BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

APPEAL OF DIANA DE BRITO AND JONATHAN GOTTLIEB OF THE ISSUANCE OF BUILDING PERMIT NOS. B-472018, B-455009, B-451175, B-452735, AND B-452577	)	**Appeal No. 17391**
2620 FOXHALL ROAD, N.W.	)	

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MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

Eugene and Carol Ludwig, the owners of the property that is involved in this appeal at 2620 Foxhall Road, N.W. and therefore automatic parties to this appeal pursuant to 11 DCMR Section 3199 ("Party"), request that the Board dismiss this appeal in its entirety prior to hearing the merits of the appeal for the following reasons:

1. The appeal of Permit Nos. B-455009, B-451174, B-442735 and B-452577 is untimely.

2. The appeal regarding Permit No. B-472018 is actually a Building Code issue, not a zoning issue and, therefore, the appeal cannot be heard by the Board.

The Board need not reach the merits of the case when it is clear from the face of the appeal papers and the undisputed facts that the appeal is time-barred for four of the five permits, and that the Board is without jurisdiction over the Building Code issue concerning the fifth permit under appeal.

A. APPELLANTS' CLAIMS

On June 24, 2005, Appellants filed an appeal alleging errors in the administrative decisions of the Director of DCRA, as follows:

1. In 2003, DCRA approved a series of building permit applications, rather than requiring the Ludwigs to submit one application for approval of a comprehensive plan.

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17391
EXHIBIT NO. 20

Board of Zoning Adjustment
District of Columbia
CASE NO. 17391
EXHIBIT NO. 20

Specifically, an application to construct a pool was filed in 2003, but the application for the pool fence enclosure was not filed until 2005. In addition, other applications were filed in 2003 to build "various retaining and other walls", but applications for fences on top of the walls were not filed until 2005. (Statement filed on June 24, 2005 (hereinafter "Statement") at page 2). (For the convenience of the Board, a copy of the appeal papers and Statement is attached as Exhibit A).

2. The several permits approved in 2003 (referred to as the House Permit, the Tennis Court Permit, and the Revised Tennis Court Permit):

(a) appear to permit construction that exceeds the limit for fences and fence walls in violation of the Building Code;
(b) appear to permit construction that violates the side yard requirement of 11 DCMR Section 405.9;
(c) appear to permit construction that violates the rear yard requirement of 11 DCMR Section 404.1;
(d) appear to permit construction that exceeds the 4 foot limitation for structures in violation of 11 DCMR Section 2503.2; and
(e) appear to permit construction that violates the Wesley Heights Overlay provisions of 11 DCMR Section 1541.3(c).

(Statement at pages 4 and 5).

3. The Fence Permit issued on April 27, 2005, violates 12 DCMR Sections 3110.3.3 and 3110.1.3 (the Building Code). (Statement at page 4).

4. The Fence Permit violates 11 DCMR Section 1541.3 (the Wesley Heights Overlay Zone Regulations). (Statement at page 4).

Appellants have asked the Board to reverse each of these decisions "to the extent that they violate the letter and spirit of applicable regulations." (Statement at p. 5).

B. STATEMENT OF UNDISPUTED FACTS

This appeal concerns the construction of a single-family home by the Ludwigs located at 2620 Foxhall Road, N.W. (Square 1397, Lot 1031) (the "Property"). Appellants Diana de Brito

and Jonathan Gottlieb live at 4610 Dexter Street, N.W. (Square 1397, Lot 1032), which abuts the subject property to the north. (*See* Exhibit B).

The Property is located in the R-1-A zone, but is **not** within the boundaries of the Wesley Heights Overlay District, as set forth in Zoning Commission Order No. 718, and as confirmed by the Office of Zoning. (*See* Exhibit C).

The Department of Consumer and Regulatory Affairs (DCRA) issued four building permits in 2003 as follows (*see* Exhibit A):

1. B-451175, dated May 9, 2003, for site work, grading, retaining wall and tennis court;
2. B-452577, dated June 26, 2003, for footing and foundation for single family dwelling.
3. B-452735, dated July 1, 2003, to revise the earlier Permit No. B 451175; and
4. B-455009, dated September 15, 2003, for construction of the house, driveway, retaining walls and terraces.

Construction of the Ludwigs' new home was completed to the point where the house was completely under roof no later than April of 2004. The final inspection was conducted on March 25, 2005.

On April 27, 2005, DCRA issued Fence Permit No. B-472018, which authorized the construction of three types of fences on the Property.

This appeal was filed on June 24, 2005. No one else has filed an appeal.

C. DISMISSAL OF THIS APPEAL IS REQUIRED UNDER APPLICABLE REGULATIONS AND PRIOR DECISIONS OF THIS BOARD AND THE COURT.

1. The Appeal of the 2003 Permits is Untimely.

Appellants' claims regarding the series of building permits issued in 2003 are plainly time-barred. Under 11 DCMR Section 3112.2, an appeal regarding the administration or enforcement of the Zoning Regulations must be filed "within sixty (60) days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier." 11 DCMR Section 3112.2(a) (as amended by Zoning Commission Order 02-01, dated September 9, 2002). The regulation further provides that if "the decision complained of involves the . . . reconstruction, conversion, or alteration of a structure. . . [n]o appeal shall be filed later than ten (10) days after the date on which the structure or part thereof in question is under roof." 11 DCMR Section 3112.2(b)(1). (A copy of Zoning Commission Order 02-01 is attached as Exhibit D). The house was completely under roof by April of 2004, 14 months prior to the filing of this appeal.

The amended regulation was intended to codify the principles discussed by the Court of Appeals in Waste Management of Maryland, Inc. v. District of Columbia Board of Zoning Adjustment, 775 A.2d 1117 (D.C. 2001) and to establish a firm, clear, and fixed deadline by which appeals are to be filed.[1] As the Court stated in discussing a "reasonable" deadline for appeal (prior to enactment by the Zoning Commission of the 60-day limit):

> A reasonable time in which to appeal is measured by the time that fairness dictates to enable an aggrieved party to evaluate the appropriateness of seeking review, to obtain the assistance of counsel, and to take the other steps necessary to proceed. . . 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. Rather, because deadlines

[1] The regulation allows the Board to grant an extension of the filing deadline only if there are "exceptional circumstances" outside the Appellant's control which "substantially impaired the Appellant's ability to file an appeal to the Board." 11 DCMR Section 3112.2(d). Such "exceptional circumstances" obviously do not apply here where the Appellants lived next door to the construction and were therefore fully aware of the construction.

> for taking appeals serve important ends, they should not be extended without good cause.

The question of what is a "reasonable" time to appeal has since been resolved by the Zoning Commission when it fixed the outside date as 60 days. There can be no dispute that the Appellants, who live next door to the Ludwig residence, had knowledge of the construction of the house, retaining wall and tennis court long before April 24, 2005, which is the date 60 days before they filed their appeal.

In the Herron case (copy attached as Exhibit E), the Board granted a motion to dismiss an appeal as untimely. The Board held that it analyzed "the timeliness of the appeal starting from the dates the Appellants knew or should have known of the decisions to grant the subdivision and issue the building permits." (Appeal No. 16982 of J. Brendan Herron Jr. and ANC 3F (March 11, 2003), at 11.)

Apparently aware that their challenge to the 2003 permits runs afoul of the time limits established by the Zoning Commission, Appellants try to grant themselves a unilateral, open-ended extension of time by pointing to the alleged "piecemeal approach" of the construction of the Ludwig home:

> The effect of this piecemeal approach has been to obfuscate the plan from both the regulators and the public. By [sic] the Ludwigs have made it difficult for the Department of Consumer and Regulatory Affairs to fulfill its responsibilities and make proper decisions. (Statement at p. 2).

But Appellants' argument about the merits of DCRA's actions cannot cure the jurisdictional defect. The Appellants' attempt to challenge the propriety of the Permits that were issued in 2003 for a building which was "under roof" in 2004 and for a retaining wall and tennis court which were also completed in 2004 are time-barred.

Moreover, the Board is not confronted with a requested "extension" of 10 days or 30 days or even 60 days in which to notice an appeal but, rather, a delay of over 2 years from the issuance of the first permits and nearly a year since the house was under roof. The work of the Court, the Zoning Commission, and this Board to bring order to the appeals timelines would be for naught if sophisticated neighbors can lay in wait for a year or more before launching an appeal. Under 11 DCMR §3112.2 and the Herron case, appellants have waited too long to file this appeal and it should be dismissed.

2. The Appeal of the Fence Permit is in the Wrong Venue.

Appellants allege on page 4 of their Statement that the Fence Permit violates 12 DCMR Sections 3110.3.3 and 3110.1.3. This is a Building Code regulation, not a Zoning Regulation. The Board does not have jurisdiction to hear appeals based upon provisions of the Building Code.

The Board has jurisdiction over appeals of "any order, requirement, decision, determination, or refusal made by any administrative officer or body, including the Mayor, *in the administration and enforcement of the Zoning Regulation, Title 11 DCMR."* 11 DCMR Section 3100.2 (emphasis added). *See also* D.C. Official Code Section 6-641.07(f) (2001). ("Appeals to the Board ... may be taken by any person aggrieved ... by any decision of the Inspector of Buildings granting or refusing a building permit ..., or any other administrative decision based in whole or in part upon any zoning regulation or map ....")

Pursuant to 11 DCMR Section 2503.3, "A fence ... constructed in accordance with the DC Building Code may occupy any yard required" under the Zoning Regulations. The specific dimensions, location and other limitations on fences are governed by the Building Code. The issue of whether a fence complies with the Building Code does not involve the

administration or enforcement of the Zoning Regulations, and is therefore outside the jurisdiction of the Board.

Challenges to the issuance of building permits lie in the first instance with DCRA. Such appeals are governed by Section 112.1 of the 2003 D.C. Construction Codes Supplement, 12 DCMR (January 2004), which provides that:

> The owner of a building or structure or any person suffering a legal wrong, or adversely affected or aggrieved, may initiate an appeal, within the Department ... **from the issuance or denial of a building permit**, including such appeals related to the D.C. Fire Prevention Code. Claimants shall appeal using a form provided by the code official, on which they shall state the grounds for the appeal, which shall be based on a claim that the Construction Codes or the rules legally adopted thereunder have been incorrectly interpreted or applied, the provisions of the Construction Codes do not fully apply, or that an equally good or better form of construction can be used. **The appeal shall be filed within 15 days from the date of the ... permit being appealed.** (Emphasis added).

The appeal of the issuance of the Fence Permit based upon a Building Code provision must be dismissed due to lack of jurisdiction.

