

BZA APPEAL NO. 17513**October 10, 2006****PROPERTY OWNER'S SUPPLEMENTAL EXHIBITS**

DATE	DESCRIPTION	SUPP. EXH.
March 17, 2005	OGB Appendix (recommendation against Scheme 1 addition to Gutman Residence)	A
June 24, 2005	Email Correspondence from Sears Architects to H. Gutman confirming transmittal of revised Scheme 2 drawings to Bonnie Hardy of ANC2E	B
July 21, 2005	OGB Appendix recommending approval of revised Scheme 2 addition	C
February 2, 2006	Email correspondence from Sears Architects to H. Gutman regarding confirmation to adjacent neighbor that permit plans approved by DCRA are the same approved by OGB	D
1980	<i>Goto v. D.C. Board of Zoning Adjustment</i> , 423 A.2d 917 (D.C. 1980)	E
October 10, 2006	Property Owner's Synopsis of Relevant BZA Cases on Timeliness	F
July 12, 2006	BZA Decision in Appeal No. 17329 (Georgetown Residence Alliance)	G
June 2, 2005	BZA Decision in Appeal No. 17127 (Nebraska Avenue Neighborhood Association)	H
October 15, 2004	BZA Decision in Appeal No. 17054-A (Henry P. Sailer, et al.)	I
March 23, 2006	BZA Decision in Appeal No. 17411 (Paul Basken)	J

BOARD OF ZONING ADJUSTMENT
District of ColumbiaCASE NO. 17513EXHIBIT NO. 25Board of Zoning Adjustment
District of Columbia
CASE NO. 17513
EXHIBIT NO. 25

Supplemental Exhibit

A

[About](#)

[Federal and District](#)

[Shipstead-Luce](#)

[Old Georgetown](#)

[Meetings](#)

[NCACA](#)

Related Topics

 [Print this page](#)

» [Public Meetings](#)

» [Recent Commission Meetings Documents](#)

» [Meeting Schedules and Submission Deadlines](#)

» [Archived Minutes, Recommendations](#)

Search



» [Non-HTML File Viewers](#)

[CFA Home](#) > [Meetings](#) > [2005](#) > [March](#) > [Old Georgetown Appendix 17 March 2005](#)

Old Georgetown Appendix 17 March 2005

OG Number: O.G. 04-288

HPA Number: HPA 04-475

Address: 1417 28th Street, NW

Owner(s): Scott Hughes -

Description: Replacement storefront bay windows, lower threshold of basement doors, and new revisions to approved design - Permit - revision to permit

RECOMMENDATION: No objection to issuance of permit for proposed revisions to approved permit lower threshold of basement doors, to retain bricked-in openings, for new configuration of rear yard for new brick garden wall with painted sliding wood gate behind; and for new paneled doors as shown in supplemental drawings received and dated 4 November 2004. Although there is no objection to the concept of replacing the windows on the two storefront bays on the facade with 3/4-inch laminated tempered glass and 7/8-inch historic true divided muntin bars, submitted materials were insufficient for permit processing. Submit four copies of proposed windows with new permit application when ready. Note is made that submitted record drawings for storefront bays dated 30 September 2004 are inaccurate in their depiction of existing configuration.

OG Number: O.G. 05-013

HPA Number: HPA 05-018

Address: 3630 Prospect Street, NW

Owner(s): Daniel Pryor -

Description: Metal fence atop existing retaining wall - Permit

RECOMMENDATION: No objection to issuance of permit for proposed metal railing atop existing Keystone retaining wall on rear yard as shown in supplemental drawings received and dated 22 February and 1 March 2005 which indicate a 6-ft high iron fence along the west property line and 48-inch high iron fence on the south and east sides. Note is made that permit application is pending final Zoning review. Any modifications to the approved design as a result of further review in the permit process must be submitted to the Commission for approval.

OG Number: O.G. 05-052

HPA Number: HPA 05-088

Address: 3146 M Street, NW

Owner(s): Lacoste - Retail

Description: Facade illumination, new doors and sign - Permit

RECOMMENDATION: No objection to issuance of permit for proposed alterations to storefront for glass doors and for non-illuminated sign composed of 9-inch high letters reading "Lacoste" and a

logo pin-mounted on existing sign band as shown in supplemental drawings received and dated : March 2005. All other signs, including projecting sign, sign above entry door and sign over second floor windows, were NOT approved and have been deleted from this application. No objection to installation of up-lighting for a trial period. Applicant agreed to remove light source if Commission considers it inappropriate after site visit by the Old Georgetown Board. No objection to removal of existing paired-spot lights and light fixtures. Note is made that permit application is pending final Zoning review. Any modifications to the approved design as a result of further review in the permit process must be submitted to the Commission for approval.

OG Number: O.G. 05-053

HPA Number: HPA 05-089

Address: 1042 Wisconsin Avenue, NW

Owner(s): 1042 Limited Partnership - Prince Café

Description: Sidewalk café - Permit

RECOMMENDATION: No objection to issuance of permit for proposed sidewalk café for Prince Café including 6 tables separated by post and rope stanchions as shown in supplemental drawings received and dated 3 March 2005, PROVIDED it complies with public space regulations for sidewalk cafés. There will be no umbrellas.

OG Number: O.G. 05-073

HPA Number: HPA 05-120

Address: 3345 Reservoir Road, NW

Owner(s): Vinod Gupta -

Description: Alterations to rear, new pergola to replace existing canopy at rear yard - Permit

RECOMMENDATION: No objection to issuance of permit for proposed alterations to side in-fill addition and for garden pergola and new terrace as shown in supplemental drawings received and dated February 2005. Note is made that permit application is pending final Zoning review. Any modifications to the approved design as a result of further review in the permit process must be submitted to the Commission for approval.

OG Number: O.G. 05-093

HPA Number: HPA 05-157

Address: 1510 Dumbarton Rock Court, NW

Owner(s): Olcott Deming -

Description: Replacement vertical board fence finished on both sides - Permit

RECOMMENDATION: Returned without Action. Submitted materials and a site visit of 16 February 2005 indicate that proposed replacement fence will not be visible from public thoroughfare. Refer to the Historic Preservation Review Board.

OG Number: O.G. 05-094

HPA Number: HPA 05-166

Address: 1237 Wisconsin Avenue, NW

Owner(s): East Bank, Inc - Puma

Description: Alterations to storefront for new glass doors and signs - Permit

RECOMMENDATION: No objection to issuance of permit for proposed new all-glass doors on storefront ONLY as shown in supplemental drawings received and dated 11 March 2005, which indicate wood frame doors with glass insert used on secondary doors. No objection to issuance of permit for signs with lettering no larger than 12-inches high reading "Puma" with logo pin-mounted over entrance

(back-lit sign) and over door to second floor, and for signs applied to glass storefronts. Projecting was NOT approved and has been deleted from this application.

OG Number: O.G. 05-095

HPA Number: HPA 05-167

Address: 1242 Potomac Avenue, NW

Owner(s): Harry and Ann Gutman -

Description: Remove rear addition and re-construct two-story rear addition with basement, alterations to rear garden structure and one-story connector to new rear addition, reconstruct front areaway and steps to basement entrance. - Concept

RECOMMENDATION: Recommend **AGAINST** concept design for proposed removal of rear addition chimney, for new two-story addition at rear and for one-story connector to carriage house at rear property, all of which would have an adverse impact on the historic house and is inappropriate to historic district. No objection to the general concept of introducing French doors at carriage house.

OG Number: O.G. 05-096

HPA Number: HPA N/A

Address: 3300 Whitehaven Street, NW

Owner(s): Georgetown University Facilities - Office building

Description: Replacement front doors - Permit

RECOMMENDATION: No objection to issuance of permit for proposed alterations to front entrance of the Milton Harris Building.

OG Number: O.G. 05-097

HPA Number: HPA 05-170

Address: 3100 Dumbarton Street, NW

Owner(s): Marc Teren -

Description: Two-story rear porch addition and alterations - Permit

RECOMMENDATION: No objection to issuance of permit for proposed alterations and addition of two-story rear porch as shown in supplemental drawings received and dated 16 March 2005 which include retention of stucco finish if repair of brick wall is not possible, and 12-inch columns. Working drawings conform to recommendations given during concept review. See previous Recommendation (O.G. 008). Note is made that permit application is pending final Zoning review. Any modifications to the approved design as a result of further review in the permit process must be submitted to the Commission for approval.

OG Number: O.G. 05-098

HPA Number: HPA 05-171

Address: 3048 _ R Street, NW

Owner(s): DC Public Schools - Jackson School

Description: Roof replacement and repair - Permit

RECOMMENDATION: No objection to issuance of permit for proposed repair and replacement of roof salvaging and re-using existing Buckingham slate. Where needed, replacement slate will be a replacement-in-kind to match existing.

OG Number: O.G. 05-101

HPA Number: HPA 05-174

Supplemental Exhibit

B

Brown, M Carolyn (WAS - X75990)

From: Sears Architects [searsarchitects@erols.com]
Sent: Friday, June 24, 2005 12:04 PM
To: Gutman, Harry L
Cc: Brown, M Carolyn (WAS - X75990)
Subject: Re: 1242 Potomac St. Details

Hank - in reply:

1. I have sent a set of the drawings to Bonnie Hardy, and explained the revisions to her. I told her we would not attend the meeting.
2. Yes.
3. I guess we should confirm with Carolyn, but I have never attended a formal F.A.C. hearing after the O.G.B. approval. It's my understanding that this is simply a formality, and there is no need to attend? I will contact John to find out about third-party review.

Thanks. Amy

----- Original Message -----

From: "Gutman, Harry L" <hgutman@kpmg.com>
To: <searsarchitects@erols.com>
Cc: <carolyn.brown@hklaw.com>; <hankgutman@aol.com>
Sent: Friday, June 24, 2005 11:35 AM
Subject: 1242 Potomac St. Details

Amy,

Carolyn and I spoke this morning and the two of you can coordinate the following:

- (1) ANC--Why don't you call Bonnie Hardy and tell her that the plans are simply refinements requested by the OGB and that we will not be at the meeting to discuss them.
- (2) OGB--You and Carolyn will attend the 7/7 meeting--and please leave me a voice or mail after letting us know what happened.
- (3) Next steps--I understand that after OGB concept approval the next step is formal Commission on Fine Arts approval on July 21. We'll be back, but want to make sure that occurs. Does it make sense for you to attend the meeting? Then, I understand a formal approval letter will come to you after which we can contact whomever we select to review the drawings. Do you know who John will be using? On this time frame it looks as if early August will be when we get started on that.

June 2005
ANC Mtg
(for July OGB)

10/5/2006

Supplemental Exhibit

C

Related Topics

 [Print this page](#)

» [Public Meetings](#)

» [Recent Commission Meetings Documents](#)

» [Meeting Schedules and Submission Deadlines](#)

» [Archived Minutes, Recommendations](#)

Search



» [Non-HTML File Viewers](#)

[CFA Home](#) > [Meetings](#) > [2005](#) > [July](#) > [Old Georgetown Appendix 21 July 2005](#)

Old Georgetown Appendix 21 July 2005

OG Number: O.G. 05-160

HPA Number: HPA 05-261

Address: 3108 M Street, NW

Owner(s): Peter Nee - P & C Art Gallery

Description: Addition of second floor at rear and alterations - Concept

RECOMMENDATION: No objection to general concept design for proposed addition to rear at second floor level as shown in supplemental drawings received and dated 24 June 2005. File new submission of working drawings, including dimensions, details, material samples and additional information in context with adjacent properties, with permit application for review by the Commission when ready.

OG Number: O.G. 05-167

HPA Number: HPA 05-269

Address: 3051 Avon Lane, NW

Owner(s): Joseph Stettinius -

Description: One and two story additions to front and side yard; also existing pool house, rear gates and pergola - Concept

RECOMMENDATION: No objection to general concept for the proposed one-story and two-story additions to front and side yard of existing house as shown in supplemental drawings received and dated 7 July 2005, and for existing pool house, trellis, rear porch and entrance gates with paved which were completed without review or permit. File new submission of working drawings, including dimensions and details, and material samples with permit application for review by the Commission when ready.

OG Number: O.G. 05-180

HPA Number: HPA 05-310

Address: 3256 Prospect Street, NW

Owner(s): Davidson Strategy Partners LLC -

Description: Addition at second floor level, replacement windows - Concept

RECOMMENDATION: No objection to concept design for proposed alterations, including rear second floor level and window replacements as shown in supplemental drawings received and dated 29 June 2005. File new submission of working drawings, including dimensions and details, with permit application for review by the Commission when ready.

OG Number: O.G. 05-182

HPA Number: HPA 05-312

Address: 1242 Potomac Street, NW

Owner(s): Harry and Anne Gutman -

Description: Remove rear addition and re-construct two-story rear addition with basement, alterations to side window openings - Concept

RECOMMENDATION: No objection to concept design for proposed two-story rear addition as shown in supplemental drawings received and dated 24 June 2005. Recommend further study to lower eave height to head of windows on south facade. File new submission of working drawings, including dimensions and details, with permit application for review by the Commission when ready.

OG Number: O.G. 05-183

HPA Number: HPA 05-313

Address: 1242 Potomac Street, NW

Owner(s): Harry and Anne Gutman -

Description: Alterations to rear carriage house, reconstruct front areaway and steps to basement entrance - Permit

RECOMMENDATION: No objection to issuance of permit for proposed alterations to rear carriage house and rear yard, for reconstruction of front areaway and steps to basement entrance, and for new fence at rear property line and metal picket fence in front as shown in supplemental drawings received and dated 13 July 2005. Working drawings conform to approved concept. See previous Recommendation (O.G. 05-095).

OG Number: O.G. 05-184

HPA Number: HPA 05-314

Address: 3700 O Street, NW

Owner(s): Georgetown University - White Gravenor Building

Description: Replacement windows and restoration - Permit

RECOMMENDATION: No objection to issuance of permit for proposed replacement of double hung windows on rear facades of the White Gravenor Building PROVIDED depth of paning is reduced, particularly over sill, and for restoration of existing leaded glass windows on South facade over the quadrangle. Recommend further study of replacement casement window with integral muntin and installation of a mock-up sample for review by the Commission, prior to issuance of permit for their replacement or repair. Note is made that permit application is pending final Zoning review. Any modifications to the approved design as a result of further review in the permit process must be submitted to the Commission for approval.

OG Number: O.G. 05-194

HPA Number: HPA 05-324

Address: 3206 N Street, NW

Owner(s): Capital Restaurant Concepts - Paul Cohn / Neyla

Description: Two-story rear addition within court - Permit

RECOMMENDATION: No objection to issuance of permit for proposed two-story in-fill addition at courtyard. Working drawings conform to approved concept. See previous Recommendation (O.G. 05-158). Applicant agreed to bring other aspects of the project into compliance. See case O.G. 05-2

OG Number: O.G. 05-195

HPA Number: HPA 05-325

Address: 1267 Wisconsin Avenue, NW

Supplemental Exhibit

D

Brown, M Carolyn (WAS - X75990)

From: Sears Architects [searsarchitects@erols.com]
Sent: Thursday, February 02, 2006 11:10 AM
To: Gutman, Harry L; agutman@nps-dc.org
Cc: Hankgutman@aol.com; whayne.quin@hklaw.com; carolyn.brown@hklaw.com
Subject: Re: Cooley

Good morning Hank and Anne.

Just for your information, I got a call from Steve Cooley yesterday. He was perfectly civil, and asked if the plans that have been approved are the last set we presented to the OGB and if there was some way he could get access to them. I told him that, yes, they are the last presented to OGB and that they are public record and on file at DCRA.

