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REQUEST FORM FOR REVIEW ONLY

DATE: 9-12-03

APPEAL NO: 92-AA-619

FULL CAPTION: Phil Mendelson vs DC Board of Zoning Adjustement

CHECK ONE:

V	CORPORATION COUNSEL	_____	PDS
____	U. S. ATTORNEY'S OFFICE	_____	CJA/CCAN ATTORNEY
____	BAR COUNSEL	_____	PRO SE/PUBLIC
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NAME (PRINT): Alan Bergstein

PHONE NO. : (202) 442-9777

SIGNATURE : A Byt

BZA
Case No. 16553
Exhibit No. 411

**********PLEASE ATTACH YOUR PICTURE I.D.**********

Board of Zoning Adjustment
District of Columbia
CASE NO.16553
EXHIBIT NO.411

DISTRICT OF COLUMBIA COURT OF APPEALS
500 INDIANA AVE. N.W. WASHINGTON 20001

APPEAL NUMBER _____

DATE _____

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1640-265

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REQUEST FORM FOR REVIEW ONLY

DATE: 9-12-03

APPEAL NO: 95-AA-2

FULL CAPTION: Phil Mendelson vs DC Board of Zoning Adjustment

CHECK ONE:

✓ CORPORATION COUNSEL	____ PDS
____ U.S. ATTORNEY'S OFFICE	____ CJA/CCAN ATTORNEY
____ BAR COUNSEL	____ PRO SE/PUBLIC
____ RETAINED	

CHECK ONE: ___ RECORD ✓ CASE FILE ___ TRANSCRIPT ___ EXHIBIT

MICRO FICHE ____ MICRO FILM ____ ROLL____ FRAME ____

NAME (PRINT): Alan Bergstein

PHONE NO.: 202-442-9777

SIGNATURE: A Bgt

**********PLEASE ATTACH YOUR PICTURE I.D.**********

DISTRICT OF COLUMBIA COURT OF APPEALS
500 INDIANA AVE. N.W. WASHINGTON 20001

APPEAL NUMBER _____

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CLERK _____ **DATE** _____

500 Indiana Avenue, N.W.
Washington, D. C. 20001

WILLIAM M. NG
CLERK OF THE COURT

TELEPHONE 879-2728
AREA CODE 202

JAN 11 1996

December 29, 1995

#95-AA-2: Phil Mendelson v. District of Columbia Board of Zoning Adjustment and National Broadcasting Corp. et al.

D.C. Board of Zoning Adjustment
Madeliene H. Dobbins, Executive Director
District Building
441 4th Street, NW, Suite 210
Washington, DC 20001

Dear Ms. Dobbins:

Pursuant to Rule 41(a) of this Court, the decision in the above-entitled case is attached.

Please acknowledge receipt of the decision by signing the copy of this letter and returning it to this office as soon as possible.

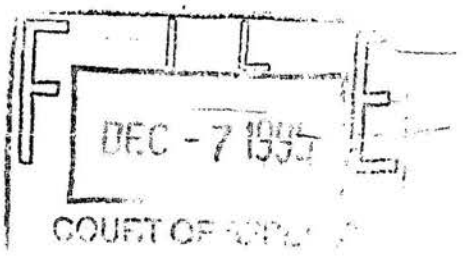
William H. Ng
Clerk

I hereby acknowledge receipt of the original of this letter with attachments.

Madeliene H. Dobbins
Signed

1/3/96
Date

District of Columbia
Court of Appeals



No. 95-AA-2

PHIL MENDELSON,

Petitioner,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT,

Respondent,

and

NATIONAL BROADCASTING CORP., ET AL.,

Intervenors.

BEFORE: King, Associate Judge, and Newman and Mack, Senior Judges.

O R D E R

Upon consideration of respondent's motion to remand the case, petitioner and intervenor National Broadcasting Corp.'s oppositions, respondent's motion for an extension of time within which to file a reply and the lodged reply, and the intervenor Committee of 100's reply thereto; petitioner's motions for extensions of time within which to file his brief and the lodged brief; intervenor Committee of 100's motions for extensions of time within which to file its brief and its lodged brief; the motion by counsel for intervenor National Broadcasting Corp. to withdraw; and intervenor National Broadcasting Corp.'s motion for an extension of time within which to file its brief, it is

ORDERED that the motion of counsel for intervenor National Broadcasting Corp. to withdraw is hereby granted and the appearance of Peter R. Kolker, Esquire is hereby entered on behalf of National Broadcasting Corp. It is

FURTHER ORDERED that respondent's motion to remand is hereby granted and this appeal is remanded to the agency for further proceedings. It is

FURTHER ORDERED that all other pending motions for extensions of time to file replys or briefs are hereby denied as moot.

PER CURIAM

No. 95-AA-2

Copies to:

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Charles L. Reischel, Esquire
Deputy Corporation Counsel

jh

PW

MRRMD

DISTRICT OF COLUMBIA COURT OF APPEALS

SEP 19 1995

PHIL MENDELSON,	:	
Petitioner,	:	
v.	:	No. 95-AA-2
DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT,	:	
Respondent,	:	
NATIONAL BROADCASTING CORP., *ET AL.*,	:	
Intervenors.	:	

DISTRICT OF COLUMBIA
COURT OF APPEALS
FILED SEP 19 1995

MOTION BY THE BOARD OF ZONING ADJUSTMENT TO REMAND

The Board of Zoning Adjustment moves to have this appeal remanded for further administrative consideration in light of the argument raised in the brief by intervenor Committee of 100 (at 7-9) that the Board's decision is procedurally defective.

We are authorized to state that counsel for intervenor National Broadcasting Company do not intend to oppose this motion. Petitioner and counsel for intervenor Committee of 100 reserve their position.

STATEMENT IN SUPPORT

The Board voted in February to grant the National Broadcasting Company's application for a modification of a special exception but the Board's decision was not issued until December 1994, by which time three of the four-member majority had been out of office for over a year because their terms had expired.

As a result of the Committee of 100's procedural challenge, the current members of the Board have agreed to consider the NBC application on the merits in accordance with D.C. Code § 1-1509(d)(1992 repl.) and Board rules. The Court does not reach the merits of administrative decisions that are procedurally defective. Remand will permit the present Board to consider the merits and cure the apparent procedural defect, thereby saving judicial resources and accelerating ultimate disposition of this dispute.

The motion to remand should be granted.

Respectfully submitted,

CHARLES F.C. RUFF
Corporation Counsel

CHARLES L. REISCHEL
Deputy Corporation Counsel
Appellate Division

LUTZ ALEXANDER PRAGER
Assistant Deputy Corporation Counsel

Office of the Corporation Counsel
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RECEIVED
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COURT OF APPEALS

DISTRICT OF COLUMBIA COURT OF APPEALS

PHIL MENDELSON,)
Petitioner)
v.)
DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT,) No. 95-AA-2
Respondent,)
and)
NATIONAL BROADCASTING CORPORATION)
and)
COMMITTEE OF 100 ON THE FEDERAL CITY,)
Intervenors.)