3. The Appeal of the Fence Permit is Without a Factual Basis in Zoning Regulations

Appellants also allege that the Fence Permit issuance violates 11 DCMR Section 1541.3. This citation is to the Wesley Heights Overlay District zoning regulations. Exhibit C attached hereto clearly indicates that the property is not within the Wesley Heights Overlay. There is no provision of the Wesley Heights Overlay regulations which applies to the Property. Therefore, this allegation is a nullity. *See* Exhibit C. It is axiomatic that an appeal based upon an alleged violation of a Zoning Regulation that does not apply must be dismissed.

The appeal of the issuance of the Fence Permit based upon the location of the Property in the Wesley Heights Overlay must be dismissed as being without a factual basis.

D. IMMEDIATE DISMISSAL WILL SERVE THE PUBLIC INTEREST

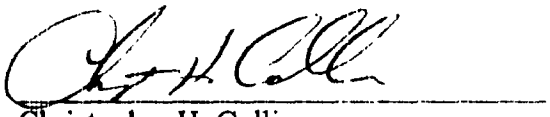
The Court of Appeals has repeatedly stated that timeliness of an appeal "is jurisdictional; if the appeal was not timely filed, the Board [is] without power to consider it." Goto v. District of Columbia Board of Zoning Adjustment, 423 A.2d 917, 923 (D.C. 1980).

The untimely appeal creates a cloud over the Ludwigs' occupancy of their new home. Appellants waited until after the permits were issued, and after construction was commenced and completed, to file an appeal on issues they knew about for at least the last year. The Board has a clear and straight path to resolving this claim, a path that Appellants themselves provided by waiting and waiting before they acted. As required by 11 DCMR Sections 3100.2 and 3112.2 and consistent with Herron, and as dictated by the papers the Appellants themselves rely on, the Board should grant the motion to dismiss.

Furthermore, with regard to the Fence Permit, the Appellants have chosen the wrong venue in which to appeal the alleged construction code issue and have made a claim with no factual basis. The Board does not have jurisdiction over non-zoning issues. Moreover, the Property is clearly not within the Wesley Heights Overlay, and therefore not subject to its requirements. For these reasons, the appeal of the Fence Permit should also be dismissed

This motion is being filed and served so that Appellants have eight (8) days in which to file any response and the motion would be ready for resolution by the Board at the November 29, 2005 public hearing.

Respectfully submitted,



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Thomas J. Carroll
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Washington, D.C. 20006
202-955-3000

Counsel to Eugene and Carol Ludwig

CERTIFICATE OF SERVICE

On November ___, 2005, I caused to be delivered by email or by hand-delivery a copy of this Motion and attached Exhibits to:

Diana de Brito
c/o Cadwalader
1201 F Street, N.W.
Washington, D.C. 20004
Diana.debrito@cwt.com

Dr. Patrick J. Canavan
Director, Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E.
Washington, D.C. 20002
(patrick.canavan@dc.gov)

Jonathan Gottlieb
4610 Dexter Street, N.W.
Washington, D.C. 20007

Julie Lee, Esq.
Office of General Counsel
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E.
Washington, D.C. 20002
(julie.lee@dc.gov)

Advisory Neighborhood Commission 3-D
c/o Alma Gates, Chair
P.O. Box 40846
Palisades Station
Washington, D.C. 20016

Alan H. Bergstein
Office of Attorney General
441 Fourth Street, N.W.
Suite 1060N
Washington, D.C. 20001
(alan.bergstein@dc.gov)

Thomas J. Carroll

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Form 125 – Exhibit 1
(Revised 03/15/02)

Case No. 17391

BEFORE THE BOARD OF ZONING ADJUSTMENT OF THE DISTRICT OF COLUMBIA

APPEAL

Notice: See other side of appeal form for instructions

Pursuant to Section (s) §3100 and §3101 of the Zoning Regulations of the District of Columbia, an appeal is hereby taken

from the administrative decision of: P Canavan and D.Clark DCRA (Name of administrative officer and title)

made on 4/27/05, 9/15/03 (Date of decision), to the effect that building permits

5/9/03, 7/1/03, 6/26/03

Address(es) of Affected Premises	Square(s)	Lot(s)	Zoning Districts
2620 Foxhall Road, NW	1397	1031	R-1A Wesley Heights Overlay District

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D.C. OFFICE OF ZONING
2005 JUN 24 PM 3:00

Present use of Property:	Construction
Proposed use of Property:	Residential
Owner of Property:	Eugene and Carol Ludwig
Telephone No.:	
Address of Owner:	4545 Dexter St., NW, Washington D.C. 20007
Name, address and telephone number of lessee:	

Name, address and telephone number of appellant, if other than owner: Diana de Brito and Jonathan Gottlieb, 4610 Dexter St., N.W., Washington, D.C. 20007, 202-862-2409

State specifically manner in which appellant is aggrieved by the administrative decision, the allegations of error in the administrative decision, and the relevant sections of the Zoning Regulations (see reverse for more detailed explanation).

Please use a separate piece of 8 ½" x 11" to respond and attach it to the Form 125 Appeal.

Date: June 24, 2005 **Signature:** Appellant* and Diana de Brito by JSG

** If appeal is filed by agent of the Appellant, Form 125 Appeal shall be accompanied by a letter signed by the appellant authorizing the agent to act on his behalf in this appeal.*

To be notified of hearing and decision:
(Appellant or Authorized Agent)*

BZA
Case No. 17391
Exhibit No. 1

Name:	Diana de Brito c/o Cadwalader				
Address:	1201 F St., NW, Washington, D.C. 20004				
Phone No.:	202-862-2409	**Fax No.:**	202-862-2400	**E-Mail:**	diana.debrito@cwt.com

ANY APPLICATION THAT IS NOT COMPLETED IN ACCORDANCE WITH THE INSTRUCTIONS ON THE BACK OF THIS FORM WILL NOT BE ACCEPTED.

24 June 2005

To Whom it may concern:

I hereby authorize my husband, Jonathan Gottlieb, to sign and file on my behalf an appeal from decisions of the Board of Zoning Adjustment in respect of property located at 2620 Foxhall Road, NW DC and to sign all documents and take all actions necessary or appropriate. Sincerely, Diana de Bont

2005 JUN 24 PM 3:00

BZA
Case No. 17391
Exhibit No. 2

Statement in Support of
Appeal of
Diana de Brito and Jonathan Gottlieb
Before
The Board of Zoning Adjustment of
The District of Columbia

Introduction

Diana de Brito and Jonathan Gottlieb ("Appellants") hereby appeal from administrative decisions of the Department of Consumer and Regulatory Affairs involving a plan to build a mansion, other structures and fences on property located at 2620 Foxhall Road, N.W., Lot 1031, Square 1397 (the ""Ludwig Estate").

The Appellants

Appellants are residents of 4610 Dexter Street, N.W., Lot 1032, Square 1397. Applicants' property consists of 28,562 square feet. The Appellants' property is adjacent to the north side of the Ludwig Estate. It is located in the Wesley Heights Overlay District. The Appellants' property is located across the street from and up the street from the Wesley Heights/Rock Creek Park.

The Ludwig Estate

The Subject Property is located at 2620 Foxhall Road, N.W., Lot 1031, square 1397. The Ludwig Estate consists of 124,980 square feet. The property is owned by Eugene and Carol Ludwig (the "Ludwigs"). The Ludwig Estate is located in the Wesley Heights Overlay District. The Ludwig Estate is located close to the Wesley Heights/Rock Creek Park. The Ludwig Estate is zoned R-1-A.

The Ludwigs have built up the level of the property by as much as twelve feet above the natural grade of the property by bringing to the property tons of materials from off site. The elaborate structure has elevated the property above adjoining homes and properties including those of the Appellants.

BZA
Case No. 17391
Exhibit No. 2

The Administrative Decisions

Appellants appeal from the decision of Patrick Canavan, the Acting Director of the Department of Consumer and Regulatory Affairs (the "Acting Director") to issue to Ludwig a building permit (No. B472018) on April 27, 2005 for "new fence" (the "Fence Permit"). Specifically, the Fence Permit authorizes the building of the following three types of "7' fence:"

1. "black vinyl coated c/l 7' fence;
2. 'natural wood privacy fence;" and
3. "wrought iron (black fence)."

These fences are part of a mull-million dollar plan to develop the Ludwig Estate. The plan apparently includes construction of the following:

1. a three story mansion with an estimated floor area of over twenty thousand square feet and a volume of over two hundred thousand cubic feet (according to the Ludwigs 2003 application);
2. tennis court;
3. swimming pool;
4. pool house;
5. various structures to elevate the height of the house and the property by as much as twelve feet; and
6. fences on top of the elevated platforms.

But instead of submitting one application for approval of a comprehensive plan at one time, the Ludwigs have submitted multiple applications for approval of various components of the plan over a period of years. With one exception, these multiple applications did not reflect changes in plans but reflected different components of the same plan.

For instance, in 2003 the Ludwigs submitted an application to build a pool but they delayed for two years until 2005 to submit an application to build fences "to meet pool enclosure requirements." Likewise, in 2003 the Ludwigs submitted multiple applications to build various retaining and other walls but they delayed for two years until 2005 to submit an application to build fences on top of the walls.

The effect of this piecemeal approach has been to obfuscate the plan from both regulators and the public. By the Ludwigs have made it difficult for the Department of Consumer and Regulatory Affairs to fulfill its responsibilities and make proper decisions.

Accordingly Appellants appeal from prior decisions involving the Ludwig Estate including the following:

1. the decision of D. Clark, the Director of the Department of Consumer and Regulatory Affairs (the "Director") to issue to the Ludwigs a building permit (No.B455009) on September 15, 2003 for construction of a three story wood frame house with stone veneer basement, new driveway stone retaining walls, bluestone terraces (the "House Permit");
2. the decision of D. Clark, the Director of the Department of Consumer and Regulatory Affairs to issue to the Ludwigs a building permit (No.B451175) on May 9, 2003 for sitework and grading and construction of a "new twelve foot retaining wall" and tennis court (the "Tennis Court Permit");
3. the decision of D. Clark, the Director of the Department of Consumer and Regulatory Affairs to issue to the Ludwigs a building permit the revised permit building permit (No.B452735) on July 1,2003 which revised permit No.B451175 (the "Revised Tennis Court Permit"); and
4. the decision of D. Clark, the Director of the Department of Consumer and Regulatory Affairs to issue to the Ludwigs a building permit (No.B452577) on June 26,2003.

All the permits together are hereby referred to as the "Ludwig Estate Permits."

The Manner in which Appellants are Aggrieved by the Administrative Decisions

The Fence Permit will adversely and irreparably effect their enjoyment of the property, the quality of the environment and the value of their property. It will create an eyesore that will loom over the Appellants' property and their house. Applicants have already suffered harm by the Ludwigs' erection of a structure located adjacent to their backyard with a poured concrete facade of several feet high with exposed metal rods.

