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**BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA**

**APPEAL OF ADVISORY NEIGHBORHOOD)
COMMISSION 3D IN THE MATTER OF)
DORCHESTER ASSOCIATES AND)
MORTON BENDER)**

Appeal No. 17465

RESPONSE TO DORCHESTER ASSOCIATES' MOTION TO DISMISS

I. INTRODUCTION

On December 5, 2005, Alma H. Gates, [then] Chair of Advisory Neighborhood Commission 3D filed an Appeal with the Board of Zoning Adjustment on behalf of the commission and the Chain Bridge Road/University Terrace Preservation Committee regarding the illegal construction of a stable at premise 2762 Chain Bridge Road, NW in the District of Columbia.

As early as October 31, 2004, Judith Lanius, an adjacent neighbor informed Tim Denece of the Historic Preservation Staff at the Office of Planning that a stable had been constructed within the last week. Following the initial complaint, numerous complaints were issued over a period of months by members of the Chain Bridge Road/University Terrace Preservation Committee and the ANC regarding construction of a stable at premise 2762 Chain Bridge Road, NW. They both raised issues of zoning violation to then Zoning Administrator, Toye Bello. And, over a period of months, Mr. Bello sought a Notice of Infraction that would have required Morton Bender to either pay a fine and remove the illegal structure or file for a Special Exception with the Office of Zoning. Of

note is the fact that a permit for construction of a stable in the R-1-A Zoning District

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could not be issued by DCRA without a Special Exception. The dismissal of the Notice of Infraction by the Administrative Law Judge did not change the fact that an illegal stable exists at 2762 Chain Bridge Road, NW, however, the dismissal did reopen the door for the commission to file an Appeal with the BZA and started “the clock” running under Section 3112.2. A special exception is a **requirement** for the construction of a stable. Appeal No. 17465 was filed within 60 days of the date the Final Order of the Office of Administrative Hearings which was signed by Administrative Law Judge Scott A. Harvey on the 20th day of October 2005. (Exhibit 23).¹

II. STATEMENT OF UNDISPUTED FACTS

Appellee acknowledges that a three-sided shed was built on the premise at 2762 Chain Bridge Road, NW but maintains “that the shed did not require a special exception... because it was not a ‘stable’ within the meaning of the regulations.” Title 11 §199, states the following:

Stable, private – an accessory building housing not more than four (4) horses or other equine animals for private use and not for remuneration, hire or sale.

Webster’s² defines a “stable:”

A building in which domestic animals are sheltered and fed; esp : such

A building having stalls or compartments <horse>.

Appellant acknowledges that the three-sided shed is an accessory building as defined under Title 11 and it does contain stalls to shelter horses. Therefore it can be argued that “*if it walks like a duck and talks like a duck,*” it must be... a stable. Appellant also

¹ All exhibit numbers refer to the original Appeal submission.

² 1967, Webster’s New Collegiate Dictionary, page 850.

acknowledges that while stables are permitted in the R-I-A Zone District, they require a Special Exception.

A. The application for appeal must be denied as untimely.

This appeal is made possible **because** Administrative Law Judge Scott A. Harvey dismissed the case against Dorchester Associates and Morton Bender on October 20, 2005. By dismissing the case, the Notice of Violation was declared “void,” but an illegal structure was still standing on the premise at 2762 Chain Bridge Road, NW. The case, (No. CR-I-05-N10086) brought before the Office of Administrative Hearings by DCRA, was about a Notice of Violation (Notice) issued to Dorchester Associates for the illegal construction of a stable. It is worth noting that it took from November 16, 2004, the date on the Notice was issued, until October 20, 2005 for the matter to work its way through the Office of Administrative Hearings and to the point where the ANC and community could file an appeal with the BZA. By the time Judge Harvey dismissed the Notice, the Zoning Administrator handling the matter had also been dismissed.

In spite of Mr. Kiernan’s assertions, the ANC and the Chain Bridge Road/University Terrace Preservation Committee are not appealing the ruling of Administrative Law Judge Scott A. Harvey with regard to the Notice. Rather, Appeal No. 17465 is based on the *requirement* that the stable built on the property at 2672 Chain Bridge Road to shelter two horses requires a special exception and at present the stable is intermitted and in violation of Title 11, Sections 204/Accessory Buildings and 208/Private Stables.

On February 9, 2005, the former Zoning Administrator reported that “a referral letter advising Mr. Bender of the need for a special exception review by the BZA [was] drafted and ready for pickup.” (Exhibit 16). On March 10, 2005, Paul Kiernan, Mr. Bender’s

attorney, filed for a “hearing to respond to the Notice and to demonstrate why the Notice was issued in error.”