ORIGINAL

OPPOSITION OF PETITIONER TO RESPONDENT'S MOTION TO REMAND

Petitioner respectfully requests that the court deny the motion to remand recently filed by Respondent, the Board of Zoning Adjustment. The Board cites its own failure to comply with the Administrative Procedures Act as the basis for remand. A provision of that act requires that when the membership of an administrative agency has changed a proposed order shall be served upon the parties and an opportunity for comment shall be provided before the final order is issued. *See* D.C. Code § 1-1509(d)). Notwithstanding Respondent's concession of error in this case, the interests of justice would be ill-served by remand.

Background.

In 1981 the National Broadcasting Corporation prepared a master plan for its property which, *inter alia*, proposed placement of an existing 459' antenna tower with a larger, 659'

tower. At NBC's request, the Board of Zoning Adjustment approved the plan (BZA case 13554). In 1988, pursuant to that approval, NBC built the replacement tower. Notwithstanding the earlier BZA order, however, the older tower was not removed and it continued to be used. Indeed, news accounts in 1991 reported that NBC was going to rent the television broadcast antenna on the older tower to an unaffiliated television broadcasting company, the "Home Shopping Network." This prompted neighborhood complaints that NBC was violating the BZA's 1981 order.

City officials agreed that NBC had violated the 1981 BZA order and directed that NBC either remove the older tower or seek BZA approval to allow it to remain. NBC chose the latter course. A public hearing was held over a year later, in December 1992. However, the Board did not issue its written decision until December 1, 1994 -- almost two years following the hearing and three years after the Zoning Administrator's determination that NBC had violated the 1981 BZA order.

This appeal followed and briefs have been submitted by Petitioner and Intervenor Committee of 100.

Argument.

It is probable that this case will only end up back before the court if it is remanded. Remand might afford the Board the opportunity to embellish its order, but the fundamental issues would remain unchanged. Judicial economy would not be achieved.

In *Hobson v. D.C. Police & Firemen's Retirement & Relief Board*, 452 A.2d 1182 (D.C. 1982) this court denied the District government's motion for remand. The court stated that in exercising its discretion whether to remand a case, "we are sensitive to the nature of the interests

affected by the administrative action." *Id.* at 1182. Although the government was seeking to cure admitted deficiencies in its order, the court concluded that the interest of justice would not be served by the delay that would result from procedural remand. The court was "disinclined to permit the Board one or even more opportunities to 'get it right'." *Id.*

The circumstances of the present case are unusual and therefore the interest of justice would not be served by the delay that would be occasioned by remand. This case is unusual for three reasons. First, it does not involve the prospective application of a zoning special exception. Rather, the special exception at issue would be retroactive. The illegal use sought to be cured, and which is the subject of the Board's order, is currently in place.

Second, significant questions related to public health were raised and admittedly left unresolved by the Board. In its Finding of Fact No. 4 the Board dismissed the considerable documentation concerning radio frequency EMF health hazards by stating that "the regulation of such impacts falls beyond its jurisdiction..." Further delay to permit the present Board to "cure the apparent procedural defect," (quoting Respondent) allows this public health issue to persist.

Third, the underlying issue of this case -- the retention of a second tower -- is already too old, dating back to 1988. NBC enjoyed the use of the tower for some three years before city officials realized the 1981 BZA order was being violated, and NBC continues to enjoy its use because of the Board's lethargy.

Delays are rampant with this particular agency. For instance, by order dated August 8, 1994 this court ordered a remand in *Mendelson, et al. v. D.C. Board of Zoning Adjustment*, 645 A.2d 1090. However, to date -- i.e., almost 14 months later -- the Board has yet to even *schedule* further proceedings pursuant to the remand. Applications for the six cases advertised in the *D.C.*

Register for the next -- October 11th -- public hearing date were filed *at least* three months ago. Since the Board recently reduced its hearing schedule to one day per month the backlog of new, unheard cases has grown to over 30. This backlog is a result of inadequate staff to prepare orders -- probably the result of budget reductions. Of the most recent publication of BZA orders in the *D.C. Register* (September 15th), five were issued between 19 and 34 months *after* the decision date.[1]

A remand in the present case would only cause further delay, perpetuate the illegal tower and its harmful effects, and not serve the public interest. The efficient administration of justice would be thwarted.

For the foregoing reasons, Petitioner respectfully submits that Respondent's motion for remand be denied.

Respectfully submitted,

Phil Mendelson, *pro se*
3871 Newark Street, N.W.
Washington, D.C. 20016-3028
(202) 966-1485

[1]Four of these, like the case at bar, are orders issued after Board membership turnover, in violation of D.C. Code 1509(d)

Phil Mendelson & Committee of 100 v. Board of Zoning Adjustment
D.C. App. No. 95-AA-2.

PHIL MENDELSON, et al., PETITIONERS, v. DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT.

No. 92-AA-619

DISTRICT OF COLUMBIA COURT OF APPEALS

645 A.2d 1090; 1994 D.C. App. LEXIS 123

February 7, 1994, Argued
August 8, 1994, Decided

PRIOR HISTORY: [**1]

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

LexisNexis (TM) HEADNOTES - Core Concepts:

COUNSEL:

Richard B. Nettler for petitioners.

Charles L. Reischel filed a statement in lieu of a brief for respondent.

Louis P. Robbins for intervenor.

JUDGES: Before WAGNER, * Chief Judge, STEADMAN, Associate Judge, and BELSON, Senior Judge.

* Chief Judge Wagner was an Associate Judge of this Court at the time of argument. Her status changed to Chief Judge on June 14, 1994.

OPINIONBY: *BELSON*

OPINION:

[*1091] BELSON, *Senior Judge:* Petitioners Phil Mendelson and others seek this court's review of the action of the District of Columbia Board of Zoning Adjustment (BZA) in dismissing as untimely the appeals of Mendelson, et al. and the Woodland-Normanstone Neighborhood Association (the "Association") challenging the issuance of revised building permits to Intervenor Woodland Limited Partnership ("Woodland") for two lots located near Rock Creek Park in the District. With regard to one of [**2] the several issues petitioners raise -- whether the rear yard depths met zoning requirements -- we agree with petitioners that the appeals to the BZA were timely, and to that extent we reverse and remand for further proceedings. Upon remand, the BZA shall also determine whether issues concerning side yard, lot width, use, and height requirements were raised in timely fashion and, if so, conduct appropriate further proceedings on those issues as well.