The House Permit, the Tennis Court Permit, and the Revised Tennis Court Permit have caused substantial harm to the applicants in terms of environmental damage, impairment of and loss in property value. From the front of the Appellants' property to the back of the property, the Ludwig estate looms over the Appellants.

The effect of the Ludwig Estate Permits is to dramatically alter the character of the neighborhood.

The Errors in the Administrative Decisions

The Acting Director erred in granting the Fence Permit because the Fence Permit violates 12 DCMR 3110.3.3 and 12 DCMR 3110.1.3 since the permit allows the building of fences that exceed seven feet in height as measured from the natural grade of the property to the top of the fence. The Ludwigs have already constructed platforms consisting of dirt, concrete, steel, gravel and other materials to artificially elevate the height of the property. They cannot be permitted to artificially change the grade of the property and thereby evade the limitation of 12 DCMR 3110.3.3. The fences if built as permitted under the Fence Permit would substantially exceed the seven foot height limit and therefore violate the regulations.

The Acting Director erred in granting the Fence Permit because the Fence Permit violates 11 DCNR 1541.3 since the permit allows the building of fences that block "access to air and light" and are in stark conflict with "the harmonious design and attractive appearance of the neighborhood." Since the Ludwigs elevated the height of the property, the house and the property towers over the neighboring properties limiting the access of air and light and conflicting with the harmonious design and attractive appearance of the neighborhood. Adding fences on top of the elevated property would only further decrease the access of air and light, only heighten the conflict with the harmonious design of the neighborhood and harm the attractive appearance of the neighborhood.

The Director erred in granting the House Permit, the Tennis Court Permit, and the Revised Tennis Court Permit for a variety of reasons including the following:

1. they appear to permit construction that exceeds the limit for fences and fence walls of seven feet in height as measured from the natural grade of the property to the top of the fence in violation of 12 DCMR 3110.3.3 and 12 DCMR 3110.1.3;
2. they appear to permit construction that violates the requirement for side yard of a minimum of eight feet in violation of 11 DCMR 405.9;

3. they appear to permit construction that violates the requirement for rear yard of a minimum of twenty five feet in violation of 11 DCMR 404.1;
4. they appear to permit construction that exceeds the four foot limitation for structures in violation of 11 DCMR 2503.2;
5. they appear to permit construction that blocks access to air and light in violation of 11 DCMR 1541.3(c); and
6. they appear to permit construction that dramatically conflicts with the harmonious design and attractive appearance of the neighborhood in violation of 11 DCMR 1541.3(c).

Basis for Proving their Case

Appellants intend to prove their case by providing documentation of each of the violations, expert and eyewitness testimony as well as analysis of the applicable laws and regulations.

The Relief Requested

Appellants respectfully request that the Board of Zoning Adjustment enter relief consistent with 11 DCMR 3100.4 and other applicable law including but not limited to the following:

1. reverse each of the decisions relating to each of the Ludwig Estate Permits to the extent that they violate the letter and the sprit of applicable regulations;
2. vacate each of the Permits Ludwig Estate Permits to the extent that they violate the letter and the sprit of applicable regulations;
3. order the owners to remove all structures, fences and other changes to the property to the extent that they violate the letter and the sprit of applicable regulations and return the property to its original condition; and
4. order such further relief that is just and proper.

Conclusion

Applicants respectfully request that the Board of Zoning Adjustment enforce the letter and the spirit of the zoning regulations of the District of Columbia to protect the interests of homeowners in this and other neighborhoods in the District of Columbia against overzealous developers.

Respectfully submitted,

Diana de Brito and Jonathan Gottlieb
June 24, 2005

Certificate of Service

I, Jonathan Gottlieb, hereby certify that I served, by first class U.S. mail, a copy of this appeal upon each of the following persons:

Patrick Canavan
Acting Director
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E.
Washington, D.C. 20002

Alma Gates
Chair
Advisory Neighborhood Commission 3-D
Post Office Box 40846
Palisades Station
Washington, D.C. 20016

Eugene and Carol Ludwig
4545 Dexter Street, N.W.
Washington, D.C. 20007

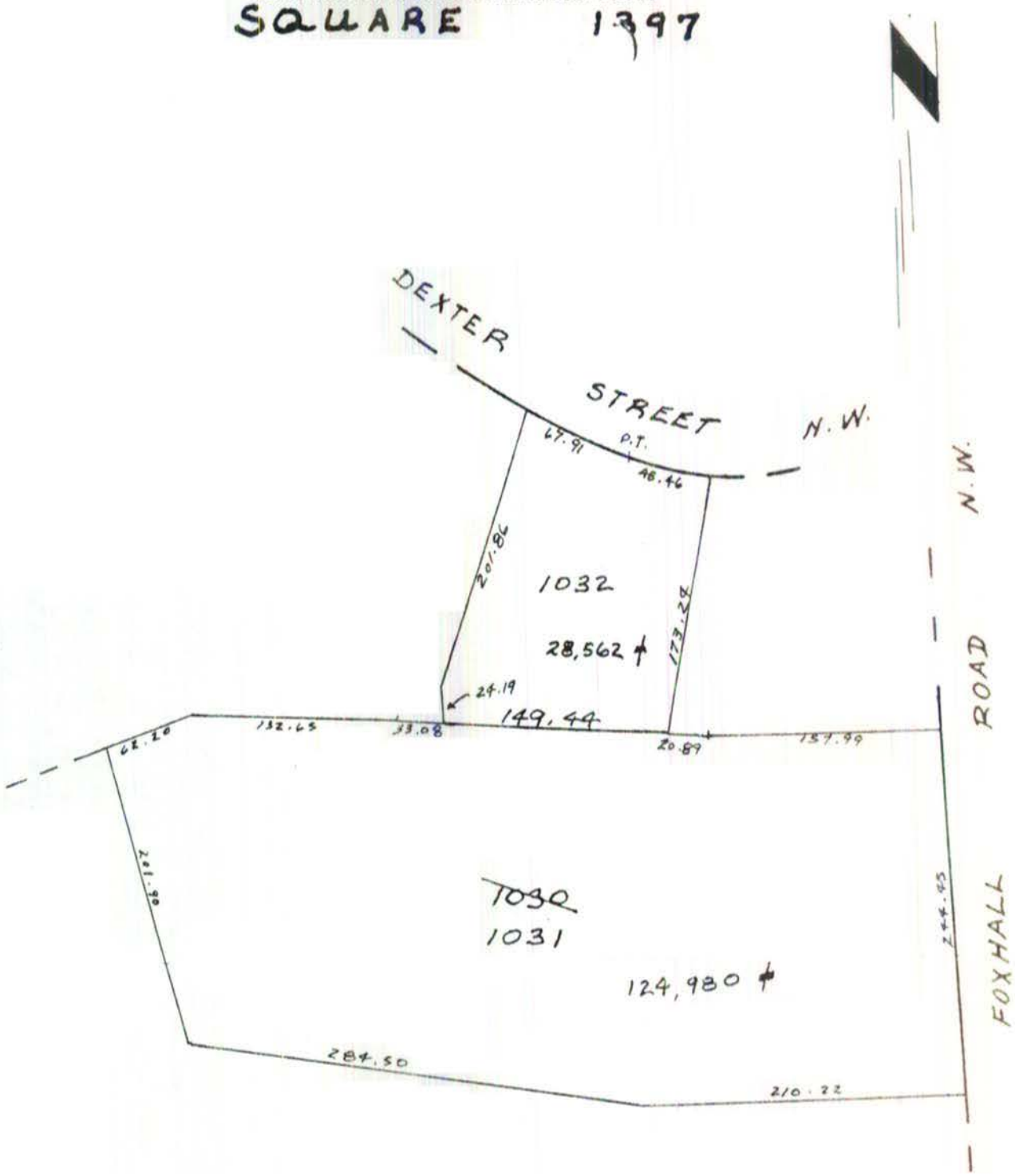
Robert Gage
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004



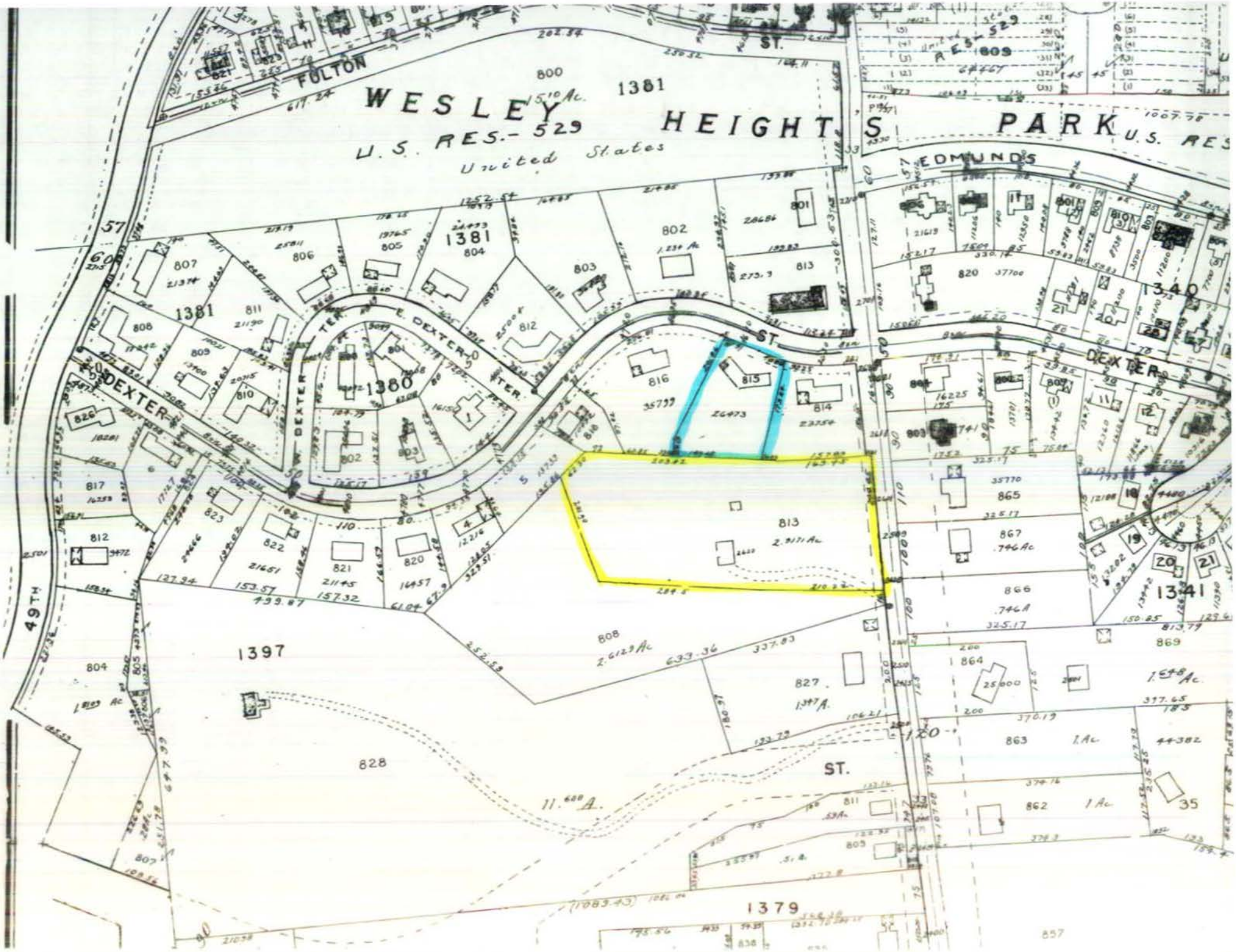
Jonathan Gottlieb

ASSESSMENT AND TAXATION PLAT

SQUARE 1397



R.E. Brown
Draftsman


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U.S. RES.- 529
United States
S PARK
U.S. RES
FULTON
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EDMUNDS
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Government of the District of Columbia

