Holland+Knight

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Paul J. Kiernan
202 663 7276
paul.kiernan@hklaw.com

August 29, 2005

VIA HAND DELIVERY

D.C. Board of Zoning Adjustment
2005 AUG 29 PM 2:35

District of Columbia Board of Zoning Adjustment
441 Fourth Street, N.W.
Suite 210 South
Washington, D.C. 20001

Attn: Mr. Richard Nero

Re: Appeal No. 17411 (Basken/Meyer/1636 Irving St.)

Dear Mr. Nero:

Enclosed please accept for filing:

- Letter authorizing Holland & Knight LLP to represent the owner/developer 1636 Irving LLC and The Madera Condominium Association, Inc.
- An original plus 20 copies of the Motion to Dismiss for Lack of Jurisdiction and Request for Immediate Consideration and attached exhibits.

Please note that the Motion is being served by email and by hand-delivery to the appellants and the agent/attorney designated on their appeal form as well as on DCRA, the ANC, and counsel.

As reflected in the Motion to Dismiss, the owner is requesting that this matter be placed before the Board at its public meeting on September 13, 2005, or as soon thereafter as the business of the Board permits. The Motion has been filed to allow the appellants 10 days to respond and still meet the timing requirements for inclusion on the September 13 calendar.

BZA
Case No. 17411
Exhibit No. 15

Board of Zoning Adjustment
District of Columbia
CASE NO. 17411
EXHIBIT NO. 15

After reviewing the enclosed, please let me know if you or the Board requires additional information or additional copies of documents. Thank you in advance for your attention to this matter.

HOLLAND & KNIGHT LLP

By: 
Paul J. Kiernan

cc: Brian Kass, Esq. (by hand-delivery)
Paul A. Basken (by hand-delivery)
Joshua S. Meyer (by hand-delivery)
Josh Adler (by email)

3182732_v1

August 26, 2005

Board of Zoning Adjustment
441 4th Street, N.W.
Second Floor
Washington, D.C. 20001

Re: 1636 Irving Street, N.W.
BZA Appeal No. 17411

Dear Members of the Board:

This letter will serve as authorization for the law firm of Holland & Knight LLP to represent 1636 Irving LLC in the appeal before the Board of Zoning Adjustment concerning the above-referenced property.

If you have any questions, please contact me.

Sincerely,

1636 IRVING LLC

By: _____
Name: Joshua Adler
Title: Managing Member

3178855_v1

August 26, 2005

Board of Zoning Adjustment
441 4th Street, N.W.
Second Floor
Washington, D.C. 20001

Re: 1636 Irving Street, N.W.
BZA Appeal No. 17411

Dear Members of the Board:

This letter will serve as authorization for the law firm of Holland & Knight LLP to represent the Madera Condominium Association in the appeal before the Board of Zoning Adjustment concerning the above-referenced property.

If you have any questions, please contact me.

Sincerely,

THE MADERA CONDOMINIUM ASSOCIATION, INC.

By:
Name: Joshua Adler
Title: President

3178855_v1

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

APPEAL OF PAUL A. BASKEN AND JOSHUA S. MEYER OF THE ISSUANCE OF B-465646, B-468513 AND CO-9912	)	Appeal No. 17411
1636 IRVING STREET, N.W.	)	

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION AND REQUEST FOR IMMEDIATE CONSIDERATION

1636 Irving Street, LLC and The Madera Condominium Association, Inc., the developer and owner of the subject property (hereafter "Madera"), ask the Board to dismiss the appeal because it was filed long after the appeal period expired. Although the Board would ultimately find that the appeal lacks merit, the Board need not and should not convene a full public hearing when it is clear from the face of the appeal papers and the undisputed facts that the appeal is time-barred.

Madera requests that this motion be heard as soon as possible, preferably at the Board's September 13, 2005 public meeting, because the pendency of this untimely appeal causes injury to Madera and to third parties.

INTRODUCTION

As detailed below, the building permits that are the subject of this appeal were issued in 2004. The appellants were fully aware of the issuance of the permits many months ago and complained to public officials loudly and repeatedly about the construction. What they did not do was file an appeal to this Board. Instead, they stood by as construction began and was completed. They saw the building go under roof last winter and took no appeal. They learned on May 27, 2005, that, notwithstanding alleged errors in approval of construction, the District had made a decision to issue a certificate of occupancy for the completed building. Still they did

not file an appeal. It was not until almost 8 months after issuance of the last of the challenged building permits, at least 4 months after the building was under roof and 70 days after appellants had notice and knowledge about DCRA's decision to issue a certificate of occupancy that this appeal was lodged.

Under 11 DCMR §3112.2, a party aggrieved by a decision has 60 days to file an appeal. The Court of Appeals has repeatedly admonished that if an appeal is not timely filed, this Board is without power to consider it. Deciding that the appeal is untimely does not require this Board to take testimony, and the Board would not have to review all of the charges leveled by appellants against the Office of Zoning and DCRA and Councilmember Graham and Madera and District employees. Rather, the Board can look at the appeal itself and the attached papers confirming that the appellants had actual knowledge of the disputed decisions long ago, and conclude that the appeal is time-barred.

UNDISPUTED FACTS OF THE CASE

This appeal concerns a seven-unit residential condominium located at 1636 Irving Street, N.W. (Square 2591, Lot 204). Appellant Paul A. Basken lives at 1638 Irving Street (Square 2591, Lot 205), which adjoins the subject property.[1] Appellant Joshua S. Meyer is the owner of a property down the block at 1640 Irving Street.[2]

---

[1] Neither Maureen Greenwood, listed in the records of the Office of Tax and Revenue as the owner of 1638 Irving Street, nor Bahman, Inc. listed as the owner of the property at 1630 Irving Street, on the other side of the subject property, has filed an appeal. In a vote held at its public meeting on July 22, 2005, Advisory Neighborhood Commission 1-D decided not to file an appeal to the BZA.

Pursuant to 11 DCMR §3199, the owner of the property is automatically a party to an appeal.

[2] Because the appeal is time-barred in any event, the Board need not resolve the issue of whether Mr. Meyer has standing to appeal. See York Apartments Tenants Association v. District of Columbia Zoning Commission, 856 A.2d 1079, 1084-85 (D.C. 2004) (mere fact that challenger lives in close proximity to project does not establish standing to appeal Zoning Commission's approval of modification to Planned Unit Development).

On December 17, 2004, the Department of Consumer and Regulatory Affairs issued Permit B-468513 as a revision to B-465646 which had been issued on September 9, 2004 (the "Building Permits," a copy of which were attached to the appeal and another copy is attached as Exhibit A). The Building Permits authorized the construction of a three-story rear addition to the existing building and expressly noted that this was the conversion of a three-unit building into a seven-unit building.

The appellants were aware of the nature of this construction as well as the issuance of the Building Permits. In the words of the appeal itself:

> [P]etitioners have . . . many written, electronic and verbal communications to city officials, in which we made known our concerns about the potential illegality of this building – **from before ground was even broken on the construction to the days before and after the units were put up for sale.** When the developers first proposed this project, in fact, the petitioners published a community-wide letter, and also wrote to Councilman Graham and our ANC representatives several times, making clear our displeasure with this project and our concerns about its potential legality.

