*Government of the District of Columbia*
**OFFICE OF ZONING**

**Z.C. CASE NO.: 02-01**

As Secretary to the Zoning Commission, I herby certify that on JAN 2 9 2003 copies of the Notice of Final Rulemaking & Order No. 02-01 were mailed first class, postage prepaid or sent by inter-office government mail to the following:

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3. Alan Bergstein, Esq. (Corporation Counsel)

4. Gotlieb Simon (ANC)

5. ANC Chairpersons (see attached list)

6. Councilmembers (see attached list)

**ATTESTED BY:** _____
**Alberto P. Bastida, AICP**
**Secretary to the Zoning Commission**

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ZONING COMMISSION
District of Columbia
CASE NO. 02-01
EXHIBIT NO. 12
ZONING COMMISSION
District of Columbia
CASE NO.02-01
EXHIBIT NO.12

Government of the District of Columbia
ZONING COMMISSION

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

**September 9, 2002**

The Zoning Commission for the District of Columbia, pursuant to its authority under §§ 1 and 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended; D.C. Code, 2001 Ed. §§ 6-641.01 and 6-641.07(c)); having held a public hearing as required by § 3 of the Zoning Act (D.C. Code, 2001 Ed. § 6-641.03); and having referred the proposed amendment to the National Capital Planning Commission for a 30-day period of review pursuant to 11 DCMR §§ 3025.3 and 3038.1; hereby gives notice of the adoption of the following amendments to § 3112 (Pre-Hearing Procedures for Appeals) of the Zoning Regulations, Title 11 DCMR, pertaining to appeals to the Board of Zoning Adjustment from the decisions of the Zoning Administrator and other administrative officials in the administration and enforcement of the Zoning Regulations. This rulemaking requires that all such appeals be filed within sixty (60) days of the date the person filing the appeal had notice or knew of the decision complained of, or reasonably should have had notice or known of the decision complained of, whichever is earlier. The Commission took final action to adopt the amendment at a public meeting held on September 9, 2002.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) There are exceptional circumstances that are outside of the appellant's control and could not have been reasonably anticipated that substantially impaired the appellant's ability to file an appeal to the Board; and

(2) The extension of time will not prejudice the parties to the appeal, as identified in § 3199.1.

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

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

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

**Carol J. Mitten**
**Chairman**
**Zoning Commission**

**Jerrily R. Kress, FAIA**
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