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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REPLY BRIEF OF EUGENE AND CAROL LUDWIG
IN SUPPORT OF MOTION TO DISMISS APPEAL

The Appellants' Response to the Motion to Dismiss the Appeal (the "Response") actually serves to highlight the reasons why this appeal should be dismissed. The facts set forth in the Response, as applied to the Zoning Regulations and the applicable case law, confirm that the appeal is indisputably untimely and is otherwise outside the Board's jurisdiction.

A. The Appeal of the 2003 Permits Is Untimely.

In their Response, the Appellants confirm that they knew about the construction long before they filed their appeal and that they objected to the construction at that time. As Appellants themselves describe it:

> Once construction began [in 2003], the Appellants contacted Mr. Ludwig and his agents to express objections to construction that had begun and to look at 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.

(Appellants' Response at p. 5). By their own admission, there is no question that the Appellants watched the construction proceed in 2003, 2004 and 2005, and objected to it while the construction was ongoing, but failed to file an appeal of any of the four permits under which the construction was proceeding. For the better part of two years, and certainly more than 60 days

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prior to filing their appeal, the Appellants were fully aware that construction to which they objected was proceeding.

The BZA's Rules of Procedure are clear on this issue. Section 3112.2 states: "An appeal shall be filed within sixty (60) days from the date the person appealing the administrative decision had notice or knowledge of" the permit issuance. (Emphasis added). Moreover, "[i]f the decision complained of involves the erection [or] construction ... of a structure or part thereof, [then] no appeal shall be filed later than ten (10) days after the date on which the structure or part thereof is under roof." (Emphasis added). 11 DCMR Section 3112.2(a) and (b).

The Appellants knew of the construction in 2003 and watched it proceed until they filed the appeal two years later, and approximately one year after the house was under roof. Based on the Appellants' own statements and the undisputed facts, the Board has no choice but to dismiss the appeal of the 2003 permits pursuant to 11 DCMR Sections 3112.2(a) and (b).

The Appellants attempt to explain away their lack of action by claiming that they were "misled" by the issuance of five separate permits for the project. However, four of these permits were issued between March and July of 2003, allowing construction, inter alia, of the retaining wall, footings and foundation, three-story wood frame house, new driveway, stone retaining walls, bluestone terraces, and tennis court. The last of the four permits was issued on July 1, 2003, and construction proceeded for almost two years. The scope of the project was clear to the Appellants well before June 24, 2005, the date on which this appeal was filed, and only two weeks before the Ludwigs moved in to their new home.

In an attempt to further bolster this weak argument, the Appellants claim they "could not assess the impact of the entire development on them" until after the issuance of the fence permit in 2005. Appellants' argument is factually suspect and legally unsustainable. The

Appellants' argument depends on the conclusion that Appellants (in their own words) stood by and watched the construction of "one of the largest estates recently developed in the District of Columbia" (Response at p. 3) for *two years*, including construction of a three-story "mansion" (id.), plus a tennis court, retaining walls and other structures, but even with all that "extensive activity" (id. at p. 8) over a two-year period, which they complained about on numerous occasions (id. at p. 5), the Appellants could not assess the full impact of this "massive development" (id. at p. 15) on them until June of 2005, when construction was virtually completed, and after the perimeter fence permit was approved. Such a claim strains credibility. Moreover, this claim is nothing more than a failed attempt to divert the Board's attention away from the plain fact that their appeal of the 2003 permits is untimely and should be dismissed.

B. The Board Is Without Jurisdiction to Hear the Appeal of the 2005 Fence Permit.

In their Response, the Appellants fail to acknowledge the plain truth that their appeal of the Fence Permit is in the wrong venue. Their appeal papers claim that the Fence Permit violates the Building Code provisions on fences found in 12 DCMR Sections 3110.3.3 and 3110.1.3. The Board simply does not have jurisdiction over appeals based on the Building Code. There is nothing that the Appellants can do at the Board of Zoning Adjustment to cure this defect in their pleading (other than to withdraw their appeal), and nothing that the Board can do to address the merits of their claim. For the reasons set forth in the Motions to Dismiss filed by Eugene and Carol Ludwig, and by the Department of Consumer and Regulatory Affairs, the appeal of the 2005 Fence Permit should also be dismissed.

C. The Appellants Fail to State a Claim Over Which the Board Has Jurisdiction.

In their Response, the Appellants do not identify any zoning violation or permitting issue of which the Board can take jurisdiction. The bulk of the Response is devoted

to complaints that (a) the Ludwigs misled them about the scope of the project [1]-- not an issue for the BZA to resolve -- or (b) the Ludwigs' Environmental Intake Form was incorrect[2] -- again not an issue for the BZA to resolve. The Ludwigs submit that the Appellants' claims are factually inaccurate; but, even if they were supportable, they do not state claims over which this Board has jurisdiction.