(Appellant's Statement dated 3 August 2005, p. 2, emphasis added). See also id. at p. 4 (describing the "long history of complaints by the petitioners"). Appellants acknowledge that during the construction they, and others in the neighborhood, believed that the project was not legal and said so to DCRA, to Councilmember Graham, and to others before public meetings. (Id. at pp. 4-5). Advisory Neighborhood Commission 1-D also expressed concern about the legality of the construction, see ANC 1-D Irving Street Zoning Resolution dated May 23, 2005, attached to appeal papers.

In a letter dated May 26, 2005, DCRA Director Patrick J. Canavan advised ANC 1-D as follows:

> ANC-1D requested that the Department of Consumer and Regulatory Affairs (DCRA) refrain from issuing any Certificate of Occupancy for the

> property, as presently configured, pending approval from the D.C. Office of Zoning. . . . .
>
> [D]CRA's examination of property records and information available to the agency disclosed errors in the review and issuance of the building permits. As you are aware, the structure is now complete and units are now for sale; in fact, only cosmetic work remains. The building code official has determined that the structure meets building code requirements.
>
> [W]hile there is no way that I can correct this situation to the satisfaction of all the affected parties, I will not penalize those who relied upon the flawed decisions of the regulatory agency charged with approving the work.
>
> **The Zoning Administrator will not deny the property owners a Certificate of Occupancy on the basis of the zoning review error. ANC 1D, of course, has the right to appeal this decision to the Board of Zoning Adjustment.**

(Copy attached to appeal papers and as Exhibit B, emphasis added). At its July 22 public meeting, within 60 days from receipt of this information, ANC 1-D voted not to appeal this decision to issue the certificate of occupancy.

No later than May 27, 2005, appellants had actual knowledge of DCRA's decision to issue the certificate of occupancy with the structure having been completed notwithstanding the alleged error in issuing the Building Permits. On May 27, appellant Basken emailed to appellant Meyer, representatives of Madera, Councilmember Graham, ANC commissioners, and other people a copy of the Canavan decision letter and a request that an appeal be taken. Appellant Basken wrote:

> councilman graham and anc representatives . . . as you have probably already seen, attached is what dcra has finally produced by way of a response to its actions in the case of 1636 irving. it admits errors in issuing the permits, talks of disciplining staff involved, and explicitly invites an appeal to the BZA for a decision on how to resolve the matter.
>
> could the members of the anc and mt pleasant historical society, which are among the groups with standing to file fee-free appeals to the BZA, please indicate if they are willing to take such a step, and if not, why not.

thanks, paul basken

(Copy attached as Exhibit C).

This appeal was filed by appellants Basken and Meyer 70 days later. No one else has filed an appeal

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

Under 11 DCMR §3112.2, an appeal regarding the administration or enforcement of the Zoning Regulations must be filed "within sixty (60) days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier." 11 DCMR §3112.2(a)(as amended by Zoning Commission Order 02-01, dated September 9, 2002). The regulation further provides that if "the decision complained of involves the . . . reconstruction, conversion, or alteration of a structure. . . [n]o appeal shall be filed later than ten (10) days after the date on which the structure or part thereof in question is under roof." 11 DCMR §3112.2(b)(1) (A copy of Zoning Commission Order 02-01 is attached as Exhibit D).

The amended regulation was intended to codify the principles discussed by the Court of Appeals in Waste Management of Maryland, Inc. v. District of Columbia Board of Zoning Adjustment, 775 A.2d 1117 (D.C. 2001) and to establish a firm, clear, and fixed deadline by which appeals are to be filed.[3] As the Court stated in discussing a "reasonable" deadline for appeal (prior to enactment by the Zoning Commission of the 60-day limit):

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[3] The regulation allows the Board to grant an extension of the filing deadline only if there are "exceptional circumstances" outside the appellant's control which "substantially impaired the appellant's ability to file an appeal to the Board." 11 DCMR §3112.2(d). Such "exceptional circumstances" obviously do not apply here where the appellants were fully aware at all times of the construction, the permits, the administrative actions and even the deadline for filing appeals.

> A reasonable time in which to appeal is measured by the time that fairness dictates to enable an aggrieved party to evaluate the appropriateness of seeking review, to obtain the assistance of counsel, and to take the other steps necessary to proceed. . . This conception of the reasonableness standard does not countenance delay in taking an appeal when it is merely convenient for an appellant to defer making that decision. Rather, because deadlines for taking appeals serve important ends, they should not be extended without good cause.

Indeed, in words which apply with equal force to appellants Basken and Meyer, the Court warned that 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 fact that Waste Management chose to concentrate on avenues that reasonably may have appeared more promising than an appeal does not excuse its delay in noting an appeal. *Cf. Woodley Park [Community Ass'n v. District of Columbia Board of Zoning Adjustment*, 490 A.2d 628, 638 (D.C. 1985) (efforts to resolve dispute through negotiations did not excuse delay in filing appeal; appellant "cannot now escape the harsh consequences of its one year delay in appealing because WSC – its adversary in difficult negotiations – was less than fully candid"). It is true that from the February 1996 denial onward, the DCRA consistently disagreed with Waste Management's contention that it was entitled to a C of O as of right and took the contrary position that Waste Management should apply for a variance or a special exception. But the DCRA did not preclude Waste Management from taking a prompt appeal from the February 1996 denial if the company was of a mind to do so.

The question of what is a "reasonable" time to appeal has since been resolved by the Zoning Commission when it fixed the outside date as 60 days. There is no dispute from the face of the appeal papers themselves that appellants Basken and Meyer had knowledge of the decision to issue the Building Permits for a seven-unit building long before June 5, 2005, which is the date 60 days before they filed their appeal. There is also no dispute that appellants Basken and Meyer had knowledge of the decision to issue the certificate of occupancy no later than May 27, 2005. Appellants not only knew about that decision but they knew the basis for that decision, that that decision could be appealed and the timing for doing so, as they had received and

reviewed Director Canavan's letter containing all of that information and, indeed, had requested on that date that the ANC take an appeal "fee-free."[4]

In the Herron case (copy attached as Exhibit E), the Board granted a motion to dismiss an appeal as untimely. The Board held that it analyzed "the timeliness of the appeal starting from the dates the Appellants knew or should have known of the decisions to grant the subdivision and issue the building permits." (Appeal No. 16982 of J. Brendan Herron Jr. and ANC 3F (March 11, 2003), at 11.) In that case, as here, the appellants did not contest that they were aware of the decisions at or about the time they were issued. (Id.) However, they argued that the time should be extended based on an alleged lack of communication or miscommunication by DCRA regarding the approvals that were being issued. The Board rejected that argument and held the appellants to the 60-day limit.

In Herron, the Board specifically overruled earlier decisions which had arguably blurred the dates for calculating the filing of appeals based on clarifications or affirmations of an administrative decision:

> The Board does not find it in the interests of judicial economy or fairness to allow an appeal of a second or subsequent determination on the same basic issue, which can come months or years after the initial determination, at a point where the permittee has progressed beyond mere preparation. Such a subsequent determination should not "re-start" the 60-day time period. If such "re-starting" were allowed, there would be no certainty for a permittee, whose project could be halted at any point by an appeal of a subsequent affirmation of the initial permit issuance decision. . . . [T]he Board cannot countenance creating such uncertainty and forcing the parties to come before it at such a late date. (Herron, at 9).