OFFICE OF ZONING

441 4TH STREET, N W
SUITE 210
WASHINGTON D C 20001
(202) 727 6311

July 29, 2005

I certify and attest that the official records of the Zoning Commission for the District of Columbia indicate that Lot 1031 in Square 1397 is zoned R-1-A, as shown on the attached plat.

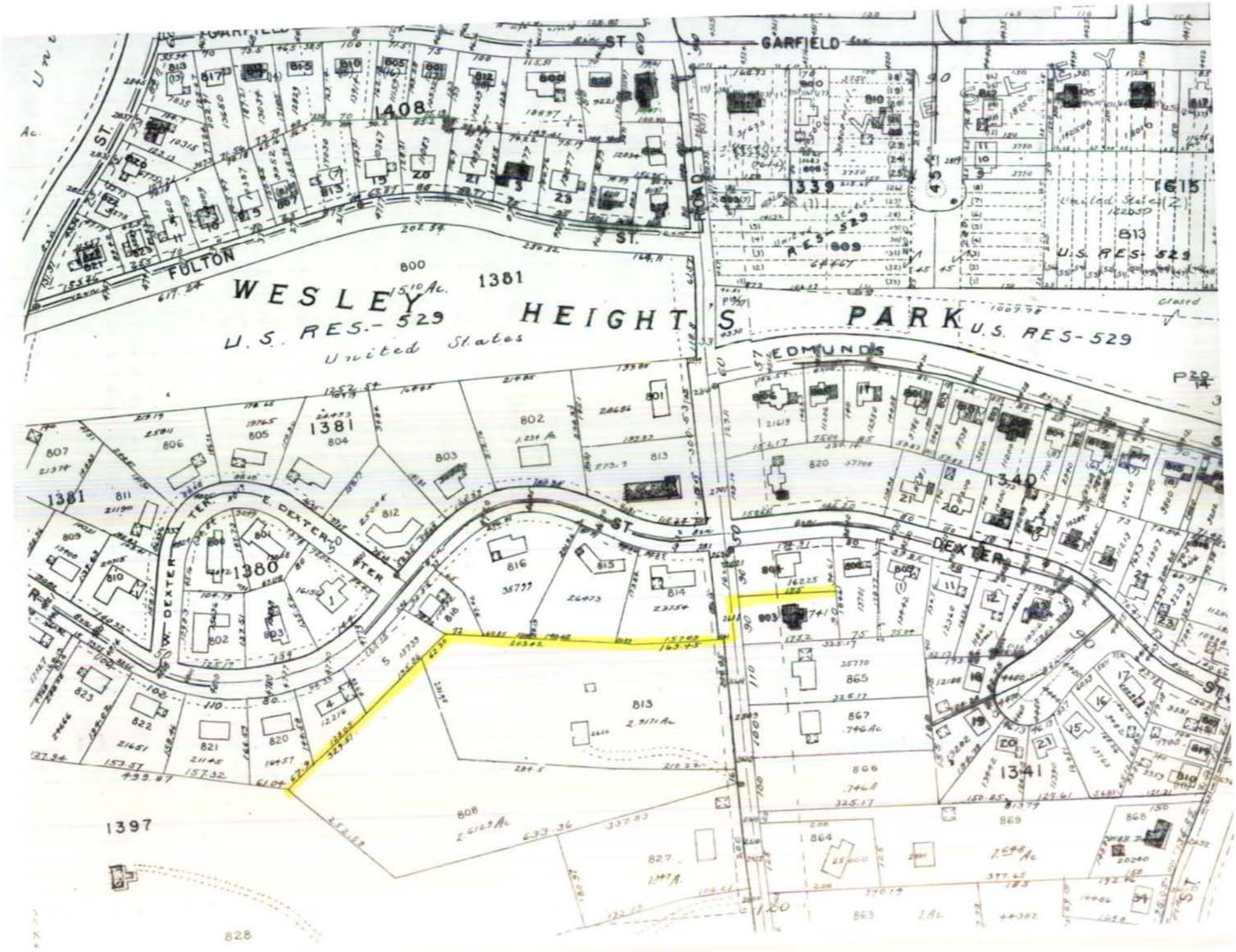
JERRILY R. KRESS, FAIA
Director
Office of Zoning

District of Columbia, ss:

Signed and sworn to before me this 29th day of July 2005.

BETTY A WILLIAMS
Notary Public, D.C.

My Commission expires on February 14, 2006


GARFIELD ST
FULTON ST.
WESLEY HEIGHTS
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U.S. RES-529
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823
827
828
863
864
865
866
867
868
869
741
15.10 Ac.
2.9171 Ac.
2.6129 Ac.
1.231 Ac.
.746 Ac.
1.547 Ac.
1.548 Ac.
1.1 Ac.

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
Case No. 90-5
([redacted]ext & Map Amendment - Wesley Heights Overlay District)

[redacted]he Zoning Commission for the District of Columbia, pursuant to the authority set forth in the Zoning Act (D.C. Code, Section 5-413 et seq.), having held a public hearing as required, hereby gives notice of adoption of amendments to the District of Columbia Municipal Regulations (DCMR), Title 11, Zoning, and the Zoning Map of the District of Columbia. The amendments create and map the new Wesley Heights Overlay District (WHOD). A notice of proposed rulemaking was published in the D.C. Register on March 20, 1992 (39 DCR 1922).

[redacted]he amendments were adopted by the Zoning Commission as final action at a public meeting on July 13, 1992. The specific amendments to the Zoning Regulations and Map are as follows:

Adopt new sections to Chapter 15, to read as follows:

[redacted]541 **WESLEY HEIGHTS OVERLAY DISTRICT**

[redacted]541.1 The Wesley Heights Overlay District (WHOD) is established to preserve and enhance the low density character of Wesley Heights by regulating construction and alteration of residential and other buildings in the area.

[redacted]541.2 The WHOD will apply to the area and properties contained in this subsection:

(a) The area is generally bounded by a line which begins at the intersection of Nebraska and New Mexico Avenues and runs southeast along the centerline of New Mexico Avenue N.W. to the western boundary of Glover Archbold Park. The line then runs south and west along the west boundary of Glover Archbold Park to a point east of the southernmost point of Lot 33 of Square 1341. The line then runs west across 44th Street to the southwest boundary of Lot 33. The line then runs in a northerly direction along the rear lot lines of the properties on the west side of 44th Street, to the southern boundary of Lot 15 of Square 1341, inclusive of Lot 33. (For those lots with narrow frontages on the west side of 44th Street, the WHOD boundary line shall cross those narrow lot frontages by connecting the rear lot lines of the adjacent lots across the narrow lot frontage.) The line then runs west along the southern boundary of Lot 15; then runs northwest along the west boundary

of Lot 15; then runs in a westerly direction along the right-of-way of the Dexter Court cul-de-sac excluding lots 19-21 and then runs southwest along the south boundary of Lot 18. The line then runs north along the west boundary of Lot 18 to the southern boundary of Lot 805. The line then runs west along the southern boundaries of lots 805 and 800; then runs north along the west boundary of Lot 800; then runs west to Foxhall Road along the southern boundary of Lot 804. The line then runs south along the centerline of Foxhall Road; then runs west along the northern boundary of Lot 813 of Square 1380; then runs southwest along the rear of lots 4, 5 and 820 of Square 1380; then runs west to 49th Street along the southern boundaries of lots 820-824, 826 and 6 of Square 1380. The line then runs north along the western boundary of 49th Street right-of-way; continues east along the northern boundary of Cathedral Avenue right-of-way; and turns north along the property line at the rear of the properties on the west side of Foxhall Road (including all of Square 1523, and lots 28 and 29 of Square 1521). The line then runs east along the northern property line of Lot 28 of Square 1521 to Foxhall Road, then runs north along the west boundary of the Foxhall Road right-of-way to New Mexico Avenue. The line then runs northeast along the centerline of New Mexico Avenue to the point of origin at the intersection of New Mexico and Nebraska Avenues N.W.

(b) The properties that are contained within the boundaries of the WHOD, as set forth in subsection 1541.2(a) include all of squares 1338-1340, 1380, 1381, 1406, 1408, 1521, 1523, 1524, 1603-1612, 1614, 1615, 1619-1622, 1625, 1626, 1700, and 1701; and a portion of squares 1341, 1397, and 1601 (those portions include lots 11, 12, 15-18, 24, 25, 28-34, 36, 37, 800, 804, 805, 807, 810, 814, 819, 821, 824, 825, and 868, and a portion of lots 35, 857, and 869 in Square 1341; lots 4-6, 814-816, 818, 820-824, and 826 in Square 1397; and lots 804 and 805 in Square 1601).

1541.3 The purpose of the WHOD is as follows:

(a) To preserve in general the current density of the neighborhood.

(b) To allow reasonable opportunities for owners to expand their dwellings; and

(c) To preserve existing trees, access to air and light, and the harmonious design and attractive appearance of the neighborhood.

1542 GENERAL PROVISIONS

1542.1 The WHOD is an overlay district and shall be mapped in combination with one of two underlying districts (R-1-A and R-1-B) and not instead of the underlying districts.

1542.2 All uses, buildings and structures permitted in accordance with this chapter and the appropriate regulations of the underlying district with which the mapped WHOD is combined, shall be permitted in the combined districts.