The allegation that the Ludwigs' actions were "misleading" is Appellants' way to try to squeeze their case into the mold of the Sisson case, cited in the Response. This case is nothing like Sisson. In that case, this Board found that the owner of a 1926 house in the Wesley Heights Overlay had constructed additions and improvements in such a way that an observer was not fairly on notice as to the extent of any potential appealable issues regarding zoning. The owner in that case had demolished and constructed improvements before obtaining required

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[1] The fact that the Appellants were ultimately unsatisfied with the outcome of their various discussions with Mr. Ludwig (*see* Response at pp. 4 and 5), even if such allegations are taken as true, does not excuse the Appellants from the obligation to file a timely appeal to the Board if they wanted the Board to consider their concerns. The D.C. Court of Appeals has warned on several occasions that a party who chooses to engage in negotiations or other ways to resolve a dispute based upon the Zoning Regulations does not thereby extend its time for filing an appeal:

> The fact that Waste Management chose to concentrate on avenues that reasonably may have appeared more promising than an appeal does not excuse its delay in noting an appeal. *Cf. Woodley Park Community Ass'n v. District of Columbia Board of Zoning Adjustment*, 490 A.2d 628, 638 (D.C. 1985) (efforts to resolve dispute through negotiations did not excuse delay in filing appeal; appellant "cannot now escape the harsh consequences of its one year delay in appealing because WSC – its adversary in difficult negotiations – was less than fully candid").

Waste Management of Maryland, Inc. v. District of Columbia Board of Zoning Adjustment, 775 A.2d 1117, 1123 (D.C. 2001).

[2] Appellants' references to the Environmental Intake Forms to suggest that there were "misleading" statements is plainly incorrect. The Forms, attached to the Response as Exhibits A and B, address the potential requirement for additional review by DCRA and the potential requirement for an Environmental Impact Screening Form ("EISF") if work beyond the site is anticipated within three years. However, it is important to note several facts: (1) single-family residential projects like this one are categorically exempt from the EISF and EIS requirements pursuant to the Environmental Policy Act Regulations, 20 DCMR Sections 7202.2(c) and 7202.2(k) (*see* Attachment); (2) Appellants have not alleged that they reasonably relied upon the statements in the Forms in deciding not to file a timely appeal regarding zoning, nor could their arguments lend a reasonable person to conclude that their reliance on the statements in the Forms led to their delay in filing this appeal; and (3) even assuming that this project is subject to the EISF and EIS requirements (which it is not) and assuming for argument's sake that the permit processor checked an incorrect box on the Forms, this would not be a Zoning Regulation issue. It would be a DCRA enforcement issue, and would be a harmless error in any event.

permits; had submitted five individual permit applications that incorrectly stated the relevant zone and incorrectly identified the work to be performed; and he did not build in conformance with the issued permits. Because the appellant in that case "alleged violations of the zoning 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 found that the time for filing an appeal was not measured from the date of the issuance of the first permit. (Appeal No. 16405 of Mildred Rodgers Crary, at 5-6, attached to Response at Exhibit C).

Here, by stark contrast, the Appellants' claims of violation relate to the siting of the improvements and the bulk and height of those improvements, all of which were clearly apparent to -- and complained about by -- the Appellants long before they filed an appeal. Moreover, there is no suggestion that the Ludwigs built contrary to their permits or submitted false information in connection with the permits. On the contrary, the Ludwigs hired one of the most renowned architects in the greater Washington area, and a respected local builder, and utilized experienced counsel from before construction began, to make certain that their structure was not only beautiful but also met all rules and regulations of the District of Columbia. The Ludwigs took every conceivable step to make sure that they built in accordance with all applicable requirements of the District.

Moreover, and perhaps more importantly, the Sisson case was decided prior to the Zoning Commission's amendment of 11 DCMR §3112.2 which now provides for a 60-day limit for filing appeals and, in the alternative, an "under roof" rule which requires that an appeal involving the reconstruction, conversion or alteration of a structure must be filed no later than 10 days "after the date on which the structure or part thereof in question is under roof." It is clear

that Appellants here did not meet the current regulations for a timely appeal with regard to the 2003 Permits.

D. The Appellants Misstate the Jurisdictional Issue Before the Board.

Appellants claim that since 11 DCMR §3100.2 provides that the Board "shall also hear and decide appeals" where there is an alleged violation of the Zoning Regulations, the Board must hear and decide the merits of this case. (Response at p. 14). But, as detailed by the Ludwigs and by DCRA in their motions to dismiss, the Court of Appeals and this Board have repeatedly recognized that a timely appeal is a jurisdictional issue. If the appeal is not timely, the Board is without jurisdiction. See Waste Management of Maryland, Inc. v. District of Columbia Board of Zoning Adjustment, 775 A.2d 1117 (D.C. 2001); Goto v. District of Columbia Board of Zoning Adjustment, 423 A.2d 917, 923 (D.C. 1980); Appeal No. 16982 of J. Brendan Herron Jr. and ANC 3F (March 11, 2003). Appellants' failure to meet this basic jurisdictional requirement is not rescued by Section 3100.2's statement regarding the Board's powers.