The request for a hearing before the Office of Administrative Hearings, dated March 10, 2005, was a mere side show that significantly delayed the ability of the Commission to file an appeal based on the requirement for a special exception. (Exhibit 18). At Exhibit 20, Toye Bello informed Appellants that “...an appeal of the Order has been filed at the Office of Administrative Hearings. This serves to hold any further enforcement action in abeyance until resolution of the appeal.” However, there was little delay in filing Appeal No. 17465 by the commission once the Notice was dismissed.

It is worth noting on page 3, paragraph 2 of the Motion to Dismiss Appeal, Mr. Kiernan states, “Here, appellant agrees that Ms. Gates was present when the decision was announced by the AJL on September 29...” At the time of the hearing, Ms. Gates could not have been present as she was in a meeting at the Wilson Building with Joel Cohn, a staff member of Councilmember Graham.

When the Notice was dismissed by the Administrative Law Judge it became reasonable and timely for the ANC (or another party) to file an appeal that would bring Mr. Bender to the BZA to seek a special exception for the construction of a stable on his property. A review of the Final Order issued by the Office of Administrative Hearings, found under Exhibit 23, clearly states why the Notice was issued – “Respondent Dorchester Associates and Morton Bender constructed a stable without a permit at 2762 Chain Bridge Road, NW.”

Appellee has attached at Tab B of the Motion to Dismiss, a copy of BZA Appeal No. 17411. It is not pertinent to this case because the filing of this Appeal is not based on the

date the Notice was dismissed by the Administrative Law Judge, but rather on the *requirement* that Mr. Bender needs to file for a special exception. The period from 20 October to 5 December is well within the 60 days permitted for a timely filing to appeal the *requirement* for a Special Exception.

B. The applicant lacks standing to appeal the dismissal.

Appellee's Motion to Dismiss the Appeal of Advisory Neighborhood Commission 3D is not based on material filed by the commission in the Appeal and before the Board of Zoning Adjustment. Appellee has based the motion to dismiss on the Notice of Violation.

According to Title 11 § 3112.2, the ANC and anyone for that matter, has standing to file an appeal with the Board.

The Appeal form submitted by ANC 3D clearly states that "a special exception hearing needs to be scheduled on the unpermitted stable before the Board of Zoning Adjustment and [ANC 3D] files this Appeal on behalf of the Chain Bridge Road/University Terrace Preservation Committee." Again, this Appeal is based on Section 3112.2: Any person aggrieved by any order, *requirement*...in the administration or enforcement of the Zoning Regulations may file a timely appeal with the Board..." In this matter it is the *requirement* for a special exception to construct a stable at premise 2762 Chain Bridge Road, not an appeal of the Notice.

Minutes of ANC 3D's October 5, 2005 Minutes are attached as Exhibit 24. The ANC was very careful to call the matter of the unpermitted stable "onto the record." The discussion that followed the request of Mrs. Lanius for commission consideration, and the unanimous vote of the commission to file a Form 300 (the proper form was designated at

a later date by Richard Nero in the Zoning Office), on the “Construction of an Illegal Stable at 2800 Chain Bridge Road” and “to ensure the necessary hearing before the BZA takes place” is clearly stated in the approved minutes attached to Appellant’s original filing. The property falls within the Single Member District of ANC 3D-05 which Mrs. Gates represents.

C. The appeal is without merit.

Given the extensive number of documents supporting the filing submitted by ANC 3D and the Chain Bridge Road/University Terrace Preservation Committee on December 5, 2005, and the photographs found at Section IV, it is impossible to dignify Mr. Kiernan’s statement that *the appeal is without merit*. The photographs show there is a three-stalled stable with two horses standing in the foreground on the Appellee’s property.

On November 18, 2004, the Zoning Administrator confirmed that “a horse stable, indeed, had been constructed without a building permit.” Then on November 19, 2004, Mr. Bello notes, “I am in agreement with your understanding [requirement for a special exception from the BZA before a building permit can be issued]. The office aims to apprise the property owner of same subsequent to the filing of a building permit application.”

The Motion to Dismiss appears to be another attempt by the Appellee to avoid a hearing before the Board of Zoning Adjustment for a Special Exception.

CERTIFICATE OF SERVICE:

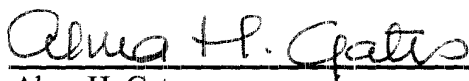
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I hereby certify that on April 25, 2006, this document was served upon the parties on this page at the addresses listed and by the means stated.



Alma H. Gates
Vice Chair, ANC 3D