1542.3 All restrictions and prohibitions provided for by either of the underlying districts combined in accordance with this chapter shall also apply, except as specifically modified by this chapter. Where there is a conflict between this chapter and the underlying zoning, the more restrictive provisions of this title shall govern.

1543 RESTRICTIONS: MAXIMUM LOT OCCUPANCY, FLOOR AREA RATIO AND FRONT YARD SETBACK

1543.1 The following restrictions will apply to both the R-1-A and the R-1-B zone districts, within the WHOD.

1543.2 No structure, including accessory buildings, shall occupy an area in excess of thirty percent (30%) of the lot; except that:

(a) Structures on lots of between 5,000 and 6,667 square feet may occupy up to 2,000 square feet; and

(b) Structures on lots of less than 5,000 square feet may occupy up to forty percent (40%) of the area of the lot.

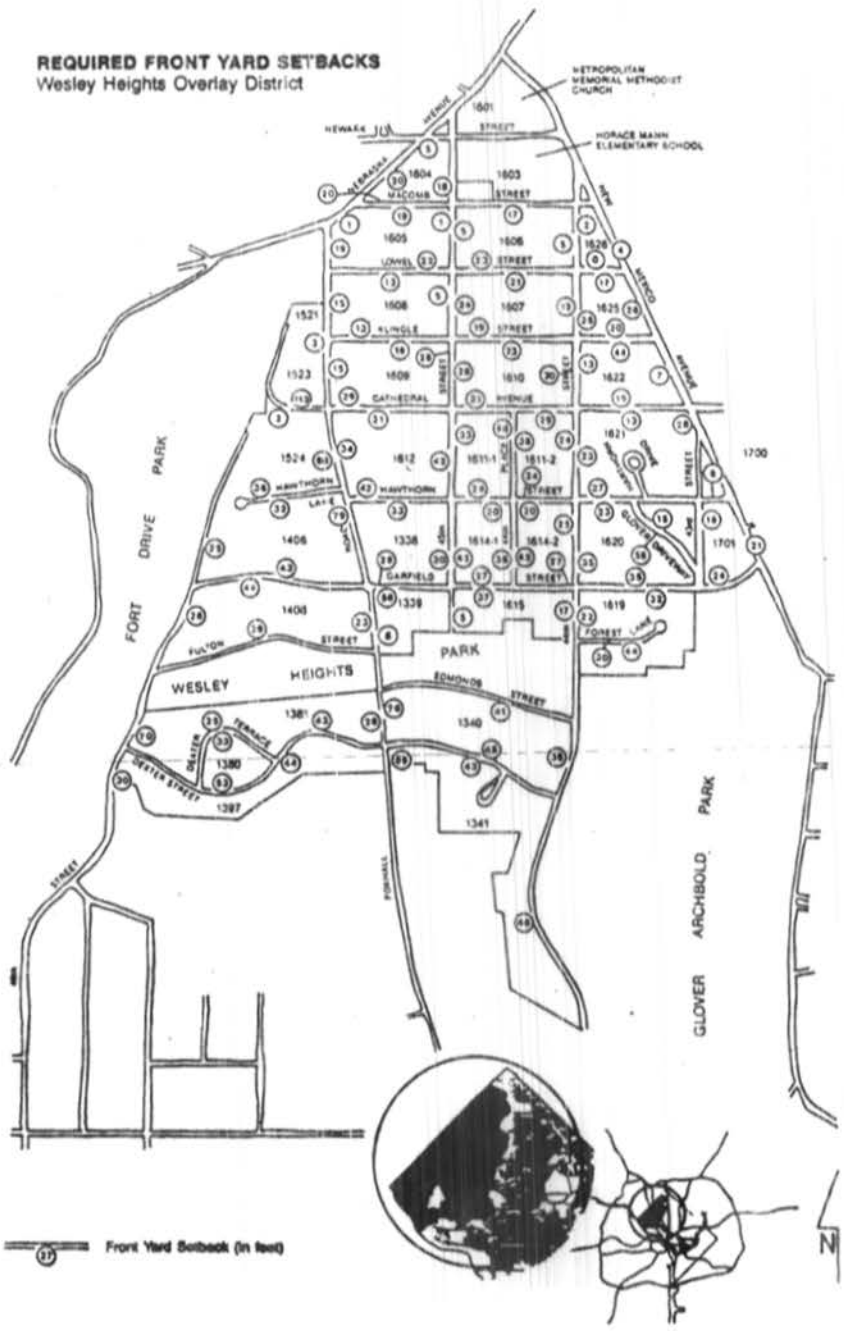
1543.3 The gross floor area of all buildings and structures on the lot shall not exceed the sum of 2,000 square feet plus forty percent (40%) of the area of the lot; provided, that the following modifications of gross floor area shall apply in the WHOD:

(a) The first 200 square feet of an open porch, or total open porch space if there is more than one open porch, and the first 600 square feet of a garage shall not count in gross floor area; and

(b) Basement or cellar floor area shall count in gross floor area if a finished floor is provided, if the floor to ceiling height is in excess of six feet six inches (6' 6"), and shall count only up to a floor area equal to five (5) times the total fenestration area for the cellar or basement floor.

1543.4 All residential buildings shall have a front yard setback equal to or greater than the average setback of all structures on the same side of the street in the block where the building in question is located. The required setbacks are depicted in the map entitled, "Required Front Yard Setbacks," which is a part of this overlay district and located in the Office of Zoning and in the Zoning Division of the Department of Consumer and Regulatory Affairs.

2. Amend the Zoning Map to map the Wesley Heights Overlay District as described in Section 1541.2 of this chapter.


REQUIRED FRONT YARD SETBACKS
Wesley Heights Overlay District
METROPOLITAN MEMORIAL METHODIST CHURCH
HORACE MANN ELEMENTARY SCHOOL
NEWARK STREET
NEBRASKA AVENUE
MASSACHUSETTS AVENUE
FORT DRIVE PARK
WESLEY HEIGHTS
PARK
GLOVER ARCHBOLD PARK
Front Yard Setback (in feet)
N

Government of the District of Columbia

ZONING COMMISSION

ZONING COMMISSION ORDER NO. 718
Case No. 90-5
(Text & Map Amendment - Wesley Heights Overlay District)
July 13, 1992

Pursuant to notice, a public hearing was held by the Zoning Commission for the District of Columbia on December 5, 1991. At that hearing session, the Zoning Commission considered a petition from the Wesley Heights Historical Society (WHHS) to amend the text of the District of Columbia Municipal Regulations (DCMR), Title 11, Zoning, and the Zoning Map of the District of Columbia, pursuant to the provisions of 11 DCMR 3021.

By petition dated April 11, 1990, the president of the WHHS requested the Zoning Commission to authorize a public hearing to consider amending the Zoning Regulations and the Zoning Map to create and map the Wesley Heights Overlay District (WHOD). The purpose of the WHOD is to preserve and enhance the low density character of Wesley Heights by regulating construction and alteration of residential and other buildings in the area.

A majority of the Wesley Heights neighborhood is zoned R-1-A and the remainder is R-1-B with the general boundaries being Nebraska Avenue, New Mexico Avenue, Garfield Street, 44th Street, and the rear property lines south of Dexter Street and Foxhall Road.

The R-1-A District permits matter-of-right development of single-family residential uses for detached dwellings with a minimum lot area of 7,500 square feet, a minimum lot width of 75 feet, a maximum lot occupancy of forty percent, and a maximum height of three stories/forty feet.

The R-1-B District permits matter-of-right development of single-family residential uses for detached dwellings with a minimum lot area of 5,000 square feet, a minimum lot width of 50 feet, a maximum lot occupancy of forty percent, and a maximum height of three stories/forty feet.

The District of Columbia Generalized Land Use Map of the Comprehensive Plan for the National Capital, as amended, designates the area for low density residential use.

The District of Columbia Office of Planning (OP), by report dated July 27, 1990, stated the following in its recommendation:

"The Office of Planning has pediodically met with the architect who did much of the technical work for petitioners. We have provided him and the petitioners with material we have been developing regarding the updating of R-1 zoning provisions in the D.C. Zoning Regulations as well as materials we have from other jurisdictions. We have emphasized that we are interested in these factors at least as much from the citywide text amendment perspective as from the immediate neighborhood perspective. Specifically, we are of the opinion that the de facto FAR permitted in the R-1 zones is inappropriately high. This has not mattered in the past because development rarely used the full envelope permitted (a 1.2 FAR house on a minimum R-1-A lot of 7,500 s.f. is 9,000 s.f. of living area). It may well prove feasible and desirable to establish a sliding FAR standard for R-1 development that will control the oversized houses beginning to be built in some of the higher priced neighborhoods of the city, while not penalizing the great majority of new homes or additions in these neighborhoods or around the city.

To summarize, we are not recommending a setdown of this case, but rather plan to address it as part of a package of proposed citywide text amendments to be submitted to the Commission in the Fall."

On August 6, 1990, at its regular monthly meeting, the Zoning Commission considered the OP status report dated July 27, 1990 concerning the case. After discussion, the Commission concurred with the OP recommendation that Z.C. Case No. 90-5 be considered as part of the OP city-wide Comprehensive Plan rezoning initiative and the Chairman so ruled.

By letter dated December 19, 1990, the President of the Wesley Heights Historical Society indicated that after a series of meetings within the Wesley Heights community, the neighbors re-evaluated the petition of April 11, 1990 and revised and simplified the proposal that has the full-fledged support of the neighborhood. The organization urged the Commission to set the revised proposal down for hearing at the earliest possible date to prevent further erosion of the character of the neighborhood.

By letter dated May 17, 1991, Councilmember James E. Nathanson indicated his support for the revised proposal and urged the Commission to schedule a hearing on the matter as soon as possible.

On July 8, 1991 at its regular monthly meeting, the Commission considered the above-mentioned letter and also considered OP's statement indicating that OP was incline to support a seperate hearing action on the matter, as opposed to including the matter with the city-wide Comprehensive Plan rezoning initiative. The

Chairperson requested OP to report to the Commission at a later time with a recommendation on whether this should be set down for a hearing.

By memorandum dated July 26, 1991, OP stated that it is fully supportive of the proposed FAR standard for R-1-A and R-1-B zones, which was developed in part by information sharing between OP and neighborhood representatives. Accordingly, OP recommended that a public hearing be scheduled.

The Office of Planning indicated that the proposed overlay zone represents substantial technical analysis of zoning factors affecting development in the Wesley Heights neighborhood, and that there has been extensive and intensive neighborhood participation in reviewing and developing the proposed overlay zone.

The specific proposal to create and map the WHOD was published as a notice of public hearing and appeared in the October 25, 1991 edition of the D.C. Register (38 DCR 6490).