Appellants write that their appeal is about not only the certificate of occupancy which Director Canavan announced would be issued and which was subsequently finalized on June 10

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[4] Appellants also attached to their appeal papers a second letter dated July 13, 2005, from Director Canavan to Councilmember Graham and copied to appellant Basken, quoting the regulation setting the deadline to file an appeal.

but also the "issuance of all building permits for this project." (Appellants' Statement at 8). The central complaint in their appeal is the propriety of the Building Permits that were issued in September and December 2004 for a building that was "under roof" in winter-spring 2005. Appellants have advised this Board that they knew of the problem and complained to public officials "before ground was even broken." They knew on May 27, 2005, that a certificate of occupancy would be issued and that the DCRA was not going to withhold that certificate based on any alleged zoning violation. They tried to get the ANC to file the appeal "fee-free" but were unsuccessful in persuading the ANC to file the appeal. Under 11 DCMR §3112.2 and the Herron case, appellants Basken and Meyer have waited too long to file this appeal and it should be dismissed.[5]

IMMEDIATE DISMISSAL WILL SERVE THE PUBLIC INTEREST

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

Madera submits that the eventual dismissal of this appeal should not be postponed until the currently-scheduled hearing date of February 7, 2006, some six months after this appeal was

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[5] These facts also establish why the present case is different from Appeal No. 16998 of Advisory Neighborhood Commission 5B (September 9, 2003). In that case, the Board held that an appeal from the issuance of a building permit which was filed less than 60 days after the issuance of the permit was not barred by the fact that the appellants had not challenged "concurrence letters" issued years earlier by the zoning administrator . Here, of course, Director Canavan's letter announcing DCRA's decision to grant the certificate of occupancy for the completed structure (a) was issued after the period for timely appealing the Building Permits had long expired, (b) after the building was completed and certain inspections had been completed, and (c) based on the same zoning issues which might have supported a timely appeal from the issuance of the Building Permits. Appellants did not file a timely appeal within 60 days from the Canavan letter announcing the decision and the basis for the decision.

The facts further demonstrate why appellants cannot rely on the notation on the December Building Permit B-468513 stating "subject to zoning approval of number of units in zone." If appellants were uncertain about what that language meant and thought that it stated a "condition" of the Permit, they should have acted in a timely manner to stop the construction and appeal the Permit, not sit by while the building was built and units sold.

filed. As reflected in the appeal papers themselves, this project is a condominium in which third-party buyers have already proceeded to closing. Additional sales are pending or will be sought. The untimely appeal creates a cloud over this building and this project. Appellants waited until after the permits were issued, after construction was commenced and completed, after DCRA advised the certificate of occupancy would be issued, after the certificate was, in fact, issued, after the ANC declined to appeal, and after unit owners have moved in -- to file an appeal on issues they knew about last year. The untimely appeal "buys" the appellants six more months of interference with this project at virtually no cost to themselves but at substantial potential cost to Madera and to third parties. It is the kind of manipulation of the timing that the Board sought to halt with its Herron decision. Appellants' request to this Board to conduct an investigation "before the developers allow people to buy or rent the seven units" comes far too late in the process as people have already bought and occupied units. Madera requests that the Board take up this motion immediately, preferably at its September 13 meeting or as soon thereafter as the business of the Board permits. That is a little out of the ordinary but it is equally out of the ordinary for an appellant to present with its appeal papers all of the facts necessary to determine that the appeal is time-barred.

* * * * *

Appellants' charges of "misfeasance or malfeasance by city officials," their call for investigations through the IG's Office "as well as the federal government's civil and criminal investigative agencies," and their innuendoes about payments and discharged employees were submitted by the appellants in an effort to disguise their late filing. The Board has a clear and straight path to resolving this appeal, a path that appellants themselves provided by waiting and

waiting before they acted. As required by 11 DCMR §3112.2 and consistent with Herron, and as dictated by the papers the appellants themselves rely on, the Board should grant the motion to dismiss.

This motion is being filed and served so that appellants have 10 days in which to file any response and the motion would be ready for resolution by the Board at its September 13, 2005 public meeting

Respectfully submitted,



Christopher H. Collins
(chris.collins@hklaw.com)
Paul J. Kiernan
(paul.kiernan@hklaw.com)
HOLLAND & KNIGHT LLP
Suite 100
2099 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
202-955-3000

Counsel to 1636 Irving Street, LLC and
The Madera Condominium Association, Inc.

CERTIFICATE OF SERVICE

On August 29, 2005, I caused to be delivered by email and by hand-delivery a copy of this Motion and attached Exhibits to:

Brian Kass, Esq.
Kass, Mitek & Kass, PLLC
Suite 1100
1050 17th Street, N.W.
Washington, D.C. 20036
(briankass@kmklawyers.com)
Counsel to Appellants

Paul A. Basken
1638 Irving Street, N.W.
Washington, D.C. 20010
(paulbasken@yahoo.com)

Joshua S. Meyer
1640 Irving Street, N.W.
Washington, D.C. 20010
(joshmeyerdc@yahoo.com)

Advisory Neighborhood Commission 1-D
c/o Jack McKay, Chair
3200 19th Street, N.W.
Washington, D.C. 20010
(jack.mckay@verizon.net)

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

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

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



Paul J. Kiernan

#3178614_v1

A

RECEIVED
D.C. OFFICE OF ZONING
2005 AUG -5 PM 1:40

T-485 P.030/031 F-461
2027276072
22-08-2005 09:48am From-DC OFFICE OF ZONING

PERMIT

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Form BLRA-15
(Rev. 9-30-91)

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION

BUILDING PERMIT

PERMIT NO. B468513

Date 12/17/04 (Type) ALTERATION AND REPAIR Lot 0204 Square 2591

Address of work 1636 IRVING STREET N.W.

Permission is hereby granted to

1636 IRVING LLC (Owner)

whose authorized to perform the work described herein at the address shown above in strict accordance with the conditions stated on BOTH sides of this permit.

NO.

TOTAL PERMIT FEE $

FILING FEE $

FEE PAYABLE $ 457.00

Authorized work and conditions of performance thereof: REVISION TO #465646 - ADDITION OF ONE KITCHEN ON FIRST, SECOND, & THIRD FLOORS. CONVERTING 3 UNITS APT. INTO 7 UNITS. REVISION OF INTERIOR FOR PREVIOUSLY APPROVED ADDITION. SUBJECT TO ZONING APPROVAL. OF NUMBER OF UNITS IN ZONE.

FOR INSPECTIONS CALL 727-4641

Builder

Width of Bldg. Length Height Value $ No. of Bldgs.

Zone R-4 No. of Stories 3 W/B.

Height of terrace above grade To be occupied as APT. BLDG.

Address of owner 4326 8TH ST. NW. WDC. Projections:

Deposit No. Amount $

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

By: Chief, Permit Clearance Branch

Director

By: ZONING

05/21/2005

RECEIVED
D.C. OFFICE OF ZONING
2005 AUG -5 PM 1:39

PERMIT

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION

BUILDING PERMIT

PERMIT NO. B468513

Date 12/17/04 (Type) ALTERATION AND REPAIR Lot 0204 Square 2591

Address of Work 1636 IRVING STREET N.W.

Permission is hereby granted to (Owner)

1636 IRVING, LLC

Who agrees to carry out construction only as described in the application, the address shown above, in accordance with the plans and specifications filed in this office and the building regulations of the District of Columbia. This permit is issued on the express condition that it may be revoked at any time if the construction is not in accordance with the plans and specifications filed in this office and the building regulations of the District of Columbia. This permit is issued on the express condition that it may be revoked at any time if the construction is not in accordance with the plans and specifications filed in this office and the building regulations of the District of Columbia.

