Before
The Board of Zoning Adjustment of
The District of Columbia

Appeal of Diana de Brito and Jonathan Gottlieb of Building Permit No. B451175 Building Permit No. B452577 Building Permit No. B452735 Building Permit No. B455009 Building Permit No. B472018 2620 Foxhall Road, N.W.	Appeal Number 17391

2005 DEC 20 PM 5:04

Appelants Response to the Motion to Dismiss the Appeal for Lack of Jusisdiction

Diana de Brito
Jonathan Gottlieb
Appellants

December 20, 2005

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17391
EXHIBIT NO. 26

Board of Zoning Adjustment
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I. Introduction

Appellants respond to the motion of the Ludwigs to dismiss the appeal based on the Ludwigs' erroneous claim that the Board lacks the jurisdiction to even hear the case. As they have from the outset, the Ludwigs continue to seek to short circuit the regulatory process. Appellants respectfully ask the Board to reject the assertions of the Ludwigs and ask the Board to hear the case on the merits rather than prematurely refuse to even consider the case.

The permits violated numerous provisions of the Zoning Code which affect not only the Appellants but all of the twelve property owners bordering the Ludwig Estate and other neighbors.

The actions of the DCRA in granting the series of five permits should be considered in their entirety.

II. The Ludwigs' Claims

The Ludwigs have moved that the Board "dismiss this appeal in its entirety prior to hearing the merits of the appeal." In fact, the Ludwigs instruct the Board that "the appeal cannot be heard by the Board." The Ludwigs erroneously base their motion on two unfounded claims.

First, the Ludwigs' make the unfounded claim that the Board should be prevented from considering the merits of the appeal because the appeal regarding the first four of the five permits is supposedly "untimely." The Ludwigs want to deny residents and the Board the right to review the decisions of the DCRA in their massive development. As established below, the appeals are timely.

Second, the Ludwigs mischaracterize the claims of the appellants as being limited to allegations that the granting of the permits only violated the Building Code. The appeal is based upon violations of the Zoning Code.

III. Facts

A. Introduction

This appeal involves one of the largest estates recently developed in the District for a single family house. The Ludwig estate is so vast that it borders twelve other single family houses, five of which are located in the Wesley Heights Overlay District each of which has been adversely affected by the development of the Ludwig Estate.

All five permits are inter-related. They all relate to one single house developed by one architect with one contractor.

The Ludwigs did not complete work on their estate until after the appeal was filed. The Ludwigs did not move into their mansion until after the appeal was filed.

B. The Ludwigs Misled the Appellants

In January 2003, appellants purchased the property at 4610 Dexter Street at which they currently live. Within a few weeks of the purchase, Appellants called Eugene Ludwig, who they knew owned the vacant lot behind their lot. Appellants asked to see the Ludwigs plans for their estate. Appellants sought assurances that they would not be

adversely affected by the development. Appellants also sought to coordinate possible improvements to their property with the Ludwigs development of their estate.

Mr. Ludwig assured the Appellants that they had nothing to worry about because the Ludwigs were going to be great neighbors. Mr. Ludwig told the Appellants that they would not have any problems with the development.

Mr. Ludwig informed the Appellants that the plans were still being worked on and agreed that once the plans were completed he, or his attorney, would set up a meeting to review and discuss any objections the Appellants had to the plans.

Mr. Ludwig assured the Appellants that he would work with them and address any and all concerns that they had.

Mr. Ludwig promised to coordinate their development with possible improvements to the Appellants property.

These representations were repeated in subsequent contacts. These representations proved untrue.

Over the course of the next several months, the Appellants waited for Mr. Ludwig or his attorney to contact them.

In May, Mr. Ludwig's attorney informed the Appellants that they were still working on the plans and that they would call back to schedule a meeting once the plans were final. He never called.

Once construction began, the Appellants contacted Mr. Ludwig and his agents to express objections to construction that had begun and to look at the plans. The Appellants were repeatedly assured that their objections would be cured and that they would be able to meet with Mr. Ludwig and or his attorney to review the plans.

Ultimately, the Appellants were never shown the plans by the Ludwigs or their agents. Moreover, the objections that Appellants made were never cured. In fact, the Appellants have numerous objections to the Ludwigs' development which adversely impacted them in many ways. Ludwig misled the Appellants telling them the Ludwigs were still working on plans while in reality they had applied for and been issued building permits.

C. The Ludwigs Piecemeal Approach

The Ludwigs built a single family mansion on their estate along with other structures. But they did so under five separate permits for the same plan of development. This was misleading to both residents and to DCRA.

1. First Application

On March 5, 2003 the Ludwigs, applied to DCRA for their first of five building permits for development of their estate. In their first application, the Ludwigs sought authorization from DCRA for sitework

and grading and construction of a "new twelve foot retaining wall" and a tennis court.

2. Second Application

Only one week later, on March 12, 2003, the Ludwigs applied to DCRA for their second building permit for development of their estate. In their second of five applications, the Ludwigs sought authorization from DCRA to construct a "three story wood frame house with stone veneer basement, new driveway stone retaining walls, bluestone terraces."

3. Third Application

On May 27, 2003, two months after filing their first and second applications, the Ludwigs applied to DCRA for their third building permit for development of their estate. In their third application, the Ludwigs sought authorization from DCRA for "footings and foundation for new single family home.

4. Fourth Application

Approximately a month after filing their third application, on July 1, 2003, the Ludwigs applied to DCRA for their fourth building permit. In their fourth application, the Ludwigs sought authorization from DCRA for their estate for the tennis court.

5. Fifth Application

On April 21, 2005, two years after certifying that they did not plan any "additional activity" that requires a permit; the Ludwigs applied to DCRA for their fifth building permit for their estate. This permit was not a mere afterthought on the part of the Ludwigs. In their fifth application, the Ludwigs sought authorization from DCRA for construction of various fences which according to their 2005 application, were needed "to meet pool enclosure requirements."

Until DCRA granted the Ludwigs this permit in 2005, appellants had no way to determine that the Ludwigs were going to build fences, gates other structures and that they were going to place these on top of the structures in the required side and rear yards which they built under permits issued in 2003. Moreover until then, the Appellants could not assess the impact of the entire development on them.

D. The Ludwigs Applications for Building Permits Were Misleading

The five applications contained errors of omission or were otherwise misleading. For instance, at least twice in 2003 the Ludwigs, through their authorized agent, stated and certified to the District of Columbia that they did not plan any "additional activity" for their estate "during the next three years that requires a permit."

On March 5, 2003 the Ludwigs, through their authorized agent, stated and certified to the District of Columbia that they did not plan any "additional activity" for their estate "during the next three years that requires a permit." This was part of their application for a permit for sitework and grading and construction of a "new twelve foot retaining wall" and a tennis court. See Exhibit A Despite their certified statement, the Ludwigs subsequently applied for four separate permits for their estate starting almost immediately after they made their certified statement.

On March 12, 2003 one week after certifying that they did not plan any "additional activity" that requires a permit, the Ludwigs applied to DCRA for their second building permit for their estate. The Second Building Permit was for construction of a "three story wood frame house with stone veneer basement, new driveway stone retaining walls, bluestone terraces." It is not credible to believe that one week earlier the Ludwigs did not plan this extensive activity for their estate.

On May 27, 2003, two months after certifying that they did not plan any "additional activity" that requires a permit, the Ludwigs applied to DCRA for their third building permit for their estate for "footings and foundation for new single family home. It is not credible

to believe that two months earlier the Ludwigs did not plan this activity for their estate.

Four months after certifying that they did not plan any "additional activity" that requires a permit, the Ludwigs applied to DCRA for their fourth building permit for their estate for the tennis court.

On June 30, 2003, the Ludwigs, through their authorized agent, stated and certified to the District of Columbia that they did not plan any "additional activity" for their estate "during the next three years that requires a permit." This was part of their application for a permit for a tennis court. See Exhibit B Despite their certified statement, the Ludwigs subsequently applied for a fifth permit for their estate.

On April 21, 2005, two years after certifying twice that they did not plan any "additional activity" that requires a permit, the Ludwigs applied to DCRA for their fifth building permit for their estate. This fifth permit was for construction of various fences some of which according to their 2005 application, were needed "to meet pool enclosure requirements." If these fences were required for the pool, they should have been sought when the Ludwigs sought a permit for the pool.

