party status.

The Appellants

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. At the time of the public hearing Mr. Levi resided in France and rented his home to tenants. Henry P. Sailer resides 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 – one house removed from the subject property. Lisa Kelly and Steven 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

The Main Permit and Construction History at the Property

3. The Owner applied for a permit to remove some of the trees from his property on or about May 9, 2001. The application included a "Tree & Slope Information Form", an "Affidavit: Tree & Slope Protection (TSP) Overlay Districts", and a report from a certified arborist stating that certain trees were diseased (Exhibit 25). He received Building Permit No. B432497 dated August 8, 2001 (the tree permit) allowing him to remove the trees. These permits were renewed on August 6, 2002 and February 5, 2003.

4. On or about November 27, 2001, the Owner applied for a permit to construct a new single-family home with a swimming pool and two-story accessory building in the rear yard. The new house would replace an existing house at the property. DCRA issued building permit No. B448548 (the main building permit) on January 29, 2003 to build a "new single family house as per plat and plans".

5. The Owner demolished the existing house at the property on February 8, 2003, after receiving Building Permit No. B448687 for an emergency raze of the house. During that time, a certified diseased tree and other trees were also removed.

6. The Association, through Judith Lanius, complained to DCRA that the existing house had been demolished without a permit and that a healthy "protected tree" had been improperly removed. As a result, DCRA Inspector Stanley Neal visited the property on February 10, 2003 and issued a "stop work order" halting construction. DCRA lifted the stop work order on or about March 21, 2003 following a letter from the owner's counsel that the stop work order was groundless, and construction resumed on or about March 24, 2003.

7. The Owner obtained other permits related to the construction of the new home, including Building Permit Number B451476 issued May 20, 2003, authorizing the construction of an in-ground pool.

The Pool Permit

8. The proposed 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.

9. The pool was first proposed when the Owner submitted a building plat dated November 14, 2001 (the initial plat) as part of the application for the main permit. This 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 plat also depicted the measurements of the rear and side yards.

10. The Owner's pool contractor later submitted the initial plat and additional 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 permit (Exhibit 38).

11. The plat and drawings show that the rear wall of the main swimming pool is 25 feet 3 inches measured from the mean horizontal distance from the rear line of the rear wall of the pool and the rear lot line (Exhibit 38).

12. The plat and drawings show that the rear wall of the main swimming pool is approximately 6 feet above grade, but the lower reservoir is only 4 feet above grade (Exhibit 38).

13. Leon Paul, the DCRA Zoning Technician, reviewed the location and size of the pool during the review of the main building permit and concluded that the pool and stairs did not exceed 4 feet above grade at any point and that the minimum rear yard and side yard requirements had been satisfied.

14. The Board credits the testimony of the Owner's zoning expert, Armando Lourenco, regarding the pool, rear yard and side yard measurements. Mr. Lourenco testified that based upon his review of the submitted plat and drawings, the proposed pool was no more than 4 feet above grade at any point.

The Revised Permit

15. The initial plat (upon which the main permit was based) showed a two story accessory building to be located on the property behind the main house and adjacent to the pool and the drive court. The accessory building, termed a "garage/studio" was to be surrounded by terraces and plantings. Although the initial plat did not depict the building as accessible by vehicle from the driveway or the drive court, it did show a parking space on the lower level.

16. On or about June 13, 2003, the Owner's architect submitted an application to revise the main building permit. The stated purpose was to "[r]evise [p]ermit #B448548 [the main permit] to show pervious drive to the accessory garage structure." The permit was issued that same day.

17. As part of the application, the Owner submitted a revised building plat dated June 5, 2003 (the revised plat). In contrast to the initial plat, the revised plat showed that the accessory garage was accessible by a vehicle from the driveway and added a driveway ramp leading from the gravel drive court to a lower drive court adjacent to the accessory garage. It also depicted the surface of the driveway and lower drive court as being "pervious" and made other minor changes that are not relevant to this appeal. The term "pervious" is not used in the Zoning Regulations. However, the Board interprets it to mean the opposite of "impervious", a term that is used in the

Regulations and defined to describe a surface that impedes the percolation of water and plant growth.

18. 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. There is also a drive ramp leading from the drive court to the lower drive court adjacent to the accessory garage. The drive ramp is shown as 7 feet wide and 23 feet long and is shown as "pervious."

19. According to the Owner's calculations, there is 7,818 square feet of total impervious surface coverage on a lot of 15, 654 feet, slightly less than fifty percent of the lot. The impervious surface coverage is about 10 square feet shy of the fifty percent.

Appellants' Knowledge of the Conditions Complained Of

20. The Owner did not establish to the Board's satisfaction that Appellants knew or should have known about the main permit and approvals when the permit was issued on January 29, 2003.