E. The Public Interest Would Be Served by Dismissal.

The Appellants completely invert where the public policy lies in this case. The clearly-stated policy from the Court of Appeals, the Zoning Commission and this Board is that a party who seeks to challenge issues relating to zoning needs to act promptly after he or she becomes aware of the facts surrounding the challenge. Delayed challenges are unfair to homeowners who invest substantial dollars and time in completing improvements that have been approved by the District. The Ludwigs are prejudiced by the untimely challenge to their home. Delayed challenges also prevent the effective enforcement of the Zoning Regulations if there is a genuine violation of a regulation. If these appellants had a genuine issue regarding the 2003

Permits, their decision to wait for two years to raise it prevented the Board and the District from addressing it while construction was still in progress and any proven violation could be corrected.

If the District of Columbia wants to encourage investment in commerce and development which supports the well being of all citizens in the District, it must not unfairly burden those who live by its rules. If it does unfairly burden such citizens, this will create a disincentive for future investment in the District. Furthermore, if the Board agrees to the Appellants' request in this case to act in violation of its own rules of procedure on timeliness and jurisdiction, it will have gone beyond a society that lives by the rule of law to one that is subject to the whims of any person discontented with his or her own personal circumstance. The Board has consistently upheld the rule of law in the past and should continue to do so in this case.

Moreover, the public interest dictates that appeals should be filed in the proper venue, and if not properly filed, should be summarily dismissed, rather than allowed to needlessly clog an administrative agency's calendar. The Board's calendar is extremely backlogged, and hearing dates are being assigned five or six months after an application or appeal is filed. It makes little sense for the Board to schedule a public hearing on the merits of the appeal of the Fence Permit that was erroneously filed in the wrong venue, and over which the Board has no jurisdiction, when the Board can more appropriately dispose of it in the context of a motion to dismiss.

By dismissing this appeal as requested by the Ludwigs and by DCRA, the Board is upholding the integrity of the Zoning Regulations, the jurisdiction of the Board, and the rule of law. While the Appellants want the Board to "send a message" to other homeowners (Response at p. 16), the real message here is that there is a process for appealing the issuance of permits or

seeking to prevent construction on your neighbor's property which you think is contrary to the law. That process does not include filing an appeal in the wrong venue or waiting for two years until construction is completed, and the family is ready to move in, before filing an appeal.

Respectfully submitted,

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CHAPTER 72 ENVIRONMENTAL POLICY ACT REGULATIONS

7200 GENERAL PROVISIONS

7200.1 Before an agency, board, commission, or authority of the District of Columbia government shall approve any major action, or issue any lease, permit, license, certificate, or other entitlement or permission to act for a proposed major action, the environmental impact of the action must be adequately considered and reviewed by the District government, as provided in these regulations.

7200.2 Agencies, boards, and commissions under the Mayor's authority shall integrate, and agencies, boards and commissions not under the Mayor's authority shall be requested to integrate the Environmental Impact Statement (EIS) process with other planning processes at the earliest stages of their planning for major actions they intend to propose, when the widest range of feasible alternatives is open for consideration, and before there has been any irretrievable commitment of resources, in order to ensure that planning and decisions reflect environmental values, in order to avoid delays later in the process, and to head off potential conflicts.

7201 MAJOR ACTIONS FOR WHICH ENVIRONMENTAL IMPACT SCREENING FORMS ARE REQUIRED

7201.1 An Environmental Impact Screening Form (EISF) shall be prepared for any action that would cost over one million dollars ($1,000,000) based on 1989 dollars adjusted annually according to the Consumer Price Index and that may have a significant impact on the environment.

7201.2 An action costing $1 million or more may have significant impact on the environment and, thus, may be a major action subject to the EISF requirement of § 7201.1 if any of the following conditions are met:

(a) The action might have a significant adverse effect on a rare or endangered species of animal or plant, or the habitat of the species;

(b) The action might violate published national or local standards relating to hazardous waste, solid waste or litter control;

(c) The action might significantly deplete or degrade ground water resources;

(d) The action might significantly interfere with ground water recharge;

(e) The action might induce significant growth or concentration of population;

(e) Any action that reached a critical stage of completion prior to October 18, 1989, and the cost of altering or abandoning the action for environmental reasons outweighs the benefits derived from the action;

(f) Any action of an environmentally protective regulatory nature;

(g) Any action within the Central Employment Area as defined in the Zoning Regulations of the District of Columbia; and

(h) Any action for which a lease, permit, certificate, or any other entitlement or permission to act by a District government agency has been approved before December 31, 1989.