IV. The Appeal is Timely

A. Introduction

The appeal is timely under various standards. First, it was filed within sixty days of the last in a series of permits being issued. The permits should be treated in their entirety. Second, the appeal was filed within a reasonable time.

The series of five permits were issued for the development of a single lot for a single family. The Ludwigs applied for and were granted four separate permits in 2003. The Ludwigs have conceded that the appeal is timely at least with regard to the most recent of the five permits.

The Ludwigs chose a piecemeal approach of many permits. This misled neighbors by not showing the entire plan at once. The Ludwigs should not be allowed to benefit. That would be unfair to us, the neighborhood and to the city of Washington D.C.

B. The Appeal is Timely Under Established Precedent

The Appeal is timely under established precedent of both the Board and the D.C. Court of Appeals. Both the Board and the D.C. Court of Appeals have ruled in a case similar to this in which the property owner (Charles Sisson) also attempted to get approval for his

development by a piecemeal approach. Like the Ludwigs, Mr. Sisson applied for and was granted five separate permits for the development of a single family house.

In Appeal No. 16405 of Mildred Rogers Crary (June 16, 1999), attached as Exhibit C, the Board upheld as timely an appeal by Mildred Rogers Crary of five separate building permits where the appeal was not filed until after the fifth permit was issued. The Board held that "[b]cause of the cumulative, piecemeal nature of the applications, the full extent of the Intervenor's construction project could not be discerned as each individual permit was issued and therefore they must be considered as a whole." The Board further held that the first of the five permits did not "...put the Appellant on notice of all the work to be done on the Intervenor's property...." The Board noting "[o]ther factors also support our conclusion" found that the permit applications contained errors of omission or were other wise misleading. The Board concluded that "the Appellant was not chargable with notice of the entire scope of work performed at the Intervenor's property until all of the permits were issued."

The D.C. Court of Appeals upheld the BZA decision that Ms. Crary's appeal was timely. Sisson v. District of Columbia Board of Zoning Adjustment, 805 A.2d 964, 970 (D.C. 2002), attached as Exhibit D.

This appeal of the five permits issued to the Ludwigs is almost identical to that of Mildred Rogers Crary in Sisson. Accordingly, Appellants respectfully request that the Board find the appeal of the series of five permits to be timely.

C. The Appeal is Timely Under Section 3112.2

1. Under Section 3112.2 (a)

Under Section 3112.2(a) an appeal is timely if filed "within sixty days." The appeal was filed with sixty days of the last of the series of five permits.

2. Extension of Deadline Under Section 3112.2 (d)

Under Section 3112.2 (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 the appellant's control and could not have been reasonably anticipated that substantially impaired the appellants ability to file an appeal to the Board; and"

(2) "the extension of time will not prejudice the parties to the appeal...."

Appellants respectfully request that should the Board not agree with their arguments above, that the Board extends the deadline. The

facts outlined above clearly demonstrate that there are exceptional circumstances outside the appellant's control and the exceptional circumstances could not have been reasonably anticipated. These exceptional circumstances substantially impaired the appellants' ability to file an appeal to the Board. Moreover, as discussed herein, an extension of time will not prejudice the parties to the appeal.

D. The Appeal is Timely if the Board Grants a Waiver Under Section 3100.5

Under Section 3100.5 the Board has the authority to "waive any of the provisions of this chapter" if "good cause" is shown; and "in the judgment of the Board, the waiver will not prejudice the rights of any party." Appellants respectfully request that if the Board does not agree with the other arguments set forth by the Appellants, that the Board exercises its authority to waive the provisions of Section 3112.2. As discussed above, Appellants believe that good cause has been demonstrated by the Appellants. The Ludwigs engaged in activity that mislead neighbors and DCRA from determining all of the plans in their entirety to develop the Ludwig Estate. Moreover, as discussed herein, no one will be prejudiced by merely hearing the appeal and the public interest will be served.

V. The Board Has Jurisdiction Because The Appeal Involves the Zoning Code

A. The Board is Obligated to Hear the Case

The Board does not have authority to dismiss this appeal. Under Section 3100.2 the Board "shall also hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal made by any administrative officer or body including the Mayor, in the administration or enforcement of the Zoning Regulations."

Clearly, appellants have alleged that the Director of DCRA and others made numerous errors in the administration or enforcement of the Zoning Regulations when they issued the five permits to the Ludwigs. Whether these allegations are valid is a matter for the Board to consider after a hearing. Section 3100.2 mandates that the Board hear and decide the case. Accordingly, the Board should deny the Ludwigs motion and should hear and decide this appeal.

VI. Hearing the Appeal Will Not Prejudice the Rights of Any Party

The Ludwigs suffer no prejudice from the Board considering the merits of this appeal.

First, the Ludwigs had notice in 2003 even before the first permit was issued that neighbors had concerns and objections to their development.

Second, the Ludwigs have completed the development of their estate. They moved in and are living in their estate. Despite the many objections of neighbors the Ludwig's have completed their massive development and have moved into their mansion.

Third, the Ludwigs have been advised from the outset by the law firm of Holland and Knight. Mr. Kiernan had represented Mr. Sisson in the previous case in which the Board and the D.C Court of Appeals upheld as timely an appeal by Mildred Rogers Crary of five separate building permits where the appeal was not filed until after the fifth permit was issued.. Mr. Kiernan knows the risks of such a piecemeal approach and presumably advised his client accordingly.

VII. The Public Interest Would Be Served By Hearing the Case

The Ludwigs are clearly wrong in claiming that the public interest would be served by the Board immediate dismissal without even hearing the merits of the appeal.

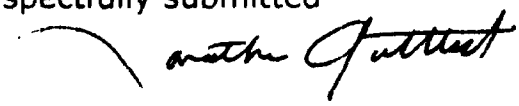
The DC Court of Appeals has consistently recognized the "fundamental notion" that the public interest is served by enforcement of the zoning laws. Sisson v. District of Columbia Board of Zoning Adjustment, 805 A.2d 964, 970 (D.C. 2002) citing Beins v. District of Columbia Board of Zoning Adjustment, 572 A.2d 122, 126 (D.C. 1990) Accordingly, The D.C. Court of Appeals, and other courts, have consistently disfavored dismissing zoning cases based upon the defenses of estoppel and/or latches.

In this appeal, the Ludwigs have attempted to evade enforcement of the zoning laws by a piecemeal approach of filing multiple permits for the same development, making misleading statements and misleading neighbors. The Board should not tolerate such attempts. By dismissing this appeal, in whole or in part, the Board would he encouraging other property owners and developers throughout the city to adopt such practices. This would clearly not be in the public interest.

VIII. Conclusion

For the reasons set forth above and those set forth in their Statement of Support of their appeal, the Appellants respectfully request that the Board find that the appeal was not barred by any time limit and that the Board has jurisdiction to hear the appeal. Accordingly, the Appellants respectfully request the Board deny the motion of the Ludwigs and hear the appeal on the merits.

Respectfully submitted



By: Diana de Brito
Jonathan Gottlieb
Appellants
4610 Dexter Street, N.W.
Washington, D.C. 20007
c/o Cadwalader
1201 F Street, N.W.
Washington, D.C. 20004
(202) 862-2409

Dated December 20, 2005

Exhibits

Exhibit A - Environmental Intake Form, dated March 5, 2003

Exhibit B - Environmental Intake Form, dated June 30, 2003

Exhibit C - Board of Zoning Adjustment, Appeal No. 16405 of Mildred Rogers Crary (June 16, 1999).