That's it. Amy

Supplemental Exhibit

E

**TAIKO GOTO, PETITIONER, v. DISTRICT OF COLUMBIA BOARD OF
ZONING ADJUSTMENT, RESPONDENT. MILTON M. GOTTESMAN,
CITIZENS ASSOCIATION OF GEORGETOWN, INTERVENORS**

No. 13491

District of Columbia Court of Appeals

423 A.2d 917; 1980 D.C. App. LEXIS 402

April 26, 1979, Argued

November 5, 1980, Decided

PRIOR HISTORY:

[**1]

Petition for Review of a Decision of the District of Columbia Board of Zoning Adjustment

Zoning Administrator that Goto could build a kiln at the rear of her pottery shop without a permit. She contends the Board should have held that principles of laches and estoppel barred the Citizens Association of Georgetown (CAG) and Milton Gottesman from appealing the Zoning Administrator's decision to the BZA. [**2] We agree as to laches and reverse. n1

COUNSEL:

Wayne S. Quin, with whom Norman M. Glasgow and Norman M. Glasgow, Jr. were on the briefs, for petitioner.

Leo N. Gorman, Assistant Corporation Counsel, with whom Louis P. Robbins, Acting Corporation Counsel at the time the brief was filed, and Richard W. Barton, Deputy Corporation Counsel at the time the brief was filed, were on the brief, for respondent.

Milton M. Gottesman, with whom Courts Oulahan was on the brief, for intervenors.

n1 We accordingly need not deal with Goto's contention that the Board erred in concluding that she required a permit because the kiln is a "building" or building addition and because a gas pipe connecting the kiln to the shop building constitutes a "communication" between buildings within the meaning of District of Columbia Zoning Regulations § 1202 (1979).

I.

JUDGES:

Kelly, Gallagher, and Ferren, Associate Judges. Opinion for the court by Associate Judge Ferren. Associate Judge Kelly concurs in part and dissents in part.

Since 1974, Taiko Goto has leased a store at 2605 P Street, N.W., in Georgetown, for use as a ceramics workshop. The area is zoned C-1, which permits "neighborhood shopping." District of Columbia Zoning Regulations § 2101.14 (1979). In early 1974, Goto wished to build a gas-fired kiln in the [*919] rear yard of her shop. She consulted with Mr. Krassensky, Chief of the Mechanical Section, Engineering Branch, Bureau of Building, Housing and Zoning (now a branch of the Building Division of the Building and Zoning Regulation Administration). n2 Krassensky told Goto that she could build the kiln without a permit [**3] if the kiln were set back from the walls of the existing structure and used

OPINIONBY:

FERREN

OPINION:

[*918] Petitioner Taiko Goto seeks review of an order of the Board of Zoning Adjustment (the Board or BZA) which reversed an earlier determination by the

less gas than a residence. Goto began constructing the kiln in November 1974.

n2 Effective July 3, 1975, the Department of Housing and Community Development of the District of Columbia government employed all the officials who were involved in the controversy concerning Goto's kiln. The Corporation Counsel's office provided the court with organizational charts showing the hierarchy of the officials involved in this case as follows:

DEPARTMENT OF HOUSING AND
COMMUNITY DEVELOPMENT

Director
Building and Zoning Regulation
Administration
Administrator -- *Dripps*
Building Division
Engineering Branch Chief -- *Osborg*
Mechanical Section Chief -- *Krassensky*
Zoning Division Administrator -- *Fahey*
Zoning Review Branch Chief -- *Bottner*

Soon thereafter, Milton Gottesman, the owner of the adjacent property to the rear of Goto's shop, and Eva Hinton, Chairperson of CAG's Committee on Zoning and Planning, complained of the [**4] kiln to James J. Fahey, the Zoning Administrator. See note 2 *supra*. Fahey investigated the complaint and orally advised Goto to stop construction until she obtained a permit, and to submit plans for the kiln to his office. Goto submitted plans showing the kiln attached to the main building. Joseph Bottner, Chief of the Zoning Review Branch (under Fahey), see note 2 *supra*, advised her that the BZA would have to approve construction of the kiln.

Goto amended the plans to show the kiln as a separate structure and submitted them next to Howard A. Osborg, Chief of the Engineering Branch, Inspection (now Building) Division. See note 2 *supra*. Osborg determined that a permit was not required for the kiln and made a notation to that effect, dated April 30, 1975, on a letter to the owner of the property leased by Goto for her shop. Fahey, the Zoning Administrator, appealed Osborg's decision to Fahey's superior, William Dripps, Chief of the Bureau of Building, Housing and Zoning (now Building and Zoning Regulation Administration). See note 2 *supra*. In May 1975, Dripps sustained

Osborg's determination that Goto could construct the kiln without a permit. Gottesman [**5] and Hinton had notice of this decision by June 1975. Goto completed the kiln and began to operate it by August 1975. n3

n3 Goto initially used propane gas to fire the kiln. By February 1976, after public hearings, the Public Service Commission granted Goto permission to use natural gas (this service was not automatic for new hookups). Goto obtained natural gas service by April 1976.

On November 18, 1975, Gottesman and Hinton met with Dripps, who reiterated his opinion that the kiln required no permit. At Hinton's request, Fahey wrote a letter on January 6, 1976, reflecting Dripps' position. n4 Hinton (on behalf of CAG) filed an appeal with the BZA on March 4, 1976, contesting the decision in Fahey's letter. Gottesman intervened as an appellant at the end of the first public hearing on July 21, 1976.

n4 Fahey's letter of January 6, 1976, informed Hinton:

This office has reviewed the kiln located at the rear of 2605 P Street, N.W. It has been determined that the kiln is not a building, but an accessory structure and, therefore permitted to be located within the rear yard.

[**6]

Goto did not learn of the appeal until May 25, 1976, when she heard of it from the owner of her leased property, who had received notice, and from her attorney, who read about the appeal on a BZA agenda. Goto's attorney made a motion to dismiss the BZA proceedings for lack of jurisdiction, [*920] as well as on grounds that laches barred CAG's appeal and that Goto's reliance on the prior decisions of District officials estopped the Board from requiring a permit. More specifically, Goto contended that the Board lacked jurisdiction to hear the appeal because (1) it was not timely filed, (2) CAG did not comply with the rules of the Board regarding authorization of the appeal, and (3) CAG was not a "person aggrieved" by Fahey's January 6 decision letter, within the meaning of the District of Columbia Zoning Act, D.C. Code 1973, § 5-420, and Zoning Regulations § 8102.1 (1979). Before the first public hearing, the Board denied the motion as to the jurisdictional grounds. The Board then considered Goto's kiln on three days of hearings between July 1976 and April 1977. In its final order of March 28, 1978, the

Board reaffirmed its jurisdictional ruling, rejected the defenses of [**7] laches and estoppel, and concluded that a permit was required for construction of the kiln. Goto petitions for review of the Board's decision. See D.C. Code 1973, § § 11-722, 17-303; *id.* 1978 Supp., § 1-1510.

II.

We first consider the three jurisdictional issues which Goto raised initially in her motion to dismiss the proceedings before the Board.

A. Goto contended that Hinton lacked authority to bring an appeal on behalf of CAG because the organization had not authorized her to do so. Hinton failed to attach to the appeal form a letter from CAG authorizing Hinton to act on its behalf, although the form directed: "If appeal is filed by agent of the appellant, Form 1 (Notice of appeal) shall be accompanied by a letter signed by the appellant authorizing the agent to act on his behalf in this appeal." Goto argues that this deficiency in the filing of the appeal deprived the Board of jurisdiction.

We cannot agree. Although the Zoning Regulations dictate that appeal forms must be complete at the time of filing, n5 the error here was not substantial. On February 26, 1976, before the appeal was filed, CAG, by resolution, authorized Hinton to act in its behalf in filing an [**8] appeal against *Dripps'* oral decision to allow construction of the kiln. Because it was *Fahey's* written decision (reflecting *Dripps'* view) that CAG apparently wished to contest, on June 21, 1976, CAG ratified Hinton's filing of the appeal against *Fahey*. This action eliminated any doubt that Hinton had authority to act as CAG's agent. The purpose of the BZA's authorization-letter requirement -- *i.e.*, that the Board should not be party to unauthorized appeals -- was adequately fulfilled in this case.

n5 The Zoning Regulations provide:

Each appeal or application to the Board shall be made on the appropriate form provided by the Board and all information required by such form shall be furnished by the appellant or applicant at the time of filing the appeal.

District of Columbia Zoning Regulations § 8203.1 (1979) (emphasis in original).

B. Goto also contended that CAG was not a "person aggrieved" within the meaning of the Zoning Act n6 and Regulations n7 and thus was not entitled to [**9] appeal [**921] *Fahey's* decision that no permit was required to

build the kiln. The Board rejected her argument, stating in its final order:

The Association and Mr. Gottesman are both "persons aggrieved" within the meaning of the Zoning Regulations. Mr. Gottesman lives immediately behind the subject site. The Association represents residents of both the immediate and the general area, and has had a long standing history of appearing in zoning matters before the Board.

We need not deal with the issue of the CAG's standing as a "person aggrieved" before the Board n8 because Gottesman, the intervenor-appellant, had standing to support the appeal. n9

n6 The statute provides:

Appeals to the Board of Adjustment may be taken by any person aggrieved, or organization authorized to represent such person, or by any officer or department of the government of the District of Columbia or the Federal Government affected, by any decision of the inspector of buildings granting or refusing a building permit or granting or withholding a certificate of occupancy, or any other administrative decision based in whole or part upon any zoning regulation or map adopted under sections 5-413 to 5-428.

D.C. Code 1973, § 5-420. [**10]

n7 The regulations track the language of the statute:

The Zoning Act of June 20, 1938 (52 Stat. 797), as amended, provides that appeals to the Board of Zoning Adjustment may be taken by any person aggrieved, or organization authorized to represent such person, or by any officer or department of the government of the District of Columbia or the Federal Government affected, by any decision of an administrative officer granting or refusing a building permit or granting or withholding a certificate of occupancy or any other administrative decision based [in] whole or part upon any zoning regulations or zoning maps adopted pursuant to the Zoning Act.

District of Columbia Zoning Regulations § 8102.1 (1979).

n8 We do not reach the question -- addressed in Judge Kelly's opinion, *post* slip op. at 27-34 --

concerning the breadth of the "person aggrieved" requirement in the zoning context. As set forth in notes 6 and 7 *supra*, the Zoning Act and Regulations permit only a "person aggrieved" to appeal a decision of a zoning administrator to the BZA. Cf. *DeLevey v. District of Columbia Rental Accommodations Commission*, D.C.App., 411 A.2d 354, 359 (1980) (regulation permitting appeal from Rental Accommodations Office to Commission by "any person adversely affected" exceeds statutory authorization of appeal by "aggrieved party"). Because we conclude that Gottesman had standing to appeal to the BZA, we need not determine whether the "person aggrieved" language of the zoning laws is broad enough to allow appeal of a zoning decision to the BZA by CAG, a neighborhood organization, absent an allegation of specific injury to its members. We note that the issue of standing to appeal an administrative decision to higher administrative authority is primarily one of statutory construction. See *id.* 411 A.2d at 358-60. Administrative appeals do not necessarily depend on the elements of standing that judicial review would require. See 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.08, at 239-40 (1958); 3 A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 37.03, at 37-40 & n.2, 37-49 (4th ed.) (April 1979).

For completeness, we note that the question of CAG's standing to appeal to the BZA is conceptually separate from the question of its standing to petition this court for review of a BZA decision adverse to its interests. If, for example, an agency imposes sanctions on a person not party to a complaint, that person may petition for review here in spite of -- indeed because of -- the absence below. See *Ammerman v. District of Columbia Rental Accommodations Commission*, D.C.App., 375 A.2d 1060, 1063 (1977). Nonetheless, when a person has the opportunity to present a complaint to an agency having jurisdiction, the failure to do so may preclude a petition for review of agency action by the court. See *DeLevey*, *supra* at 358. We note, finally, that when agency action in other contexts has adversely affected CAG's interests, this court has entertained CAG's petition for review. See *Citizens Ass'n of Georgetown v. Simonson*, 131 U.S. App. D.C. 152, 153, 403 F.2d 175, 176 (1968) (per curiam), cert. denied, 394 U.S. 975, 22 L. Ed. 2d 755, 89 S. Ct. 1454 (1969) (Congressional direction to Alcoholic Beverage Control Board to consider "the wishes of the persons residing or owning property in the

neighborhood" in issuing licenses and CAG's allegation that many members reside or own property within neighborhood establishes nexus between plaintiff's interests and adverse action of defendants required to support judicial review of relicensing of saloon); *Citizens Ass'n of Georgetown v. District of Columbia Alcoholic Beverage Control Bd.*, D.C.App., 288 A.2d 666, 669 (1972) (CAG has standing to seek D.C. Court of Appeals review under § 1-1510 of issuance of liquor license) (citing *Simonson*, *supra*). See generally *Basiliko v. Government of the District of Columbia*, D.C. App., 283 A.2d 816 (1971); K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § § 22.00-21 (1976 & Supp. 1980). See also French, *Broadened Concepts of Standing in the Local District of Columbia Courts*, 23 How. L.J. 255 (1980). [**11]

n9 The Zoning Regulations contain no provision for intervention. The Board presumably allowed intervention pursuant to its Supplemental Rules of Practice and Procedure, which provide:

At the time of the hearing on the appeal, the Board may in its discretion and for good cause shown, permit interested persons to intervene in the appeal for such general or limited purpose as the Board may specify.

Supplemental Rules of Practice and Procedure Before the Board of Zoning Adjustment, 22 D.C.R.R. § 2.4 (1972).

The cases cited in the text below generally construe FED. R. CIV. P. 24, which regulates intervention in federal courts:

"Ordinary interveners [in administrative proceedings], as distinguished from public interest ones, are treated about the way interveners in a civil action in a federal court are treated." K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, *supra* § 8.11, at 293.

[*922] As a rule, an intervenor joins a preexisting dispute and cannot cure a jurisdictional defect in the original case. Intervention ordinarily will be denied if the intervenor is the only party [**12] who fulfills jurisdictional prerequisites. See, e.g., *McClune v. Shamah*, 593 F.2d 482, 486 (3d Cir. 1979) (district court properly denied motion of limited partnership to intervene in suit by limited partners when original plaintiffs lacked standing to assert claims); *Gebhard v. GAF Corp.*, 59 F.R.D. 504, 507-08 (D.D.C. 1973)

(motion of employee to intervene in age discrimination suit by fellow employees denied when original plaintiffs failed to satisfy jurisdictional prerequisite of filing timely notice with EEOC); cf. *Lidie v. California*, 478 F.2d 552, 555 (9th Cir. 1973) (motion of food stamp applicants to add other plaintiffs properly denied when original plaintiffs were not qualified to represent class). In other words, an intervenor cannot come into a case that is not really there.

The courts, however, have established a narrow exception to this rule. In order to avoid excessive technicality, expense, and delay, a court in limited circumstances may treat an intervenor's claim as a separate action and decide the matter, while dismissing the original action. A court, accordingly, may invoke this exception only if there is an independent jurisdictional basis for [**13] the intervenor's claim and failure to adjudicate the claim would result in unnecessary delay. See, e.g., *Miller & Miller Auctioneers, Inc. v. G.W. Murphy Industries, Inc.*, 472 F.2d 893, 895-96 (10th Cir. 1973) (district court lacked interpleader jurisdiction over original defendant but still had jurisdiction to award judgment to intervenor-defendant); *Atkins v. State Board of Education*, 418 F.2d 874, 876 (4th Cir. 1969) (per curiam) (original plaintiff failed to show standing to bring desegregation suit; case remanded so that parents of schoolchildren could intervene); *Fuller v. Volk*, 351 F.2d 323, 328-29 (3d Cir. 1965) (district court lacked jurisdiction over original plaintiffs; case remanded to determine whether court had independent basis for jurisdiction over intervenor-plaintiffs); *Hunt Tool Co. v. Moore, Inc.*, 212 F.2d 685, 688 (5th Cir. 1954) (permissive intervention with independent jurisdictional grounds survives dismissal of original suit); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1920, at 613 (1972).