Authorized work and conditions, if any, are as follows: REVISION TO #465646

ADDITION OF ONE KITCHEN ON FIRST, SECOND, & THIRD FLOORS.
CONVERTING 3 UNITS APT. IN TO 7 UNITS.
REVISION OF INTERIOR FOR PREVIOUSLY APPROVED ADDITION. SUBJECT TO ZONING APPROVAL OF NUMBER OF UNITS IN ZONE.

TO ALL PERMIT FEE $
FILING FEE $
NO. DATE
FEE PAYABLE $457.00

FOR INSPECTIONS CALL 442-4641

Builder Value No. of Bldgs.
Width of Bldgs. Length Height No. of Stories 3 W/B.
Zone R-4 To be occupied as APT. BLDG.
Height of terrace above grade Projections
Address of owner 4320 81ST ST. NW. WDC.
Deposit No. Amount

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

D. CLARK
DIRECTOR

Plan Examiner/Issuance Branch

E. KING

PERMIT

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION

BUILDING PERMIT

PERMIT NO. B465646

Date 9/9/04 (Type) ALTERATION AND REPAIR Lot 0204 Square 2591

Address of Work 1636 IRVING ST. N.W.

Permission is hereby granted to (Owner)

GALLATIN CO. LLC

Who agrees to carry out construction only as described in the application, the address shown above, in accordance with the plans and specifications filed in this office and the building regulations of the District of Columbia. This permit is issued on the express condition that it may be revoked at any time if the construction is not in accordance with the plans and specifications filed in this office and the building regulations of the District of Columbia.

Authorized work and conditions, if any, are as follows:

THREE STORY REAR ADDITION INTERIOR REMODEL AS PER PLANS. SEPARATE ELECTRICAL, PLBG AND MECH. INSTALLATION PERMITS ARE REQUIRED.

TO ALL PERMIT FEE $
FILING FEE $
NO. DATE
FEE PAYABLE $753.68

FOR INSPECTIONS CALL 727-7562
INSPECTION BRANCH 442-4641

Builder Value No. of Bldgs.
Width of Bldgs. Length Height No. of Stories
Zone R-4 To be occupied as 4 UNITS APTS.
Height of terrace above grade Projections
Address of owner SAME AS ABOVE
Deposit No. Amount

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

D. CLARK
DIRECTOR

Plan Examiner/Issuance Branch

B

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Consumer and Regulatory Affairs

Office of the Director

May 26, 2005

[Served via email and regular mail]

Jack McKay, Chair
Mount Pleasant Advisory Neighborhood Commission, 1-D
P.O. Box 43529
Washington, D.C. 20010

Re: ANC 1-D Irving Street Zoning Resolution

Dear Commissioner McKay:

This letter is in response to a May 23, 2005 Advisory Neighborhood Commission 1-D (ANC-1D) Resolution related to the property located at 1636 Irving Street, N.W. In the Resolution, ANC-1D requested that the Department of Consumer and Regulatory Affairs (DCRA) refrain from issuing any Certificate of Occupancy for the property, as presently configured, pending approval from the D.C. Office of Zoning. The Resolution suggests, in support of the requested action, that the building permit issued for the property on December 17, 2004 allows the conversion of the Property into a seven-unit apartment house in violation of the minimum lot area requirements of 11 DCMR § 401.3 and § 330.5(c).

Records show that on September 9, 2004, DCRA issued a building permit (B465646) to construct a three-story rear addition to the structure. Several months later, on December 17, 2004, DCRA issued a second building permit (B468513) authorizing the property owner to construct an additional three units for a total of seven units in the structure. DCRA's examination of property records and information available to the agency disclosed errors in the review and issuance of the building permits. As you are aware, the structure is now complete and units are now for sale; in fact, only cosmetic work remains. The building code official has determined that the structure meets building code requirements.

At the very time when I have committed to restoring the confidence of the community in this agency, I cannot allow this situation to undermine that confidence. While there is no way that I can correct this situation to the satisfaction of all the affected parties, I will not penalize those who relied upon the flawed decisions of the regulatory agency charged with approving the work.

I am deeply disturbed that such gross mistakes were made at the highest levels of the zoning administration with such serious consequences. I apologize to the Commission and to the community for this error.

BZA
CASE No. 17411

The Zoning Administrator will not deny the property owners a Certificate of Occupancy for the property on the basis of the zoning review error. ANC 1D, of course, has the right to appeal this decision to the Board of Zoning Adjustments (BZA).

Finally, it is important that you know that I have not taken this matter lightly. In addition to ordering a complete review of the procedures used by the Zoning Administrator in this matter, I will take appropriate and serious personnel actions against those staff members involved. Be assured that I will not allow poor staff performance to impact the credibility of this agency or undermine the "foundation of an R-4 District," as the ANC Resolution states.

Should you have further questions regarding this matter, please feel free to contact me at (202) 442-8936 or via email at patrick.canavan@dc.gov. You may also contact my Chief of Staff, Theresa Lewis, at (202) 442-8937.

Sincerely,

Patrick J. Canavan, Psy.D.
Director

cc: Deputy Mayor Stanley Jackson
Councilmember Jim Graham

RECEIVED
D.C. OFFICE OF ZONING
2005 JUN -5 PM 1:29

C

Josh Adler

From: paul@basken.com [paulbasken@yahoo.com]
Sent: Friday, May 27, 2005 2:05 PM
To: 'Josh Meyer'; 'Richard Wysocki'; 'Richard Wysocki'; 'Jack McKay'; 'Fay Armstrong'; 'Gregg Edwards'; 'Marika Torok'; 'Robb LaKritz'; 'Josh Adler'; 'Robert Frazier'; Jim Graham
Subject: dcra response on 1636

Follow Up Flag: Follow up
Flag Status: Flagged



5-26-05.doc (40 KB)

councilman graham and anc representatives... as you probably have already seen, attached is what the dcra has finally produced by way of a response to its actions in the case of 1636 irving. it admits errors in issuing the permits, talks of disciplining staff involved, and explicitly invites an appeal to the BZA for a decision on how to resolve the matter.

could the members of the anc and mt pleasant historical society, which are among the groups with standing to file fee-free appeals to the BZA, please indicate if they are willing to take such a step, and if not, why not.

thanks, paul basken

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Consumer and Regulatory Affairs

Office of the Director

May 26, 2005

[Served via email and regular mail]

Jack McKay, Chair
Mount Pleasant Advisory Neighborhood Commission, 1-D
P.O. Box 43529
Washington, D.C. 20010

Re: ANC 1-D Irving Street Zoning Resolution

Dear Commissioner McKay:

This letter is in response to a May 23, 2005 Advisory Neighborhood Commission 1-D (ANC-1D) Resolution related to the property located at 1636 Irving Street, N.W. In the Resolution, ANC-1D requested that the Department of Consumer and Regulatory Affairs (DCRA) refrain from issuing any Certificate of Occupancy for the property, as presently configured, pending approval from the D.C. Office of Zoning. The Resolution suggests, in support of the requested action, that the building permit issued for the property on December 17, 2004 allows the conversion of the Property into a seven-unit apartment house in violation of the minimum lot area requirements of 11 DCMR § 401.3 and § 330.5(c).