Exhibit D - Sisson v. District of Columbia Board of Zoning Adjustment, 805 A.2d 964 (D.C. 2002)

Exhibit A

DEPARTMENT OF CONSUMER & REGULATORY AFFAIRS
Building and Land Regulation Administration
941 North Capitol Street NE, Suite 2000
Washington DC 20002

ENVIRONMENTAL INTAKE FORM

Project Name:	Project Address: Lot: Square
LUDWIG RESIDENCE	2620 FOXHALL RD, NW 1031 13
Filed Job Application # (if applicable):	Project Description:
	SITE GRADING FOR SFD

Owner: MR & MRS EUGENE LUDWIG Date: 3/04/03

Owner's address and phone #: _____

Authorized agent: PERMITS LIMITED INC

Address and Phone # of authorized agent: 17617 PRINCESS ANNE DR OLNEY MD 20832

Scope of the Project	Yes	No	Instructions
1. Does the owner of this site own adjacent or abutting property?		✓	If yes, submit a site plan to EIS Coordinator, DCRA. If no plan exists, submit written explanation to EIS Coord DCRA.
2. Does the owner of this site plan to acquire property that is adjacent to or abutting this site within the next three years?		✓	If yes, submit a site plan to EIS Coordinator, DCRA. If no plan exists, submit written explanation to EIS Coord DCRA.
3. Is additional activity planned by the applicant for this site or any site within the same square during the next three years that requires a permit?		✓	If yes, submit a site plan to EIS Coordinator, DCRA. If no plan exists, submit written explanation to EIS Coord DCRA.
4. Is this a residential project within the R-1 through R-5-A zoning districts?	✓		If yes, skip to signature line.
5. Is this project a single-family residence that is not in conjunction with the building of two or more units?			If yes, skip to signature line.
6. Is this project an accessory structure such as a garage, patio, swimming pool or fence?			If yes, skip to signature line.
7. Is the project solely an interior renovation with no change in the use or capacity of the structure being renovated?			If yes, skip to signature line.
8. Is the project located in an Economic Development Zone, as defined in DC Code 5-1401 et seq (DC Law 7-177)?			If yes, skip to signature line.
9. Is the project located within the Central Employment Area as defined in DC Zoning Regulations? (Title 11DCMR)			If yes, skip to signature line.
10. Does the project involve only the operation, repair, maintenance, or minor alteration of public structures, facilities, mechanical equipment, or topographical features and involve negligible or no expansion of use beyond that previously existing?			If yes, skip to signature line.
11. Has an Environmental Impact Statement (EIS) been prepared pursuant to the National Environmental Policy Act of 1969 (NEPA), or a determination made that no EIS is needed, or has the functional equivalent of an EIS been prepared?			If yes, submit documentation to EIS Coordinator, DCRA.

Scope of the Project	Yes	No	Instructions
12. Is an exemption claimed from the requirement to submit an Environmental Impact Screening Form pursuant to Title 20, Sec. 7202 that is not referred to in this form? If yes, describe the exemption and cite the relevant section of the regulations on an attachment.			If yes, describe on an at ment and submit to EIS Coordinator, DCRA.
13. Does the total cost of the project exceed $1.42 million, including site preparation and construction?			If yes, and no exemption claimed, Environmental Impact Screenin Form (EISF) required. If no, indicate actual project cost
14. Is the cost of this project $1.42 million or less? If yes, please answer all of the following questions:			If yes, complete A through G.
A. Does the project site contain any species of plant or animal that is identified as threatened or endangered?			If yes, EISF required.
B. Are any streams, lakes, ponds, springs or wetlands within 100 feet of the project site?			If yes, EISF required.
C. Will the project result in an emission of odorous or other air pollutants from any source, including VOCs?			If yes, EISF required.
D. Will this action involve the use, production or disposal of hazardous substances as defined in 20 DCMR 7299?			If yes, EISF required.
E. Will construction be on land where the depth to the water table is less than 3 feet?			If yes, EISF required.
F. Will blasting occur as part of the project?			If yes, EISF required.
G. Will the project generate medical, infectious, radioactive or hazardous waste?			If yes, EISF required.

I certify that all of the statements on this application are true and complete to the best of my knowledge and belief. I agree to comply with all applicable laws and regulations of the District of Columbia. The making of false statements on this application is punishable by criminal penalties. (DC Code Sec. 22-2514)

Signature of Owner/Authorized Agent _____ Date 3/05/03

OFFICIAL USE ONLY

Environmental Impact Screening Form required: Yes _____ No X Referred to EIS Coordinator ___

DCRA Reviewer _____ Date 5/7/03

If yes, submit to EIS Coordinator
Department of Consumer and Regulatory Affairs
Building and Land Regulation Administration

Comments _____

NOTE: APPROVAL OF A BUILDING PERMIT IS NOT SYNONYMOUS WITH APPROVAL OF AN ACTION OR ENTIRE PROJECT UNDER THE ENVIRONMENTAL POLICY ACT OF 1989. IF THE APPLICANT BUILDS ON THE SAME, ADJACENT OR ABUTTING PROPERTY OR EXPANDS UPON THE WORK DESCRIBED IN THE INSTANT APPLICATION OR PLANS AND SPECIFICATIONS WITHIN THREE YEARS, AN ENVIRONMENTAL IMPACT SCREENING FORM MAY BE REQUIRED FOR THE ENTIRE PROJECT, INCLUDING THE PORTION ENCOMPASSED BY THIS APPLICATION AND PERMIT APPROVAL. FURTHER, IF THE ACTION IS IN VIOLATION OF ANY FEDERAL OR DISTRICT LAWS PERTAINING TO THE ENVIRONMENT, AN EISF CAN BE REQUIRED.

TO REPORT WASTE, FRAUD, OR ABUSE BY ANY DC GOVERNMENT OFFICE OR OFFICIAL, CALL THE INSPECTOR GENERAL ON 1- 800- 521-1639

Exhibit B

DEPARTMENT OF CONSUMER & REGULATORY AFFAIRS
Building and Land Regulation Administration
941 North Capitol Street NE, Suite 2000
Washington DC 20002

ENVIRONMENTAL INTAKE FORM

Project Name:	Project Address: 2620 FOXHALL RD, NW Lot: 1831 Square: 139
Filed Job Application # (if applicable):	Project Description:

Owner: LUDWIG RESIDENCES Date: 6/30/03

Owner's address and phone #:

Authorized agent: PERMITS LIMITED INC
17817 PRINCESS ANNE DR
OLNEY MD 20832

Address and Phone # of authorized agent:

Scope of the Project	Yes	No	Instructions
1 Does the owner of this site own adjacent or abutting property?			If yes, submit a site plan to EIS Coordinator, DCRA. If no plan exists, submit written explanation to EIS Coordinator, DCRA.
2 Does the owner of this site plan to acquire property that is adjacent to or abutting this site within the next three years?			If yes, submit a site plan to EIS Coordinator, DCRA. If no plan exists, submit written explanation to EIS Coordinator, DCRA.
3 Is additional activity planned by the applicant for this site or any site within the same square during the next three years that requires a permit?			If yes, submit a site plan to EIS Coordinator, DCRA. If no plan exists, submit written explanation to EIS Coordinator, DCRA.
4 Is this a residential project within the R-1 through R-5-A zoning districts?			If yes, skip to signature line.
5 Is this project a single-family residence that is not in conjunction with the building of two or more units?			If yes, skip to signature line.
6 Is this project an accessory structure such as a garage, patio, swimming pool or fence?			If yes, skip to signature line.
7 Is the project solely an interior renovation with no change in the use or capacity of the structure being renovated?			If yes, skip to signature line.
8 Is the project located in an Economic Development Zone, as defined in DC Code 5-1401 et seq (DC Law 7-177)?			If yes, skip to signature line.
9 Is the project located within the Central Employment Area as defined in DC Zoning Regulations? (Title 11DCMR)			If yes, skip to signature line.
10 Does the project involve only the operation, repair, maintenance, or minor alteration of public structures, facilities, mechanical equipment, or topographical features and involve negligible or no expansion of use beyond that previously existing?			If yes, skip to signature line.
11 Has an Environmental Impact Statement (EIS) been prepared pursuant to the National Environmental Policy Act of 1969 (NEPA), or a determination made that no EIS is needed, or has the functional equivalent of an EIS been prepared?			If yes, submit documentation to EIS Coordinator, DCRA.