We are persuaded that Gottesman's intervention falls within this exception. First, because Gottesman's property adjoined Goto's, the Board [**14] had a basis for jurisdiction over Gottesman's claim independent of its jurisdiction over CAG's appeal. Generally, persons wishing to contest zoning determinations must demonstrate some damage -- damage greater than that suffered by the general public -- to satisfy the "person aggrieved" requirement. See 3 A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 37.03, at 37-52 & n.35 (4th ed.) (April 1979). Members of the Board, however, apparently assumed that, as the adjoining property owner, Gottesman did not have to claim any special damage to intervene in this case. n10 We agree. A property owner has a sufficient interest in the zoning of adjoining property to permit an appeal on the basis of that interest alone, without [**923] additional allegations

of interest or injury. See *Weiner v. City of Los Angeles*, 68 Cal.2d 697, 706, 441 P.2d 293, 300, 68 Cal. Rptr. 733, 740 (1968) (en banc); *Gnau v. Seidel*, 25 Md. App. 16, 25-26, 332 A.2d 739, 744-45 (Ci. Spec. App. 1975); 3 A. RATHKOPF, *supra* § 37.03, at 37-46 to -47; Comment, *Standing to Appeal Zoning Determinations: The "Aggrieved Person" Requirement*, 64 MICH. L. REV. 1070, 1079 & n.63 (1966). Accordingly, any [**15] defect in CAG's jurisdictional assertions, see note 8 *supra*, does not apply to Gottesman.

n10 The following colloquy occurred at the end of the July 21, 1976, hearing:

MR. HARPS [of the Board]: That will be for my file. Anything I request you must also send to Mr. Gottesman and Mrs. Hinton.

MR. QUIN [Goto's attorney]: There is only one party here and you are identifying them both?

MR. HARPS: Mr. Gottesman is the man next door and I cannot eliminate him from this case. He is the man next door.

MR. QUIN: He did not take the appeal.

MR. HARPS: You cannot get any closer.

MR. HATTON: The Board will determine who are the parties.

MS. CUMMINGS [of the Board]: He can be made a party.

MR. GOTTESMAN: I can pay the fee and become a party. I move to intervene as a party.

MR. HARPS: Granted. I do not think the Board will reverse me on that.

Second, failure to adjudicate Gottesman's claim would result in unnecessary delay in the resolution of this case. In reliance on advice of Building Division [**16] officials, Goto began building her kiln in November 1974. She completed and began operating it in August 1975, five years ago. CAG instituted its appeal in March 1976, and Gottesman intervened in July of that year. The Board issued its final order on March 28, 1978. To dismiss the case for lack of jurisdiction at this late stage would only further protract this lengthy proceeding and disserve the interests of justice.

Third, permitting the case to proceed on the strength of Gottesman's standing does not prejudice any party. See *United States Steel Corp. v. EPA*, 614 F.2d 843, 846 & n.4 (3d Cir. 1979) (intervenor-plaintiff permitted to proceed after dismissal of original plaintiff when

defendant on notice of intervenor's claims); *Atkins, supra* at 876 (case remanded to permit intervention by new plaintiffs when change would not cause prejudice). Gottesman has been involved in a timely fashion. See note 10 *supra*. As an immediate neighbor, he would be a proper appellant before the Board. Furthermore, the interests of Gottesman and CAG have been closely identified with each other throughout this proceeding. Gottesman testified as a witness for CAG before he intervened; [**17] Gottesman and CAG filed a single brief in this court. In these circumstances, no party can claim lack of notice of Gottesman's participation or claims.

Finally, no evidence of record suggests that Gottesman intervened in order to save the Board's jurisdiction, although in retrospect his entry may have had that effect. See note 8 *supra*. Compare *United States Steel Co., supra* at 846 (intervention after dismissal of original plaintiff permitted when intervenor was attempting only to protect own interests, not to cure jurisdictional defect) with *McClune, supra* at 486 (intervention properly denied when directed toward forestalling defendants' argument that original plaintiffs lacked standing to assert certain claims). The parties appear to have assumed CAG's standing. Gottesman has participated in this proceeding from the beginning. There is no indication that this case presents an effort to create sham jurisdiction.

We accordingly treat CAG's pleadings as those of Gottesman and conclude that the Board had jurisdiction to consider the appeal.

C. Finally, there is the question whether CAG's appeal was timely filed. The question of timeliness is jurisdictional; if the [**18] appeal was not timely filed, the Board was without power to consider it. See *Bertrand v. Zoning Board of Review*, 99 R.I. 329, 331-32, 207 A.2d 604, 605 (1965).

By rule, the Board requires appeals to be filed in merely a "timely" manner. n11 When an administrative agency has not adopted a specific time limit on appeals, a reviewing court should apply a standard of reasonableness. n12 See *State ex rel. Housing Authority v. Wind*, 337 S.W.2d 554, 558 (Mo. Ct. App. 1960); *Cave v. Zoning Board of Appeals*, 49 A.D.2d 228, 231, 373 N.Y.S.2d 932, 935 (App. Div. 1975).

n11 The BZA's Supplemental Rules of Practice and Procedure provide in part:

Any person aggrieved by any order, requirement, decision, determination, or refusal made by any administrative officer or body ... in the

administration or enforcement of the Zoning Regulations, may file a *timely* appeal with the Board

Supplemental Rules of Practice and Procedure Before the Board of Zoning Adjustment, 22 DCRR § 2.21 (1972) (emphasis added).

n12 We agree, however, with cases and commentators that a specific time limit on appeals would serve the salutary purpose of increasing certainty and predictability for all parties to Board proceedings. See *Keating v. Zoning Bd. of Appeals*, 325 A.2d 521, 523-25 (Me. 1974); *Ehrenberg v. Persons*, 8 A.D.2d 18, 21, 185 N.Y.S.2d 369, 372 (App. Div. 1959) (per curiam); 3 A. RATHKOPF, *supra* § 37.04, at 37-53 to -54.

[**19]

In considering whether CAG's appeal was timely filed, the Board began to run the clock with Fahey's letter of January 6, 1976, although CAG had oral notice of that decision six months earlier. In its final order, the BZA concluded: ["The] written ruling dated January 6, 1976 was the first action which could be appealed to the Board." The BZA cites nothing in its order indicating that appeal lies only from a written decision, nor do the regulations explicitly establish such a requirement. According to the Zoning Act and Regulations, an appeal will lie from "any decision of an administrative officer granting or refusing a building permit or granting or withholding a certificate of occupancy or any other administrative decision based [in] whole or part upon any zoning regulations or zoning maps adopted pursuant to the Zoning Act." District of Columbia Zoning Regulations § 8102.1 (1979); see D.C. Code 1973, § 5-420; notes 6-7 *supra*. In similar circumstances, courts in other jurisdictions have concluded that a verbal decision is an appealable order which begins the running of the time for appeal. See *State ex rel. Beacon Court Inc. v. Wind*, 309 S.W.2d 663, 665-66 (Mo. [**20] Ct. App. 1958); *Hunter v. Board of Appeals*, 4 A.D.2d 961, 962, 168 N.Y.S.2d 148, 150-51 (App. Div. 1957) (mem.).

We conclude, however, that we cannot appropriately overrule the Board's construction of the Act and Regulation. Administrative determinations regarding an agency's internal procedures are entitled to due respect and should not be reversed unless "clearly wrong." *Capitol Hill Restoration Society v. Zoning Commission*, D.C.App., 380 A.2d 174, 181-82 (1977), overruled on other grounds, *Citizens Association of Georgetown v. Zoning Commission*, D.C.App., 392 A.2d 1027 (1978) (en banc); see *Leefer v. Administrator, National*

Aeronautics & Space Administration, 177 U.S. App. D.C. 62, 66, 543 F.2d 209, 213 (1976) (per curiam) (agency interpretation of its regulations honored unless "plainly erroneous or inconsistent with the regulations") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 89 L. Ed. 1700, 65 S. Ct. 1215 (1945)). Applying that test, we conclude it was not clearly wrong for the Board to calculate timeliness of CAG's appeal by reference to the written order; thus, we defer to that interpretation. See *Gueory v. Hampton*, 167 U.S. App. [**21] D.C. 1, 4-5, 510 F.2d 1222, 1225-26 (1974); *Wasserman v. Udall*, 234 F. Supp. 651, 654 (D.D.C. 1964). n13 Our deference is reinforced by our concern that we cannot foresee how different interpretation of the Act and Regulation, linking timeliness of an appeal to oral notice of a decision, would affect how the BZA functions in future cases. See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 674-79, 94 L. Ed. 1194, 70 S. Ct. 876 (1950). n14

n13 Cf. *People's Counsel v. Public Serv. Comm'n*, D.C.App., 414 A.2d 520 (1980) (per curiam). There we held that the time for filing an appeal from a decision of the Public Service Commission runs from the release of the printed copy of the decision rather than from a verbal announcement at a "sunshine hearing." *Id.* at 521. In *People's Counsel*, the Commission had offered no interpretation of the statutory terms at issue, leaving the question to this court in the first instance. *Id.* In that case, we accordingly were required to construe a statute, performing a task more appropriate to a court than an agency, and our construction did not interrupt the prior practice of the agency. [**22]

n14 We should not be understood, however, to hold that the BZA *must* interpret timeliness by reference to a written decision within the Department of Housing and Community Development.

Given that calculation of the timeliness of CAG's appeal began with the January 6 Fahey letter, the Board reasonably concluded that the appeal two months later was timely. See *Keating v. Zoning Board of Appeals*, 325 A.2d 521, 524-25 & n.5 (Me. 1974) (60 days is a reasonable appeal period). We cannot hold this conclusion "arbitrary, capricious, an abuse of discretion, [**925] or otherwise not in accordance with law." D.C. Code 1978 Supp., § 1-1510 (3)(A). We conclude that the Board had jurisdiction.

III.

Goto claims that the Board is estopped from enforcing the Zoning Regulations against her because she relied to her detriment on the assurances of District officials that the kiln could be constructed without a permit. She also contends that the claim of Gottesman and CAG is barred by laches because they waited to appeal until after she had undertaken significant work on the kiln. Although the [**23] courts disfavor the affirmative defenses of estoppel and laches because of the public interest in enforcement of the zoning scheme, see *Wieck v. District of Columbia Board of Zoning Adjustment*, D.C.App., 383 A.2d 7, 10 (1978) (citing cases), we conclude that the appeal was barred by laches in this case. n15

n15 The same elements of prejudice cited by Goto to support her laches defense give weight to her argument that the District is estopped from reversing its agents' earlier decision that a permit is not required. In order to establish a defense of equitable estoppel, Goto would be required to prove that (1) acting in good faith, (2) on affirmative acts of the District, (3) she made expensive and permanent improvements in reliance, and (4) the equities are strongly in her favor. See *Wieck*, *supra* at 11; *District of Columbia v. Cahill*, 60 App. D.C. 342, 343, 54 F.2d 453, 454 (1931).

Goto arguably has met all these requirements. Her estoppel claim presents a problem, however. 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. See *Wright v. DeFatta*, 129 So.2d 614, 619 (La. Ct. App. 1961); *Lichte v. Heidlage*, 536 S.W.2d 898, 901 (Mo. Ct. App. 1976). The District itself did not become involved in enforcing Zoning Regulations against Goto until after the BZA proceedings, i.e., until the BZA rendered a decision adverse to Goto which became the official position of the District. The estoppel defense thus may not have been available to Goto until the proceedings in this court, in which she could argue that the BZA could not compel her to observe zoning requirements that other agents of the District were estopped to enforce.

Given our conclusion that laches barred the appeal, we need not resolve these issues.

[**24]

Laches will bar the claim of Gottesman and CAG if they delayed unreasonably in bringing their appeal to the Board, to Goto's prejudice. n16 "The principal element in applying the doctrine of laches is the resulting prejudice to the defendant, rather than the delay itself." 4 A. RATHKOPF, *supra* at 67-12 (1967) (footnote omitted). See generally *American University Park Citizens Association v. Burka*, D.C.App., 400 A.2d 737, 740 (1979); *Wieck*, *supra* at 11.

n16 Laches presents a question distinct from that of the timeliness of CAG's appeal, discussed in Part II.C., *supra*. In deciding that jurisdictional question, we look only to the period from the zoning official's decision to the filing of the appeal. See Supplemental Rules of Practice and Procedure Before the Board of Zoning Adjustment, 22 DCRR § 2.21 (1972); note 11 *supra*. In contrast, to determine the validity of a laches defense, we look to the entire course of events. See, e.g., *American Univ. Park Citizens Ass'n v. Burka*, D.C. App., 400 A.2d 737, 740-45 (1979); *Wieck*, *supra* at 11-13. Moreover, laches may bar consideration of an appeal which, for jurisdictional purposes, would be timely, just as laches may bar an equitable claim brought within an applicable statute of limitations. See *Amidon v. Amidon*, D.C.App., 280 A.2d 82, 84 (1971).

[**25]

We look, first, to the record before the Board as to the timing of the claim in order to determine whether there was any unreasonable delay. Goto began work on the kiln in November 1974; Gottesman and Hinton learned by June 1975 that Dripps had decided no permit was necessary. During that seven-month period, Gottesman and CAG were working within the administrative process to attempt to prevent construction of the kiln; that delay is reasonable and cannot be held against them. See *Larkin v. Tsavaris*, 85 So.2d 731, 733 (Fla. 1956); *Morris v. Borough of Haledon*, 24 N.J. Super. 171, 178, 93 A.2d 781, 784 (Super. Ct. App. Div. 1952).

The critical period was from June 1975 to March 1976. Hinton and Gottesman were aware of Dripps' ruling by June 1975. The record reveals no reason why they waited until November 1975 to discuss that decision with Dripps. That unexcused delay of five months was compounded by an additional [*926] two months during which they requested (the record does not show when) and received a written decision. There is no record indication that bureaucratic delay was responsible for the two-month lag between the meeting on November

18, 1975, and the [**26] written decision of January 6, 1976. Finally, the delay of still another two months between that letter decision and the filing of the appeal on March 4, 1976, adds to the unreasonableness of the timing of CAG's action. Accordingly, although we have held that the appeal was timely filed, see Part II.C. *supra*, we cannot agree with the Board's conclusion that "the appellants have diligently objected to the kiln" During the nine months between their discovery of Dripps' decision and the filing of the appeal, Gottesman and CAG had knowledge of their rights and an opportunity promptly to assert them.

The second element of the laches equation is prejudice to Goto resulting from the delay. See *American University Park Citizens Association*, *supra* at 740. As the Board itself found, Goto spent approximately \$2,000 of the \$5,000 to build the kiln after Osborg, see note 2 *supra*, told her in April 1975 that no permit was required. She also expended time and money seeking a natural gas hookup at a hearing before the Public Service Commission. See note 3 *supra*. Essentially, therefore, the neighbors stood by and watched Goto spend time and money months before [**27] pressing their objections before the BZA.

Under similar circumstances, courts in other jurisdictions have concluded that equity requires the barring of a claim. In *Hill v. Board of Adjustment*, 122 N.J. Super. 156, 299 A.2d 737 (Super. Ct. App. Div. 1972), for example, homeowners relied on a building inspector's grant of a permit to build a garage. *Id.* at 158, 299 A.2d at 738. The homeowners began construction and had spent \$3,500 of an estimated cost of \$6,000 when, four months later, neighbors alerted the building inspector that the garage construction violated the side-yard requirement. *Id.* at 159, 299 A.2d at 738. The Board of Adjustment granted a variance to the homeowners. *Id.* The court held that the neighbors' appeal was barred by estoppel and laches. *Id.* at 162-63, 299 A.2d at 740-41. Similar, and occasionally even shorter, delays have been held to bar claims in light of a party's reliance on a zoning official's decision, to his or her prejudice. See *Medical Arts, Inc. v. Rohrbaugh*, 293 So.2d 366, 369 (Fla. Dist. Ct. App. 1974) (laches bars appellee-neighbors' suit filed three months after issuance of building permit and two months after complaint [**28] to City Council when appellant had spent considerable sums on construction before suit filed); *Black v. Barnes*, 215 Ga. 827, 829, 114 S.E.2d 38, 39 (1960) (laches bar plaintiff-neighbor's suit filed three months after commencement of construction when defendant had undertaken substantial building activity and financial commitment); *Oeth v. Felty*, 421 S.W.2d 860, 860-62 (Ky. 1967) (laches bars plaintiff-neighbors' suit filed six months after issuance of permit to erect

television transmission tower when neighbor moved for rehearing only after tower partially built and filed suit only after tower completed); *Maroney v. Friere*, 74 Misc.2d 339, 341, 343 N.Y.S.2d 183, 185 (Sup. Ct. 1973) (laches bars petitioner-neighbors' suit filed four months after issuance of building permit when respondents had entered into building contract in interim).