The Wesley Heights Historical Society (WHHS), the petitioners, by its prehearing submission dated September 9, 1991 and by testimony at the public hearing, indicated that the provisions of the proposed overlay zone are designed to supplement the current R-1-A and R-1-B regulations. The WHHS further stated that the intent of the overlay zone proposal is to limit new construction to a scale and proportion compatible with the character of the neighborhood as it was before recent large scale additions and new construction were initiated.

The petitioners indicated that the overlay proposal would impose the following additional restrictions beyond those that are already required in R-1 zone districts:

> **LOT OCCUPANCY:** Only 30 percent of the lot can be covered by livable structures, except for smaller lots. Houses on lots with 6,667 square feet or less would be permitted to occupy a higher percentage of the lot - up to 40 percent for lots 5,000 square feet or less.
>
> **FLOOR AREA RATIO (FAR):** The overlay proposal also provides for a limitation on the livable space in each residence. The gross livable floor area will be restricted to less than the sum of 2,000 square feet plus 40 percent of the area of the lot. The formula will apply to all residences regardless of the size of the lot. The gross livable area shall include all but the first 200 square feet of an open porch, all but the first 600 square feet of any garage, any attic space with headroom greater than 7'6" (if accessible by a permanent stair), and any basement space with a finished floor, a

ceiling height greater than 7'6" and window area that equals at least 20 percent of the wall area.

FRONT YARD SETBACK: The overlay proposal includes a front yard setback, consisting of the average setback on each side of the street in each block. Construction would be allowed up to an average distance from the street of the fronts of other houses on the same side of the street in that block. The effect of this limitation would be to prevent additions from extending ahead of neighboring houses toward the street.

OP by memorandum dated November 25, 1991 and by testimony presented at the public hearing, recommended that the WHOD be approved. OP stated the following:

> "The present controls of the R-1 zones as to density, especially the combination of the 40 percent lot occupancy and the three-story height limit, have been identified in the past to represent unnecessarily bulky development -- a de facto 1.2 FAR. As the Commission is aware, OP has proposed that a sliding scale FAR limit be adopted as a text amendment affecting R-1 development citywide. Our research on houses in a wide variety of R-1-A and R-1-B zones has found that a significant, but not onerous, reduction in permitted bulk can be adopted while allowing the great majority of new houses and additions to proceed as of right. Neighboring properties will in many cases benefit from more favorable conditions regarding light, air and privacy. In Wesley Heights itself, OP has found that there are a significant number of vacant lots as well as existing houses sited on large lots with potential for additions or subdivision. Thus, the overlay zone's provisions can have an important and favorable impact on future neighborhood character."

Advisory Neighborhood Commission (ANC) 3D, by letter dated February 14, 1991 and by testimony presented at the public hearing, unanimously voted to support the Wesley Heights Overlay zone proposal at its January 22, 1991 regular monthly meeting.

A representative of ANC-3D also testified at the public hearing that the Spring Valley-Wesley Heights Citizens Association also voted unanimously to support the proposal.

Several persons testified at the public hearing and several letters were received in support of the proposal. In addition to the aforementioned, other reasons for supporting the proposal include, but are not limited to, the following:

a. The proposed overlay is consistent with the goals of the Comprehensive Plan for retention of the natural

environment and encouragement of appropriate design solutions;

b. The proposed overlay represents an extraordinary effort by existing property owners to limit the development potential of their property in order to maintain overall neighborhood quality;

c. The proposed overlay restrictions represent a compromise between environmental preservation and the need for broad-based community support. To achieve the latter, the proposal does not limit tree cutting or the creation of impermeable surfaces (driveways, tennis courts, pools, patios, walkways, etc.); and

d. The residents of the neighborhood do not want their 60-year old houses dwarfed by shiny new palaces, do not want housing stock that is affordable for families replaced by mansions, and do not want the recreational charms of the neighborhood obliterated by overdevelopment.

Testimony was also received from an individual representing the trustees of property at 2620 Foxhall Road which recommended that the southern boundary of the overlay follow the rear lot lines of properties fronting on Dexter Street instead of following an arbitrary line 200 feet south of Dexter Street.

Several persons testified at the public hearing and several letters were received in opposition to the proposal. Reasons for opposing the proposal include, but are not limited to, the following:

a. The proposed restrictions need to be justified by a very convincing case, since they are not needed to protect the physical environment or public health but instead are advanced largely on aesthetic grounds or on grounds related to philosophies about the desireability of allowing economic forces to cause change in the composition of communities;

b. Insofar as aesthetics are concerned, the rebuilding and enlargement of houses in Wesley Heights during the past decade has in most cases made the houses and neighborhood more attractive;

c. The existing R-1-A and R-1-B zoning restrictions are adequate. (Property owners wishing to restrict their own property rights in accordance with the proposed WHOD zoning restrictions are already free to add irrevocable covenants that encompass WHOD zoning restrictions to their own property deeds);

d. If the Zoning Commission adopts the proposal, the District of Columbia will be deprived of much needed property tax revenue that will be derived from future Wesley Heights construction projects; and

e. The proposed overlay is not adequate to preserve the trees, topography, and natural drainage patterns of Wesley Heights.

On February 10, 1992, at its monthly meeting, the Zoning Commission discussed the case including, but not limited to, clarifying the boundaries of the proposed overlay, proposing alternative language regarding the definition of gross liveable floor area and gross floor area, and clarifying language concerning the front yard setback standards.

The Commission concurs with the position and recommendations of the petitioners, ANC-3D and the Office of Planning. The Commission does not concur with the position of the opponents to the proposal. The Commission believes that after considering and balancing all of the issues for and against the proposal, the WHOD is an appropriate means of preserving the character of the community.

The Commission believes that the proposed overlay will preserve, in general the current density of the neighborhood, allow reasonable opportunity for owners to expand their dwellings and preserve existing trees and access to air and light, as well as the harmonious design of the neighborhood.

The Zoning Commission believes that the proposed decision to approve the Wesley Heights Overlay District is in the best interest of the District of Columbia, is consistent with the intent and purpose of the Zoning Regulations and the Zoning Act, and is not inconsistent with the Comprehensive Plan for the National Capital.

The proposed decision to approve the WHOD was referred to the National Capital Planning Commission (NCPC), under the terms of the District of Columbia Self-Government and Governmental Reorganization Act. NCPC, by report dated April 2, 1992, found that the objectives of the proposed zoning amendments would not adversely affect the Federal Establishment, nor be inconsistent with the Comprehensive Plan for the National Capital.

The Zoning Commission has accorded ANC-3D the "great weight" consideration to which it is entitled.

A notice of proposed rulemaking was published in the D.C. Register on March 20, 1992 (39 DCR 1922). A letter from the petitioner dated April 22, 1992, and a memorandum from the Secretary to the Zoning Commission dated April 6, 1992 were received into the record.

The petitioner in the above-mentioned letter submitted a certified study map of the existing setbacks of all the houses that are included in the WHOD as requested by the Commission for establishing the average front yard setback. The petitioners also submitted information that would clarify the boundaries of the proposed overlay and revised Section 0002.4(a) of the notice of public hearing.

The April 6, 1992 memorandum from the Secretary to the Zoning Commission recommended, in addition to the description of the boundaries of the WHOD in Section 1541.2 of the notice of proposed rulemaking, that it would be useful to identify the squares and portions thereof that are included within the WHOD boundaries. The above-mentioned memorandum recommended the following:

1. Renumber subsection 1541.2 to read 1541.2(a).

2. Create a new subsection 1541.2 and a preamble sentence thereto and to read as follows:

   1541.2 **The WHOD will apply to the area and properties contained in this subsection.**

3. Create a new subsection 1541.2(b) to list the squares and portions thereof that are contained in the boundaries that are described in subsection 1541.2(a) and to read as follows:

   (b) The properties that are contained within the boundaries of the WHOD, as set forth in subsection 1541.2(a) include all of squares 1338-1340, 1380, 1381, 1406, 1408, 1521, 1523, 1524, 1603-1612, 1614, 1615, 1619-1622, 1625, 1626, 1700, and 1701; and a portion of squares 1341, 1397, and 1601 (those portions include lots 11, 12, 15-18, 24, 25, 28-34, 36, 37, 800, 804, 805, 807, 810, 814, 819, 821, 824, 825, and 868, and a portion of lots 35, 857 and 869 in Square 1341; lots 4-6, 814-816, 818, 820-824, and 826 in Square 1397; and lots 804 and 805 in Square 1601).

4. Correct the reference to "Loughboro Road" in the last two sentences of subsection 1541.2 of the notice of proposed rulemaking. Use the phrase "New Mexico Avenue" instead of "Loughboro Road". Although Loughboro Road is the western extension to New Mexico Avenue, it only becomes so at a point that is west of the intersection of Foxhall Road and New Mexico Avenue.

On May 11, 1992 at its regular monthly meeting, the Zoning Commission considered draft Zoning Commission Order No. 718 for final action and the comments that were received in response to the publication of the notice of proposed rulemaking. The Commission referred the petitioner's letter dated April 22, 1992 to OP for further analysis and requested OP to report its findings to the Commission at a subsequent meeting. The Commission decided to incorporate the suggestions of the Secretary to the Zoning Commission, as outlined in the April 6, 1992 memorandum. The Commission also requested the Office of Zoning to prepare a graphic illustration of the WHOD boundaries for the Commission's understanding.

By memorandum dated May 13, 1992, the Office of Zoning prepared a graphic illustration of the boundaries of the proposed WHOD, which also highlights the southern boundary of the WHOD as the zone boundary lines gerrymanders through squares 1341 and 1397.

On July 13, 1992 at its regular monthly meeting, the Zoning Commission discussed the OP memorandum dated July 6, 1992, which analyzed the requested front yard setbacks of the WHOD. The Commission found that the average frontyard setback, as recommended by OP, for each street front was a reasonable setback requirement for new construction or additions.

In consideration of the reasons set forth herein, the Zoning Commission for the District of Columbia hereby orders **APPROVAL** of the amendments to the Zoning Regulations and Map to create and map the Wesley Heights Overlay District (WHOD). The specific amendments to the Zoning Regulations and Map are as follows:

1. Adopt new sections to Chapter 15, to read as follows:

1541 **WESLEY HEIGHTS OVERLAY DISTRICT**

1541.1 The Wesley Heights Overlay District (WHOD) is established to preserve and enhance the low density character of Wesley Heights by regulating construction and alteration of residential and other buildings in the area.