Scope of the Project	Yes	No	Instructions
12 Is an exemption claimed from the requirement to submit an Environmental Impact Screening Form pursuant to Title 20, Sec. 7202 that is not referred to in this form? If yes, describe the exemption and cite the relevant section of the regulations on an attachment			If yes, describe on an attachment and submit to EIS Coordinator DCRA.
13. Does the total cost of the project exceed $1 42 million, including site preparation and construction?			If yes, and no exemption claimed, Environmental Impact Screening Form (EISF) required. If no, indicate actual project cost
14 Is the cost of this project $1.42 million or less? If yes, please answer all of the following questions			If yes, complete A through G.
A Does the project site contain any species of plant or animal that is identified as threatened or endangered?			If yes, EISF required.
B. Are any streams, lakes, ponds, springs or wetlands within 100 feet of the project site?			If yes, EISF required.
C Will the project result in an emission of odorous or other air pollutants from any source, including VOCs?			If yes, EISF required.
D. Will this action involve the use, production or disposal of hazardous substances as defined in 20 DCMR 7299?			If yes, EISF required.
E Will construction be on land where the depth to the water table is less than 3 feet?			If yes, EISF required.
F Will blasting occur as part of the project?			If yes, EISF required.
G. Will the project generate medical, infectious, radioactive or hazardous waste?			If yes, EISF required.

I certify that all of the statements on this application are true and complete to the best of my knowledge and belief. I agree to comply with all applicable laws and regulations of the District of Columbia. The making of false statements on this application is punishable by criminal penalties. (DC Code Sec. 22-2514)

Signature of Owner/Authorized Agent _____ Date 6/30/03

OFFICIAL USE ONLY

Environmental Impact Screening Form required: Yes _____ No _____ Referred to EIS Coordinator _____

DCRA Reviewer _____ Date _____

If yes, submit to EIS Coordinator
Department of Consumer and Regulatory Affairs
Building and Land Regulation Administration

Comments _____

_____

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Exhibit C

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16405 of Mildred Rodgers Crary, pursuant to 11 DCMR § 3105 (new 3100.2), from the administrative decision of the Zoning Administrator to issue the following building permits allowing various alterations and additions to the subject property: Permit No. B413166, dated January 29, 1998, for a two-story addition on the rear; Permit No. B413424, dated February 9, 1998, for an addition to a garage, length 20 feet. width 20 feet, height 14 feet; Permit No. B415675 dated May 27, 1998, for a new garage to be located on the same spot as previous garage, length 20 feet, width 10 feet 9 inches, height 8 feet; Permit No. B417814, dated August 17, 1998, for repair of existing roof, roof in place, no structural change; and Permit No. B419108, dated October 5, 1998, to build new porch roof as per plans. The Appellant also challenges the R-1-B zoning classification attributed to the property by the Zoning Administrator. These permits were issued for property located at premises 3020 43rd Street, N.W. (Square 1621, Lot 810).

HEARING DATES: December 16, 1998, February 17, 1999, April 21, 1999, May 5, 1999, May 19, 1999 and May 26, 1999

DECISION DATE: June 16, 1999

ORDER

PRELIMINARY AND PROCEDURAL MATTERS:

This Appeal was brought by Mildred R. Crary, the owner of property abutting the subject property. At the Board's December 16, 1998 public hearing, Charles Sisson, owner of the subject property, requested Intervenor status and postponement of the hearing because of a previously scheduled overseas trip. The Board granted both requests.

At the hearing held February 17, 1999, the Appellant sought to amend the Appeal to include two building permits that were discovered after the Appeal, which initially challenged three permits, was filed. The Board determined that the two newly discovered building permits were germane and directed readvertisement of the Appeal to include all five permits. Also at the February 17, 1999 hearing, the Intervenor requested dismissal of the Appeal because it was not timely filed and was also barred by the doctrines of laches and estoppel. The Board denied

Intervenor's estoppel claim on May 5, 1999, but determined that the facts of the case must be heard before addressing the issues of timeliness and laches.

The Appeal was heard on May 26, 1999. Testimony was received from Mr. Edgar Nunley, chief of the Zoning Review Branch in the Department of Consumer and Regulatory Affairs, Advisory Neighborhood Commission ("ANC") 3D, and Mr. George Watson, president of the Wesley Heights Historical Society, in addition to the Appellant and the Intervenor.

FINDINGS OF FACT

1. The subject property is located at 3020 43rd Street, N.W. (Square 1621, Lot 810) in the Wesley Heights neighborhood of Ward 3. The streets that surround the property are Cathedral Avenue to the north, New Mexico Avenue and 43rd Street to the east, Hawthorne Street to the south, and 44th Street to the west.

2. The property contains 6,563 square feet of land area and is developed with a single-family, detached dwelling that was constructed in 1926. The building contains a gross floor area of 2,876 square feet.

3. The subject property is zoned WHOD/R-1-A. The Wesley Heights Overlay District (WHOD) was 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. 11 DCMR § 1541.1. The purposes of the WHOD are: (1) to preserve in general the current density of the neighborhood; (2) to allow reasonable opportunities for owners to expand their dwellings; and (3) to preserve existing trees, access to air and light, and the harmonious design and attractive appearance of the neighborhood. 11 DCMR § 1541.3.

4. The WHOD zoning requirements apply in combination with the requirements of the R-1-A District. 11 DCMR § 1542.1. The zoning requirements applicable to the Intervenor's property are summarized in the following chart:

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[1] The elements of estoppel are: (1) expensive and permanent improvements, (2) made in good faith, (3) in justifiable and reasonable reliance upon, (4) affirmative acts of the District government, (5) without notice that the improvements might violate the zoning regulations, and (6) equities that strongly favor the party asserting the defense. *Wieck v. District of Columbia Board of Zoning Adjustment*, 383 A.2d 7, 11 (D.C. 1978). In denying Intervenor's estoppel claim, the Board relied upon the principle that an innocent third party properly cannot be estopped from challenging the government's mistaken issuance of a permit, even when there has been reliance by the permittee. The Board has previously held that estoppel cannot bar a neighboring property owner (as distinct from the District government) from asserting rights under the zoning regulations. The Court of Appeals has noted that the Board has adopted this position in *Beins v. District of Columbia Board of Zoning Adjustment*, 572 A.2d 122, 125 (D.C. 1990.) This position has been accepted in other jurisdictions as well. *See Lithe v. Hidalgo*, 536 S.W.2n 898, 901-02 (Mo.App. 1976) ("unconscionable to hold that aggrieved private parties could be prejudiced by the conduct of city officials with whom they are not in privity"); *Boyd v. Donelon*, 193 So.2d 291, 298 (La. App. 1966) (citations omitted) ("neighboring property owners . . . are not estopped by any permission or representations made by the municipal employees"): *Pascale v. Board of Zoning Appeals of City of New Haven*, 186 A.2d 377, 380 (1962) (assuming that a city may be estopped from enforcing a regulation because it issued a building permit, such estoppel will not defeat the rights of an aggrieved property owner).

Zoning Requirements	**R-1-A**	**WHOD/R-1-A**	**Site**
Minimum Lot Area	7,500 s.f.	7,500 s.f.	6,563 s.f. (existing)
Minimum Lot Width	75 ft.	75 ft.	53 ft. (existing)
Lot Occupancy	40%	2,000 s.f., where lot size is between 5,000 s.f. and 6,667 s.f.	2,145 s.f. (existing)
Floor Area Ratio	None Prescribed	Gross floor area shall not exceed the sum of 2,000 s.f. plus 40% of lot area, with exceptions for open porches and garages	2,876 s.f.
Minimum Front Yard	None Prescribed	Equal to or greater than the average setback of all structures on the same side of the street in the same block; 21 ft. in this case	25 ft. (prior to addition); 17 ft. (after porch construction)
Minimum Rear Yard	25 ft.	25 ft.	N.A.
Minimum Side Yard	8 ft. each	8 ft. each	6 ft. each (existing)
Off –street parking	One space, accessible directly from improved street or alley or via a graded and unobstructed private driveway	One space, accessible directly from improved street or alley or via a graded and unobstructed private driveway	

5. The subject property is nonconforming because its lot area, lot width, and setbacks are smaller than the minimums prescribed in the WHOD/R-1-A zone, and because its lot occupancy is higher than the prescribed maximum.