Goto's actions in reliance on the assurances of zoning officials were reasonable, in contrast with the unexplained delays by her neighbors in instituting an appeal, to Goto's substantial prejudice.

IV.

We conclude that the Board had jurisdiction over this appeal. Nonetheless, the Board's conclusion that Gottesman's and CAG's claim was [**29] not barred by laches was "unsupported by substantial evidence in the record of the proceedings before the court." D.C. Code 1978 Supp., § 1-1510(3)(E). We therefore set aside the BZA's order reversing the decision of the Zoning Administrator dated January 6, 1976.

So ordered.

CONCURBY:

KELLY (In Part)

DISSENTBY:

KELLY (In Part)

DISSENT:

[*927] KELLY, Associate Judge, concurring in part and dissenting in part:

I agree with the majority opinion's holding as to laches but would reverse for lack of jurisdiction in the Board.

The Board's final order in this case held that petitioner's kiln was a "building" and a "building addition" under § 1202 of the Regulations, and not an "accessory structure" which would have automatically been permitted within the C-1 zone. n1 Variances from the floor area ratio, rear yard and open court requirements were thus necessary.

n1 The Board interpreted the term "building," defined as a "structure having a roof supported by columns or walls for the shelter, support or enclosure of persons, animals, or chattel" in § 1202 of the Zoning Regulations, to include the kiln. It rejected petitioner's argument that a kiln is *not* for sheltering, supporting, or enclosing pots but for *firing*, or "cooking" them,

and that it is thus most comparable to a backyard barbecue. The Board also found that the gas pipes running from the main building to the kiln constituted such "communication" between them as to make them one building, despite the following language in the Regulations: "The existence of communication between separate portions of a structure below the main floor shall not be construed as making such structure one building" (§ 1202) and despite the absence of any statutory or case law referring to pipes or plumbing as a means of "communication" between buildings. ("Communication" normally appears to be used as an equivalent term for "access.") In my judgment, the Board's interpretation of the terms "building" and "communication" are not only contrary to common sense but also plainly erroneous and inconsistent with the Zoning Regulations. See *Dietrich v. District of Columbia Board of Zoning Adjustment*, D.C.App., 320 A.2d 282, 286 (1974).

[**30]

The Board found merit neither in petitioner's argument that the BZA was estopped by petitioner's good faith detrimental reliance on the actions of the District of Columbia officials nor in her contention that the defense of laches barred the CAG from bringing its appeal. n2

n2 I note in passing that the Board's conclusions and findings of fact seem insufficient to defeat what the Board itself seems to concede is a prima facie case of estoppel against the municipality, which is a cognizable defense to Zoning Board jurisdiction in the District of Columbia. See *Wieck v. District of Columbia Board of Zoning Adjustment*, D.C.App., 383 A.2d 7 (1978); *District of Columbia v. Stewart*, D.C.App., 278 A.2d 117 (1971); *District of Columbia v. Cahill*, 60 App.D.C. 342, 54 F.2d 453 (1931); and see *Smith v. District of Columbia Board of Zoning Adjustment*, D.C.App., 342 A.2d 356 (1975).

The Board concluded that

Ms. Goto did indeed receive the approval of the government of the District of Columbia to construct the kiln.

And that

The total cost of building the kiln was approximately \$5,000, of that total cost, approximately \$2,000 was expended after Ms.

Goto received an indication from the permit authorities in April of 1975 that no permit was required.

Unless the Board found, as it did not, that petitioner's reliance was insufficiently detrimental or not reasonable and in good faith, or that the balance of equities does not favor the petitioner here, it would be difficult to affirm the Board's conclusion that estoppel was an insufficient defense. See *Wieck v. District of Columbia Board of Zoning Adjustment*, *supra* at 11:

The necessary elements [of estoppel] are: a party (1) acting in good faith, (2) on affirmative acts of a municipal corporation, (3) makes expensive and permanent improvements in reliance thereon, and (4) the equities strongly favor the party invoking the doctrine Furthermore, the reliance of the party must be justifiable [Citations omitted.]

And see *Smith v. District of Columbia Board of Zoning Adjustment*, *supra* at 359:

[The] Board must make findings as to (a) whether there was reasonable and good faith reliance by petitioners ... and (b) the extent to which they were on notice that the [structure] might violate the Zoning Regulations.

[**31]

The BZA also found that the CAG had standing before it as a "person aggrieved" within the meaning of the Zoning Regulations, § 8102, and as an "appellant" alleging error under § 8206.

In reviewing the BZA's decision, or the decision of any administrative agency with quasi-judicial powers, this court must, before reaching the standards of review set forth in § 1-1510 of the District of Columbia Administrative Procedure Act, make two threshold determinations. First, as any court, it must ascertain the adequacy of its own jurisdiction. *Reid v. United States*, 211 U.S. 529, 53 L. Ed. 313, 29 S. Ct. 171 (1909); *Minnesota v. Hitchcock*, 185 U.S. 373, [*928] 46 L. Ed. 954, 22 S. Ct. 650 (1902). Second, almost as a conceptual prerequisite to its own exercise of jurisdiction, it must assure itself that there was a proper assertion of jurisdiction by the agency (or court) below. Normally, this court is bound by the BZA's interpretation of its own regulations unless it is plainly erroneous or inconsistent with the Regulations. *Dietrich v. District of Columbia Board of Zoning Adjustment*, D.C.App., 320 A.2d 282, 286 (1974). However, an agency's faulty interpretation of its [**32] governing jurisdictional

regulations can never be harmless error. Our inherent judicial authority in matters of statutory construction requires us to consider *de novo* the propriety of an agency's exercise of jurisdictional power under its statutory grant of authority. Furthermore, this inquiry needs no prompting; it must be done by this court *sua sponte*.ⁿ³ Although a presumption of regularity attaches to jurisdictional questions, it may be disproved by extrinsic evidence or by the record itself. *Pardo v. Wilson Line of Washington, Inc.*, 134 U.S. App.D.C. 249, 252, 414 F.2d 1145, 1148 (1969).

ⁿ³ Petitioner raised the issue of jurisdiction in her motion to dismiss, which was summarily denied before the first hearing began. See *Smith v. District of Columbia Board of Zoning Adjustment*, *supra* at 359 ^{n.8}, where we suggested that defenses to an agency's exercise of jurisdiction be heard before proceeding to the merits, "in the interest of judicial economy, [so] that this court [need] not be compelled to reach the merits ... if petitioners will prevail in their defense" The jurisdictional question was raised there, as here, in a motion to dismiss, but there based solely on the defenses of estoppel and laches.

[**33]

The crucial jurisdictional question before us, in my opinion, is whether the CAG, appellant below, had proper standing to come before the Board and contest the Zoning Administrator's January 6, 1976, decision in Miss Goto's favor. ⁿ⁴ I recognize that over the years CAG has brought many important cases in the interest of its members, but this is the first time this point has been squarely presented.

ⁿ⁴ The name of Mr. Gottesman, intervenor both here and before the BZA, does not appear anywhere on the March 4, 1976, appeal form. He was not granted leave to intervene on the side of the CAG until July 21, 1976, the day of the first BZA hearing. There is nothing in the record that argues that his relationship to the CAG is the basis for the CAG's appeal.

The Board's jurisdiction is set forth in D.C. Code 1973, § 5-420, which codifies section 8, chapter 534 of the congressional Act of June 20, 1938. ⁿ⁵ The Act empowers the Zoning Commission to adopt Zoning Regulations pursuant to it and also give the BZA the

power **[**34]** to "make special exceptions" and "pass upon disputed questions ... as they arise in the administration of the Regulations." It then sets forth the Board's jurisdiction to hear "appeals ... taken by any person aggrieved [etc.]" (the language is identical to § 8102 of the Regulations) and gives the Board four categories of powers "upon appeals": (1) to "hear and decide appeals where it is alleged by any appellant that there is error ..." (identical to § 8206), n6 (2) to hear and decide requests for special exceptions, (3) to grant hardship variances, and (4) to assume "all the powers of the officer or body from whom the appeal **[*929]** is taken" necessary to "exercise the above mentioned powers." n7

n5 The 1938 Act is found in Pub. L. No. 684, 52 Stat. 797.

n6 "Appeals from Administrative Decisions," § 8102, says, in pertinent part:

The Zoning Act of June 20, 1938 (52 Stat. 797), as amended, provides that appeals to the Board of Zoning Adjustment may be taken by any person aggrieved, or organization authorized to represent such person ... by any decision of an administrative officer ... or any other administrative decision based in whole or part upon any zoning regulations or zoning maps

Under § 8206, the Board

shall 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 ... in the administration or enforcement of these regulations.

At the first BZA hearing on this action, Board Member Cummings could not distinguish the two provisions. She complained, "There are two sections under which one could appeal and I could never get them straight and I could never understand why there were two sections." **[**35]**

n7 The BZA's powers under (2) and (3) were codified in the Regulations under § § 8207.11 and 8207.2 ("Original Jurisdiction"), while (4) was codified in § 8208 ("Administrative Powers").

The Act sets forth two cumulative (not alternative) requirements for appeals to the BZA: first, a showing of

aggrievement, and, second, either invoking the Board's original jurisdiction under § § 8207.11 or 8207.2 or its appellate jurisdiction under § 8206 by "alleging error" in an administrative order, etc. Thus, all applicants to the Board's jurisdiction, whether original or appellate, must include a § 8102 showing that they are aggrieved.

Presuming that the CAG is technically an "organization," rather than a "person" under § 8102, it bears the additional burden of showing that it is "authorized to represent [an aggrieved] person." There is nothing in the record before us to support such a finding.

Even assuming that the CAG is a "person," the CAG, and the BZA in its ultimate conclusions, made no adequate showing that it was an "aggrieved" one. n8 Given the apparent confusion regarding the interpretation **[**36]** of the term "aggrieved person" within the Zoning Regulations, I briefly examine its provenance and use in this jurisdiction and its application (particularly to neighborhood associations) in zoning board of appeals cases elsewhere.

n8 The Board found that "[The] Citizens Association of Georgetown is a neighborhood citizens' association composed of many residents of the area, including the immediate vicinity of the site which is the subject of this appeal. The Association has often appeared before both the Board of Zoning Adjustment and the Zoning Commission to represent the views of its members on zoning issues and to protect its community from negative influences." There was no evidence in the record to support these findings, which appear to be based entirely upon facts of which the Board took administrative notice. Aside from the propriety of adopting the CAG's self-depiction as a fighter against "negative influences," I question its unsupported finding that the CAG has members residing in the immediate vicinity and, if there are such members nearby, that it is authorized to represent their interests.

[37]**

The term "aggrieved person" is not unfamiliar language in the District of Columbia. It is used to demarcate the standing required for judicial review of agency action in both the District of Columbia Administrative Procedure Act [DCAPA] n9 and in the analogous provision in the Federal Act. n10

n9 D.C. Code 1978 Supp., § 1-1510.

n10 5 U.S.C. § 702 (1970).

In *Basiliko v. Government of the District of Columbia*, D.C.App., 283 A.2d 816, 818 (1971), this court first construed the "aggrieved person" language in the DCAPA, adopting a three-part standing test that required a showing of injury in fact, caused by agency action which was arbitrary, capricious, or in excess of statutory authority, and within the zone of interests to be protected by the statute. n11

n11 See *Ballerina Pen Co. v. Kunzig*, 140 U.S.App.D.C. 98, 101, 433 F.2d 1204, 1207 (1970), cert. denied sub nom. *National Industries for Blind v. Ballerina Pen Co.*, 401 U.S. 950, 28 L. Ed. 2d 234, 91 S. Ct. 1186 (1971) (citing the test in the 1970 Supreme Court companion cases, *Barlow v. Collins*, 397 U.S. 159, 164-65, 25 L. Ed. 2d 192, 90 S. Ct. 832 (1970), and *Association of Data Processing Service Associations v. Camp*, 397 U.S. 150, 153-55, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970)).

[**38]

The underlying concern in limiting standing is generally "that the questions ... be framed with the necessary specificity, that the issues ... be contested with the necessary adverseness and that the litigation ... be pursued with the necessary vigor" *Flast v. Cohen*, 392 U.S. 83, 106, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968).

"The question of standing depends primarily upon the existence of a logical and adequately direct nexus between the plaintiff's interests and the adverse action of the opposing party or parties." *Citizens Association of Georgetown v. Simonson*, 131 U.S.App.D.C. 152, 153, 403 F.2d 175, 176 (1968), cert. denied sub nom. 3259 M Street, Inc. v. *Citizens Association of Georgetown*, 394 U.S. 975, 22 L. Ed. 2d 755, 89 S. Ct. 1454 (1969).

[*930] Standing restrictions are generally devised "not so much [out of] fear of a plethora of parties in interest as [out of] apprehension that standing might be abused by a person with no legitimate interest in the proceedings but with a desire only to delay the [agency action] for some private selfish reason." *Office of Communication of United Church of Christ v. FCC*, 123 U.S.App.D.C. 328, [**39] 335, 359 F.2d 994, 1001 (1966) (emphasis in original). And see legislative history cited, *id.* at 335 n.12, 359 F.2d at 1001 n.12.

Since the "aggrieved person" language that Congress employed in the District of Columbia Zoning Regulations, § 8102, cannot, under any canons of

statutory construction, be treated as surplusage or as adventitious terminology, especially given the established history of the term in federal law, the question becomes how to apply the term in Board of Zoning Adjustment cases. Since there has been no automatic "aggrieved person" standing statutorily granted to citizens associations in these cases, n12 I look to the use of the term elsewhere, as it applies to organizations and as used in zoning appeals.

n12 Compare *Citizens Association of Georgetown v. Simonson*, *supra* at 153, 403 F.2d at 176, where Congress explicitly directed the Alcoholic Beverage Control Board to consider "the wishes of the persons residing or owning property in the neighborhood" in issuing liquor licenses. *Simonson* also involved the CAG, which there, unlike here, alleged in its complaint "that many of its members reside or own property within the neighborhood" and was shown to be "an authorized spokesman organized to promote [the neighbors'] interests for its individual members." *Id.* Nor was *Simonson* a case construing "aggrieved person" terminology. Cf. *Kopff v. District of Columbia Alcoholic Beverage Control Board*, D.C.App., 381 A.2d 1372, 1376-77 (1977) (Advisory Neighborhood Commission members have individual standing as area residents to seek court review of ANC's statutorily granted rights).

[**40]

"A mere 'interest in a problem,' no matter how long standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient itself to render an organization 'adversely affected' or 'aggrieved' within the meaning of the APA [5 U.S.C. § 702]." *Sierra Club v. Morton*, 405 U.S. 727, 739, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972) (quoted in *United States v. Richardson*, 418 U.S. 166, 177, 41 L. Ed. 2d 678, 94 S. Ct. 2940 (1974)).

In zoning review cases, where aggrieved person language is frequently employed, n13 the test is generally whether the applicant for relief "show[s] a sufficient interest in the subject matter of the application that he will actually be injured by the governmental action. ... The rule that one without some right, title or interest in property cannot apply for relief, rests on the theory that hardship ... cannot be incurred by a person who is without some valid attachment to the land to which the application relates. ROHAN, ZONING AND LAND USE CONTROLS § 51.02[1] (1979). "In a sense, every citizen of the community has a stake in the

disposition of each zoning dispute, and may be 'aggrieved' by administrative [**41] decisions which he regards as erroneous. But it seems unlikely that the draftsmen ... could have intended to give standing to such a broad class of persons." ANDERSON, *AMERICAN LAW OF ZONING* § 21.06 (1968). See also 3 A. RATHKOPF, *LAW OF ZONING AND PLANNING* § 37.03 (4th ed. 1979).

n13 Most state enabling statutes have been modeled after the Standard State Zoning Enabling Act of 1926 which provides for appeals to the zoning board "by any person aggrieved" (§ 7).