As the outcome of this appeal turns on timing, we will set out the chronology of relevant actions in some detail. On June 8, 1988, Woodland applied for permits to build seven single-family residences on property located in Square 2140, Lots 37 to 43 which is bordered by Woodland Drive, Rock Creek Drive, and Normanstone Drive, Northwest, in the District. The Zoning Administrator approved the applications and on August 11, 1988, Woodland obtained building permits for the planned residences from the Department of Consumer and Regulatory Affairs ("DCRA"). n1 Despite the fact that five of the seven lots abutted or fronted Rock Creek Park, the permit applications were not referred to the Commission of Fine Arts ("Commission") for review as [**3] required by the Shipstead-Luce Act, *D.C. Code § 5-410* (1988 [*1092] Repl.). n2 Two weeks following the Zoning Administrator's issuance of the building permits, Woodland began construction on lots 37 and 38.

n1 The Zoning Division later approved Woodland's request to resubdivide lots 39 and 40 to create lots 45 and 46 respectively.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 15708 of the National Broadcasting Corporation, pursuant to 11 DCMR 3108.1, for a special exception under Section 211 to modify a condition of the Board's previous Order No. 13554 to continue to operate a commercial broadcasting tower in an R-1-B District at premises 4001 Nebraska Avenue, N.W. (Square 1722, Lot 1).

HEARING DATES: September 23 and December 16, 1992
DECISION DATES: January 6 and February 3, 1993

ORDER

SUMMARY OF EVIDENCE:

1. The application was originally scheduled for the public hearing of September 23, 1992. The Board was unable to hear the application on that date because other applications scheduled for hearing before the Board on that date took more time than was originally anticipated. The case was postponed until the public hearing of December 16, 1992.

2. The property is located on the east side of Nebraska Avenue between Massachusetts Avenue to the south and Upton Street to the north and is known as premises 4001 Nebraska Avenue, N.W. It is zoned R-1-B.

3. The site consists of 315,810 square feet or 7.25 acres in land area. It has 60 feet of street frontage on Nebraska Avenue. The site is shaped somewhat like a baseball diamond. Vehicular access for the site is from a 310-foot long driveway from Nebraska Avenue. There is a 222-car parking lot on the site. An additional 144 spaces are provided on the adjacent site of the National Presbyterian Church. The site is developed with a two-story brick structure and a radio tower. A ground floor plus two-story addition is currently being constructed on the site. The existing structure totals approximately 124,000 square feet of floor area.

4. To the south of the subject site is the U.S. Naval Security Station with its communication facilities, including a large antenna and other miscellaneous structures close to Glover-Archbold Park. To the north of the site is the National Presbyterian Church headquarters and school facilities. All of the property is located in an R-1-B District. To the east of the site is Glover-Archbold Park followed by property in the C-3-A District and the McLean Gardens residential development in the R-5-A District fronting on Wisconsin Avenue.

52

5. The Board first granted the National Broadcasting Company a use variance to establish an office building and special exceptions to establish an office building and parking in Appeal No. 4159, public hearing June 1, 1955. In Appeal No. 5494, the Board granted a use variance to permit continuation and enlargement of accessory parking facilities after a change in the Zoning Regulations.

6. In BZA Appeal No. 8234, dated June 16, 1965, the Board granted a use variance to permit an addition to the office building established under Appeal No. 4159. The existing building then contained 91,370 square feet and the addition provided an additional 16,280 square feet.

7. In Appeal No. 10120, dated November 16, 1979, the Board granted the applicant a use variance to permit a second floor addition to the addition permitted under Appeal No. 8234. That addition would have contained a floor area of approximately 8,140 square feet. Economic conditions existing at the time that Appeal No. 10120 was approved then made it unwise to proceed with construction. Consequently, that approval expired without the addition having been constructed.

8. In Appeal No. 12011, dated October 22, 1975, the applicant was granted a reinstatement of Order No. 10120 and additional permission to locate a temporary office structure upon the subject property for two years during the period of construction of the proposed second floor addition. The original intent of the applicant was to utilize the temporary building for employees who were waiting to occupy the second-floor addition of the broadcast studio, which was then under construction. However, there has been an increase of staff over the past few years, and the main building is still fully occupied with no space to accommodate the occupants from the temporary building. Therefore, the applicant requested a two-year extension of the temporary building while NBC searched for a means to relieve its space concerns. This relief was granted by the Board in BZA Order No. 12539, dated March 7, 1978.

9. In Application No. 13222, dated July 28, 1980, the Board granted the applicant a use variance to permit a ground floor plus two-story addition to the existing structure. One of the conditions of that order was that before the Board would approve any additional applications, the applicant must first prepare a master plan for the site and present it to the Board.

10. In Application No. 13554, dated November 25, 1981, the Board approved a master plan for the site and additions to the studio and office building, subject to the following CONDITIONS:

a. The addition shall be phased and constructed in accordance with the master plan marked as Exhibit No. 10 of the record.

b. The applicant shall secure the approval of the Director of the National Capital Region of the National Park Service for the proposed storm water drainage into Glover-Archbold Park.

11. By letter dated February 25, 1992, the Zoning Administrator notified the applicant of his opinion that, based on review of the Master Plan approved by BZA Order No. 13554, the old tower (1955 Tower) was to have been replaced by the new tower (1988 tower) and should, therefore, be removed. The Zoning Administrator advised the applicant of its right to seek special exception approval from the Board to allow the 1955 tower to remain.

12. The applicant is seeking special exception approval necessary to continue the use of the existing antenna tower erected pursuant to approval in Appeal No. 4159 in 1955. In 1988, pursuant to permit, NBC built the second antenna tower adjacent to the 1955 tower. The 1988 tower was built to a height of 659 feet but was not placed upon a garage or parking deck as contemplated in the Master Plan approved in BZA Application No. 13554. After the 1988 tower was built, the 1955 tower was continued as part of the NBC antenna space requirements.

13. The two antenna towers on the subject site are set back a distance of approximately of 600 feet from Nebraska Avenue. The 1955 tower has an approximate height of 459 feet. The 1988 tower is approximately 659 feet high. Both antenna towers are set back approximately 200 feet from Glover-Archbold Park.

14. The 1955 tower approved by the Board has a triangular base with 30-foot spread footings. The Master Plan contemplated an antenna tower, also triangular, having 90-foot spans between its footings. The Master Plan anticipated that the new 659-foot tower structure would be installed as part of a further phase of construction on top of a parking garage or deck to improve broadcast range and capacity and "replace" the then existing tower.

15. The Board, in BZA Case No. 13554, approved the larger tower structure and noted that it would "replace" the existing tower. The Master Plan submitted to the Board of Zoning Adjustment also sought approval of additions to the studio and office building. The Master Plan anticipated third, fourth and fifth floor additions in three phases and a large parking garage.

16. The 1988 tower was constructed in the general location approved by the Master Plan. The garage or parking deck upon which the 1988 tower was to have been constructed under the approved

Master Plan was never erected since the need for additional parking was satisfied by arrangements made with the National Presbyterian Church and the adjoining parking lot. The 1988 tower was built on an equilateral triangular base, having footing separation of 60 feet instead of the approved 90 feet. The 1955 tower and the 1988 tower combined have a bulk of approximately 50 percent of the bulk approved for the larger antenna set forth in the Master Plan.