7202.2 In addition to the actions listed in § 7202.1, no agency shall require that an EISF or EIS be prepared for the following classes of actions:

(a) Class 1. Operation, repair, maintenance, or minor alteration of existing public structures, facilities, mechanical equipment, or topographical features, including replacement of roofs, HVAC, electrical, plumbing, elevator, sprinkler or other systems, plus interior work to common areas and individual units, involving negligible or no expansion of use beyond that previously existing;

(b) Class 2. Replacement, renovation, or reconstruction of existing structures and facilities, where the new or renovated structure meets the requirements of the Zoning Regulations, is located on the same site as the structure replaced, renovated, or reconstructed, will have substantially the same purpose and capacity as the structure replaced, renovated, or reconstructed, and will not exceed the density of that structure;

(c) Class 3. Construction and location of limited numbers of small facilities or structures; installation of new equipment in small structures, including replacement of HVAC, electrical, plumbing, elevator, sprinkler or other systems; and the conversion of existing small structures from one use to another where only minor modifications are made in the exterior of the structure. This class includes, but is not limited to:

(1) Single family residences not in conjunction with the building of two or more such units;

(2) Small commercial structures not involving the use of significant amounts of hazardous substances;

(3) Water main, sewage, electrical, and other utility extensions of reasonable length to serve such construction; and

(4) Accessory structures such as garages, patios, swimming pools, and fences;

(d) Class 4. Minor public or private alterations in the condition of land, water, or vegetation which do not involve the removal of mature, healthy trees. This class includes, but is not limited to:

(1) Grading on land with a slope of less than ten percent (10%), except in waterways, wetlands, or officially designated scenic areas;

(2) New gardening, landscaping or planting of trees or other vegetation;

(3) Temporary use of land having negligible permanent effects, such as carnivals, fairs, and sales of Christmas trees; and

(4) The creation of bicycle lanes on existing rights-of-way;

(e) Class 5. Minor alterations in land use limitation in areas with an average slope of less than twenty percent (20%), which do not result in any changes in land use or density. This class includes, but is not limited to:

(1) Minor lot line adjustments, side yard and set back variances; and

(2) Issuance of minor encroachment permits;

(f) Class 6. Actions taken by District agencies as authorized by law or regulation to assure the maintenance, restoration, or enhancement of a natural resource or the environment, where the regulatory process involves procedures for protection of the environment. This includes basic data collection, research, experimental management and resource evaluation activities which do not result in a serious or major disturbance to the environment and activities limited entirely to inspections to check for performance of an operation, or the quality, health or safety of a project;

(g) Class 7. Construction or placement of minor structures accessory to existing commercial, industrial, or institutional facilities. This class includes, but is not limited to:

(1) On-premise signs;

(2) Small parking lots (fewer than 50 vehicles); and

(3) Placement of seasonal or temporary use items such as mobile food units, portable restrooms, or similar items in generally the same locations from time to time in publicly owned parks, stadiums, or other facilities designed for public use;

(h) Class 8. Action in the nature of a response to an emergency as determined by the Mayor;

(i) Class 9. Action in the nature of remedial actions related to leaking underground storage tanks, removal of PCB equipment, hazardous substances, or other environmental contaminants pursuant to all lawfully required and issued permits;

(j) Class 10. Actions related to the removal of asbestos pursuant to all lawfully required and issued permits;

(k) Class 11. Residential structure projects, or portions of projects, within the R-1 through R-5-A zoning districts, as defined under Chapters 2 and 3 of Title 11, DCMR (Zoning);

(l) Class 12. Actions within Development Zones as defined pursuant to the District of Columbia Economic Development Zone Incentives Act of 1988 (D.C. Law 7-177).

7202.3 An applicant may submit an existing environmental description and analysis of a proposed action to the lead agency, which must make a written determination within thirty (30) days of receipt of the document as to whether or not (i) the environmental description and analysis qualifies as a functional equivalent of an EIS, and (ii) the action is exempt under § 7202.1.

7203 DESIGNATION AND RESPONSIBILITIES OF LEAD AND REVIEW AGENCIES

7203.1 The lead agency responsible for the coordination of the preparation and review of the EISF, and the EIS if necessary, shall be as follows:

(a) For any major action proposed by an applicant that would require any license, permit, certificate of occupancy or other approval from a District Agency prior to implementation, the District agency responsible for the first District government authorization of the project shall be the lead agency;

(b) For any major action proposed by the District government, the agency proposing the project shall be the lead agency.

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