6. The Appeal challenges five permits issued between January and October 1998 for construction at the subject property, whose main elements were a covered front porch, a rear two-story addition, and a new garage. The five permits at issue are:

(1) Building Permit No. B413166, dated January 29, 1998, for a two-story addition on the rear;
(2) Building Permit No. B413424, dated February 9, 1998, for an addition to a garage, length 20 feet, width 20 feet, height 14 feet;
(3) Building Permit No. B415675, dated May 27, 1998, for a new garage to be located on the same spot as previous garage - length 20 feet, width 10 feet 9 inches, height 8 feet;
(4) Building Permit No. B417814, dated August 17, 1998, for repair of existing roof, roof in place, no structural change;
(5) Building Permit No. B419108, dated October 5, 1998, to build new porch roof as per plans.

7. The first permit, pertaining to the rear addition, incorrectly identified the zoning classification applicable to the subject property as R-1-B instead of WHOD/R-1-A.

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

9. The second permit, pertaining to an addition to the existing garage, also applied the wrong zoning classification, this time R-1-A instead of WHOD/R-1-A.

10. Although the second permit authorized an addition to an existing garage, the garage was demolished without authorization, purportedly because the Intervenor's contractor discovered that the footings to the existing garage were decayed.

11. A new garage was constructed on the subject property that was larger than the approved garage addition. The second permit approved a garage with dimensions of 20 feet in length and 14 feet in height, but the dimensions of the new garage were approximately 23 feet long, 21 feet wide, and 16 feet high.

12. The third permit, for a new garage in the same location as the previous garage, was issued after the new garage was already substantially completed. The large size of the new garage also exceeded the dimensions allowed by the third building permit.

13. The Zoning Regulations require that off-street parking spaces must be accessible at all times directly from improved streets or alleys or accessible from improved streets and alleys via graded and unobstructed private driveways. 11 DCMR § 2117.4.

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

15. A private easement extends from Hawthorne Street, along the rear of four neighboring properties, and terminates at the Intervenor's property. Following construction of the new garage, the easement is eight feet wide.

16. The Intervenor's new garage is accessible only by means of the private easement.

17. The fourth permit, pertaining to roof repair, again applied the wrong zoning classification, in this instance R-1-B instead of WHOD/R-1-A.

18. The fourth permit was issued for repairs to an existing roof over the porch but, at the time the permit was issued, the porch was open and did not have a roof. The Intervenor was instructed to obtain a new building permit after DCRA discovered that there was no roof in place.

19. The fifth building permit authorized construction of a new porch roof.

CONCLUSIONS OF LAW AND OPINION:

An appeal to the Board may be taken by any person aggrieved by any decision of DCRA granting a building permit, or any other administrative decision based on the Zoning Regulations. D.C. Code § 5-424; 11 DCMR § 3202.2. The Board's powers with regard to appeals include to decide allegations of error in any decision made by DCRA in carrying out or enforcement of any zoning regulation. D.C. Code § 5-424.

The Zoning Regulations provide that an appeal must be "timely." 11 DCMR § 3315.2. Because the Board's rules do not adopt a specific time limit on appeals, a standard of reasonableness is applicable to determine whether an appeal is timely. *Goto v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 917, 923 (D.C. 1980). In applying the reasonableness standard, courts have consistently held that the time for filing an appeal commences when the party appealing is chargeable with notice or knowledge of the decision complained of. *Woodley Park Community Association v. District of Columbia Board of Zoning Adjustment*, 490 A.2d 628, 636 (D.C. 1985). *See also, e.g., Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994).

The Board concludes that the Appeal was timely with respect to all five permits. The Intervenor submitted five separate applications for building permits that all related to work performed on a single property. Because of the cumulative, piecemeal nature of the applications, the full extent of the Intervenor's construction project could not be discerned as each individual permit was issued and therefore they must be considered as a whole. The Appellant has alleged violations of the zoning regulations, such as failure to comply with lot occupancy and setback requirements, that pertain to the full extent of the work performed on the Intervenor's property, rather than merely concerning the individual components of the project. The Board is not persuaded that the first permit put the Appellant on notice of all the work to be done on the Intervenor's property or, therefore, that the work allegedly violated the Zoning Regulations.

Other factors also support our conclusion that the Appellant was not "chargeable with notice" as soon as the first permit was issued. The Intervenor's various permit applications contained errors of omission or were otherwise misleading in that they did not reflect all existing and planned improvements accurately and consistently. For example, the garage was not depicted accurately on the first application, concerning the rear addition, and the fourth application indicated that the front porch was not open but had an existing roof. Because of these errors, zoning violations arising from the failure to comply with lot occupancy and setback requirements of the Wesley Heights overlay, in particular, were not apparent until the work was substantially completed on the Intervenor's property. Moreover, some work was performed beyond the scope of the permit, as with the demolition of the existing garage and the construction of a new garage larger than the dimensions specified on the permit, and two of the permits (the third and fifth) were issued for work that was undertaken prior to receiving the permits. Therefore, the Board concludes that the Appellant was not chargeable with notice of the entire scope of work performed at the Intervenor's property until all of the permits were issued.[2]

The Intervenor argues that the Appeal is barred by laches. "Laches is a species of estoppel, being defined as the omission to assert a right for an unreasonable and unsatisfactorily explained length of time under circumstances prejudicial to the party asserting laches." *Wieck v District of Columbia Board of Zoning Adjustment*, 383 A.2d 7, 11 (D.C. 1978), *quoting* 3 RATHKOPF, LAW OF ZONING AND PLANNING, at 67-1 (3d ed. 1972). "Laches is the principle that 'equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant." *American University Park Citizens Association v. Burka*, 400 A.2d 737, 740 (D.C. 1979), *quoting Russell v. Todd*, 309 U.S. 280, 287, 84 L. Ed. 754, 60 S. Ct. 527 (1940). The two elements of laches are the unreasonableness of the delay and the resulting prejudice to the party asserting the defense. *See, e.g., American University Park Citizens Association v. Burka*, 400 A.2d at 741. The "entire course of events," not merely the period from the zoning official's decision to the filing of an appeal, is relevant when determining the validity of a laches defense. *Goto v. District of Columbia Board of Zoning Adjustment*, 423 A.2d at 925, n.16.

The Board finds no merit in the Intervenor's argument. As discussed above with respect to timeliness, the Appellant did not unreasonably delay the filing of the Appeal. Rather, the Appeal was filed as soon as Appellant realized the entire scope of work being performed at the Intervenor's property. The Board concludes that the Appellant did not omit to assert her right to appeal for an unreasonable and unsatisfactorily explained length of time. Any delay in filing the appeal was not unreasonable but resulted from the fact that the Intervenor applied for separate building permits for each component of the construction on his property. Thus, there was no "unexcused delay." Accordingly, because the Intervenor failed to demonstrate the first element of laches – an unreasonable delay in bringing the appeal – the Board denies Intervenor's motion to dismiss the Appeal on grounds of laches.

---

[2] The fifth permit, which was issued after the appeal was filed, authorized construction of a new porch roof. That permit was purportedly issued to correct the fourth permit, which had authorized repairs to an existing porch roof, but in fact no roof was in existence when the permit was issued.

Turning to the merits of the Appeal, the five permits issued to the Intervenor violate the zoning regulations in several respects. The applicable zone district was misidentified on three of the five permits. Twice, the underlying zone was incorrectly identified as R-1-B; however, because of the similarity between R-1-A and R-1-B requirements that mistake likely had no substantive effect. A more significant oversight was the failure to recognize that the Intervenor's property is located within the Wesley Heights Overlay District. Thus, the more stringent WHOD provisions were not applied, and permits were issued that purported to allow work that does not comply with relevant lot occupancy and setback requirements. This oversight was compounded by the fact that the full scope of the work planned for the Intervenor's property was not depicted consistently and accurately on all permit applications, thus precluding an assessment of each individual permit application within the context of all existing and planned improvements.

Moreover, the Intervenor's property is nonconforming because its lot area, lot width, and setbacks are smaller than the minimums prescribed in the WHOD/R-1-A zone, and because its lot occupancy is higher than the prescribed maximum. Structural alterations to nonconforming structures are permitted. 11 DCMR § 2001.2. However, enlargements or additions made to nonconforming structures must comply with certain conditions, including that the structure must conform to percentage of lot occupancy requirements, and the addition or enlargement itself must not increase or extend any existing, nonconforming aspect of the structure, or create any new nonconformity of structure and addition combined. 11 DCMR § 2001.3. The Board concludes that the work performed on the Intervenor's property increased its nonconforming aspect with respect to setbacks and lot occupancy.