17. The architect testified that the continuance of the 1955 tower along with the new tower complies with the intent of the Board in approving the Master Plan because the volume or bulk was well within the approved envelope. Moreover, the architect testified that there would be less impact on the surrounding neighborhood than if the Master Plan antenna were constructed with stronger and heavier steel framing and with greater load bearing capacity for larger and more antenna and that the Zoning Administrator, in approving the permit for the second tower, agreed. No complaints were received from anyone concerning the two towers until a member of an adjoining ANC complained about the tower in 1992 in connection with an antenna proposed for the tower. Such complaint resulted in the Zoning Administrator's requiring NBC to file this special exception application to permit the continuation of the 1955 tower.

18. The only issue before the Board is whether the 1955 antenna tower meets the requirements of Section 211 and the special exception authority under the Zoning Regulations. While Section 211 is a relatively new provision in the Zoning Regulations, the essential test is the same as applied by the Board in 1955. The applicant is not seeking approval nor do the Zoning Regulations require licenses from the Board of Zoning Adjustment for antennae to be located on the tower.

19. The applicant's representative testified that the 1955 antenna is critically needed for the operational, economic and structural viability of the broadcast facility serving the area, nation and world. Because of changing and advancing technology, the space needs for antenna presently existing and those which are needed for known future antennae, require the retention of the 1955 tower. Additionally, as recognized in the Master Plan, and by the Board in previous orders, the facilities at Nebraska Avenue must have the flexibility of meeting unanticipated changes in technology which may require more antenna space in the future.

20. The applicant's representative testified regarding the overall need for the 1955 antenna tower and the history of the construction of the 1988 antenna tower. The applicant's representative testified that he was unfamiliar with the language in the Master Plan or BZA Order relating to the "replacement" of the antenna tower. The applicant's representative testified that

as with other towers in this area of the city with a higher elevation, space is a much sought after commodity for antenna and antenna towers routinely utilized by many different users to service the area, the nation and world with news programs and indicated that there had not been any complaints filed about the 1955 tower.

21. The applicant's representative testified that the space on the subject tower is occupied by antenna which are critical to the operation of the TV station. These antenna include receiver microwave links from the Clock Tower at 12th and Pennsylvania Avenue which enable NBC-WRC to receive pictures and sound from the Mall area and the District Building. These links also allow the station to receive important news breaks and items from the White House. Additionally, there are two microwave links from the State Department, including the Channon Building and a microwave link from Capitol Hill. Of particular importance are four antenna housed on the small tower serving the District of Columbia police department. There are other antennae utilized by various service providers, including private two-way uses for security and other endeavors. Interruption of service would adversely affect the NBC/WRC facility.

22. The applicant rents space, as is routinely done by other tower owners, to other broadcast and receiver users. The income generated assists the station in providing services to the community, defraying costs of high definition TV conversion and helps offset adverse business conditions. Programs such as WRC's "Beautiful Babies" is an example of the public service activities made possible through revenues generated from space rental on the towers. The applicant has an extensive outreach program to the community in terms of its activities, far beyond what is required by the Federal Communications Commission.

23. The applicant presented testimony indicating that several technological developments have occurred since the erection of the 1988 tower. The Federal Communications Commission (FCC) has required that every television station convert the existing NTSC Broadcast Standard to a new high definition system. The FCC will issue a license for an additional television channel in 1993 to every existing television station. Every station must build a new transmitting facility for high definition television. While the antenna requirements are not specifically known at this time, it is expected that the antenna will be a heavy one requiring substantial support. The loss of the small tower would create a difficulty for WRC-TV because of the existing limited amount of tower space on the two existing towers. The amount of tower space in Washington that accommodates television and other antennae is extremely limited.

WRC-TV's small tower can be used for other emerging innovative technologies. Personal communications services, data collection and the National Plan for Public Safety are examples of services which the Federal Communica-tions System is currently studying.

24. The applicant's architect, who has had a continuous professional relationship with NBC since January of 1970 and participated in obtaining approval of the 1988 tower, testified in support of the application. He assisted in the preparation of the Master Plan and participated in BZA Application Nos. 13222 and 13554. The architect described the specific location of the two towers and noted that the towers are approximately 30 feet apart at the closest point. The towers are set back from lot lines to conform to the Zoning Regulations and, in fact, are approximately 600 feet back from Nebraska Avenue and approximately 200 feet from Glover-Archbold Park.

25. The applicant's architect testified that the purpose of the 1981 Master Plan was to deal with future needs and probable physical development for the NBC facility. The Master Plan set forth the basic design and scope of three phases of contiguous physical expansion. The architect testified that the original tower covered an area of 390 square feet and had a volume of 59,670 cubic feet. The 1988 tower covered an area of 1,560 square feet with a volume of 342,680 cubic feet. The Master Plan, on the other hand, provided for a tower that would be 3,510 square feet in coverage and would have a volume of 771,030 cubic feet. Thus, the Master Plan envelope for the tower was almost twice as large as the combined area and volume of the two existing antenna towers.

26. The applicant's architect testified that he was personally involved in the process of seeking the permit for the 1988 tower and indicated that he felt that he had acted in good faith and that both towers were within the envelope approved by the Master Plan. It was his judgment that the two towers together had substantially less impact on the surrounding area than the Master Plan antenna. The Master Plan Tower would have had larger structural members, 18 inches to 24 inches in width and would have been closer to the park than the other two antennae. The architect testified that the two existing antenna towers are interim uses until such time as technology requires construction of the larger tower and additional facilities approved in the Master Plan.

27. The applicant's architect described the site plan for the property, including the landscaping, location of existing facilities, location of footings for the two existing towers, as well as the proposed location of the Master Plan tower. The architect presented exhibits showing the elevations of the existing towers showing the difference in height between the subject antenna

and the 1988 antenna. Also contrasted with the two existing antenna towers, the architect submitted elevations to schematically show what the Master Plan tower could be.

28. The applicant's representative testified that if the Master Plan tower were built, the applicant would wish to make the tower as strong and sturdy as possible so as to meet future antennae needs and changing technology. The result, as shown on the elevations, is that the Master Plan antenna would be more visible from surrounding areas, including Glover-Archbold Park than the existing antennae. This is particularly true since the tops of the existing antennae are very narrow whereas the Master Plan antenna would be broader at the higher portion of the antenna tower in order to support heavier loads.

29. The applicant presented a video tape of a walk through Glover-Archbold Park using a normal lens to indicate that the subject antenna tower was barely visible from most of the Park area, but the top portion is visible to some degree from the cleared area towards Massachusetts Avenue. The existing larger antenna is much more visible and a Master Plan antenna tower would be even more visible.

30. The applicant's representative, in response to issues regarding electromagnetic frequency and radio frequency, testified that while the tower structure itself is approved by this Board, antennae to be located on the tower are licensed by the Federal Communications Commission. The applicant's representative noted that the American National Standard Institutes recommended standard for impact is 1,000 microwaves per square centimeter (UM/CM2). The applicant submitted an engineering statement from Smith and Powstenko, engineering consultants for NBC, noting that the maximum ground level power intensity from the main WRC/TV facility is .0014 MW/CM2 which would fall at a location 69 meters from the tower base. The applicant's representative likened the ground level power to something less than would occur with a child's walkie-talkie transmitter.