1541.2 The WHOD will apply to the area and properties contained in this subsection.

(a) The area is generally bounded by a line which begins at the intersection of Nebraska and New Mexico Avenues and runs southeast along the centerline of New Mexico Avenue N.W. to the western boundary of Glover Archbold Park. The line then runs south and west along the west boundary of Glover Archbold Park to a point east of the southern-most point of Lot 33 of Square 1341. The line then runs west across 44th Street to the southwest boundary of Lot 33. The line then runs in a northerly direction along the rear lot lines of the properties on the west side of 44th Street, to the southern boundary of Lot 15 of Square 1341, inclusive of Lot 33. (For those lots with narrow frontages on the west side of 44th Street, the WHOD boundary line shall cross those narrow lot frontages by connecting the rear lot lines of the adjacent lots across the narrow lot frontage.) The line then runs west along the southern boundary of Lot 15; then runs northwest along the west boundary of Lot 15; then runs in a westerly direction along the right-of-way of the Dexter Court cul-de-sac excluding lots 19-21 and then runs southwest along the south boundary of Lot 18. The line then runs north along the west boundary of Lot 18 to the southern boundary of Lot 805. The line then runs west along the southern boundaries of lots 805 and 800; then runs north along the west boundary of Lot 800; then runs west to Foxhall Road along the southern boundary of Lot 804. The line then runs south along the centerline of Foxhall Road; then runs west along the northern boundary of Lot 813 of Square 1380; then runs southwest along the rear of lots 4, 5 and 820 of Square 1380; then runs west to 49th Street along the southern boundaries of lots 820-824, 826 and 6 of Square 1380. The line then runs north along the western boundary of 49th Street right-of-way; continues east along the northern boundary of Cathedral Avenue right-of-way; and turns north along the property line at the rear of the properties on the west side of Foxhall Road (including all of Square 1523, and lots 28 and 29 of Square 1521). The line then runs east along the northern property line of Lot 28 of Square 1521 to Foxhall Road, then runs north along the west boundary of the Foxhall Road right-of-way to New Mexico Avenue. The line then runs northeast along the centerline of New Mexico Avenue to the point of origin at the intersection of New Mexico and Nebraska Avenues N.W.

(b) The properties that are contained within the boundaries of the WHOD, as set forth in subsection 1541.2(a) include all of squares 1338-1340, 1380, 1381, 1406, 1408, 1521, 1523, 1524, 1603-1612, 1614, 1615, 1619-1622, 1625, 1626, 1700, and 1701; and a portion of squares 1341, 1397, and

1601 (those portions include lots 11, 12, 15-18, 24, 25, 28-34, 36, 37, 800, 804, 805, 807, 810, 814, 819, 821, 824, 825, and 868, and a portion of lots 35, 857, and 869 in Square 1341; lots 4-6, 814-816, 818, 820-824, and 826 in Square 1397; and lots 804 and 805 in Square 1601).

1541.3 The purpose of the WHOD is as follows:

(a) To preserve in general the current density of the neighborhood.

(b) To allow reasonable opportunities for owners to expand their dwellings; and

(c) To preserve existing trees, access to air and light, and the harmonious design and attractive appearance of the neighborhood.

1542 GENERAL PROVISIONS

1542.1 The WHOD is an overlay district and shall be mapped in combination with one of two underlying districts (R-1-A and R-1-B) and not instead of the underlying districts.

1542.2 All uses, buildings and structures permitted in accordance with this chapter and the appropriate regulations of the underlying district with which the mapped WHOD is combined, shall be permitted in the combined districts.

1542.3 All restrictions and prohibitions provided for by either of the underlying districts combined in accordance with this chapter shall also apply, except as specifically modified by this chapter. Where there is a conflict between this chapter and the underlying zoning, the more restrictive provisions of this title shall govern.

1543 RESTRICTIONS: MAXIMUM LOT OCCUPANCY, FLOOR AREA RATIO AND FRONT YARD SETBACK

1543.1 The following restrictions will apply to both the R-1-A and the R-1-B zone districts, within the WHOD.

1543.2 No structure, including accessory buildings, shall occupy an area in excess of thirty percent (30%) of the lot; except that:

(a) Structures on lots of between 5,000 and 6,667 square feet may occupy up to 2,000 square feet; and

(b) Structures on lots of less than 5,000 square feet may occupy up to forty percent (40%) of the area of the lot;

1543.3 The gross floor area of all buildings and structures on the lot shall not exceed the sum of 2,000 square feet plus forty percent (40%) of the area of the lot; provided, that the following modifications of gross floor area shall apply in the WHOD:

(a) The first 200 square feet of an open porch, or total open porch space if there is more than one open porch, and the first 600 square feet of a garage shall not count in gross floor area; and

(b) Basement or cellar floor area shall count in gross floor area if a finished floor is provided, if the floor to ceiling height is in excess of six feet six inches (6' 6"), and shall count only up to a floor area equal to five (5) times the total fenestration area for the cellar or basement floor.

1543.4 All residential buildings shall have a front yard setback equal to or greater than the average setback of all structures on the same side of the street in the block where the building in question is located. The required setbacks are depicted in the map entitled, "Required Front Yard Setbacks," which is a part of this overlay district and located in the Office of Zoning and in the Zoning Division of the Department of Consumer and Regulatory Affairs.

2. **Amend the Zoning Map to map the Wesley Heights Overlay District as described in Section 1541.2 of this chapter.**

Vote of the Zoning Commission taken at the regular meeting on February 10, 1992: 3-0 (John G. Parsons, William L. Ensign and Maybelle Taylor Bennett, to approve - Tersh Boasberg, not voting having recused himself and Lloyd D. Smith, not voting, not having participated in the case).

This order was adopted by the Commission at its monthly meeting on July 13, 1992 by a vote of 3-0 (John G. Parsons, William L. Ensign and Maybelle Taylor Bennett to adopt as amended - Tersh Boasberg, not voting, not present and having recused himself and Lloyd D. Smith, not present, not voting).

In accordance with 11 DCMR 3028.8, this order is final and effective upon publication in the D.C. Register; that is, on SEP 11 1992.

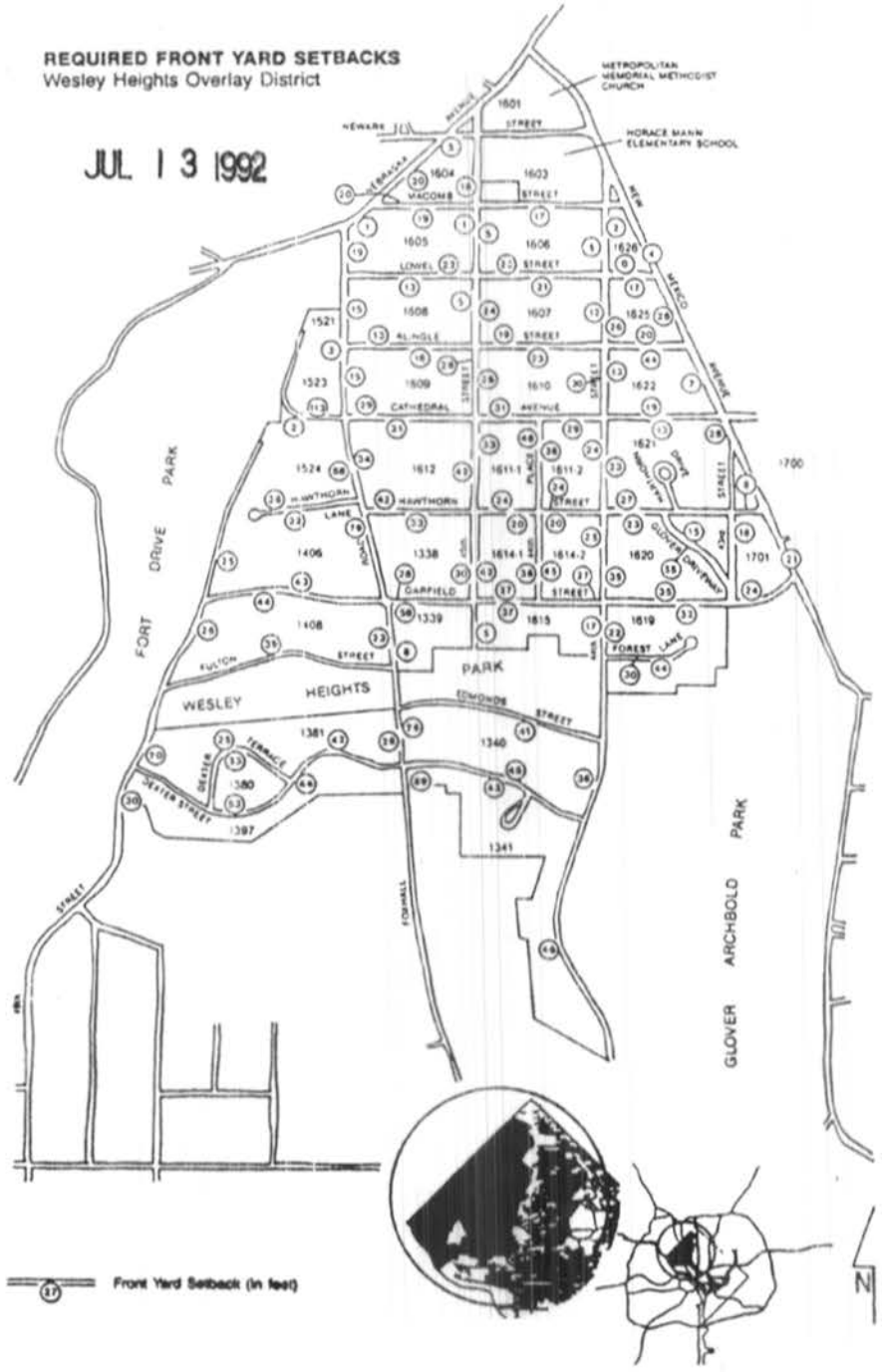
TERSH BOASBERG
Chairman
Zoning Commission

MADELIENE H. ROBINSON
Acting Director
Office of Zoning

zco718/LJP

REQUIRED FRONT YARD SETBACKS
Wesley Heights Overlay District

JUL 13 1992



Government of the District of Columbia
ZONING COMMISSION

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
and
ORDER NO. 02-01
Z.C. Case No. 02-01
(Text Amendment – 11 DCMR)
(Filing Deadline for Appeals to the Board of Zoning Adjustment)

September 9, 2002

The Zoning Commission for the District of Columbia, pursuant to its authority under §§ 1 and 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended; D.C. Code, 2001 Ed. §§ 6-641.01 and 6-641.07(c)); having held a public hearing as required by § 3 of the Zoning Act (D.C. Code, 2001 Ed. § 6-641.03); and having referred the proposed amendment to the National Capital Planning Commission for a 30-day period of review pursuant to 11 DCMR §§ 3025.3 and 3038.1; hereby gives notice of the adoption of the following amendments to § 3112 (Pre-Hearing Procedures for Appeals) of the Zoning Regulations, Title 11 DCMR, pertaining to appeals to the Board of Zoning Adjustment from the decisions of the Zoning Administrator and other administrative officials in the administration and enforcement of the Zoning Regulations. This rulemaking requires that all such appeals be filed within sixty (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. The Commission took final action to adopt the amendment at a public meeting held on September 9, 2002.