As Mr. Nunley acknowledged at the public hearing, the permits for the garage should not have been issued if the garage did not provide access in conformance with the zoning regulations. The two-car garage is accessible only through an easement that, at a width of eight feet, is narrower than the minimum width of 14 feet specified in the zoning regulations for a driveway with two-way circulation serving a parking space. 11 DCMR § 2117.8.

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

The motion to **DISMISS** the Appeal based on timeliness and laches is **DENIED.**

VOTE: 4-0 (Angel Clarens, Betty King, Sheila Cross Reid and Jerry Gilreath to deny.)

The Zoning Administrator erred in issuing Building Permit Nos. B413166, B413424, B415675, B417814 and B419108. Therefore, it is hereby **ORDERED** that the Appeal be **GRANTED.**

VOTE: 4-0 (Angel Clarens, Betty King, Sheila Cross Reid and Jerry Gilreath to grant.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: _____
JERRILY R. KRESS
DIRECTOR

FINAL DATE OF ORDER: DEC 28 1999

UNDER 11 DCMR 3103.1 "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPEAL NO. 16405

As Director of the Office of Zoning, I hereby certify and attest that on DEC 28 1999 a copy of the order entered on that date in this matter was mailed first class, postage prepaid, to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

John Patrick Brown, Jr.
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Eleanor Roberts Lewi, Chairperson
Advisory Neighborhood Commission 3D
P.O. Box 40846
Palisades Station
Washington, D.C. 20016

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
DIRECTOR

Exhibit D

LEXSEE 805 A2D 964

CHARLES SISSON, PETITIONER, v. DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT, MILDRED R. CRARY, INTERVENOR.

No. 00-AA-97

DISTRICT OF COLUMBIA COURT OF APPEALS

805 A.2d 964; 2002 D.C. App. LEXIS 504

November 9, 2001, Argued
August 29, 2002, Decided

PRIOR HISTORY: [**1] Petition for Review of a Decision of the District of Columbia Board of Zoning Adjustment.

DISPOSITION: Affirmed the Order of the Board of Zoning Adjustment.

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

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

JUDGES: Before SCHWELB, REID, and WASHINGTON, Associate Judges.

OPINIONBY: REID

OPINION: [*966]

REID, *Associate Judge*: This case concerns a challenge to the Zoning Administrator's issuance of several construction permits regarding petitioner Charles Sisson's renovation of his home and garage. Mildred Crary, Mr. Sisson's neighbor, appealed the issuance of the permits to the Board of Zoning Adjustment ("BZA"), which ruled in her favor. n1 Mr. Sisson primarily contends that Ms. Crary's BZA appeal is jurisdictionally and procedurally barred because of untimeliness and laches. He also contends that the BZA erred with respect to its [**2] decision on the merits. We affirm the decision of the BZA, which (a) denied Mr. Sisson's motion to dismiss Ms. Crary's appeal; and (b) found that the Zoning Administrator erred by issuing the building permits to Mr. Sisson.

n1 Ms. Crary did not file an appellate brief in this case.

FACTUAL SUMMARY

Responding to Mr. Sisson's requests, the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") issued five building permits to him between January 29, 1998, and October 5, 1998, covering a rear two-story addition, the garage, and the front porch. n2 Mr. Sisson's home is located in the Northwest quadrant of the District of Columbia, within the Wesley Heights Overlay District ("WHOD"). Residential properties within the WHOD are subject to particularized zoning regulations.

n2 In actuality, the Department issued a sixth permit to Mr. Sisson on October 11, 2000, although that permit is not before the court for review at this time.

[**3]

The BZA made extensive factual findings regarding Mr. Sisson's permit applications and the regulatory requirements for the issuance of the requested permits. Although Mr. Sisson's property is actually zoned as WHOD/R-1-A, his permit applications generally were reviewed erroneously as R-1-A or R-1-B, rather than as WHOD/R-1-A. n3 Furthermore, Mr. Sisson's piecemeal application process and his tendency to complete, or substantially complete, work before obtaining a permit made it difficult to determine the full scope of the renovation project.

n3 The R-1-A and WHOD/R-1-A zoning classifications specified requirements for minimum lot area, minimum lot width, lot occupancy, floor area ratio, minimum front yard, minimum rear yard, minimum side yard, and off-street parking; and the R-1-A and WHOD/R-1-A classi-

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fications contained different requirements for lot occupancy, floor area ratio, and minimum front yard. The applicable zoning requirements for Mr. Sisson's renovation had to be considered in light of the existing dimensions of his home and garage.

[**4]

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

Plans submitted by [Mr. Sisson] as part of his application for the first permit did not reflect all of the construction work that [he] planned to perform at the site. [His] project was developed in a piecemeal manner and the various applications were often incomplete or otherwise misleading in that they did not always reflect [Mr. Sisson's] plans for the garage, rear addition, and front porch consistently and accurately. [*967]

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

A third [**5] permit for the construction of a new garage, dated May 27, 1998, replaced the February 1998 permit, and "was issued after the new garage was already substantially completed." Moreover, "the large size of the new garage also exceeded the dimensions allowed by the third building permit." n4

n4 A new permit was required when structural impediments prevented Mr. Sisson from completing the addition to the garage as originally planned. After discovering the structural problem, however, Mr. Sisson continued construction without first obtaining a new permit. When the DCRA received Ms. Crary's complaint about Mr. Sisson's construction, an investigation was conducted, resulting in a Stop Work Order.

DCRA issued a fourth permit, dated August 17, 1998, to repair a roof allegedly situated over Mr. Sisson's porch. The permit was issued pursuant to the R-1-B zoning regulations, rather than the appropriate WHOD/R-1-A regulations. In addition, even though this permit covered repairs to an existing porch roof, "at the time the [**6] permit was issued, the porch was open and did not have a roof." The fifth and final permit, dated October 5, 1998, was issued to build a "new porch roof." In this court, "Mr. Sisson concedes that the BZA did not commit reversible error in finding that the two front porch permits (August and October 1998) were not appropriately issued . . . [and does] not contest[] the validity of BZA's rejection of the front porch permits."

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

The Board concludes that the Appeal was timely with respect to all five permits. [Mr. Sisson] submitted five separate applications for building permits that all related to work performed on a single property. Because of the cumulative, piecemeal nature of the applications, the full extent of [Mr. Sisson's] construction project could not be discerned as each individual permit was issued and therefore they must be considered as a whole . . . The Board is not persuaded that the first permit put [Ms. Crary] [**7] on notice of all the work to be done on [Mr. Sisson's] property or, therefore, that the work allegedly violated the Zoning Regulations

Other factors also support our conclusion that [Ms. Crary] was not "chargeable with notice" as soon as the first permit was issued. [Mr. Sisson's] various permit applications contained errors of omission or were otherwise misleading in that they did not reflect all existing and planned improvements accurately and consistently . . . . Because of these errors, zoning violations arising from the failure to comply with lot occupancy and setback requirements of the Wesley Heights overlay, in particular, were not apparent until the work was substantially completed on [Mr. Sisson's] property. Moreover, some work was performed beyond the scope of the permit, as with the demolition of the existing garage and the construction of a new garage larger than the dimensions specified on the permit, and two of the permits (the [*968] third and fifth) were issued for work that was undertaken prior to receiving the permits. Therefore, the Board concludes that [Ms. Crary] was not chargeable with notice of the entire scope of work performed at [Mr. Sisson's] property [**8] until all of the permits were issued. n5

n5 Both the Zoning Administrator and Ms. Crary's attorney had difficulty locating the third

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and fourth permit in DCRA's records. In fact, Ms. Crary did not locate the third permit until January 1999.

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

The Board concludes that the work performed on [Mr. Sisson's] property increased its nonconforming aspect with respect to setbacks and lot occupancy.

As [the Zoning Administrator] acknowledged at the public hearing, the permits for the garage should not have been issued if the garage did not provide access in conformance with the zoning regulations. The two-car garage [which Mr. Sisson constructed] [**9] is accessible only through an easement that, at a width of eight feet, is narrower than the minimum width of 14 feet specified in the zoning regulations for a driveway with two-way circulation serving a parking space.