21. The Owner did not establish to the Board's satisfaction that Appellants knew or should have known about the main permit and approvals on February 8, 2004, when the existing house was demolished.

22. Based upon the following facts, the Board is persuaded that the Appellants knew or should have known about the main permit approvals by March 24, 2004:

(a) One of the Appellants, Henry P. Sailer, testified that he knew about the construction activities as early as March 24, 2003.

(b) On or about March 5, 2003, an article appeared in a local newspaper (the Palisades News) describing the demolition activities of February 8, 2003. The article stated that the tree removal was a violation of the Overlay zone and that permits had been mistakenly issued. The newspaper also noted that a building permit had been issued for "3101 Chain Bridge Road, new home $1,250,000, Brian Logan." (Exhibit 25).

In late March or early April, 2003 another appellant, Arthur S. Levi. while in France. contacted Leon Paul, a DCRA zoning technician by e-mail, seeking clarity from DCRA as to what had changed on the plans in order for them to be approved as in compliance with the Zoning Regulations. According to Mr. Paul, Mr. Levi's e-mail indicated that he had a copy of the original permit at that time because his comments referred to that permit.

23. Although it may have been difficult for the Appellants to obtain details from DCRA regarding the permits and plans, there is no evidence that DCRA's actions substantially impaired Appellants' ability to file the subject appeal.

24. Appellants filed this appeal on July 2, 2003, approximately 100 days after March 24, 2003, the date that they knew or should have known of the issuance of the original permit, but less than 60 days after the issuance of the revised permit and the pool permit.

CONCLUSIONS OF LAW

The Motion to Dismiss.

The District of Columbia Court of Appeals has held that "[t]he timely filing of an appeal with the Board is mandatory and jurisdictional." *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994). The Board's Rules of Practice and Procedure (11 DCMR, Chapter 31) 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).

This appeal, filed July 2, 2003, was untimely filed as to the main permit and its related approvals. As stated in the Findings of Fact, Appellants knew or should have known about the permit approvals by March 24, 2003. Thus, under section 3112.2(a) of the Regulations, the appeal should have been filed within 60 days of that date, or by late May, 2003. Instead, it was filed in July, 2003, approximately 100 days after the Appellants are charged with notice of the conditions complained of. While the Appellants may have had difficulties in preparing their actual case, the Board does not find any exceptional circumstances outside of their control that impaired their ability to file a timely, good faith appeal with respect to the main permit approvals.

The appeals of the pool permit (issued on May 20, 2003) and the revised permit (issued on June 13, 2003) were timely filed within 60 days of the conditions complained of and are properly before the Board.

Therefore the Board grants the motion to dismiss that portion of the appeal related to the main permit, but denies the motion to dismiss with respect to pool permit and the revised permit.

The Merits of the Appeal

The Pool Permit

The Board concludes that DCRA had ample legal basis for issuing the pool permit, and that aspect of the appeal is therefore denied. The rear yard does not exceed the minimum size required under the Regulations, as claimed by the Appellants. In a residential 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 District, is 25 feet. 11 DCMR § 404.1. As stated above, the plat shows that the rear wall of the main swimming pool is 25 feet 3 inches measured from the mean horizontal distance from the rear line of the rear wall of the pool and the rear lot line (Finding of Fact 11).

Nor did the permit approve a pool that encroached into the rear yard or side yard, as claimed by the Appellants. Section 2503.2 of the Regulations permits structures less than 4 feet above grade to occupy a required yard. Under 11 DCMR § 199.1, a swimming pool is a structure (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..."). As discussed above, the lower reservoir of the pool is only 4 feet above grade and the structure, including the stairs, is no more than 4 feet above grade at any point (Findings of Fact 12-14).

For these reasons, the Board denies that portion of the appeal that challenged DCRA's issuance of the pool permit.

The Revised Permit

The Board concludes that the revised permit was issued in error because the driveway's surface area should have been counted towards the Overlay's limitation on impervious surfaces, regardless of the Applicant's representation that the surface would be pervious. When so counted, the record indicates that the percentage of impervious surface on the site would exceed the amount allowed under the Overlay.

The Owner and DCRA both contend there is no requirement for the driveway to be impervious because it is a driveway to a parking space that is not required. They rely on sections 2101.1, 2117.3, 2117.4, 2117.8 and 2118.9 of the Regulations in support of their position that there are no specific access requirements for an "extra" parking space that is not required under the Regulations, and that the parking space within the garage is such an optional "extra" space. Section 2101.1 provides that only one off-street parking space is required for a single-family dwelling; and, according to the Owner, the "required space" at this property is located in the side yard[2], not within the accessory garage. They concede that sections 2117.3, 2117.4 and 2117.8 set forth standards for access driveways and parking spaces, and require impervious surfaces for both. However, the Owner and DCRA assert that these provisions apply only to "required spaces", not optional spaces.