Records show that on September 9, 2004, DCRA issued a building permit (B465646) to construct a three-story rear addition to the structure. Several months later, on December 17, 2004, DCRA issued a second building permit (B468513) authorizing the property owner to construct an additional three units for a total of seven units in the structure. DCRA's examination of property records and information available to the agency disclosed errors in the review and issuance of the building permits. As you are aware, the structure is now complete and units are now for sale; in fact, only cosmetic work remains. The building code official has determined that the structure meets building code requirements.

At the very time when I have committed to restoring the confidence of the community in this agency, I cannot allow this situation to undermine that confidence. While there is no way that I can correct this situation to the satisfaction of all the affected parties, I will not penalize those who relied upon the flawed decisions of the regulatory agency charged with approving the work.

I am deeply disturbed that such gross mistakes were made at the highest levels of the zoning administration with such serious consequences. I apologize to the Commission and to the community for this error.

The Zoning Administrator may not deny the property owners a Certificate of Occupancy for the property on the basis of the zoning review error. ANC 1D, of course, has the right to appeal this decision to the Board of Zoning Adjustments (BZA).

Finally, it is important that you know that I have not taken this matter lightly. In addition to ordering a complete review of the procedures used by the Zoning Administrator in this matter, I will take appropriate and serious personnel actions against those staff members involved. Be assured that I will not allow poor staff performance to impact the credibility of this agency or undermine the "foundation of an R-4 District," as the ANC Resolution states.

Should you have further questions regarding this matter, please feel free to contact me at (202) 442-8936 or via email at patrick.canavan@dc.gov. You may also contact my Chief of Staff, Theresa Lewis, at (202) 442-8937.

Sincerely,

Patrick J. Canavan, Psy.D.
Director

cc: Deputy Mayor Stanley Jackson
Councilmember Jim Graham

D

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).

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

September 9, 2002

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

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
Carol J. Mitten
Chairman
Zoning Commission

Jerrily R. Kress
Jerrily R. Kress, FAIA
Director
Office of Zoning

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16982 of J. Brendan Herron Jr. and ANC 3F, pursuant to §§ 3100 and 3101 of the Zoning Regulations, from the administrative decision of the Department of Consumer and Regulatory Affairs ("DCRA" or "Appellee") in the issuance of building permit Nos. B446312, and B446316, issued on June 13, 2002, to Zuckerman Brothers, Inc. ("Property Owner"), allowing the construction of two single family dwellings at 2900 and 2902 Albemarle Street, N.W. ("Property"), and from the administrative decision to allow the subdivision of the Property on April 17, 2002.

HEARING DATE: March 4, 2003
DECISION DATE: March 11, 2003

DECISION AND ORDER

J. Brendan Herron Jr. filed an appeal with the Board of Zoning Adjustment ("Board" or "BZA") on December 14, 2002. ANC 3F later joined in the appeal. Mr. Herron and ANC 3F will be collectively referred to as the "Appellants." They appeal an October 23, 2002 decision of David Clark, the then Director of DCRA, as that decision relates to the building permits[1] issued on June 13, 2002, for the Property, as well as the subdivision of the Property.

Appellants allege that DCRA erred because it did not process the building permits in accordance with the Forest Hills Tree and Slope Protection Overlay ("FHTSP" or "Overlay"). Because the building permit applications were filed before the Zoning Commission decided to "set down" the Overlay for hearing, 11 DCMR §3202.5 (a) ("set down rule") would ordinarily allow the permits to be processed in accordance with the zoning in place as of the date of application. However, Appellants' claim that the building permit applications were incomplete and therefore, under the same rule, must be processed under the more restrictive zoning designation proposed to be set down. Appellants contend that the development on each newly subdivided lot was noncompliant with the FHTSP provisions.

[1] The Board must first clear up an inconsistency resulting from the information filed by Appellants. Appellant Herron listed permits "B446310", "B446312" and "B44316" in his initial filing for this appeal. Appellant Herron incorrectly identified permit B446316 as "B44316" in this filing, omitting the first number 6. In Appellants' statement filed on December 19, 2002, Appellants referenced only permits B446312 and B446316. At the hearing, Appellants withdrew their appeal of the raze permit B446310 (Hearing Transcript at 152). In light of the above, the Board has determined that this appeal concerns building permits B446312 and B446316.

Appellants also assert that the subdivision of the Property created lots that were not in conformance with the side yard requirements of 11 DCMR § 405.9, and therefore was in violation of 11 DCMR § 410.6(c). The Appellants allege that the error occurred as a result of DCRA's failure to consider the existing house on the Property at the time of the subdivision.

Lastly, Appellants allege that a statutorily required 30-days notice to the ANC of a pending permit application was not given to ANC 3F for the permits at issue. Section 8 of the Zoning Act of 1938 limits the Board's jurisdiction alleged errors that are made "in the administration or enforcement of the Zoning Regulations." D.C. Official Code § 6-601.07 (2001). A failure to provide ANC notice in this context stems from § 13(b) of the Advisory Neighborhood Commissions Act of 1975, effective October 10, 1975 (D.C. Law 1-21; D.C. Official Code § 1-309.10(b) (2001)), not the Zoning Regulations. Therefore, only the first two grounds are considered to be properly before the Board and the portion of the appeal regarding notice to the ANC is dismissed.

Representing ANC 3F in this appeal were David J. Bardin and Cathy Wiss. Appellant Herron represented himself. Appellee was represented by Laura Gisolfi Gilbert, DCRA, and Brenda Walls, Office of the Corporation Counsel (now the Office of the Attorney General for the District of Columbia). The Property Owner, Zuckerman Brothers Inc., was represented by John Epting, from the law firm of Shaw Pittman.

The Property Owner filed a Motion for Leave to Intervene and Dismiss for lack of jurisdiction based on timeliness on January 9, 2003. He was granted leave to intervene as a preliminary matter on the day in which the hearing was scheduled.

The Property Owner also filed a Motion to Schedule Hearing on Motion to Dismiss and Postpone Public Hearing on Merits. On the day of the scheduled hearing for this case, this motion was withdrawn.

Appellants' Opposition to the Property Owner's Motion for Leave to Intervene and Dismiss was received on February 20, 2003.

On February 24, 2003, the Property Owner also submitted a Motion to Dismiss for Failure to Comply with the Requirements of 11 DCMR § 3110 *et seq.* In that Motion, Property Owner argued that Appellants failed to adhere to the filing requirements of § 3112.10 when filing their pre-hearing statement and Opposition to Motion for Leave to Intervene and Dismiss. The pre-hearing statement was filed on February 12, 2003, only twelve days before the scheduled hearing, two days beyond the limited established in § 3112.10. However, Appellants did send a letter on the date that the filing was due stating their delay and explaining that a snowstorm prevented easy communication between the two Appellants, and that Appellants therefore had difficulty submitting the pre-hearing statement on time. The Board therefore determined that Appellants met their burden of

proof to establish good cause, pursuant to 11 DCMR § 3110.4, and the pre-hearing statement was accepted into the record. As to the Appellants' Opposition to Motion for Leave to Intervene and Dismiss, there is no provision establishing the timeliness of such a submission. Subsection 3112.10 does not apply to motions or oppositions thereto. Therefore, the Property Owner's motion was considered on this point and denied.

After hearing from all parties on the Property Owner's Motion to Dismiss for lack of jurisdiction, the Board granted the motion and dismissed the remainder of the appeal at its March 11, 2003, public meeting. The Board therefore does not address the Appellants' arguments regarding the merits of the case.