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

Ms. Crary filed her appeal on September 18, 1998, prior to the issuance of the fifth permit on October 5, 1998, for a new porch roof. At a February 17, 1999, hearing, Ms. Crary sought to amend her BZA appeal to include two [**10] permits not addressed in her original notice of appeal. The BZA granted the amendment.

ANALYSIS

Mr. Sisson continues to press his jurisdictional and procedural arguments in this court. In addition, he contends that his new garage and the two-story rear addition to his home do not violate the zoning regulations. "We accord great deference to an agency's interpretation of its own administrative regulations, and we will uphold that construction unless clearly erroneous or inconsistent with the regulations. . . . Moreover, the agency's judgment . . . is entitled to additional deference [where] it was interpreting its own internal rule of procedure rather than the Zoning Regulations." *Du Pont Circle Citizens Ass'n v. District of Columbia Zoning Comm'n*, 431 A.2d 560, 565 (D.C. 1981) (citations and references omitted); *see also, Waste Mgmt. of Md., Inc. v. District of Columbia Bd. of Zoning Adjustment*, 775 A.2d 1117, 1122 (D.C. 2001) (citing *Goto v. District of Columbia Bd. of Zoning Adjustment*, 423 A.2d 917, 924 (D.C. 1980) (citations [*969] omitted)). However, we are required to "to hold unlawful and set aside any action [**11] or findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] in excess of statutory jurisdiction, authority, or limitations or short of statutory jurisdiction, authority, or limitations or short of statutory rights." D.C. Code § 2-510 (a) (3)(A),(C) (2001). Furthermore, "the timely filing of an appeal with the BZA is mandatory and jurisdictional." *Mendelson v. District of Columbia Bd. of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994) (referencing *Woodley Park Cmty. Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 490 A.2d 628, 635 (D.C. 1985)) (other citations omitted).

We turn first to Mr. Sisson's argument that the BZA should have dismissed Ms. Crary's appeal on the ground that it was untimely. The underlying events critical to this issue occurred around 1998. In 1998, BZA regulations required a "timely" appeal. While there was no time limitation specified in statute or regulation, our case law generally held that the filing had to be within a "reasonable period" after the appellant was chargeable with notice of the decision [**12] that was the subject of the appeal. As this Court said in *Woodley Park Cmty. Ass'n, supra*, "because the rules of the BZA adopt no specific time limit on appeals, a standard of reasonableness is applied in determining whether an appeal is timely." n6 490 A.2d at 636 (citation and references omitted). More recently, we have stated that "at least in the absence of exceptional circumstances substantially impairing the *ability* of an aggrieved party to appeal - circumstances outside the party's control - we conceive of two months between notice of a decision and appeal therefrom as the limit of timeliness." *Waste Mgmt. of Md., supra*, 775 A.2d at 1122 (emphasis in the original).

n6 The applicable BZA rule stated:

Any person aggrieved by any order, requirement, decision, determination, or refusal made by

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an administrative officer or body, including the Mayor of the District of Columbia, in the administration or enforcement of the Zoning Regulations, may file a timely appeal with the Board as may be provided by the Board.

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

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

49 D.C. Reg. at 4885.

[**13]

Ms. Crary's case, as the BZA implicitly determined, falls under the principle of "exceptional circumstances substantially impairing the *ability* of an aggrieved party to appeal - circumstances outside of the party's control." *Id.* Application of this principle supports the Board's conclusion that the timing of Ms. Crary's BZA appeal was not unreasonable, precisely because circumstances beyond her control impacted the timeliness of her filing. As the BZA determined, "because of the cumulative, piecemeal nature of the applications, the full extent of [Mr. Sisson's] construction [*970] project could not be discerned as each individual permit was issued and therefore they must be considered as a whole." Thus, "[Ms. Crary] was not chargeable with notice of the entire scope of work performed at [Mr. Sisson's] property until all of the permits were issued." The factual record supports this conclusion.

Not only were most of the permits issued under the wrong zoning classification, but each of the individual permits failed to reflect the entire scope of Mr. Sisson's proposed renovations. The first permit, issued in January 1998, covered a proposed two-story addition to Mr Sisson's home, [**14] but did not authorize any garage or front porch modifications. The second permit, relating only to the garage construction, contained information that was not entirely consistent with that provided in conjunction with the first permit. Indeed, during the hearing on Ms. Crary's appeal, the BZA questioned Mr. Sisson at length about relevant omissions in his permit application. Those omissions related to the overall construction renovations at his home. Ultimately, the District issued a Stop Work Order when it appeared that Mr. Sisson's renovations did not comport with the permit issued to him by the DCRA. In fact, although his "permit authorized an addition to an existing garage," Mr. Sisson "demolished [the existing garage] without authorization," and ultimately constructed a new garage, for which he had no permit, "that was larger than the approved garage addition." Mr. Sisson then applied for a new permit relating to the garage after the District issued the Stop Work Order. He obtained the secondary garage permit, the third of the five, on May 27, 1998, at a time when the new garage was substantially complete. In fact, even the secondary permit raises questions, as evidenced by [**15] discrepancies between the permit itself and the actual construction of the garage, particularly with respect to its physical location. While the secondary garage permit authorized a "new garage to be located on same spot as previous garage," when questioned directly about this issue by the Vice Chair of the BZA, Mr. Sisson confirmed very little other than that the old and new garages shared a common wall. As to the porch, Mr. Sisson concedes that the fourth and fifth permits at issue in this case "were not appropriately issued."

Mr. Sisson argues that this court's approach in *Woodley Park Cmty. Ass'n*, *supra*, 490 A.2d at 628, should control the timing of Ms. Crary's appeal to the BZA in this case, and that under that decision, her appeal was untimely. There, as in Mr. Sisson's case, the appellants before the BZA challenged permits issued on separate dates concerning different aspects of the relevant construction project, but did not file separate BZA appeals at the time each permit was issued. Rather than assessing the timeliness question in terms of the cumulative nature of the hotel project, however, this court analyzed the timeliness of the appeal on the issues of "height, setback, and accessory [**16] use" as a discrete matter, separate and apart from the timeliness of the challenge relating to parking issues. Mr. Sisson urges the court to adopt the *Woodley Park* approach in his case,

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rather than the analysis followed by the BZA in this case.

Significantly, "this court is not to substitute its judgment for that of the agency, and . . . the decision of the BZA will be upheld provided there is a rational basis for it." *Gladden v. District of Columbia Bd. of Zoning Adjustment*, 659 A.2d 249, 253 (D.C. 1995) (quotation omitted). Moreover, *Woodley Park* does not compel a decision different from that reached by the BZA, because it is distinguishable. We note first that the issue here pertains to renovations on private residential property and a challenge by a single individual, whereas *Woodley Park* involved the construction [*971] of a hotel and a challenge by a community association on other grounds. Furthermore, the parties in *Woodley Park* engaged in negotiations through a task force on which the Woodley Park Community Association was represented. The negotiations lasted for many months, during which the hotel construction project was discussed at length. Consequently, [**17] the negotiations provided the BZA appellants ample opportunity to become thoroughly informed about and to raise objections relating to height, setback, and accessory use. "Thus, by October 6, 1978 — the date the full building permit was issued — the [appellants before the BZA] had full actual notice of the aspects of the building project relating to height, setback, and use. Nevertheless, one year elapsed between the issuance of the building permit and the filing of the appeal on October 12, 1979." *Woodley Park Cmty. Ass'n, supra*, 490 A.2d at 637. Under those particular circumstances, the court concluded that the challenge relating to height, setback, and use was not timely filed.

Unlike the facts that gave rise to the court's approach to the multi-permit question in *Woodley Park*, Mr. Sisson did not engage in a thorough negotiation process during which Ms. Crary would have been informed about all of Mr. Sisson's construction plans on his property. In short, there was no lengthy, intense and extensive effort by Mr. Sisson to collaborate with Ms. Crary and the local neighborhood associations on his construction project. In contrast, the negotiation process [**18] in *Woodley Park* rendered "unreasonable" the timing of the appeal as to height, setback, and use. n7

> n7 We reiterate that the Court decided *Woodley Park* when the "reasonableness" test controlled the jurisdictional timeliness question.