This final rulemaking is effective upon publication in the *D.C. Register*.

The Commission initiated this rulemaking to reduce uncertainty and litigation over the timeliness of Board of Zoning Adjustment appeals. Section 8 of the Zoning Act authorizes the Board to hear and decide appeals where an aggrieved person alleges that there is an error in any order, requirement, decision, determination, or refusal by the Zoning Administrator or other administrative official in carrying out or enforcing the Zoning Regulations. *See* D.C. Code, 2001 Ed. § 6-641.07(g)(1). The Zoning Act, however, does not specify a time period for the filing of an appeal and the Board's Rules of Practice and Procedure in 11 DCMR § 3112.2 simply require that an appeal be "timely." Because the timeliness of an appeal is jurisdictional, the absence of a specific time period has led over the years to extensive litigation, both before the Board and the District of Columbia Court of Appeals. In *Waste Management of Maryland, Inc. v. District of Columbia Board of Zoning Adjustment*, 775 A.2d 1117, 1122 (D.C. 2001), the Court stated that

"in the absence of exceptional circumstances substantially impairing the ability of an aggrieved party to appeal – circumstances outside of the party's control – we conceive of two months between notice of a decision and appeal therefrom as the limit of timeliness."

The amendment to 11 DCMR § 3112.2 codifies the principles established in *Waste Management* and prior Court decisions by requiring that all appeals to the Board pursuant to the Zoning Act be filed within sixty (60) days of the date the appellant had actual or constructive knowledge of the administrative decision complained of. Because an appellant may not have notice or knowledge of a decision until construction is underway, the amendment provides that no appeal may be filed later than ten (10) days after the construction is "under roof." The Board is authorized to provide an extension of the filing deadline only when there are exceptional circumstances outside of the appellant's control that substantially impaired the appellant's ability to file an appeal and the extension would not prejudice the rights of other parties to the appeal.

The Commission held a public hearing on this case on April 11, 2002. At the hearing, Dorothy Miller expressed concern that the denial of access to permit files and plans might affect a person's ability to file a timely appeal. The Commission agrees that the denial of access to public information might result in delay; however, the rule addresses such delays by providing that the appeal period begins to run from the time a person had actual or constructive knowledge of the administrative decision complained of and by providing that the Board may extend the appeal period in exceptional circumstances.

At its regularly scheduled monthly meeting on May 13, 2002, the Commission took proposed action pursuant to 11 DCMR § 3027.2 to approve the proposed amendment. A Notice of Proposed Rulemaking was published in the *D.C. Register* on May 24, 2002, at 49 DCR 4884, for a 30-day notice and comment period.

The Commission received comments in response to the Notice of Proposed Rulemaking from the law firm of Holland & Knight LLP recommending that the language in proposed § 3112.2 be amended to read that "An appeal *may* be filed no later sixty (60) days" from the date the person filing the appeal had notice or knowledge of the administrative decision complained of, to reflect that the filing of an appeal is a discretionary act. The Commission declines to make the suggested change since the introductory language in § 3112.2 already reflects the discretionary nature of the filing of an appeal (that is, an aggrieved person "may file a timely appeal"). The language in paragraph (a), however, is intended to be mandatory. That is, if an aggrieved person chooses to file an appeal, that appeal must be filed within the sixty (60) day time period allowed.

Further, Holland & Knight interprets paragraph (b) in § 3112.2 as potentially shortening the sixty- (60) day time period established in paragraph (a), and suggests revising paragraph (b) to state that an appeal must be filed no later than ten days after the date the structure is under roof or within the sixty- (60) day period established in paragraph (a), whichever comes first. The Commission, however, did not intend in paragraph (b) to shorten the sixty- (60) day appeal period. Since the sixty- (60) day appeal period is based upon actual or constructive notice or knowledge of the decision complained of rather than the actual date of the decision complained of, the Commission's intent in paragraph (b) was to establish a firm deadline beyond which no appeal could be filed. Accordingly, the Commission has revised paragraph (b) and added a new

paragraph (c) to clarify that all appellants have at least sixty (60) days from the date of the decision complained of in which to file an appeal. When an appellant seeks to file an appeal more than sixty (60) days after the date of the decision on the grounds that the appellant did not have notice or knowledge of the decision until some time after the date of the decision, the latest date an appeal can be filed is ten (10) days after the structure is under roof. The cap in paragraph (b) on the appeal period, however, does not relieve an appellant of the responsibility of filing a timely appeal, within sixty (60) days of actual or constructive notice or knowledge of the decision complained of.

Finally, Holland & Knight recommends adding a paragraph that states an appeal that is timely filed is subject to dismissal on equitable grounds, such as laches and estoppel. Because an appeal may be dismissed on any number of grounds, the Commission has declined to add the suggested language.

The proposed rulemaking was referred to the National Capital Planning Commission (NCPC) under the terms of § 492 of the District of Columbia Charter. NCPC, by report dated June 6, 2002, found that the proposed text amendment would neither adversely affect the federal interest, nor be inconsistent with the Federal Elements of the Comprehensive Plan for the National Capital.

There are no Advisory Neighborhood Commission or District of Columbia Office of Planning reports in this case. The Office of the Corporation Counsel has determined that this rulemaking meets its standards of legal sufficiency.

Apart from the clarifying amendments noted above, no substantive changes to the rulemaking as proposed have been made. The Commission therefore took final action to adopt the proposed rulemaking as the final rulemaking at its public meeting on September 9, 2002.

Based on the above, the Commission finds that the proposed amendment to the Zoning Regulations is in the best interests of the District of Columbia, consistent with the purpose of the Zoning Regulations and Zoning Act, and not inconsistent with the Comprehensive Plan for the National Capital.

In consideration of the reasons set forth herein, the Zoning Commission hereby **APPROVES** the following amendment to chapter 31, § 3112 of the Zoning Regulations, Title 11 DCMR.

Chapter 31, Board of Zoning Adjustment Rules of Practice and Procedure, § 3112.2, pertaining to pre-hearing procedures for appeals, is amended to read as follows. Added language is shown bolded and underlined:

3112.2 Any person aggrieved by an order, requirement, decision, determination, or refusal made by an administrative officer or body, including the Mayor of the District of Columbia, in the administration or enforcement of the Zoning Regulations may file a timely appeal with the Board **as follows:**

(a) An appeal shall be filed within sixty (60) days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier.

(b) If the decision complained of involves the erection, construction, reconstruction, conversion, or alteration of a structure or part thereof, the following subparagraphs shall establish the latest date on which an appeal may be filed:

(1) No appeal shall be filed later than ten (10) days after the date on which the structure or part thereof in question is under roof. For purposes of this subparagraph, the phrase "under roof" means the stage of completion of a structure or part thereof when the main roof of the structure or part thereof, and the roofs of any structures on the main roof or part thereof, are in place; and

(2) The provisions of paragraph (b) of this subsection shall not relieve an appellant of the jurisdictional requirement in paragraph (a) of this subsection of filing a timely appeal.

(c) Notwithstanding paragraphs (a) and (b) of this subsection, for purposes of establishing the timeliness of an appeal under this subsection, an appellant shall have a minimum of sixty (60) days from the date of the administrative decision complained of in which to file an appeal.

(d) The Board may extend the sixty- (60) day deadline for the filing of an appeal only if the appellant demonstrates that:

(1) There are exceptional circumstances that are outside of the appellant's control and 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, as identified in § 3199.1.

Vote of the Zoning Commission taken at its public meeting on May 13, 2002, to **APPROVE** the proposed rulemaking: 4-0-1 (Carol J. Mitten, Peter G. May, Anthony J. Hood, and James H. Hannaham, to approve; John G. Parsons, not voting, not having heard the case).

This order was **ADOPTED** by the Zoning Commission at its public meeting on September 9, 2002, by a vote of 4-0-1 (Carol J. Mitten, Peter G. May, Anthony J. Hood, and James H. Hannaham to adopt; John G. Parsons not voting, not having heard the case).

In accordance with the provisions of 11 DCMR § 3028.9, this order shall become effective upon publication in the *D.C. Register*; that is, on FEB - 7 2003.

Carol J. Mitten
Chairman
Zoning Commission

Jerrily R. Kress, FAIA
Director
Office of Zoning

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
and
ORDER NO. 02-01
Z.C. Case No. 02-01
(Text Amendment – 11 DCMR)
(Filing Deadline for Appeals to the Board of Zoning Adjustment)

September 9, 2002

The full text of this Zoning Commission order is published in the "Final Rulemaking" section of this edition of the *D.C. Register*.

DISTRICT OF COLUMBIA GOVERNMENT
OFFICE OF THE SURVEYOR

Washington, D.C., February 6, 2003

Plat for Building Permit of: SQUARE 1287 LOT 1031

Scale: 1 Inch = 40 feet Recorded in A & T Book Page 3798 M

Receipt No. 31579 032843

Furnished to: HOLLAND & KNIGHT

Surveyor, D.C.

By: L.E.S.

I hereby certify that all existing improvements shown hereon, are completely dimensioned, and are more dly platted, that all proposed buildings or construction, or parts thereof, including covered porches, are correctly dimensioned and platted, and agree with plans accompanying the application; that the Restrictions plans as shown hereon is correct, and dimensioned consistently to the same scale as the property lines shown on this plat and that by reason of the proposed improvements to be erected as shown hereon the size of any adjoining lot or premises is not decreased to an area less than is required by the Zoning Regulations for light and ventilation; and it is further certified and agreed that accessible parking area where required by the Zoning Regulations will be reserved in accordance with the Zoning Regulations, and that this area has been correctly drawn and dimensioned hereon. It is further agreed that the elevation of the accessible parking area with respect to the Highway Department approved curb and alley grade will not result in a rate of grade along centerline of driveway at any point on private property in excess of 20% for single dwellings or flats or in excess of 12% at any point for other buildings. (The policy of the Highway Department permits a maximum driveway grade of 12% across the public parking and the private restricted property.)

Date: _____

_____
(Signature of owner or his authorized agent)

NOTE: Data shown for Assessment and Taxation Lots (or Parcels) are in accordance with the records of the Department of Finance and Revenue, Assessment Administration, and do not necessarily agree with deed descriptions.

July 24, 2025

I certify and attest that the official records of the Zoning Commission for the District of Columbia indicate that Lot 1031 in Square 1287 is zoned R-5-A, as shown on the attached plat.

MARILYN R. ROSS, ESQ.
Director
Office of Zoning