Notice of Appeal and Notice of Public Hearing. By memoranda dated January 6, 2003, the Office of Zoning advised the Zoning Administrator, the Office of the Corporation Counsel, the Property Owner, ANC 3F, the ANC for the area within which the property is located, the ANC Commissioner for the affected Single-Member District, the affected Ward Councilmember, and the D.C. Office of Planning, of the appeal.

Pursuant to 11 DCMR § 3113.14, the Office of Zoning, on January 9, 2003, mailed to the Appellant, the Zoning Administrator, ANC 3F, and the Property Owner's counsel, notice of hearing. Notice of Public Hearing was also published in the *D.C Register* on January 17, 2003, at 50 DCR 547.

ANC Report. The ANC, being a party to this appeal, did not submit a report to the BZA. A report to the Board of Appeals and Review ("BAR")[2] was submitted, but, because it only addressed the proceeding before the BAR, it was not given great weight.

Hearing and Decision. On March 11, 2003, the Board voted to grant the Property Owner's motion to dismiss the appeal based upon timeliness, by a vote of 3 to 1.

FINDINGS OF FACT

1. The Property is Lot 9 in Square 2043, with an address of 2900 and 2902 Albemarle Street, N.W.

2. Appellant J. Brendan Herron Jr. lives across the street from the Property.

3. ANC 3F is the ANC in which the Property is located.

4. On April 5, 2002, the Property Owner applied to DCRA to subdivide the Property into two lots.

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[2]The BAR's responsibilities have since been transferred to the Office of Administrative Hearings, but at all times relevant to this case the BAR was in existence. Therefore, the term "BAR" is used herein.

5. The Property Owner applied for raze permit B446310 on March 1, 2002, and for building permits B446312 and B446316 on April 4, 2002.

6. On April 17, 2002, DCRA granted the Property Owner's application to subdivide the Property.

7. Appellants knew of the subdivision on or around the time it was approved by DCRA.

8. The subdivision bisected an existing house on the Property.

9. On April 19, 2002, the Zoning Commission set down for a hearing the Forest Hills Tree and Slope Protection Overlay. Pursuant to 11 DCMR § 3202.5, applications for building permits filed prior to a Commission decision to hear a zoning map change are processed under existing zoning controls provided that the application is "sufficiently complete to permit processing without substantial change or deviation". Incomplete applications and applications filed after a "set down" decision is made are processed "only in accordance with the zone district classification of the site pursuant to the final decision of the Zoning Commission in the proceeding, or in accordance with the most restrictive zone district classification being considered for the site".

10. Appellants allege that the proposed Overlay's geographic area includes the Property that the building permit application was incomplete, and that, therefore, the application should have been processed as if the provisions of the proposed Overlay were in effect. This, presumably, would have made the proposed buildings or lots noncompliant.[3]

11. Appellant Herron requested copies of the subdivision application from DCRA on April 22, 2002.

12. During April and May of 2002, Appellants submitted letters and emails to DCRA expressing their concerns regarding the building permit applications for the Property.

13. The ANC 3F resolution dated April 29, 2002, indicated that several neighbors had reviewed building plans for the Property and had objections to those plans.

14. By email dated May 9, 2002, Theresa Lewis, Deputy Director for Operations, DCRA, informed Phil Cogan, from ANC 3F, that DCRA would "withhold

[3] Section 3202.5 does not by its terms apply to the processing of subdivision applications.

issuance of the building permits until June 3, 2002, to allow [the ANC] time to fully review the information submitted."

15. On May 28, 2002, Theresa Lewis met with Appellant Herron and representatives of Appellant ANC 3F to discuss Appellants' concerns regarding the building permits for the Property.

16. On June 11, 2002, Theresa Lewis sent Appellants a letter (Property Owner's Exhibit L) informing them that the subject permits would be issued on June 12, 2002. The letter also discussed the subdivision plan for the Property.

17. Permit B446310, for the razing of an existing structure, and permits B446312 and B446316, for construction of two single-family dwellings, were issued on June 13, 2002.

18. On June 20, 2002, Steven Sher of the law firm of Holland and Knight, on behalf of the Property Owner, mailed a letter to Appellants and neighboring property owners, informing them that the subject permits had been issued. (Property Owner's exhibit N).

19. By email dated July 2, 2002, Appellant Herron asked DCRA whether he was correct in his understanding that Building Code issues may be appealed to the BAR and issues related to the "zoning code" may be appealed to the BZA.

20. By email dated July 19, DCRA's Customer Services Advocate, stated, in response to Appellant Herron's July 2, 2002 email, that the procedures for appealing building permits were in DCMR Title 12A, Section 122, (Appellants' exhibit A-5). A copy of that section was attached to the email. Nothing was stated in the email regarding zoning issues.

21. Title 12A, D.C. Building Code Supplement, Section 122, Subsection 122.2 reads as follows:

> Appeal to Board of Appeals and Review: The owner of a building or structure or any other person may appeal to the D.C. Board of Appeals and Review for a final decision of the code official. The appeal shall specify that the true intent of the Construction Codes or the rules legally adopted thereunder have been incorrectly interpreted, the provisions of the Construction Codes do not fully apply, or an equally good or better form of construction can be used.

Section 122 does not discuss appeals related to the Zoning Regulations nor does it mention the Board of Zoning Adjustment.

22. On July 3, 2002, Appellant Herron appealed the issuance of the building permits to the BAR, pursuant to § 122.2 of the Building Code Supplement. In his submission to the BAR, Appellant Herron included, in addition to building code issues, a brief discussion of the § 3202.5 zoning issue.

23. On July 3, 2002, Appellant Herron sent a letter to David A. Clark, then the DCRA Director, asking that the issues outlined in the BAR complaint be reviewed.

24. On July 9 and October 18, 2002, David A. Clark sent Appellant Herron letters that indicated that DCRA would respond to his request to overturn the building permits. (Appellants' exhibits A-6 and A-7). These letters, however, did not indicate that DCRA would review the merits of Appellant Herron's request.

25. Appellant Herron sent a copy of the BAR appeal to DCRA, on or around the time of filing, asking that they "reconsider and/or follow their own appeal process regarding the issuance of these permits" and requesting that they issue a stop work order. (Property Owner's exhibit P).

26. Appellant Herron's brief to the BAR referenced the May 9, 2002, email exchange between Appellant Herron and Theresa Lewis, DCRA. Appellant Herron informed the BAR that he disagreed with Ms. Lewis' contention therein that the FHTSP did not apply to the permit applications.

27. On July 18, 2002, the Property Owner filed a motion with the BAR to dismiss the zoning issues from the BAR appeal on the grounds that the BZA, and not the BAR, had jurisdiction to hear an appeal involving such subject matter. (Property Owner's exhibit Q). Appellant Herron received this motion by first class mail.

28. In response to the July 18, 2002, motion to the BAR, Appellant Herron, on August 1, 2002, countered that his appeal was of building code issues and was therefore properly before the BAR. (Property Owner's exhibit R at 3).

29. On July 18, 2003, Appellant Herron received the following documents: copies of the subject permits, the subdivision record from the Office of Tax and Revenue, copies of the corresponding amended permit applications, and other supporting documents and plans (other than the storm water management plans). (Appellants' Opposition to Motion to Dismiss).

30. On or around July 18, 2002, Appellant Herron received a copy of the subdivision application, which included the proposed lot lines drawn on the application but did not depict the existing house, which the Property Owner intended to raze. (Transcript at 186).