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

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

Significantly, the problematic permit history surrounding Mr. Sisson's renovations, coupled with the fact that some of the permits issued [**19] by the BZA were faulty on their face, constitute the very circumstances that were beyond Ms. Crary's control, *see Waste Mgmt. of Md., supra*, 775 A.2d at 1122, and make applicable the "extraordinary circumstances" exception in *Waste Mgmt.* Consequently, we affirm the BZA decision that Ms. Crary's appeal was timely.

We turn next to Mr. Sisson's argument that Ms. Crary's appeal was procedurally barred by laches and estoppel. At the outset, we reiterate a fundamental notion that has controlled our treatment of these doctrines in prior cases: "The defenses of estoppel and laches are judicially disfavored in the zoning context because of the public interest in enforcement of the zoning laws." *Beins v. District of Columbia Bd. of Zoning Adjustment*, 572 A.2d 122, 126 (D.C. 1990) (citing *Goto, supra*, 423 A.2d at 925)) (other citation omitted) Laches "is rarely applied [in the zoning context] 'except in the clearest and most compelling circumstances.'" *Id.* (quoting *Wieck v. District of Columbia Bd. of Zoning Adjustment*, 383 A.2d 7, 11 (D.C. 1978) (citation omitted)) While we give deference [*972] to the BZA's findings with respect to laches, [**20] "'whether the facts, taken together, are sufficient to sustain the defense of laches . . . is a question of law,' to be answered *de novo* by the appellate court." *Id.* (quoting *American Univ. Park Citizens Ass'n v. Burka*, 400 A.2d 737, 741 (D.C. 1979) (alterations in the original)).

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

The record before us does not reflect "the clearest and most compelling circumstance[]" requiring the application of the laches doctrine. *Beins, supra*, 572 A.2d at 126. Indeed, we agree with the BZA's conclusion that

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the first element of laches, unreasonable delay, is not present in this case. n8 As "the entire course [**21] of events," *see Goto, supra*, 423 A.2d at 925 n.16, and the BZA factual record in the case show, the BZA properly determined that: "Any delay in filing the appeal was not unreasonable but resulted from the fact that [Mr. Sisson] applied for separate building permits for each component of the construction on his property." Consequently, we affirm the BZA's decision that the doctrine of laches does not apply in this case.

n8 Since the first element of the laches doctrine is not satisfied, we need not address the second.

We have also previously set forth the elements of estoppel, while noting that the doctrine is "not judicially favored," *Wieck, supra*, 383 A.2d at 10 (references and citations omitted), and that its application is "'limited [to] situations when the equities are strongly in favor of the party invoking the doctrine.'" *Id.* (quoting *District of Columbia v. Stewart*, 278 A.2d 117, 119 (D.C. 1971) (citation and footnote omitted)). To make out a case of estoppel Mr. [**22] Sisson must show that: "(1) acting in good faith, (2) on affirmative acts of [the DCRA], (3) [he] made expensive and permanent improvements in reliance thereon, and (4) the equities strongly favor [him]." *Wieck, supra*, 383 A.2d at 11 (referencing *District of Columbia v. Cahill*, 60 App. D.C. 342, 344, 54 F.2d 453, 454-55 (1931)).

On the record before us, we cannot say that Mr. Sisson acted in good faith in presenting the proposed renovations to his property in piecemeal fashion, or in demolishing his old garage and proceeding to construct a new garage without proper permits, or in building a new garage "that was larger than the approved garage addition." Nor can we conclude that Mr. Sisson initially relied on DCRA-issued permits that authorized him to demolish his existing garage and construct a new garage of larger dimensions than those approved for a garage addition. And, the record does not support Mr. Sisson's implicit assertion that the equities strongly favor him in this case. Thus, we see no reason to disturb the BZA's decision not to apply the estoppel doctrine to bar Ms. Crary's appeal. n9

n9 Furthermore, as we indicated in *Goto, supra*, 423 A.2d at 925 n.15, and reiterated in *Rafferty v. District of Columbia Zoning Comm'n*, 583 A.2d 169, 176 (D.C. 1990) (*Rafferty I*), "it is not clear that estoppel will bar a case brought by a neighboring landowner; arguably, that defense may be asserted only against the municipality which rendered the decision on which a party relied." 423 A.2d at 925, n.15 (references omitted).

[**23] [*973]

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

We are satisfied that: (1) the Board's conclusion - that the Zoning Administrator erred by issuing the five permits that are the subject of this case - - is supported by its material findings of fact and [**24] substantial evidence of record, (2) and that its legal conclusion flows rationally from its findings. Not all of Mr. Sisson's permit applications were scrutinized under the WHOD/R-1-A regulations. As the BZA indicated:

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

The BZA also recognized that "[Mr. Sisson's] property is nonconforming because its lot area, lot width, and setbacks are smaller than the minimums prescribed in the WHOD/R-1-A zone, and because its lot occupancy is higher than the prescribed maximum." This meant, as the BZA found, "that the work [**25] performed on [Mr. Sisson's] property increased its nonconforming

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aspect with respect to setbacks and lot occupancy."

Despite these BZA conclusions, Mr. Sisson asserts that the BZA erred in its application of the regulation set forth at 11 DCMR § 2117.8, n10 and in its finding of [*974] fact No. 14. n11 On the record before us, we cannot say that the BZA erroneously applied its regulation by citing subsection (c) of 11 DCMR 2117.8, rather than subsection (b) in accordance with Mr. Sisson's view. Subsection (c) applies to a "driveway . . . which serves more than one (1) parking space" and which involves "two-way circulation." The Zoning Administrator's testimony before the BZA showed clear concern for ingress and egress as well as access to and from a public street or alley through a recorded easement. In addition, the Zoning Administrator recognized that the larger garage would accommodate two cars, and that there would be two-way circulation to and from Mr. Sisson's garage. We defer to an agency's reasonable interpretation of its regulations that is consistent with its governing statute. *See Du Pont Circle Citizens Ass'n, supra*, 431 A.2d at 565. Given the language of [**26] the regulation and the Zoning Administrator's testimony at the BZA hearing, if we decided that subsection (b) of 11 DCMR § 2117.8 applied instead of subsection (c), we would be substituting our judgment for that of the BZA. That we cannot do. *See Gladden, supra*, 659 A.2d at 253.

n10 Section 2117.8 of 11 DCMR provides in pertinent part:

> A driveway which provides access to required parking spaces shall meet the following standards:
>
> . . . .
>
> (b) A driveway serving a one-family dwelling or flat or which otherwise serves only one parking space shall be not less than seven feet (7 ft.) in width;
>
> (c) A driveway serving any use other than a one-family dwelling or flat, or which serves more than (1) parking space shall be as follows:
>
> (1) Not less than twenty-five feet (25 ft.) from a street intersection as measured from the intersection of the curb line extended;
>
> (2) Not less than twelve feet (12 ft.) in width if designed for one-way circulation or fourteen feet (14 ft.) if designed for two-way circulation, and
>
> (3) Not more than twenty-five feet (25 ft.) in width
>
> 11 DCMR 2117.8 (1995) (emphasis added) [**27]

n11 Finding of fact No. 14 stated:

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

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

The Board concludes that the Zoning Administrator erred in issuing the five building permits to [Mr. Sisson]. The Zoning Administrator's decisions were not based on complete and accurate information about [Mr. Sisson's] property, reflecting all existing and planned improvements. The Zoning Administrator also failed to apply the correct zoning classification, which resulted in the issuance of permits that did not conform to applicable zoning provisions, especially the Wesley Heights Overlay District, in several material respects. The violations stemming from erroneously issued permits were compounded in this [**28] case by the fact that some work, with respect to the garage and front porch, was not performed strictly in compliance with the permits

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

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

So ordered.

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Certificate of Service

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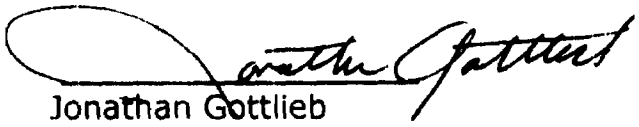
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