31. The applicant's representative further testified that the antennae located on the subject tower could not be relocated to the existing larger tower because of space needs, limited wind-load capacity and structural and foundation limitations and cited the advice of the engineer designers of the larger tower.

32. The Office of Planning, by report dated September 15, 1992, recommended approval of this application on the basis that the applicant met the requisite burden of proof under Section 211 of the Zoning Regulations. The Office of Planning found that the tower is necessary to adequately serve the needs of the applicant and the community and that it would not adversely impact the neighborhood. The Office of Planning report analyzed the history

of the lower antenna, other approvals by this Board and recognized that a number of technological changes have taken place in recent years that make it necessary for the applicant to continue using the small tower. These include the District of Columbia Police Department usage as well as other future needs such as the high definition television requirement of the Federal Communications Commission. The Office of Planning pointed out that the site is large and surrounded by institutional uses and noted the deep set backs for the antenna.

33. Advisory Neighborhood Commission (ANC) 3E, by letter dated November 13, 1992 and representative at the public hearing supported the granting of the requested special exception. In support of its position, ANC-3E noted the following issues:

a. The preexisting lower antenna is adjacent to the newer and taller antenna, both of which are substantially set back from all property lot lines.

b. The applicant and its representatives have been good neighbors making positive contributions to the community in many areas. No complaints concerning the operation of the station or the antenna towers have been received. No evidence suggests that the continuation of the tower would intensify in any way the existing operation of the station either as to the number of people or amount of traffic, pedestrian or vehicular. Importantly, the applicant's representatives represented that they are committed to continuing close liaison with the ANC.

c. The subject grounds are carefully maintained and screened from surrounding property.

d. The subject tower is reasonably necessary for the satisfactory and economic transmission and maintenance of the facility.

e. The Master Plan provides for flexibility in technology. The preexisting antenna tower presently serves the District of Columbia police and other important users. It appears that the newer antenna tower could not structurally support the antenna that are used on the lower antenna. Interruption of service would have a severe and adverse impact on the facility.

f. Comments from neighborhood residents were supportive, except for two representatives of ANC-3C.

g. Several persons raised an issue concerning electro-magnetic influence. The applicant's technical experts indicated that there were no electromagnetic effects

from the tower that would have adverse impacts on the neighborhood. Moreover, the applicant has complied with all requirements of the Federal Communications Commission regarding safety of radio frequency broadcast.

34. By letter dated August 31, 1992 and by representative at the public hearing, ANC-3C opposed the granting of the application. The issues and concerns expressed by ANC-3C are summarized, as follows:

(a) the case should be considered as a variance rather than as a special exception;

(b) the tower is unnecessary for NBC's operations;

(c) the tower intensifies the commercialization of NBC's site;

(d) the potential health hazards must be weighed against the necessity for the additional antennas;

(e) the tower is visually obtrusive;

(f) the tower, with its many additional antennas, will increase radio interference problems experienced by neighboring property users;

(g) there is nothing about the site that constitutes an exceptional situation, creating a hardship, that warrants relief; and

(h) the tower is inconsistent with the zoning regulations applicable to the area, and would adversely affect the use of neighboring property.

35. The National Park Service, by letter dated September 18, 1992, requested that the application be denied on the basis that the subject tower, currently painted orange and white, would result in adverse impact to Glover-Archbold Park and on other parks and vistas throughout the City of Washington. The principal objection of the Park Service was its understanding that the new tower under the Master Plan would "replace" the older tower. The Park Service recommended that all of the devices on the tower should be painted black to match the color on the present black tower.

36. In response to the National Park Service position, the applicant testified that technological changes have occurred since the approval of the Master Plan and that the two antenna towers have less impact and are more consistent with the intent of the Master Plan. The applicant indicated that it was prepared to repaint the lower tower when maintenance required and to utilize a

paint that would blend in better with the skyline subject to FAA and FCC approval. Additionally, applicant indicated that it was prepared to dedicate an easement desired by the National Park Service prior to the understood date at which the easement would be deeded under previous understandings with the Park Service.

37. Several other persons testified at the public hearing in opposition to the application. The concerns expressed by the opposition were generally the same to those expressed by ANC-3C and the National Park Service.

FINDINGS OF FACT:

1. The applicant is appropriately seeking special exception relief. Antenna towers are permitted in the R-1-B District by special exception. The original 1955 tower, which is the subject of this case, was approved as a special exception. The Zoning Administrator has determined that Section 211 is relevant to the subject situation and may permit this Board to approve the continuance of the 1955 antenna tower as a special exception.

2. The Board is persuaded that the retention of the tower is necessary for the applicant. As indicated in the original order of the Board in 1955 and in the Master Plan, unanticipated technological changes can require physical changes to the facilities on site to maintain operational, structural, and economic viability.

3. The commercialization of the site would not be increased by virtue of the approval of the application in that there will be no increase in office space, number of employees, vehicular and pedestrian traffic or the establishment of other commercial uses on the site.

4. With respect to the health hazard allegations, the Board finds that while the opposition filed documentation relative to the impacts of electromagnetic frequency, it is not specifically applicable in this case. The applicant has provided testimony that the power generation on the site represents a minute portion of the applicable standard. The Board notes that the regulation of such impacts falls beyond its jurisdiction and must be more properly reviewed and controlled by the appropriate Federal and District government agencies during the licensing process.

5. The visual obtrusiveness of the subject towers represents a minor skyline protrusion and its height is much less than permitted under the Board's previous Master Plan approval. The subject tower is set back from residential areas a substantial distance and is visually shielded by distance, existing vegetation and the existing larger tower.

6. The Board finds that the continued use of the antenna tower will not increase existing radio interference problems, if any.

7. The applicant is seeking special exception relief and, therefore, does not have to demonstrate that the property is affected by an exceptional condition creating a practical difficulty or undue hardship upon the owner.

8. The proposed continuation of the antenna tower is governed by special exception criteria and, subject to compliance with the specified criteria, is predeemed to be consistent with the existing R-1-B zoning.

9. The proposed location, height and other characteristics of the subject antenna tower will not adversely effect the use of neighboring property. The location of the existing tower is such that it is set back from all residential uses and by virtue of its height and relationship to the new antenna does not have any adverse impact on neighboring property. There would be no extension of commercial activities on adjacent residential property.

10. The antenna tower is in a location which minimizes to the greatest practical degree its visibility from neighboring property by virtue of its proximity to the newer tower and its main building. Set backs are provided from all property lines substantially more than is required under the Regulations. The site has been extensively landscaped and the visibility of the tower has been minimized. Based upon the video tape and photographs submitted in the record, it is the Board's finding that the shorter tower does not have an adverse impact from a visual standpoint.

11. Each part of the ground mounted antenna tower is set back a minimum of 10 feet from each lot line or a distance of at least 1/6 of the antenna height.