The cases generally require a "specific, personal and legal interest," *Krepcio v. Zoning Board of Appeals*, 152 Conn. 657, 211 A.2d 687, 689 (1965), and, more than a general interest in the viability of the community zoning plan, "a pecuniary interest injuriously affected." *Tyler v. Board of Zoning Appeals*, 145 Conn. 655, 145 A.2d 832, 835 (1958). One test is the person's "'direct', 'immediate', 'pecuniary' and 'substantial' interest in the subject matter of the litigation" *Baker v. Zoning Hearing Board of West Goshen Township* [**42], 27 Pa. Commw. 602, 367 A.2d 819, 822 (1976).

Property owners' associations cannot be characterized as "aggrieved" unless they [**931] "successfully demonstrate[] that those whom [they] represent have a significant interest in the matter." ROHAN, *supra* at § 51.02[2]. See *Vitolo v. Chave*, 63 Misc. 2d 971, 314 N.Y.S.2d 51 (1970); RATHKOPF, *supra* at § 37.03[5], and see ANDERSON, *supra* at § § 21.05 to 21.10. A property owners' association that does not own land affected by a [zoning] board decision is not a person aggrieved by such a decision. *Lido Beach Civic Association v. Board of Zoning Appeals*, 13 App. Div. 2d 1030, 217 N.Y.S.2d 364 (1961); accord, *Stocksdale v. Barnard*, 239 Md. 541, 212 A.2d 282, 284 (1965) ("an appeal is not authorized by an association as a party aggrieved [even] by reason of its members being aggrieved").

In light of the general consensus in federal law and in zoning appeals cases that "aggrieved" organizations must represent their members' concrete interests in a contested administrative decision, and in view of the specific language in § 8102 of our Regulations that these appeals be made by an "organization [**43] authorized to represent [an aggrieved] person," and the lack of any per se standing exemptions in the regulations for citizens groups such as the CAG, n14 I would hold that the BZA must, before asserting jurisdiction, establish both "the

existence of a logical and adequately direct nexus," *Citizens Association of Georgetown v. Simonson*, *supra* at 153, 403 F.2d at 176, between the interests of its members and the administrative decision it is contesting, and its own authority to represent those interests. Furthermore, these "interests" must be specific and significant, viewed under the standards we enumerated in *Basiliko v. Government of the District of Columbia*, *supra* at 818.

n14 D.C. Code 1973, § 5-420 exempts citizens associations "created for civic purposes and not for profit" only from paying the filing fee required in appeals to the BZA.

The record before us is devoid of anything but vague, generalized assertions of injury. When asked on the BZA's application form for appeals to "state manner [**44] in which appellant is aggrieved by administrative decision," the CAG answered: "Decision permits the erection of addition to (or accessory to) non-conforming building with substandard rear yard, thereby increasing congestion and density of development in Georgetown Historic District." Asked to "state briefly the allegations of error in administrative decision," the CAG said: "Decision improperly relieves owner of F.A.R. [floor area ratio] and rear yard requirements in the C-1 Zone and allows a rear addition to a non-conforming structure reducing depth of rear yard Also permits unauthorized use in C-1 Zone, i.e., fabrication of ceramics."

Neither answer is adequate. Not only is the logical nexus between the backyard kiln in question and "increasing congestion and density of development" unexplained, the relationship of the CAG to the "Georgetown Historic District" designation is not mentioned, nor is there any allegation that CAG members live in the area of petitioner's kiln or are affected in any way by its construction.

I do not believe such an application is sufficient to establish aggrievement under § 8102. Nor could the inadequacy of the application information [**45] have been cured by the record before the Board. n15

n15 The only neighbors, other than Mr. Gottesman, who appear in the record, are the twelve who submitted letters to the Board in support of petitioner. They all say she was a good neighbor and that they did not believe her studio or the kiln was harmful. Her next door neighbor, in fact, said, "The shop in no way is

offensive to me or to anyone else, in fact, it is an asset to the block. I see no reason why it should not be allowed to remain in business." Another neighbor said, "We have come to regard this studio as one of the valued cultural institutions of our neighborhood. We would be sorry to see Ms. Goto unable to continue with her fine neighborhood cultural service."

Although the Board says, in its final order, that "to accept the position [on standing] advanced by Miss Goto would be to effectively negate the appeals process," I disagree. The appeal procedure under § § 8102 and 8206 need not necessarily bar cases such as this. On the contrary, establishing "[**46] proper standing before the onset of [*932] a BZA hearing will ensure that the questions before the Board are "framed with the necessary specificity ... contested with the necessary adverseness, and pursued with the necessary vigor." *Flast v. Cohen*, *supra* at 106. Although Congress could have extended automatic standing to groups that seek to represent the public interest, such as the CAG, it did not, and this court may not.

There is no factual support in the record for establishing standing for Gottesman. He filed no complaint; he testified for CAG at the July 21, 1976 hearing and orally moved to intervene as a party at the end of the hearing. His objections to the kiln are general and unrelated to any injury to him. The Board made no finding that Gottesman was a "person aggrieved;" he was allowed to intervene because "he was the man next

door." I would not confer automatic standing upon an adjoining property owner without some allegation of injury to that specific property. Courts have frequently denied standing to adjoining property owners who failed to make a sufficient showing of special or pecuniary damages. *See, e.g., Stephens v. Tate*, 147 Ga. App. 366, [**47] 249 S.E.2d 92 (1978); *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. Ct. 210, 326 N.E.2d 348 (1975); *Housing Authority of the City of Melbourne v. Richardson*, 196 So.2d 489 (Fla. Dist. Ct. App. 1967); *Kalvatis v. Village of Port Chester*, 235 N.Y.S.2d 44 (1962). *See also Western Michigan University Board of Trustees v. Brink*, 81 Mich.App. 99, 265 N.W.2d 56, 58 n.1 (1978) ("If adjoining landowners could suffer special damages, then they can easily plead them.")

Since the CAG did not establish its standing n16 as required under the Zoning Regulations, I would hold the Board's denial of petitioner's motion to dismiss for lack of jurisdiction was plainly erroneous.

n16 *See DeLevey v. District of Columbia Rental Accommodations Commission*, D.C.App., 411 A.2d 354 (1980), for a recent discussion of standing to bring an appeal to the RAC pursuant to RAC Regs. § 5.30 (an interpretation of the "aggrieved party" language in the Rental Accommodations Act, D.C. Code 1978 Supp., § 45-1652(g)).

[**48]

Supplemental Exhibit

F

**PROPERTY OWNER'S SYNOPSIS OF
BZA CASES ON TIMELINESS**

1. Close Scrutiny of Project Indicates Knowledge of Permit

Appellant's close scrutiny of project, including monitoring of concept/permit applications before OGB, is persuasive evidence that Appellant knew or should have know of decision complained of when permit was issued.

Appeal No. 17329 of Georgetown Residence Alliance (July 12, 2005)

"Several of the proposed changes [to the property] were reviewed by the Old Georgetown Board of the US Commission of Fine Arts and monitored by the Alliance, including changes to the rooftop." (Page 2, Finding #2)

"Appellant's own submissions show written communications [with DCRA] dated January 24, 25, and 26 of 2005. During the hearing on this matter, Appellant also referred to his 'constant communication' with District agencies." (Page 3, Finding #7) (citations omitted)

"Given the Appellant's close scrutiny of the project, the Board is persuaded that the Appellant knew about the access permit on or about the date it was issued, on December 28, 2004, but at least by December 29, 2004 after the e-mail communication from the Zoning Administrator." (Page 4, Finding #13)

Appeal No. 17127 of Nebraska Avenue Neighborhood Association (June 2, 2005)

"12. Given the Appellant's close scrutiny of the Sunrise project, including three prior appeals to this Board, the Board is persuaded that the Appellant knew or should have known about the August permit on or about the date it was issued, on August 25, 2003." (Pages 3, Finding # 12)

2. Difficulty in Obtaining Information from DCRA Does Not Necessarily Excuse Delay

Difficulty in obtaining information from DCRA is insufficient to substantially impair Appellant's ability to file timely appeal of permit.

Appeal No. 17054-A of Henry P. Sailer, et al. (October 15, 2004)

"Although it may have been difficult for the Appellants to obtain details from DCRA regarding the permits and plans, there is no evidence that DCRA's actions substantially impaired Appellants' ability to file the subject appeal." (Page 5, Finding #23 (bottom of page)).

Appeal No. 17127 of Nebraska Avenue Neighborhood Association (June 2, 2005)

"While the Appellant may have had difficulties in preparing its actual case, the Board did not find any exceptional circumstances outside of its control that impaired its ability to file a timely, good faith appeal with respect to the August permit." (Page 5, Conclusions of Law).

3. **Pursuit of Other Remedies Does Not Toll Filing Deadline for Appeal**

Pursuit of other avenues does not toll period for filing appeal.

Appeal No. 17411 of Paul Basken and Joshua Meyer (March 23, 2006)

"During this 70-day period, the Appellants pursued other avenues to resolve their dispute and even sought to have the ANC appeal in their place. Appellants may very well have wished to avoid the difficulty and expense of prosecuting an appeal. However, a party who chooses to engage in negotiations or other ways to resolve a dispute does not thereby extend its time for filing an appeal. The Board does not 'not countenance delay in taking an appeal when it is merely convenience for an appellant to defer in making that decision.' (citing Waste Management, Inc. v. D.C. Board of Zoning Adjustment, 775 A.2d 1117 (D.C. 2001)).

4. **Building Permit Triggers 60-Day Clock**

When decision complained of is based on issuance of building permit, that date triggers start of requisite 60-day appeal period.

Appeal No. 17411 of Paul Basken and Joshua Meyer (March 23, 2006)

"Appellants clearly identified in their appeal the error complained of as 'the decision that the existing structure... be allowed to expand from four rental properties into a seven-unit condominium complex.... Accordingly, the error complained of – that the existing structure...be allowed to expand from four rental properties into a seven-unit condominium complex – was made in the issuance of the revised permit." Appellants clearly identified in their appeal that this was the error complained of. (Page 5, Para. 1)

Supplemental Exhibit

G

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17329 of Georgetown Residence Alliance, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decisions of the Department of Consumer and Regulatory Affairs (DCRA) for failure to enforce the Zoning Regulations and from the issuance of Building Permit No. B-468701 for a roof hatch and mechanical access door at 1531 31st Street, N.W. in the R-3 zone (Square 1269, Lot 294).

HEARING DATE: July 12, 2005
DECISION DATE: July 12, 2005

DECISION AND ORDER

This appeal was filed with the Board of Zoning Adjustment (the Board) on March 25, 2005, challenging DCRA's issuance of a building permit allowing the construction of a roof hatch and mechanical access door at the premises, and also challenging DCRA's alleged failure to enforce the Zoning Regulations. Prior to the public hearing, the property owner moved to dismiss the appeal, claiming that it had been untimely filed. After hearing argument and reviewing the written submissions of the parties, the Board dismissed the appeal, finding that the appeal was untimely filed as to the building permit, and that the Board lacked subject matter jurisdiction to review other alleged errors.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Public Hearing

The Office of Zoning scheduled a hearing on the appeal for July 12, 2005. In accordance with 11 DCMR § 3113.4, the Office of Zoning mailed notice of the hearing to the Appellant, the property owner, and DCRA.

Parties

The Appellant in this case is the Georgetown Residence Alliance (the Appellant or the Alliance), a not-for-profit civic association represented by Don Crockett. The owner of the subject property is Reid Dunn, who was represented by Holland & Knight LLP, Mary

441 4th Street, N.W., Suite 200/210-S, Washington, D.C. 20001

Telephone: (202) 727-6311

Facsimile: (202) 727-6072

E-Mail: dcoz@dc.gov

Web Site: www.dcoz.dc.gov

Carolyn Brown, Esq. As the property owner, Mr. Dunn is automatically a party under 11 DCMR § 3199. Appellee DCRA was represented by Lisa Bell, Esq.

FINDINGS OF FACT

Background

1. The subject property is located at 1531 31st Street, NW in the R-3 zone. Originally a single-family home, the building was converted into a four-unit apartment house prior to the enactment of the Zoning Regulations. Although the R-3 district permits only single-family dwellings and flats, the apartment house use is a lawfully existing non-conforming use.
2. Beginning on or about September, 2004, the current property owner proposed changes at the property for the purpose of converting the apartment house to a condominium. Several proposed changes were reviewed by the Old Georgetown Board of the US Commission on Fine Arts and monitored by the Alliance, including changes to the rooftop. The building permit issued by DCRA on or about May 17, 2004 provided only for renovation work to the building's interior, not the rooftop or any other portions of the exterior. The permit was not entered in the administrative record and there was disagreement about the exact date it was issued. However, both parties referred to the permit during the hearing and concurred that it was issued prior to November, 2004 when construction began.
3. Shortly after construction began, the Alliance initiated a series of communications with the DC Historic Preservation Office (HPO), the Historic Preservation Review Board (HPRB)¹, and the Zoning Administrator of DCRA, complaining that construction was proceeding illegally. The Alliance complained that the owner had unlawfully removed part of a large ornamental turret that occupied part of the roof space, and was about to construct an unauthorized roof deck.
4. HPO and DCRA both inspected the site, and determined that construction -- including the partial removal of the turret -- had occurred without the necessary building permits. The HPO inspected the site and issued a stop work order on or about November 16, 2004, and DCRA inspected the site and issued a stop work order on or about December 27, 2004. According to an e-mail from the Zoning Administrator to Mr. Crockett, DCRA's stop work order was issued because the rooftop work went beyond the interior

¹ The District of Columbia Historic Preservation Review Board advises the State Historic Preservation Officer. The Historic Preservation Office is part of the Office of Planning and serves as staff to the State Historic Preservation Officer and the Historic Preservation Review Board.

renovations allowed by the building permit. The e-mail also stated that Board approval would be required before the owner could expand the non-conforming use and construct a roof deck (Exhibit 2, Appellant's Statement in Support of their Appeal, Appendix I at 18).

5. The owner promptly applied to DCRA for a permit to allow him to construct rooftop access. The revised plans submitted with the application showed a proposed roof hatch but no roof deck (Exhibit 2, Appendix I at 18). DCRA lifted the December 27 stop work order and issued Building Permit No. 468701 (the access permit) on December 28, 2004. The access permit is the subject of this appeal. It allowed the owner to construct a roof hatch and a mechanical access door at the rear of the rooftop turret (Attachment to Exhibit 11). It did not authorize a roof deck.

6. On December 29, 2004, The Zoning Administrator notified the Appellant by e-mail that DCRA's stop work order had been lifted and the access permit had been issued.

7. The Appellant continued to communicate with the HPO, HPRB, and DCRA after the access permit was issued, and requested that the rooftop turret be restored to its original condition. Appellant's own submissions show written communications dated January 24, 25, and 26 of 2005 (Exhibit 2, Appendix I at 10, 21, 24, and 26). During the hearing of this matter, Appellant also referred to his "constant communication" with District agencies (See, for instance, T., p. 111). Although Appellant stated in these written communications that the turret had been "demolished", HPO and DCRA disagreed, stating that a portion of the turret was altered to allow for mechanical access to the roof (Exhibit 2, Appendix I at 31).

The Appeal

8. The appeal was filed on March 25, 2005 alleging that DCRA "refuse[d] to enforce the Zoning Regulations and Zoning Laws against the unlawful and un-permitted extension and expansion of the non-conforming apartment house use" at the premises (Exhibit 1).

9. In an undated statement submitted April 8, 2005, the Appellant alleged that on or about December 28, 2004, DCRA improperly issued Building Permit No. B468701 (the access permit) allowing the owner to construct a roof hatch and mechanical access door at the premises (Exhibit 11).

10. During the public hearing, the Appellant alleged that the appeal stemmed from: (a) the owner's unlawful rooftop demolition and construction work without a permit (T. p. 104, 120), (b) the HPRB's failure to order that the roof be restored to its original

condition, and (c) the issuance of the access permit that allegedly improperly authorized the rooftop expansion of a non-conforming use.