However, the Board finds that even if this were a lawful pervious driveway, it should nevertheless have been treated as an impervious surface for the purpose of calculating impervious surfaces under the CBUT Overlay. Had the Zoning Administrator done so, he would have determined that the maximum impervious surface limitations of 11 DCMR § 1567.2 had been exceeded. In finding that pervious driveways should be deemed impervious surfaces for this calculation, the Board relies on three regulations and their underlying intent:

> 11 DCMR 199.1, the definitional section of the Zoning Regulations. defines an "impervious surface"as follows:

[2] Parking spaces may be located in the side yard under 11 DCMR 2116.2.

> an area that impedes the percolation of water into the subsoil and impedes plant growth. Impervious surfaces include the footprints of principal and accessory buildings, footprints of patios, **driveways,** other paved areas, tennis courts, and swimming pools, and any path or walkway that is covered by impervious material. (39 DCR 1904) (emphasis added).

The Board reads this provision as indicating that all footprints of driveways are to be deemed impervious surfaces by definition , particularly when read in connection with 2500.5, governing private garages in an R-1-A or R-1-B District and the Overlay regulations set forth at 1565 et seq.

2500.5 states as follows:

> In an R-1-A or R-1-B District only, 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..

Pursuant to this regulation the only two- story buildings allowed in this District are accessory private garages. This regulation could be greatly abused if the features attendant to garages, such as access by a driveway, were not also required. Otherwise any two-story building could be called a garage. Subsections 199.1 and 2500.5 should be strictly construed in the CBUT District where impervious surfaces are limited in order to preserve and enhance the park-like setting of the Chain Bridge Road/University Terrace District. This interpretation is consistent with the intent of the Zoning Commission in establishing this and other Tree and Slope Overlays. The CBUT Overlay states that among its purposes is to "[p]reserve the natural topography" and "[l]imit permitted ground coverage of new and expanded buildings and other construction, so as to encourage a general compatibility between the siting of new buildings or construction and the existing neighborhood" 11 DCMR § 1565.2 (a) and (c). It would be inconsistent with these purposes to permit an owner to use pervious paving to exceed the 50 percent limitation for impervious surfaces, since the point of the overlay is to retain 50 percent of the lot in a natural state, not encroached upon by pavement, whether impervious or not.

The Board thus concludes that the Zoning Administrator erred in approving the revised permit because the driveway to the accessory garage should have been treated as an "impervious" surface for lot coverage purposes. As a result, DCRA miscalculated the impervious surface coverage Section 1567.2 of the Regulations (within the CBUT Overlay provisions) which provides that the maximum impervious surface coverage on a lot is fifty percent. Because the Board interprets the Regulations to require that a driveway be treated as an impervious surface, the driveway square footage depicted on the plat must be added to the surface coverage calculations. This was not done. According to the Owner's own calculations, the impervious surface coverage was barely within the 50% maximum without including the driveway or drive ramp calculations. Accordingly, when the foot print of the driveway is added to the calculations, the record indicates that the lot coverage for impervious surfaces would exceed the 50% maximum allowed under Section 1567.2 of the Regulations. The Board is required under § 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law

1-21, as amended; D.C. Official Code § 1-309.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC's recommendations. To give great weight, the Board must articulate with particularity and precision why the ANC does or does not offer persuasive advice under the circumstances and make specific findings and conclusions with respect to each of the ANC" issues and concerns. In this appeal, the ANC concurred with the views advanced by the Appellants. For the reasons stated above, the Board finds this advice unpersuasive with respect to the pool permit, but concurs with ANC's views with respect to the revised permit.

Therefore, for the reasons stated above, it is hereby **ORDERED** that:

a. the motion to dismiss the appeal as untimely is **GRANTED** as to the building permit of January 29, 2003 and **DENIED** as to the building permit of May 20, 2003 and June 13, 2003.

Vote taken on November 25, 2003
VOTE: 4-1-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., and David A. Zaidain in favor of the motion, John G. Parsons, opposed)

b. the appeal is **DENIED** with respect to the building permit of May 20, 2003

Vote taken on March 2, 2004
VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., David A. Zaidain, and John Parsons)

c. the appeal is **GRANTED** with respect to the building permit of June 13, 2003

Vote taken on March 2, 2004
VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., David A. Zaidain, and John G. Parsons)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order.

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

FINAL DATE OF ORDER: AUG 2 3 2004

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.SG/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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As Director of the Office of Zoning, I hereby certify and attest that on AUG 2 3 2004 a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY: Jerrily Kress

JERRILY R. KRESS, FAIA
Director, Office of Zoning

rsn