12. The height of the shorter tower is reasonably necessary to render satisfactory service as has been found by the Board of Zoning Adjustment in its previous orders. The tower is 200 feet lower than the new antenna tower.

13. The transmission equipment which is the subject of this application is reasonably necessary for technically satisfactory and economic transmission. The antennae located on the tower are presently functioning, and removal of the tower would adversely impact the technical and economic operation of the station.

14. The subject property is not subject to review by the Historic Preservation Review Board or the Commission of Fine Arts.

15. The height of the antenna tower has previously been approved by the Mayor under the Act of June 1, 1910 in the 1955 permit process.

16. The application has been submitted to the Office of Planning for review of report and the Office of Planning supports the application.

17. The applicant demonstrated the need for the existing antenna tower and the same was approved previously by this Board. There is no reason to review or change the previous finding that the height of the lower antenna was appropriate. Matter of right standards permit only those antenna and towers set forth in Sections 201.2 through 201.5 of the Zoning Regulations. This permits one ground mounted antenna not to exceed a height of 12 feet at its highest point. This Board has previously determined that the lower tower and its height is reasonably necessary and appropriate.

18. The antenna tower will be in harmony with the general purpose and intent of the Zoning Regulations in that it is on a site which, in the words of the 1955 order, indicates that "it would be difficult to find a suitable elevation for this facility which would result in less damage to residential properties."

CONCLUSIONS OF LAW AND OPINION:

Based on the foregoing findings of fact and the evidence of record, the Board concludes that the applicant is seeking special exception relief, the granting of which requires the applicant to demonstrate that it is in compliance with the criteria set forth in Section 211 and 3108 of the Zoning Regulations. The Board concludes that the applicant has complied with requirements as indicated in Finding of Fact Nos. 9 through 18.

The Board concludes that it has accorded the ANC in which the site is located, as well as the adjacent ANC, the "great weight" to which they are entitled.

The Board further concludes that, as hereinafter conditioned, the special exception can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map and that the granting of the requested relief will not tend to adversely affect the use of neighboring property in accordance with the regulations and map. It is therefore ORDERED that the application is GRANTED, SUBJECT to the following CONDITIONS:

1. Approval shall be for a period of TEN (10) YEARS from the date of this order.

2. The applicant shall grant the National Park Service a scenic easement of a portion of the site consistent with Exhibit No. 48 of the record.

3. The applicant shall repaint the lower tower a color subject to the approval of the National Park Service.

4. The applicant shall establish and maintain a Community Liaison/Advisory Council which shall meet with neighborhood representatives upon the request of Advisory Neighborhood Commissions 3E and 3C. The applicant's General Manager or his/her designee(s) shall provide any relevant information about their operations upon request, including but not limited to information regarding use of the broadcast towers, real property improvements, parking and traffic issues, or community outreach efforts. The applicant shall also provide upon request information regarding its intentions to seek any licenses or approvals required by any agencies of the Federal or District or Columbia governments regarding station operations.

5. The applicant's General Manager shall use his/her best efforts to establish an on-going dialogue with the operators of other broadcast facilities within the boundaries of Advisory Neighborhood Commissions 3E and 3C.

VOTE: 4-1 (Maybelle Taylor Bennett, Paula L. Jewell, Sheri M. Pruitt and Carrie L. Thornhill to grant; Angel F. Clarens opposed to the motion).

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

ATTESTED BY: Madeliene H. Robinson
MADELIENE H. ROBINSON
Director

FINAL DATE OF ORDER: DEC 1 [illegible] 1994

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

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 BEFORE THE BOARD OF ZONING ADJUSTMENT."

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF SIX MONTHS, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

ord15708/SS/LJP

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 15708

As Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on DEC 1 - 1994 a copy of the order entered on that date in this matter was mailed postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

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Madeliene H. Robinson

MADELIENE H. ROBINSON
Director

#63

DATE: DEC 1 - 1994

EXHIBIT No. 63

cc BZA 15129 + 15136

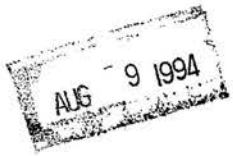
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Notice: This opinion is subject to formal revision before publication in the Atlantic and Maryland Reporters. Users are requested to notify the Clerk of the Court of any formal errors so that corrections may be made before the bound volumes go to press.

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District of Columbia Court of Appeals

APPELLATE DIVISION



No. 92-AA-619

PHIL MENDELSON, *et al.*, PETITIONERS,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT.



WOODLAND LIMITED PARTNERSHIP, INTERVENOR.

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

(Argued February 7, 1994 Decided August 8, 1994)

Richard B. Nettler for petitioners.

Charles L. Reischel filed a statement in lieu of a brief for respondent.

Louis P. Robbins for intervenor.

Before WAGNER,* *Chief Judge*, STEADMAN, *Associate Judge*, and BELSON, *Senior Judge*.

BELSON, *Senior Judge:* Petitioners Phil Mendelson and others seek this court's review of the action of the District of Columbia Board of Zoning Adjustment (BZA) in dismissing as untimely the appeals of Mendelson, et al. and the Woodland-Normanstone Neighborhood Association (the "Association") challenging the issuance of revised building permits to Intervenor Woodland Limited Partnership ("Woodland") for two

BZA
CASE No. 15129
EXHIBIT No. 44

* Chief Judge Wagner was an Associate Judge of this Court at the time of argument. Her status changed to Chief Judge on june 14, 1994.

lots located near Rock Creek Park in the District. With regard to one of the several issues petitioners raise — whether the rear yard depths met zoning requirements —we agree with petitioners that the appeals to the BZA were timely, and to that extent we reverse and remand for further proceedings. Upon remand, the BZA shall also determine whether issues concerning side yard, lot width, use, and height requirements were raised in timely fashion and, if so, conduct appropriate further proceedings on those issues as well.

s the outcome of this appeal turns on timing, we will set out the chronology of relevant actions in some detail. On June 8, 1988, Woodland applied for permits to build seven single-family residences on property located in Square 2140, Lots 37 to 43 which is bordered by Woodland Drive, Rock Creek Drive, and Normanstone Drive, Northwest, in the District. The Zoning Administrator approved the applications and on August 11, 1988, Woodland obtained building permits for the planned residences from the Department of Consumer and Regulatory Affairs ("DCRA").[1] Despite the fact that five of the seven lots abutted or fronted Rock Creek Park, the permit applications were not referred to the Commission of Fine Arts ("Commission") for review as required by the Shipstead-Luce Act, D.C. Code § 5-410 (1988 Repl.).[2] Two weeks following the Zoning Administrator's issuance of the building per-
, Woodland began construction on lots 37 and 38.

Subsequently, area residents discovered that the Commission of Fine Arts had not considered the project. Thereafter,

[1] The Zoning Division later approved Woodland's request to resubdivide lots 39 and 40 to create lots 45 and 46 respectively.