31. Appellant Herron mailed a letter dated October 11, 2002, to Gregory Love, then the Administrator of the Building and Land Regulation Administration, and David A Clark, DCRA Director, asking for a stay, a stop work order, or to vacate the permits for the Property. Appellant Herron's letter alleges various building code violations related to the subject permits and that the Zoning Regulations were improperly applied because the FHTSP should have been given effect pursuant to the requirements of § 3202.5. In that letter, Appellant Herron does not go so far as to allege a violation of the FHTSP in the issuance of the building permits, but merely states that the permit applications should not have been allowed to proceed.

32. DCRA Director Clark stated on October 23, 2002, in a letter to Appellant Herron, that, after considering all the correspondence submitted, including the July 3 and October 11 letters, the permits in question "were correctly issued and [DCRA] stands by its decision issuing the [permits]. Therefore, your request for a stay of the permits, stop work order or order to revoke permits B446310, B44[6]316 and B446312 is hereby formally denied by DCRA."

33. A decision by the BAR on the Property Owner's motion to dismiss was mailed to Appellant Herron on October 29, 2002. The BAR's Order stated that the BAR did not have jurisdiction over the zoning issues raised in the appeal.

34. By letter dated November 20, 2002, DCRA's General Counsel's Office stated that 11 DCMR § 3202.5 was not violated by accepting the subject building permit applications.

35. On November 25, 2002, the Property Owner began razing the existing structure.

36. Appellants filed this appeal with the Board of Zoning Adjustment on December 14, 2002.

CONCLUSIONS OF LAW

The Property Owner, in its Motion to Dismiss, argued that the Board lacks jurisdiction to hear this appeal because it was not timely filed by Appellant.

At the time the events giving rise to this appeal transpired, the Zoning Regulations did not specify a particular number of days within which a decision had to be appealed to the Board. The Board and the courts had long applied a standard of reasonableness, which required appeals to be brought within a "reasonable" period of time in order to invoke the

appellate jurisdiction of the Board. The "reasonableness" of the timing of an appeal had historically been judged on a case-by-case basis depending on the circumstances and factors that caused the delay.

In *Waste Management of Maryland, Inc. v. District of Columbia Board of Zoning Adjustment*, 775 A.2d 1117, 1122 (D.C. 2001), the Court of Appeals re-affirmed that the Board lacks jurisdiction to consider an appeal which is not timely filed and articulated a test for timeliness:

> [e]xperience teaches that in the ordinary scheme of things, two months is ample time in which to decide whether to seek appellate review and act accordingly. At least in the absence of *exceptional circumstances substantially impairing the ability of an aggrieved party to appeal—circumstances outside the party's control*—we conceive of two months between notice of a decision and appeal therefrom as the limit of timeliness.[4]

(Emphasis added.) If actual notice was not given, "the time for filing the appeal commences when the party appealing is chargeable with notice or knowledge of the decision complained of." *Id.*

As a threshold matter, the Board must determine what is the "decision complained of". Appellant asserts that it is the October 23, 2002 letter from the Director of DCRA. That position is supported by recent Board precedent.

Thus in *Appeal No. 16764 of Darryl J. Grinstead,* 49 DCR 5227 (2002)., the Board determined that it had jurisdiction to hear an appeal from a DCRA letter affirming a previous decision, made seven months earlier, to issue a building permit. There, DCRA had clearly stated in the letter that it had re-reviewed the zoning issue and the errors alleged, and after this more thorough review, found no violation. The Board found that this letter represented another decision from which an appeal could be taken, the first being the decision to issue the building permit.

In Appeal of Robert Lehrman, BZA No. 16849, 50 DCR 4055, (2003), the Board sought to narrow the *Grinstead* precedent. In *Lehrman* the appellant received a letter from DCRA rejecting assertions that DCRA had violated the Zoning Regulations. This letter represented the first decisions on the issues raised. Then, after continued attempts to resolve the dispute, an additional DCRA letter was sent. Because the second letter

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[4]This standard was later codified in Zoning Commission Order No. 02-01, published together with a notice of final rulemaking in the *D.C. Register* on February 9, 200, at 50 DCR 1200. The Order amends subsection 3112.2 of the Zoning Regulations.

merely reaffirmed the first decision, and did not actually represent a more thorough review of the issues raised, the Board held that only the first letter gave rise to an appeal

In the instant case, the October 23, 2003 letter from DCRA stated that, after considering all the correspondence submitted, the permits in question "were correctly issued and [DCRA] stands by its decision issuing the [permits]." The October 23 letter was therefore akin to the letter in *Grinstead* in that it reconsidered the initial decision, and represented that action was taken beyond that which was represented to have been taken in the second letters in *Lehrman.*

This appeal was filed less than sixty days after the October 23 letter. Therefore, if the Board followed *Grinstead* in this case, it would have no choice but to allow this appeal of a second determination (contained in the October 23, 2003, letter) regarding the same underlying zoning issue, but purporting to contain a more thorough review of that issue.

The Board is convinced that it must go beyond limiting the *Grinstead* precedent, and overrule it. The Board does not find it in the interests of judicial economy or fairness to allow an appeal of a second or subsequent determination on the same basic issue, which can come months or years after the initial determination, at a point where the permittee has progressed beyond mere preparation. Such a subsequent determination should not "re-start" the 60-day time period. If such "re-starting" were allowed, there would be no certainty for a permittee, whose project could be halted at any point by an appeal of a subsequent affirmation of the initial permit issuance decision. The permittee might have such affirmative defenses as laches and estoppel available to it,[5] but the Board cannot countenance creating such uncertainty and forcing the parties to come before it at such a late date. Nor can it be said that the permit holder proceeds at its own risk, since it may not even know that a potential appellant has written to DCRA. And because there are no DCRA rules establishing a timeframe for this process, a permit holder may never know when it is safe to proceed.

The *Lehrman* decision only compounded the uncertainty. The distinction between a "mere affirmation" and a "more thorough review" letter puts a potential appellant in an untenable position, since a potential appellant cannot know which type of letter will issue, or even if a letter will be issued at all. Indeed, in this case, Appellant Herron's July 2002 letter was not responded to until after he wrote a second letter in October. A potential appellant who lets the 60-day appeal period expire in the hopes of receiving a DCRA response to a letter, may end up getting non-appealable "mere affirmation," or no letter at all. In either case their right to appeal would be lost.

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[5]An estoppel defenses, however, does not lie against a party other than the municipality which issued the permit. *See, e.g., Rafferty v. District of Columbia Zoning Commission,* 583 A.2d 169, 176 (D.C. 1990). ("[I]t 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.")

In *Grinstead*, the Board stated that it needed to recognize the right of appeal of a second determination in order to allow DCRA "the opportunity to correct its errors internally before the appeal process begins – an opportunity that promotes administrative efficiency, the prompt correction of errors, and the resolution of disputes." *Grinstead*, 49 DCR at 5237. The Board still recognizes that DCRA should have an opportunity to correct alleged errors, but notes that there is nothing preventing a potential appellant from filing a timely appeal before the BZA while continuing to try to resolve any issues with DCRA. The fact that a potential appellant is working with DCRA to resolve issues does not "substantially impair" the ability of that potential appellant to appeal to the BZA.

For the rules to be applied fairly the timeframe for the appeal must be clear to all concerned and the starting point for this timeframe must be definite. The facts in this appeal demonstrate that the *Grinstead* and *Lehrman* precedents accomplished the very opposite and are therefore overruled.