The Motion to Dismiss

11. Prior to the public hearing, the owner filed a motion to dismiss the appeal, contending that the appeal of the access permit was untimely. The owner also claims that DCRA's issuance of the access permit is the only administrative decision which can be appealed to this Board.

12. As stated above, Appellant's view of the appeal is broader. He contends that the appeal was timely filed because it was filed when "it was clear no one would do anything" (T. p. 166). Appellant cites the 3 letters he sent to the HPRB chair asking him "to look into the situation and take action" (T. p. 110), with copies to "everyone involved", including the Zoning Administrator and Timothy Dennee of the HPO (T. 112). Appellant also claims that his appeal was timely because it was filed "about a month after, or less than a month after" Mr. Dennee failed to respond to his last letter (T. p. 166), and because Mr. Dennee's office and the HPRB office is each a "subsidiary" office of DCRA (T. p. 112).

13. Given the Appellant's close scrutiny of the project, the Board is persuaded that the Appellant knew about the access permit on or about the date it was issued, on December 28, 2004, but at least by December 29, 2004 after the e-mail communication from the Zoning Administrator.

14. Appellant filed this appeal on March 25, 2005, approximately 87 days after the access permit was issued. Although Appellant may have been frustrated in his dealings with DCRA, there is no evidence that DCRA's actions substantially impaired Appellant's ability to file an appeal.

CONCLUSIONS OF LAW

The Appellant did not clearly identify the error that was being complained of in this appeal. After extensive exploration of Appellant's concerns at the hearing, the Board determined that Appellant was appealing the access permit and the DCRA and HPRB decisions not to require the property owner to restore the rooftop turret to its original condition. For the reasons discussed below, the Board concludes that it lacks jurisdiction over the claim related to the access permit because the appeal of its issuance was not timely filed, and it lacks subject matter jurisdiction over the enforcement claim because the alleged violations did not involve zoning regulations. The reasons for these conclusions follow.

The Appeal of the Access Permit was Untimely

The Board's Rules of Practice and Procedure (11 DCMR, Chapter 31) require that all appeals be filed within 60 days after the date the person filing the appeal had notice or knew of the decision complained of, or reasonably should have had notice or known of the decision complained of, whichever is earlier. 11 DCMR § 3112.2(a). This 60-day time limit may be extended only if the appellant shows that: (1) "There are exceptional circumstances that are outside the appellant's control and could not have been reasonably anticipated that substantially impaired the appellant's ability to file an appeal to the Board; and (2) "The extension of time will not prejudice the parties to the appeal." 11 DCMR 3112.2(d).

As stated in the Findings of Fact, the access permit was issued on December 28, 2004, and Appellant knew about this approval when the permit was issued, or shortly thereafter on December 29, 2004, when it was notified by the Zoning Administrator. Thus, under section 3112.2(a) of the Regulations, the appeal should have been filed within 60 days after that date, or on or about February 27, 2005. Instead, the appeal was filed on March 25, 2005, approximately 86 days after the Appellant was charged with notice of the decision complained of. During this 86 day period, Appellant pursued other avenues to resolve its dispute and engaged in extensive communications with the Zoning Administrator and HPO staff. However, a party who chooses to engage in negotiations or other ways to resolve a dispute does not thereby extend its time for filing an appeal. *Waste Management of Maryland, Inc. v. DC Board of Zoning Adjustment*, 775 A.2d 1117 (D.C. 2001); *Woodley Park Community Ass'n v District of Columbia Board of Zoning Adjustment*, 490 A.2d 628 (D.C. 1985).

The District of Columbia Court of Appeals has held that "[t]he timely filing of an appeal with the Board is mandatory and jurisdictional." *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994). This appeal, filed March 25, 2005, was untimely filed as to the access permit and the Board, therefore, lacks jurisdiction to hear it.

The Board Lacks Subject Matter Jurisdiction Over The Other Alleged Errors

As to the other issue raised by the appeal, the claimed refusal of DCRA and HPRB to enforce the Zoning Regulations, the Board lacks subject matter jurisdiction because no violations of the Zoning Regulations are alleged.

The Appellant is essentially claiming that DCRA should have required the turret to be restored because the rooftop work was performed without a building permit, as is required by section 10 of the Zoning Act of 1938, codified at D.C. Official Code § 6-

641.08 (2001). Similarly the Appellant contends that HPRB or the HPO should have ordered restoration, presumably based upon section 5 of the Historic Landmark and Historic District Protection Act of 1978 ("Historic Preservation Act"), codified at D.C. Official Code § 6-1104, which requires review by the Mayor before all or part of a historic landmark or contributing building is demolished.

Neither of these requirements may be found in the Zoning Regulations. Yet, the Board's jurisdiction is limited to hearing and deciding appeals "where it is alleged by the appellant that there is error in any order, requirement, decision², determination, or refusal made by any ... administrative officer or body in the carrying out or enforcement of any regulation adopted pursuant to the Zoning Act. D.C. Official Code § 6-641.07 (f) (2001). With respect to the lack of a building permit, this Board has twice held in the context of Civil Infraction Act appeals that its jurisdiction does not extend to violations of the Zoning Act that are not also included in the Zoning Regulations, such as the requirement for a building permit. *Appeal of Peter Choharis*, BZA No. 03-0001, 51 DCR 8210 (2004); *Appeal of William Robinson*, BZA No. 04-0001 52 DCR 3677 (2005). The requirement for the Mayor to review applications to demolish historic or contributing buildings is not even in the Zoning Act, but in an entirely different law.

The Board has no jurisdiction to hear complaints over the alleged inaction of District officials in enforcing the Zoning Act, the Historic Preservation Act, or any other statutory or regulatory provisions other than those contained the Zoning Regulations. Since Appellant does not claim that any zoning regulation was violated, the alleged lack of enforcement cannot be addressed by this Board.

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

1. The motion to dismiss the appeal of the building permit as untimely is **GRANTED**.

VOTE: 4-0-1 (Geoffrey H. Griffis, Ruthanne G. Miller, John A. Mann II and Anthony J. Hood, in favor of the motion; Curtis L. Etherly, Jr. being necessarily absent)

Vote taken on July 12, 2005

² To the extent that the Appellant was also appealing the construction and demolition activities of the property owner, as opposed to the decisions made by District officials with respect to those activities, the Board also has no jurisdiction. The Zoning Act limits the Board's appellate jurisdiction to actions taken by District officials in carrying out and enforcing the Zoning Regulations, not to actions taken by private citizens.

2. The motion to dismiss the appeal on the ground that it lacks subject matter jurisdiction is **GRANTED** with respect to the alleged failure to enforce by DCRA and the HPRB/HPO

VOTE: 4-0-1 (Geoffrey H. Griffis, Ruthanne G. Miller, John A. Mann II and Anthony J. Hood in favor of the motion; Curtis L. Etherly, Jr. being necessarily absent)

Vote taken on July 12, 2005

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

ATTESTED BY:



JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: JUL 12 2006

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



BZA APPEAL NO. 17329

As Director of the Office of Zoning, I hereby certify and attest that on JULY 12, 2006, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

Don Crockett
Georgetown Residence Alliance
3070 Q Street, N.W.
Washington, D.C. 20007

Mary Carolyn Brown, Esq.
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W., Suite 100
Washington, D.C. 20006

Reid Dunn
3526 Ordway Street, N.W.
Washington, D.C. 20016

Lisa Bell, Esq.
Senior Counsel
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E., Suite 9400
Washington, D.C. 20002

Chairperson
Advisory Neighborhood Commission 2E
3265 S Street, N.W.
Washington, D.C. 20007

441 4th Street, N.W., Suite 200/210-S, Washington, D.C. 20001

Telephone: (202) 727-6311

Facsimile: (202) 727-6072

E-Mail: dcoz@dc.gov

Web Site: www.dcoz.dc.gov

BZA APPEAL NO. 17329
PAGE NO. 2

Single Member District Commissioner 2E06
Advisory Neighborhood Commission 2E
3265 S Street, N.W.
Washington, D.C. 20007

Bill Crews
Zoning Administrator
Dept. of Consumer and Regulatory Affairs
Building and Land Regulation Administration
941 North Capital Street, N.E., Suite 2000
Washington, D.C. 20002

Councilmember Jack Evans
Ward Two
1350 Pennsylvania Avenue, N.W.
Suite 106
Washington, D.C. 20004

Ellen McCarthy, Director
Office of Planning
801 North Capitol Street, N.E., 4th Floor
Washington, D.C. 20002

Alan Bergstein
Office of the Attorney General
441 4th Street, N.W., 7th Floor
Washington, D.C. 20001

Jill Stern
General Counsel
941 North Capitol Street, N.E., Suite 9400
Washington, D.C. 20002

ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning 

Supplemental Exhibit

H

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Appeal No. 17127 of Nebraska Avenue Neighborhood Association (NANA), pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decisions of the Department of Consumer and Regulatory Affairs (DCRA) in the issuance of Building Permit No. B454315 dated August 25, 2003, and Building Permit No. B456618 dated November 7, 2003,¹ revision permits issued for the Sunrise Assisted Living Facility (Sunrise or the Facility), located at 5111 Connecticut Avenue, NW in the R-2 and R-5-B zone (Square 1989, Lot 162)

DECISION AND ORDER

HEARING DATES: April 13, 2004 and May 25, 2004
DECISION DATE: May 25, 2004

This appeal was filed with the Board of Zoning Adjustment (the Board) on January 5, 2004, challenging DCRA's decisions to approve two revised building permits at the Facility. The first revised permit, dated August 25, 2003, modified the seventh floor balconies, allegedly in violation of various setback requirements. The second revised permit, dated November 7, 2003, allowed Sunrise to relocate a trash room enclosure to the rear of the building, allegedly resulting in an increase in the floor area ratio (FAR) over that permitted as a matter of right and an unlawful protrusion into the rear yard. Sunrise moved to dismiss the appeal of both permits, claiming the appeal of the August 25, 2003 permit was untimely, and the appeal of the November 7, 2003 permit was barred by the doctrine of *res judicata*. After hearing argument and reviewing the written submissions of the parties, the Board voted to dismiss the appeal of both permits, finding that the appeal of the August 25, 2003 permit was untimely, and that the Appellant failed to state a claim of error with respect to the November 7, 2003 permit.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Public Hearing

The Office of Zoning scheduled a hearing on the appeal for April 13, 2004. In accordance with 11 DCMR § 3113.4, the Office of Zoning mailed notice of the hearing to the Appellant, the property owner, and DCRA.

¹ As originally filed, the appeal also challenged Building Permit Nos. B454064, B454523, B454596 and B453159. However, the scope of the appeal was narrowed at the public hearing held on April 13, 2004.

Parties

The Appellant in this case is the Nebraska Avenue Neighborhood Association (NANA) and the Advisory Neighborhood Association 3/4G (ANC 3/4G) (collectively, the Appellant). Sunrise, the owner of the subject property, was represented by Allison Prince, Esq. of Shaw Pittman, LLP. As the property owner, Sunrise is automatically a party under 11 DCMR § 3106.2. DCRA was represented by Lisa Bell, Esq., Senior Counsel.

Requests for Party Status

The Board received requests for party status from Anne Page Chiapella and John Frye, both residents of 5126 Nebraska Avenue, NW. However, Ms. Chiapella and Mr. Frye withdrew their requests for party status after clarifying that the Appellant represented their views and that they would assist the Appellant during its case presentation.

FINDINGS OF FACT

Background

1. The Sunrise facility is an assisted living facility located at 5111 Connecticut Avenue, NW. The property is located in a "split" zone: a portion of the property is in the R-2 zone and a portion is in the R-5-D zone.
2. NANA appealed DCRA's issuance of the main building permit for the Facility on or about March, 2001. The issuance of that permit was ultimately upheld by this Board and the DC Zoning Commission through its *sua sponte* review process² in BZA Orders No. 16716A, 16716B and Zoning Commission Order No. 952.
3. NANA filed a second appeal on or about March, 2002 challenging a remedial permit that, in part, modified the elevator penthouse in accordance with the Zoning Commission's decision. This Board dismissed the second appeal in BZA Order No. 16879-A, dated February 4, 2003. NANA moved for reconsideration of the Board's Order of dismissal, but the motion was dismissed as untimely.
4. NANA filed a third appeal on or about March, 2003 challenging a wall test report while construction was ongoing. This Board denied that appeal as premature in BZA Order No. 17010.
5. On or about December 5, 2003, the Sunrise facility was issued Certificate of Occupancy (C of O) No. 66771 by DCRA. The first resident moved into Sunrise

² The *sua sponte* review process is a discretionary review process of BZA orders that is set out in section 3128 of the Zoning Regulations.

on or about January 6, 2004, and twenty-two senior citizens resided there by the time of the public hearing in this appeal.

The Present Appeal

6. The present appeal was filed on January 6, 2004, and concerns a challenge to two revision permits, both of which were issued by DCRA prior to the C of O: permit B454315 issued by DCRA on August 25, 2003 (the August permit), and permit B456618 issued by DCRA on November 7, 2003 (the November permit).
7. Appellant claims that the August permit, which approved changes at the 7th floor roof level, resulted in a stairwell and penthouse not being enclosed, allegedly in violation of setback requirements in the Zoning Regulations.
8. Appellant claims that the November permit, which approved a relocation of a trash room enclosure, resulted in an unlawful increase in the FAR and a protrusion into the required rear yard.

The Motion to Dismiss

9. Prior to the public hearing, Sunrise filed a motion to dismiss the present appeal.
10. Sunrise contended that the August permit had no zoning impacts but that, in any event, that portion of the appeal challenging the August permit must be dismissed as untimely.
11. Sunrise originally claimed that the challenge to the November permit was barred by the doctrine of *res judicata*. In essence, Sunrise claimed that all zoning challenges had been adjudicated in the prior appeals; and, because the November permit made only minor interior changes to the Facility, no new zoning issues had been raised by the present appeal. Sunrise later withdrew its claim of *res judicata*, conceding that the relocation of the trash room was an exterior change that could have zoning implications and that this challenge had not been adjudicated during the prior Board appeals. Notwithstanding its change in legal theory, Sunrise maintained throughout the proceedings that the appeal of the November permit should be dismissed without a hearing because it did not state a factual or legal basis to support a claim of error.

The August Permit

12. Given the Appellant's close scrutiny of the Sunrise project, including three prior

appeals to this Board, the Board is persuaded that the Appellant knew or should have known about the August permit on or about the date it was issued, on August 25, 2003.

13. Appellant filed this appeal on January 6, 2004, more than 120 days after the August permit was issued.
14. Although it may have been difficult for the Appellant to obtain details from DCRA regarding the revised permits and plans, there is no evidence that DCRA's actions substantially impaired Appellant's ability to file an appeal.

The November Permit

15. The November permit authorized, among other things, the relocation of a trash room enclosure from a location adjacent to the alley stub to the southeastern corner of the site adjacent to the building.
16. The trash room, comprising approximately 80 square feet, abuts the rear of the Sunrise building. Although it was built into an existing retaining wall, it is not part of the building. It has a roof that was constructed at grade level.
17. According to the project architect, Sunrise was not constructed to its full allowable FAR, but had a "surplus" FAR of approximately 187 square feet. Also according to the architect, relocating the trash room did not result in an FAR calculation that exceeded the maximum allowed (Exhibit 24).
18. The Appellant did not provide specific information as to the amount of allowable FAR at the project, the amount of FAR existing before the trash room enclosure was moved, or the amount of FAR at the project after it was moved.

CONCLUSIONS OF LAW

The Appeal of the August Permit was Untimely

The District of Columbia Court of Appeals has held that "[t]he timely filing of an appeal with the Board is mandatory and jurisdictional." *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994). The Board's Rules of Practice and Procedure (11 DCMR, Chapter 31) require that all appeals be filed within 60 days of the date the person filing the appeal had notice or knew of the decision complained of, or reasonably should have had notice or known of the decision complained of, whichever is earlier. 11 DCMR § 3112.2(a). This 60-day time limit may

be extended only if the appellant shows that: (1) "There are exceptional circumstances that are outside the appellant's control and could not have been reasonably anticipated that substantially impaired the appellant's ability to file an appeal to the Board; and (2) "The extension of time will not prejudice the parties to the appeal." 11 DCMR 3112.2(d).