[2] "[W]hen application is made for permit for the erection . . . of any building, any portion of which is to front or abut upon the grounds of . . . Rock Creek Park, . . . the plans therefor, so far as they relate to height and appearance, color, and texture of the materials of exterior construction, shall be submitted by the Mayor of the District of Columbia to the Commission of Fine Arts [for its review and recommendations]." D.C. Code § 5-410 (1988 Repl.).

the Commission reviewed Woodland's building permit applications. On January 25, 1989, the Commission informed DCRA that it disapproved Woodland's plans. On February 10, 1989, the U.S. District Court for the District of Columbia granted the Commission's application for a temporary restraining order halting construction on the property except for lots 37 and 38. The Commission did not seek a restraining order against construction on these lots because it believed that DCRA had overlooked the matter and Woodland had already completed substantial construction on them.

On March 23, 1989, the Association forwarded a letter to Mr. Hampton Cross, Administrator of the Building and Land Regulation Administration, alleging that the houses being constructed on lots 37 and 38 violated the zoning regulations. The Association asserted that there were violations with respect to rear yard, side yard, use, and height requirements, and questioned the adequacy of lot widths. The Association requested the issuance of a stop-work order for all construction on the property. In a second letter to Mr. Cross of March 31, 1989, the Association argued:

> The deck on lot 38 protrudes into the rear yard such that there is no longer a 25-foot rear yard and the side yards on the plans violate the 8-foot side yard requirement. Indeed, the plans show the distance from the side yard to the other lots as only 7'8". Also, you should note that while the plans show the chimney as protruding 1'8" into the side yard, [our] measurement of the chimney shows that it projects 3 feet into the side yard.

The Building and Land Regulation Administration issued a stop-work order on March 28, 1989, as to all lots, but lifted it on April 4, 1989, upon Woodland's submission to the Permit Processing Division of DCRA of revised plans which reflected the actual construction on the lots. Upon reviewing the revised plans and inspecting the lots in question, DCRA found that the revised plans were in accordance with the zoning

regulations and issued revised building permits for lots 37 and 38 to Woodland on April 4, 1989. The new building permit for lot 37 specified that it authorizes revisions to attic plans (electric and floor plans and roof), location and elevation of retaining walls, rear terrace, roof trusses detail, and rear deck. The new permit for lot 38 was virtually identical.

On May 26, 1989, the Association appealed that action to the BZA, alleging that the development did not comply with the zoning regulations as to rear yard, side yard, use, and l ht requirements. On June 5, 1989, Phil Mendelson, et al. also appealed to the BZA maintaining that the subdivision plan generally did not comply with the zoning regulations.[3]

The BZA consolidated the two appeals and set a hearing for September 27, 1989. Participating as an intervenor at the hearing, Woodland moved for dismissal on the ground that the appeals were untimely, in that eight months had passed since petitioners had been placed on notice that the building permits had been issued to Woodland. In response, Mendelson and the Association contended that their appeal was timely as it was filed within two months after Woodland obtained revised building permits for lots 37 and 38.

The BZA deferred its decision on the motion to dismiss until the conclusion of the hearing on the merits. At that time, i' und that petitioners had constructive notice of the right to appeal when construction began on lots 37 and 38 in August 1988. The BZA reasoned that having received said notice, petitioners were obliged to proceed expeditiously to inquire about the appropriateness of the approval of the subdivision and the issuance of building permits. Ultimately, the BZA concluded that petitioners' appeals were filed after an unreasonable period of time under the circumstances and thus were untimely. Therefore, BZA dismissed the appeals

[3] On this appeal, the Association and Mendelson challenge only the dismissal of their appeals from the issuance of the building permits for lots 37 and 38.

regarding lots 37 and 38. It is that conclusion of untimeliness that we examine on this appeal.

The timely filing of an appeal with the BZA is mandatory and jurisdictional. *See Woodley Park Community Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 490 A.2d 628, 635 (D.C. 1985) ("if [petitioner's] appeal was not timely filed, the BZA was without power to consider it"); *Goto v. District of Columbia Bd. of Zoning Adjustment*, 423 A.2d 917, 923 (D.C. 1980) ("question of timeliness is jurisdictional"). As we stated in *District of Columbia Pub. Employee Relations Bd. v. District of Columbia Metro. Police*, 593 A.2d 641 (D.C. 1991): "The time limits for filing appeals with administrative adjudicative agencies, as with courts, are mandatory and jurisdictional matters [citing cases]." *Id.* at 643. "Because the rules of the BZA adopt no specific time limit on appeals, a standard of reasonableness is applied in determining whether an appeal is timely." *Woodley Park Community Ass'n, supra*, 490 A.2d at 636 (citations omitted). Under the reasonableness standard, "the time for filing an appeal commences when the party appealing is chargeable with notice or knowledge of the decision complained of." *Id.*

In the instant case, we recognize that "BZA's conclusion is entitled to additional deference because the agency was interpreting its own internal rule of procedure rather than the zoning regulations." *Id.* at 636 n.20 (citing *Dupont Circle Citizens Ass'n v. District of Columbia Zoning Comm'n*, 431 A.2d 560, 565 (D.C. 1981)). *See also United Unions, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 554 A.2d 313, 318 (D.C. 1989); *Dietrich v. District of Columbia Bd. of Zoning Adjustment*, 320 A.2d 282, 286 (D.C. 1974).

Within this framework, we consider petitioners' argument that the BZA erred in concluding that petitioners were chargeable with constructive notice of their right to appeal at the time construction began on lots 37 and 38. The Board, in its order, summarized the parties' respective positions as follows:

11. Responding in opposition to the Motion to Dismiss, [petitioners] stated [they are] appealing the decision made on April 4, 1989 to approve the revised plans for lots 37 and 38. [Petitioners] point[] out that the appeal was timely filed on May 26, 1989, less than two months after this decision was made.

12. The intervenor [Woodland] stated, however, that the errors alleged by [petitioners] in the appeal relate to rear yard, side yard, use and height requirements. The only revision made to the plans respecting the claimed errors was in connection with the rear yard. There were no changes respecting side yard, use or height. These remained unchanged from the plans for which the original permit was issued on August 11, 1988. Therefore, the intervenor maintains that [petitioners are] actually appealing the original decision. Since the appeal was filed more than nine months after the original decision date and notice of the decision, the appeal, is in the intervenor's view, untimely.

Following its recitation of the parties' respective positions, BZA concluded that petitioners had constructive notice of their rights to appeal at the time Woodland began construction on the two lots, and a resulting obligation to inquire expeditiously about the appropriateness of the subdivision and the decision to issue building permits. BZA's conclusion is flawed in two respects. First, with respect to the rear yard issue, BZA acknowledges that on March 27, 1989, Woodland submitted applications with the DCRA for revised building permits which included modifications to the rear yards of the two lots. On April 4, 1989, DCRA approved these changes to the rear yards and issued revised building permits to Woodland. Petitioners' appeal was filed May 26, 1989, approximately two months after the revised building permits were issued. The chronology of these events demonstrates that

petitioners were not "chargeable with notice" of the approval of the revised building permits pertaining to the rear yard modifications until April 4, 1989.[4] *See generally Woodley Park Community Ass'n, supra*, 490 A.2d at 636-37 (petitioners were on notice of revised plans reducing the number of parking spaces when the certificate of occupancy that incorporated the new calculations was subsequently issued).