The Board thus holds that when an appeal challenges the grant or denial of a building permit or subdivision, no subsequent communication from DCRA may be appealed, including, but not limited to, a refusal to issue a stop work order or take other enforcement actions. Obviously a DCRA decision to reverse its position (*i.e.* the revocation of a building permit) may be appealed. Although this holding specifically addressed whether the 60-day appeal timeframe established in *Waste Management* may be re-started by a subsequent DCRA communication, its analysis is equally applicable to appeals governed by the codification of the *Waste Management* ruling that is now found in section 3112.2 of the Board's Rules of Practice and Procedure.

The *Grinstead* appeal was decided by the Board in December 2001, but not published in the *D.C. Register* until June 7, 2002; almost two months after the subdivision was granted and four days after the building permits were issued. Therefore, for most of the period between the decisions complained of and the filing of this appeal, *Grinstead* was good law.

In *Smith v. District of Columbia Bd. of Zoning Adjustment*, 342 A.2d 356, 359 (D.C. 1975), the Court of Appeals, though noting that the Board is "not bound for all time by its prior positions", remanded the appeal back to the Board because it failed to explain why its reversal of its past rulings and Zoning Administrator interpretation should be applied retroactively.

In *Appeal of Southeast Citizens for Smart Development, Inc., and ANC 6B*, BZA No. 16791, 49 DCR 6607 (2002), also involving a retroactive application of a holding, the Board noted that:

The Court of Appeals has outlined a number of factors to be considered in determining whether to apply a new rule of law retroactively in a pending case or prospectively only, including:

> (1) The extent of reliance by the parties on the previous rule;
>
> (2) The need to avoid any alteration of property or contract rights;
>
> (3) The policy of rewarding plaintiffs who seek to initiate just changes in the law; and
>
> (4) The desire to avoid unduly burdening the administration of justice with retroactive changes in the law.
>
> *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1031 (D.C. 1995). Any reliance must be reasonable to avoid retroactive application of the new interpretation. *Id.*

Id. at 6632.

Unlike the permit holders in *Smith,* there is nothing in the record to suggest that the Appellants either knew of or relied upon this particular Board precedent. Indeed, Appellant Herron contended throughout the BAR proceeding that the BZA appeals process, including its timeliness rule and precedent, were irrelevant. The Board will therefore analyze the timeliness of the appeal starting from the dates that the Appellants' knew or should have known of the decisions to grant the subdivision and issue the building permits.

As to that issue there is no real dispute. Appellants concede that they knew of the grant of the subdivision on or about April 17, 2002, the day on which it was approved. (FF 6 and 7) The Appellants were informed by DCRA that the building permits would issue after June 12, 2002 (FF 16) and were advised of their June 13th issuance in a letter sent June 20, 2002. (FF 18). Assuming three days for mailing, the Board finds that the Appellants had notice of the issuance of the building permits on or about June 23, 2002. The Appeal was not filed until December 14, 2002, more than sixty days after Appellants were chargeable with notice of the decisions complained of. Therefore, under the *Waste Management* test, the Board must now consider whether Appellants have demonstrated "exceptional circumstances substantially impairing the ability ... to appeal—circumstances outside the party's control." Since the subdivision decision was made at a different time than the building permits decision, two distinct timeframes for appeal exist, each of which must be separately examined to determine whether exceptional circumstances arose within the sixty day period following notice.

As to the building permits, Appellant Herron claims that DCRA failure to furnish documentation hindered his ability to file a timely BZA appeal. Yet, even without such information, he was able to appeal these same permits, on the same zoning grounds, to the BAR on July 3, 2002, well within the 60-day period. Mr. Herron's BAR appeal thus disproves his claim that DCRA's unresponsiveness constituted an exceptional circumstance.

Mr. Herron also claims that he filed the BAR appeal in reliance upon a DCRA communication, which delayed his appeal to the Board. To prove this, Mr. Herron points to an email from a DCRA Customer Services Advocate that responded to his request for verification that zoning issues are appealed to the BZA and building code issues to the BAR. This email merely provided Appellant Herron with the provision governing appeals of the "Construction Code," which directed a person to appeal building code issues to the BAR. Nothing in that provision covered appeals of administrative decisions of the Zoning Regulations. If anything, the omitted reference should have convinced Mr. Herron that his understanding of the BZA's role was correct. At worse, the response was ambiguous and could not have reasonably been relied upon one way or the other.

The Court of Appeals decision in *Felicity's Inc. v DCRA*, 817 A.2d 825 (D.C. 2003), cited by Appellants, is easily distinguished. In *Felicity's*, the Court of Appeals allowed an appeal to the BZA after the appellant was directed to the BAR in an Administrative Law Judge's final written order. The direction was unequivocal and contained in the very document that would be the subject of the appeal. Here, the communication neither instructed Mr. Herron to appeal erroneous zoning interpretations to the BAR nor constituted a document of any legal standing. Whereas Felicity's reliance was understandable, Mr. Herron's claimed reliance was not.

Even if the DCRA communication could be viewed as an exceptional circumstance, its relevance vanished on July 18, 2002, when the Property Owner filed a motion with the BAR stating that the BAR had no jurisdiction over zoning issues. Appellant Herron was served with this motion and could have timely appealed his zoning issues to the BZA thereafter. Instead, he responded on August 1, 2002, still within the 60-day time period for filing an appeal with the BZA, and asserted that all aspects of the appeal were properly before the BAR. From this point on, Mr. Herron was relying upon nothing other than his own misinterpretation of the law.

The appeal with regard to the issuance of Building Permits B446312, and B446316 should have been filed within 60-days of their June 13, 2002 issuance date. Because this aspect of the appeal was not filed until December 14, 2002, it is untimely.

With respect to the subdivision decision, Appellant Herron requested copies of the subdivision plans on April 22, 2002, but did not receive subdivision plans until July 18th of that year. However, it would not require plans or any other documents to determine

the particular violation alleged. Appellant Herron lives across the street from the property. He undoubtedly noticed that a house still stood on it when he learned that the lot was subdivided and that therefore the line separating the new lots almost certainly would pass through the building. In any event, the Appellants clearly should have known of the alleged violation when they received the building plans for the Property on July 18, 2002 and a copy of the subdivision application on or around that time, both of which delineated the new lot lines. While what Appellants received did not depict the still-standing house, it would have been relatively easy to determine where the house generally stood in relation to those lines. At most this would permit the extension of the time for filing the subdivision appeal to the end of July, but not to mid-December.

Therefore, the appeal regarding the decision to grant the application to subdivide the Property should have been filed within 60-days of the April 17, 2002, subdivision issuance date. Because the appeal was not filed until December 14, 2002, it is also untimely as to the subdivision.

It is therefore **ORDERED** that the **MOTION TO DISMISS** be **GRANTED**, and this appeal be **DISMISSED** for lack of jurisdiction.

VOTE: 4-0-1 (Geoffrey H. Griffis, Curtis L. Etherly, Jr., David A. Zaidain and James Hannaham, by proxy, to grant Owner's Motion and dismiss the appeal, Anne M. Renshaw opposed to the motion)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member approved the issuance of this order.

ATTESTED BY: _____
Jerrily R. Kress, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: APR - 7 2005

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPEAL NO. 16982

As Director of the Office of Zoning, I hereby certify and attest that on APR - 7 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:

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ATTESTED BY: Jerrily R. Kress
JERRILY R. KRESS, FAIA
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rsn