This appeal, filed January 6, 2004, was untimely filed as to the August permit. As stated in the Findings of Fact, Appellant knew or should have known about the permit approval when it was issued on August 25, 2003, or shortly thereafter. Thus, under section 3112.2(a) of the Regulations, the appeal should have been filed within 60 days of that date, or by October 24, 2003. Instead, it was filed on January 6, 2004, approximately 136 days after the Appellant was charged with notice of the decision complained of. While the Appellant may have had difficulties in preparing its actual case, the Board did not find any exceptional circumstances outside of its control that impaired its ability to file a timely, good faith appeal with respect to the August permit.

The Appeal of the November Permit

The Res Judicata Issue

The appeal of the November permit is not barred by the doctrine of *res judicata*, as originally claimed by Sunrise. Under the doctrine of *res judicata*, once a claim has been litigated, a party is precluded from relitigating the same claim in a subsequent proceeding. *Rhema Christian Center v. BZA*, 515 A.2d 189 (D.C. 1986). However, the appeal of the November permit raised new issues involving the alleged zoning impacts of the trash room relocation. It was undisputed by the parties that this permit approved the relocation of a trash room at the property. Because this relocation constituted an exterior change – not a minor interior change as originally suggested by Sunrise – it could conceivably have had a zoning impact. Appellant alleged that the relocation to the rear of the property resulted in an unlawful increase in FAR and an unlawful protrusion into the rear yard. While Sunrise denied each of these assertions, the issues were properly before the Board for its consideration.

Appellant Failed to State a Claim of Administrative Error

The FAR Claim

The Board's jurisdiction in an appeal pursuant to the Zoning Act is limited to whether an administrative official erred in the carrying out or enforcement of the Zoning Regulations. See D.C. Official Code 6-641.07(g)(1) (2001). With respect to the FAR claim, the Appellant never articulated what the exact administrative error was, despite repeated attempts from the Board to extract this information. Although the Appellant alleged that the trash enclosure resulted in an excessive amount of FAR, this claim was

never stated with any particularity. The Appellant never specifically alleged the amount of FAR that existed at the Facility before the trash room was moved. Nor did it allege the exact amount by which the allowable FAR had been exceeded, only that it was over that permitted as a matter of right.

The Appellant initially asserted in a pre-hearing submission (Attachment 9 appended to Exhibit 10) that the FAR had increased 78 square feet as a result of the trash enclosure being moved. When questioned by Board members, the Appellant asserted that the FAR had increased by 114 square feet. However, the Appellant never stated what it believed the FAR was to begin with. To be sure, the Appellant argued that the baseline FAR figure could be ascertained from a plan that had been submitted to DCRA. However, the plan referenced by the Appellant was submitted in connection with an earlier permit that preceded several design changes at the project. This plan could not possibly have represented the amount of FAR at the project at the point that the trash room was moved. Because the design changes necessarily resulted in new FAR calculations at each juncture, it was incumbent upon the Appellant to demonstrate the exact FAR prior to the relocation of the trash room, and the amount of additional FAR that resulted from the trash room being moved. Only by supplying these two critical figures could the Appellant have established how the trash room relocation impacted upon the FAR.

Because the Appellant never stated its FAR claim with any particularity, the Board is dismissing that portion of the appeal. As explained above, the Appellant failed to state its FAR-related claim with any degree of particularity, despite being afforded the opportunity to do so during two public hearings and/or by written submissions. In the interests of fairness and justice, and as a matter of law, the Board cannot countenance further proceedings on this issue when Appellant has failed to state a case that can be responded to by the Appellee and Sunrise, and considered by the Board.

The Protrusion Claim

Appellant claims that the November permit allows the trash room to unlawfully protrude into the rear yard of the property. The Board disagrees with this assertion as a matter of law and finds that the trash room enclosure lawfully occupies the rear yard.

Appellant's claim is based upon alleged violations of sections 2502.1 and 2503.1 of the Zoning Regulations. Section 2502.1 prohibits projections into required yards and other open spaces unless excepted elsewhere in section 2502 or section 2503 of the Regulations. Section 2503.1 prohibits structures in required yards unless excepted elsewhere in section 2503. However, Appellant incorrectly concludes that the enclosure is a "projection" or "structure", when in fact it is an "accessory building". Appellant claims the trash room enclosure is not "accessory" to the Sunrise building, but is part of it. The Board concludes otherwise. As stated in the Findings of Fact, the enclosure abuts

the Sunrisc facility, but is not part of the building. Having concluded that the trash room enclosure is an accessory building, the Board turns to section 2500.2 of the Regulations. This provision not only permits accessory buildings in a rear yard; it limits their location to the rear yard. As such, the trash room enclosure lawfully occupies the rear yard and the November permit which approved this location was properly issued.

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

1. The motion to dismiss the appeal as untimely is **GRANTED** as to the revised building permit of August 25, 2003.

Vote taken on May 25, 2004

VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann, II., and Carol J. Mitten, in favor of the motion)

2. The motion to dismiss the appeal on the grounds of *res judicata* is **DENIED** with respect to the revised building permit of November 7, 2003.

Vote taken on May 25, 2004

VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann, II and Carol J. Mitten, in favor of the motion)

3. The motion to dismiss the appeal on the ground that it fails to state a claim of administrative error is **GRANTED** with respect to the revised building permit of November 7, 2003.

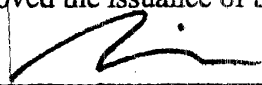
Vote taken on May 25, 2004

VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann, II and Carol J. Mitten, in favor of the motion)

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

Each concurring member has approved the issuance of this Decision and Order.

ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: JUN 02 2005

BZA APPEAL NO. 17127

PAGE NO. 8

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

SG/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



BZA APPEAL NO. 17127

As Director of the Office of Zoning, I hereby certify and attest that on JUN 02 2005, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

Anne Page Chiapella
President, NANA
5126 Nebraska Avenue, NW
Washington, DC 20008

Allison C. Prince, Esq
Pillsbury Winthrop
Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037

Lisa Bell, Esq.
Senior Counsel
Office of the General Counsel
941 North Capitol Street, NE, 9th Floor
Washington, DC 20002

Councilmember Kathleen Patterson
Ward 3
1350 Pennsylvania Avenue, NW, Suite 107
Washington, DC 20004

Ellen McCarthy, Deputy Director
Office of Planning
801 North Capitol Street, N.E., 4th Floor
Washington, D.C. 20002

Chairman
Advisory Neighborhood Commission 3/4G
Chevy Chase Community Center
5601 Connecticut Avenue, NW
Washington, DC 20015

Zoning Administrator
Department of Consumer & Regulatory
Affairs
941 North Capitol Street, NE
Washington, DC 20002

ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning

Supplemental Exhibit

I

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



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

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

DECISION DATES: November 4, 2003, November 18, 2003, November 25, 2003, March 2, 2004, October 5, 2004

CORRECTED DECISION AND ORDER

Note: The Board, on October 5, 2004, at a public meeting, approved the underlined corrections made to this order found on page 8.

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

PRELIMINARY MATTERS

Notice of Appeal and Notice of Public Hearing

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

Parties

The Appellants in this case are Henry P. Sailer, Lisa S. Kelly, Steven S. Wolf, Arthur L. Levi, Veronica and Bruce Steinwald, Veronique LaGrange, and Benoit Blarel (the Appellants). Appellants initially represented themselves, but later retained Patton Boggs, LLP, as counsel. Brian Logan, the owner of the subject property (the Owner or Mr. Logan), was represented by

Shaw Pittman, LLP. As the property owner, Mr. Logan is automatically a party under 11 DCMR § 3106.2.¹ DCRA was represented by Lisa Bell, Esq., Senior Counsel.

Persons/Entities in Support of the Appeal

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

Preliminary Matters

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

The Positions of the Parties on the Remaining Issues

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

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

FINDINGS OF FACT

The Property

1. The subject property is located at 3101 Chain Bridge Road, N.W., Square 1427 in a portion of the R-1-A zone that is subject to the Chain Bridge Road/University Terrace (CBUT) Overlay. The CBUT Overlay (provided for at 11DCMR § 1565 et. seq.) is designed to preserve and enhance the park-like setting of the Chain Bridge Road/University Terrace area by regulating alteration or disturbance of terrain, destruction of trees, and ground coverage of permitted buildings and other impervious surfaces, and by providing for widely spaced residences.

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

The Appellants

2. The Appellants are the Owner's neighbors. Arthur S. Levi owns a home at 3045 Chain Bridge Road, which is immediately to the west of the subject property. At the time of the public hearing Mr. Levi resided in France and rented his home to tenants. Henry P. Sailer resides at 3111 Chain Bridge Road, which is immediately to the east of the subject property. Veronica and Bruce Steinwald live next door to Mr. Sailer – one house removed from the subject property. Lisa Kelly and Steven Wolf live at 3117 Chain Bridge Road, immediately to the east of the Steinwalds, and two houses down from the subject property. Veronique LaGrange and Benoit Blarel live at 3106 Chain Bridge Road, directly across the street from the subject property

The Main Permit and Construction History at the Property

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

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

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

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

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

The Pool Permit

8. The proposed swimming pool is an infinity pool in which some of the water from the main pool structure is allowed to spill over the lip of the pool into a reservoir below. The function of the reservoir is to catch the overflow and re-circulate it into the main swimming pool.

9. The pool was first proposed when the Owner submitted a building plat dated November 14, 2001 (the initial plat) as part of the application for the main permit. This plat showed the proposed house, a "new 2 story accessory building garage/studio," a pool, and all of the proposed driveways, steps and walkways. The plat also depicted the measurements of the rear and side yards.

10. The Owner's pool contractor later submitted the initial plat and additional structural drawings as part of the application for the pool permit. There were no changes in the dimensions and location of the pool after DCRA approved and issued the main permit (Exhibit 38).

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

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

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

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

The Revised Permit

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

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

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

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

18. The revised plat shows an impervious paved main drive entry leading from Chain Bridge Road to a driveway. At the point the driveway enters the side yard, it is paved with impervious drive tracks that measure 7 feet between the outside edges of the paved tracks. The driveway continues through the side yard of the house to a paved drive and pervious drive court behind the house. There is also a drive ramp leading from the drive court to the lower drive court adjacent to the accessory garage. The drive ramp is shown as 7 feet wide and 23 feet long and is shown as "pervious."

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

Appellants' Knowledge of the Conditions Complained Of

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

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

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

- (a) One of the Appellants, Henry P. Sailer, testified that he knew about the construction activities as early as March 24, 2003.
- (b) On or about March 5, 2003, an article appeared in a local newspaper (the Palisades News) describing the demolition activities of February 8, 2003. The article stated that the tree removal was a violation of the Overlay zone and that permits had been mistakenly issued. The newspaper also noted that a building permit had been issued for "3101 Chain Bridge Road, new home \$1,250,000, Brian Logan." (Exhibit 25).

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

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

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

CONCLUSIONS OF LAW

The Motion to Dismiss.

The District of Columbia Court of Appeals has held that "[t]he timely filing of an appeal with the Board is mandatory and jurisdictional." *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994). The Board's Rules of Practice and Procedure (11 DCMR, Chapter 31) require that all appeals be filed within 60 days of the date the person filing the appeal had notice or knew of the decision complained of, or reasonably should have had notice or known of the decision complained of, whichever is earlier. 11 DCMR § 3112.2(a). This 60-day time limit may be extended only if the appellant shows that: (1) "There are exceptional circumstances that are outside the appellant's control and could not have been reasonably anticipated that substantially impaired the appellant's ability to file an appeal to the Board; and (2) "The extension of time will not prejudice the parties to the appeal." 11 DCMR 3112.2(d).

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

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

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

The Merits of the Appeal

The Pool Permit

The Board concludes that DCRA had ample legal basis for issuing the pool permit, and that aspect of the appeal is therefore denied. The rear yard does not exceed the minimum size required under the Regulations, as claimed by the Appellants. In a residential district, a rear yard must be provided for each structure. The minimum rear yard for the property, which is located in the R-1-A District, is 25 feet. 11 DCMR § 404.1. As stated above, the plat shows that the rear

wall of the main swimming pool is 25 feet 3 inches measured from the mean horizontal distance from the rear line of the rear wall of the pool and the rear lot line (Finding of Fact 11).

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

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

The Revised Permit

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

The Owner and DCRA both contend there is no requirement for the driveway to be impervious because it is a driveway to a parking space that is not required. They rely on sections 2101.1, 2117.3, 2117.4, 2117.8 and 2118.9 of the Regulations in support of their position that there are no specific access requirements for an "extra" parking space that is not required under the Regulations, and that the parking space within the garage is such an optional "extra" space. Section 2101.1 provides that only one off-street parking space is required for a single-family dwelling; and, according to the Owner, the "required space" at this property is located in the side yard², not within the accessory garage. They concede that sections 2117.3, 2117.4 and 2117.8 set forth standards for access driveways and parking spaces, and require impervious surfaces for both. However, the Owner and DCRA assert that these provisions apply only to "required spaces", not optional spaces.

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

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

an area that impedes the percolation of water into the subsoil

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

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

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

2500.5 states as follows:

In an R-1-A or R-1-B District only, an accessory private garage may have a second story used for sleeping or living quarters of domestic employees of the family occupying the main building.

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

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

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

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

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

Vote taken on November 25, 2003

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

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

Vote taken on March 2, 2004

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

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

Vote taken on March 2, 2004

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

- d. corrections to Order No. 17054 **APPROVED**. Vote taken on October 5, 2004

VOTE: 5-0-0 (Ruthanne G. Miller, John G. Parsons, Geoffrey H. Griffis, Curtis L. Etherly, Jr. and David A. Zaidain to approve)

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

Each concurring member has approved the issuance of this Decision and Order.

ATTESTED BY:


JERRY R. KHESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: OCT 15 2004

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



BZA APPEAL NO. 17054-A

As Director of the Office of Zoning, I hereby certify and attest that on OCT 15 2004 a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

Steven S. Wolf, M.D.
3117 Chain Bridge Road, N.W.
Washington, D.C. 20016

Andrew Zimmitti, Esq.
Patton Boggs LLP
2550 M Street, N.W.
Washington, D.C. 20037

John T. Epting, Esq.
Ashleigh Horne, Esq.
Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037

Lisa Bell, Esq.
Laura Gisolfi Gilbert, Esq.
Dept. of Consumer and Regulatory Affairs
941 North Capitol Street, N.E., Suite 9400
Washington, DC 20009

Chairperson
Advisory Neighborhood Commission 3D
P.O. Box 40846
Washington, DC 20016

Single Member District Commissioner 3D05
Advisory Neighborhood Commission 3D
P.O. Box 40846
Washington, DC 20016

BZA APPEAL NO. 17054-A

PAGE NO. 2

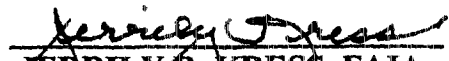
Acting Zoning Administrator
Dept. of Consumer and Regulatory Affairs
Building and Land Regulation Administration
941 North Capitol Street, N.E., Suite 2000
Washington, DC 20009

Councilmember Kathleen Patterson
Ward 3
1350 Pennsylvania Avenue, N.W.
Suite 107
Washington, DC 20004

Ellen McCarthy
Office of Planning
801 North Capitol Street, N.E.
Washington, D.C. 20002

Alan Bergstein
Office of the Attorney General
441 4th Street, N.W., 7th Floor
Washington, DC 20001

ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning

rsn

Supplemental Exhibit

J

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17411 of Paul A. Basken and Joshua S. Meyer pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decisions of the Department of Consumer and Regulatory Affairs (DCRA) in the issuance of Building Permit No. B465646 dated September 9, 2004, Building Permit No. B468513 dated December 17, 2004, and Certificate of Occupancy CO9912 dated June 10, 2005 for the conversion and occupancy of an existing 3 unit apartment building to a 7 unit condominium, allegedly in violation of use and lot occupancy requirements of the Zoning Regulations in the R-4 zone, at premises 1636 Irving Street, NW (Square 2591, Lot 203).

HEARING DATES: September 13, 2005 and September 20, 2005
DECISION DATE: September 27, 2005

DECISION AND ORDER

This appeal was filed with the Board of Zoning Adjustment (the Board) on August 5, 2005 challenging DCRA's decisions to approve building permits dated September 9, 2004 and December 17, 2004, and a certificate of occupancy dated June 10, 2005. In response to a motion to dismiss filed by the property owner, the Board scheduled a hearing as to whether the appeal was untimely. At a special public meeting held September 27, 2005, the Board concluded that the administrative decision complained of was the grant of the second building permit (issued December 17, 2004) approving the proposed conversion of a three unit apartment building to a seven unit condominium and that the appeal from that decision was untimely filed. The Board therefore concluded it had no jurisdiction over the appeal and voted to grant the property owner's motion to dismiss. A full discussion of the facts and law that support this conclusion follows.

PRELIMINARY MATTERS

Notice of Public Hearing

The Office of Zoning scheduled a hearing on the motion to dismiss for September 13, 2005. In accordance with 11 DCMR § 3113.13, the Office of Zoning mailed notice of the hearing to the Appellants, ANC 1D (the ANC in which the subject property, is located), the property owner, and DCRA.

441 4th St., N.W., Suite 210-S, Washington, D.C. 20001

Telephone: (202) 727-6311

E-Mail Address: zoning_info@dc.gov

Web Site: www.docz.dcgov.org

Parties

The Appellants in this case are Paul Basken and Joshua Meyer. Appellants represented themselves during the Board proceedings, but were initially represented by the law firm of Kass, Mitek & Kass, PLLC.

The Madera Condominium Association, Inc. ("Madera") and 1636 Irving Street, LLC, the respective owner and developer of the subject property, were represented by the law firm of Holland & Knight. As the property owner, Madera was automatically a party under 11 DCMR § 3106.2 and will hereafter be referred to as the Owner.

ANC

ANC 1-D, as the affected ANC, was automatically a party in this Appeal. In a Resolution dated September 6, 2005, ANC 1-D voted to oppose the motion to dismiss filed by the property owner. The Resolution was submitted to the Board on September 12, 2005, following a regularly scheduled monthly meeting with a quorum present (Exhibit 18). Among other things, the ANC contends that a "hearing is necessary" to resolve the issues involved in the appeal.

FINDINGS OF FACT

The Property

1. The building is located at 1636 Irving Street, NW in the R-4 zone and was constructed prior to 1958.
2. The Owner obtained Building Permit No. B465646 on or about September 9, 2004, authorizing a three- story rear addition to an existing three- unit apartment building. It also provided for the interior remodeling of the existing three- unit apartment building into a four - unit apartment building.
3. The Owner obtained Building Permit No. B468513 (the revised permit) on or about December 17, 2004, authorizing the construction of seven apartment units at the property. The permit stated "Revision to 465646 – converting 3 units apt. into 7 units. Revision of interior for previously approved addition *subject to zoning approval of number of units in zone*" (emphasis supplied).
4. The revised permit was the first and only DCRA administrative decision that authorized the conversion of the existing structure into a 7-unit apartment use.
5. Appellants "repeatedly telephoned DCRA officials during the construction process, expressing concerns about all of [the] apparent zoning violations at the [property]"

(Exhibit 8, Appellants' Statement on Appeal, p. 6), and continued to complain to city officials even after the units were put up for sale, *Id.* at p. 2).

6. The converted building was under roof on or about January 15, 2005.

7. In a letter dated May 26, 2005, DCRA Director Patrick Canavan indicated to ANC 1-D that a zoning review error was made when DCRA issued the building permits, but that DCRA would nevertheless issue the certificate of occupancy. The letter also indicated that ANC 1-D had the right to appeal to the Board the Director's decision to issue the certificate of occupancy (Exhibit 4, Motion to Dismiss, Attachment B).

8. On May 27, 2005, Mr. Basken e-mailed this letter to Mr. Meyer and others and requested in the e-mail that the ANC and the Mount Pleasant Historical Society file a "fee-free" appeal to the Board (Motion to Dismiss, Attachment C).

9. Appellants engaged in ongoing negotiations with the Owner and Developer between June 8, 2005 and July 30, 2005. (See e-mails appended to Exhibit 17, Response to Motion to Dismiss.)

10. In the above-referenced e-mails, the Appellants refer to the construction as "in violation of the zoning law;" they refer to the "zoning dispute" between the parties; and they submit draft settlement proposals to resolve the dispute.

11. DCRA issued Certificate of Occupancy CO9912 (the C of O) for the building on or about June 10, 2005.

12. On or about July 21, 2005, Mr. Basken e-mailed Frederic Press, Esq., a Maryland attorney who represented the Owner, and expressed concern about "wait[ing] past the date[s] of a legally allowable appeal to the [Board]".

13. Mr. Press responded by email the next day and stated, among other things, that the Appellants had until August 10, 2005 to file their appeal. Appellants' counsel, Brian Kass, was "copied" on this e-mail as well as the other e-mails between Mr. Basken and Mr. Press.

14. August 10, 2005 was the 61st day after the C of O was issued.

15. The ANC decided at a public meeting on July 22, 2005 not to appeal the decision to issue the certificate of occupancy.

16. Appellants filed this appeal on August 5, 2005, 231 days after the revised permit was issued, 70 days after they became aware of DCRA's May 26, 2005, letter, and 56 days after the C of O was issued.

CONCLUSIONS OF LAW

Merits

Appellants have appealed two building permits and a certificate of occupancy on grounds that they unlawfully allowed for the expansion of four rental properties into a seven-unit condominium complex in violation of certain zoning regulations, including 11 DCMR § 401.3. Subsection 330.5 (c) of the Zoning Regulations allows, within an R-4 District, the conversion of a pre-1958 building to an apartment house. Subsection 401.3 provides that such converted structures must have a minimum lot area of 900 square feet for each apartment. Appellants contend that the Owner's lot is too small to allow for seven apartments of this size. Accordingly, Appellants assert that the permit was based upon an erroneous zoning determination.

Motion to Dismiss

The owner and developer filed a motion to dismiss the appeal for lack of jurisdiction on grounds of timeliness. Accordingly, the Board was bound to consider the jurisdictional question first, prior to consideration of the merits. The District of Columbia Court of Appeals has held that "[t]he timely filing of an appeal with the Board is mandatory and jurisdictional." *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994).

The rules governing the timely filing of an appeal before the Board are set forth in 11 DCMR § 3112.2. Subsection 3112.2(a) provides that an appeal must be filed within sixty (60) days from the date the person filing the appeal had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge, whichever is earlier. Because this appeal involves the erection of a building, § 3112.2 (b) also applies. That provision states that no appeal shall be filed later than 10 days after the structure or part thereof in question is under roof.¹ However, § 3112.2(c) provides that notwithstanding § 3112.2(a) and (b), an appellant shall have a minimum of sixty (60) days from the date of the administrative decision complained of in which to file an appeal. Finally, § 3112.2 (d) provides that the Board may extend the 60 - day time limit 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 appellant's ability to file an appeal to the Board; and (2) The extension of time will not prejudice the parties to the appeal.

Pursuant to the Zoning Act, the Board has jurisdiction to hear appeals alleging "error in any order, requirement, decision, determination, or refusal made by ... any [District] administrative officer or body in the carrying out or enforcement of" the Zoning Regulations. D.C. Official Code 6-641.07(g) (1) (2001). Therefore, the threshold

¹ The subsection goes on to define "under roof as "the stage of completion of a structure or part thereof when the main roof of the structure or part thereof, and the roofs of any structures on the main roof or part thereof, are in place".

question in this motion to dismiss is the Board's determination of the error being alleged and the decision in which that error was made.

Appellants clearly identified in their appeal the error complained of as "the decision that the existing structure....be allowed to expand from four rental properties into a seven-unit condominium complex.... Developer 1636 Irving St. LLC. received building permits for seven units "subject to zoning approval of number of units in zone" (B468513) and later, certificate of occupancy for seven units." Accordingly, the error complained of - that the existing structure....be allowed to expand from four rental properties into a seven-unit condominium complex - was made in the issuance of the referenced permit, i.e. the revised permit, issued December 17, 2004.

Applying the rules set forth in § 3112.2, the time limit for filing an appeal of this decision is determined as follows: This project was under roof on January 15, 2005. Pursuant to § 3112.2(b) (1) an appeal should have been filed by January 25, 2005. However, because this date is less than 60 days from when the revised permit was issued (December 17, 2004), pursuant to § 3112.2 (c) the last date for a timely appeal was February 15, 2005. Finally, the Board may extend this deadline pursuant to § 3112.(d) upon a finding of exceptional circumstances beyond appellants' control impairing their ability to file a timely appeal, provided the extension of time will not prejudice a party to the case. Appellants argue that the language - "subject to zoning approval of number of units in zone" on the building permit was confusing and reasonably led the appellants to the conclusion that the decision was not final.

Even if the Board were to find that Appellants' confusion was both reasonable and an extenuating circumstance beyond their control that impaired their ability to file an appeal that circumstance ended on May 26, 2005, when the Director of DCRA in a letter to ANC 1-D specifically admitted to a "zoning review error". Appellants had actual knowledge of that letter as indicated by Mr. Basken's e-mail of May 27, 2005 to Mr. Meyer, Council member Jim Graham and others, requesting that the ANC and the Mount Pleasant Historical Society file a "fee-free" appeal to the Board. Accordingly, there can be no doubt that by May 27, 2005, Applicants knew that it was time to appeal.

The question then becomes what amount of time should be allowed for an appeal to be filed after the extenuating circumstances end. Subsection 3112.2 is silent on this issue, but certainly the rule could not be reasonably interpreted as permitting more than the 60 days permitted in the absence of a reasonable basis for delay. The Board therefore concludes the deadline for filing this appeal was 60 days from when the appellants had notice or knowledge of the decision complained of. That date is July 26, 2005, 60 days from May 27, 2005. (D.C. 2001).

The Board finds that as of May 27, 2005, there were no exceptional circumstances outside of appellants' control that could not have been reasonably anticipated and

substantially impaired the appellants' ability to file an appeal to the Board.² On May 27th DCRA disclosed that – despite the zoning error-- the C of O would be issued. At that point, Appellants, who since the time of permit issuance had all the information needed to file an appeal (including now a confession of error), also now knew that it was time to do so. Instead they waited 70 additional days to file this appeal. There are no exceptional circumstances that would excuse this further delay.

During this 70-day period, Appellants pursued other avenues to resolve their dispute and even sought to have the ANC appeal in their place. Appellants may very well have wished to avoid the difficulty and expense of prosecuting an appeal. However, a party who chooses to engage in negotiations or other ways to resolve a dispute does not thereby extend its time for filing an appeal. *Waste Management, supra.*; *Woodley Park Community Ass'n v. District of Columbia Board of Zoning Adjustment*, 490 A.2d 628 (D.C. 1985). The Board need “not countenance delay in taking an appeal when it is merely convenient for an appellant to defer in making that decision. *Waste Management, supra.*

Nor may exceptional circumstances be found in DCRA's statement that the C of O may be appealed or Mr. Press's statement that Appellant had until August 10th to do so. Neither statement constituted exceptional circumstances that impaired appellants' ability to file the appeal. The Appellants were represented by counsel who were not hindered from researching beyond these statements and determining the deadlines for filing a timely appeal. Accordingly, Applicants' August 5, 2005 filing of the appeal was untimely.

Finally, Appellants contend that the C of O, issued on June 10, 2005, is the decision being appealed and therefore the appeal is timely. They maintain that DCRA's letter of May 26, 2005 invited them to appeal the C of O and, at a minimum, created “uncertainty” regarding their appeal rights (Response to Motion to Dismiss, p. 3.)

The Board finds to the contrary. DCRA made no additional zoning decisions when it issued the C of O. Rather, the issuance of the C of O reflects only an administrative judgment of what was fair and equitable in light of the zoning error that had been made.³ The only decision that can be associated with the zoning error

² Because the appeal is being dismissed, and the condominium may remain in place, the Board need not reach the issue of whether there was any prejudice to the Owner as a result of any extension of the time to appeal.. Nevertheless, the Board notes that the Owner was on notice that Appellants had serious concerns about the legality of the conversion and knew that an appeal was being considered.

³ The Appellants did not appeal the validity of that determination. The Board therefore expresses no view with respect to the validity of that decision or even whether the issuance of this C of O was “based in whole or in part upon any zoning regulation”, D.C. Official Code § 6-641.07 (d).

complained of (the inadequate lot size) is the revised permit and therefore that is the only decision that can be appealed on that ground.

Moreover, Appellants' argument does not give effect to § 3112.2 (b) (1) and (c), which bars an appeal of a decision involving "the erection, construction, reconstruction, conversion, or alteration of a structure or part thereof", if the appeal is "filed more than ten days after a structure is "under roof" or "sixty (60) days from the date of the administrative decision complained" whichever is the last to occur. Even if Appellants correctly characterize the building permit as representing an incomplete decision, it clearly involved and authorized the construction complained of here. And indeed the construction proceeded under the revised permit and the project was under roof approximately a month later. To permit an appeal to be filed based upon events that occur more than ten days after a structure becomes "under roof" is contrary to the Zoning Commission's "intent in paragraph (b) ... to establish a firm deadline beyond which no appeal could be filed". Order No. 0201, Case No. 02-0, (50 DCR 1200 (February 7, 2003.)

ANC

The Board is required under § 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21), as amended; D.C. Official Code § 1-9.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC's recommendations. ANC 1-D voted to oppose the Motion to Dismiss, but stated only that it wanted the Board to consider the merits of the appeal. As stated in this Decision and Order, because the appeal was untimely filed, the Board lacks jurisdiction to do so.

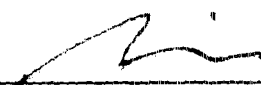
For reasons discussed above, the Board must grant the motion to dismiss the appeal. It is hereby **ORDERED** that the motion to dismiss the appeal as untimely is **GRANTED**.

Vote taken on September 27, 2005

VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr.,
John A. Mann II and Kevin Hildebrand in support of the motion)

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

Each concurring member has approved the issuance of this Decision and Order.

ATTESTED BY: 

JERRILY R. KRESS, FAIA
Director, Office of Zoning 

MAR 23 2006

FINAL DATE OF ORDER: _____

BZA APPEAL NO. 17411

PAGE NO. 8

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



BZA APPEAL NO. 17411

As Director of the Office of Zoning, I hereby certify and attest that on MAR 23 2006, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

Paul Basken
1638 Irving Street, N.W.
Washington, D.C. 20010

Joshua Meyer
1640 Irving Street, N.W.
Washington, D.C. 20010

Paul J. Kiernan, Esq.
c/o The Madera Condominium Association, Inc
& 1636 Irving LLC
Holland & Knight
2099 Pennsylvania Avenue, N.W., Suite 100
Washington, D.C. 20006

Chairperson
Advisory Neighborhood Commission 1D
P.O. Box 43529
Washington, D.C. 20010

Single Member District Commissioner 1D05.
Advisory Neighborhood Commission 1D
P.O. Box 43529
Washington, D.C. 20010

Bill Crews
Zoning Administrator
Dept. of Consumer and Regulatory Affairs
Building and Land Regulation Administration
941 North Capitol Street, N.E., Suite 2000
Washington, D.C. 20002

BZA APPEAL NO. 17411

PAGE NO. 2

Councilmember Jim Graham
Ward One
1350 Pennsylvania Avenue, N.W.
Suite 105
Washington, D.C. 20004

Ellen McCarthy, Interim Director
Office of Planning
801 North Capitol Street, N.E.
4th Floor
Washington, D.C. 20002

Alan Bergstein
Office of the Attorney General
441 4th Street, N.W., 7th Floor
Washington, D.C. 20001

David Rubenstein
Deputy General Counsel
941 North Capitol Street, N.E.
Suite 9400
Washington, D.C. 20002

ATTESTED BY:



JERRILY R. KRESS, FAIA
Director, Office of Zoning

TWR