The two month interval between notice of rear yard modification and petitioners' filing of an appeal cannot be deemed unreasonable under these circumstances. *See Goto, supra*, 423 A.2d at 924 (two month delay in filing appeal was reasonable). For this reason, we conclude that the BZA's dismissal of petitioners' appeal with respect to the rear yard issue was plainly erroneous and requires us to remand this aspect of the proceedings to the Board for its resolution on the merits.[5]

A second shortcoming in the BZA's conclusion that petitioners' appeals were untimely filed is that the Board failed to make the findings of fact necessary to support an implicit underpinning of its ruling, *viz.*, that revisions to the plans approved with the issuance of the April 1989 permits did not affect lot width, side yard, use, or height specifications. As indicated in the Board's order, there was a dispute as to whether, as Woodland maintained, petitioners were appealing from DCRA's original issuance of building permits in August 1988 or whether petitioners were, as they assert,

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4 In its brief, Woodland states that "[t]he only revision made to the plans in 1989 respecting the claimed errors was in connection with the rear yard."

5 Although Woodland invites us to apply what it calls a "subjective certainty" test as to what the Board would probably decide on remand, we decline to do so, as our role in reviewing an administrative agency's decision is clear. *See RoseExpress, Inc. v. District of Columbia Dep't of Employment Servs.*, 602 A.2d 659, 661 (D.C. 1992); *see also Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

appealing from issuance in April 1989 of permits which contained or were based upon material changes with respect not only to rear yard but also other features. We note that, facially, the April 1989 permits do not appear to modify the original provisions concerning side yard, lot width, use, or height.[6] The BZA, however, made no finding of fact with respect to this contested matter. We cannot regard the statement in paragraph 12 of the BZA's final order, quoted above, as such a finding because it is set forth in a summary of i rvenor's position, and does not purport to be a finding of fact that the only revision to the plans approved in April of 1989 was with respect to rear yard.

In reviewing a BZA decision, we must determine "(1) whether the agency has made a finding of fact on each material contested issue of fact; (2) whether substantial evidence of record supports each finding; and (3) whether conclusions legally sufficient to support the decision flow rationally from the findings." *Glenbrook Road Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 605 A.2d 22, 31 (D.C. 1992) (quoting *Levy v. District of Columbia Bd. of Zoning Adjustment*, 570 A.2d 739, 746 (D.C. 1990)); *see also Draude v. District of Columbia Bd. of Zoning Adjustment*, 582 A.2d 949, 953 (D.C. 1990); *George Washington Univ. v. District of Columbia Bd. of Zoning Adjustment*, 429 A.2d 1342, 1345 (D.C. 1981); D.C. C e § 1-1509 (e) (1992 Repl.). "Generalized, conclusory or *incomplete findings* are insufficient; subsidiary findings of basic fact on all material issues must support the end result in a discernible manner." *Levy, supra*, 570 A.2d at 746 (emphasis added) (citation omitted).

Since the Board failed to make findings on the issue of whether the April 1989 permits had the effect of modifying the initial permits regarding side yard, lot width, use, or height, this court "'cannot fill the gap by making its own determination from the record, but must remand the case for findings on that issue.'" *2101 Wisconsin Assoc. v. District of Columbia Dep't of Employment Servs.*, 586 A.2d 1221, 1225 (D.C. 1991) (quoting *Colton v. District of Columbia Dep't of Employment Servs.*, 484 A.2d 550, 552 (D.C. 1984)); *Levy, supra*, 570 A.2d at 746; *see also Newsweek Magazine v. District of Columbia Comm'n on Human Rights*, 376 A.2d 777, 784 (D.C.), *cert. denied*, 434 U.S. 1014 (1977) ("reiteration of the evidence [or a party's contention] is not a finding of fact"). Such findings are necessary to a conclusion as to whether the appeals to the BZA regarding those issues were timely. Accordingly, we remand this matter to the Board for further proceedings consistent with this opinion.

So ordered.

[6] Petitioners argue that the scope of the revised permits is elucidated by the working plans on which they were based.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 15129 of Richard B. Nettler on behalf of the Woodland-Normanstone Neighborhood Association, pursuant to 3200.2 and 3105.1, from the decision of Hampton Cross, Administrator and Joseph Bottner, Zoning Administrator, Building and Land Regulation Administration, made on April 4, 1989 to the effect that development of Lots 37 and 38 in Square 2140 comply with the Zoning Regulations for the construction of single-family dwellings in an R-1-A District at premises 2804 and 2808 Woodland Drive, N.W., (Square 2140, Lots 37 and 38).

Appeal No. 15136 of Phil Mendelson on behalf of Advisory Neighborhood Commission 3C, pursuant to 3200.2 and 3105.1, from the decision of the Zoning Administrator, Joseph Bottner, and the Department of Consumer and Regulatory Affairs made on June 17, 1988 and subsequently, to the effect that the subdivision and development of former Lot 33 into 7 new lots complies with the Zoning Regulations for the construction of single-family dwellings in an R-1-A District at premises 2805 and 2815 Normanstone Drive, 2804 and 2808 Woodland Drive and 2600, 2610 and 2620 Rock Creek Drive, N.W., (Square 2140, Lots 37, 38, 41, 42, 43, 45 and 46).

HEARING DATES: September 27 and October 4, 1989
DECISION DATE: December 6, 1989

ORDER

MOTION TO DISMISS:

1. The property which is the subject of these appeals is located in Square 2140 and is bordered by Woodland Drive N.W. to the north, Rock Creek Drive N.W. to the east, and Normanstone Drive N.W. to the south. The property is owned by Woodland Limited Partnership. The owner subdivided the property (originally Lot 30) into seven smaller lots numbered 37, 38, 39, 40, 41, 42 and 43. This subdivision was approved by the Zoning Division of the Department of Consumer and Regulatory Affairs (DCRA) on June 14, 1988 and recorded in the Office of the Surveyor on June 17, 1988. On August 3, 1988, the Zoning Division approved a revised subdivision submitted by the owner. The revision involved resubdividing lots 39 and 40 into lots 45 and 46 respectively. The revised subdivision was recorded on October 3, 1988.

2. On June 8, 1988, the owner applied for permits to construct seven single-family houses on the subject lots. Approval was received from the office of the Zoning Administrator on August 9, 1988. On August 11, 1988, the owner obtained seven building permits for new construction. These permits are numbered B332325,

#24

B332326, B332327, B332328, B332329, B332330, and B332333. Although the owner sought permits to construct single-family houses on lots which abut or face Rock Creek Park, the permit applications were not referred to the Commission of Fine Arts (the "Commission") for review under the Shipstead-Luce Act.

3. Construction began on lots 37 and 38 about two weeks after the building permits were issued. Because of this work, the project was brought to the attention of the Commission which then contacted the Department of Consumer and Regulatory Affairs (DCRA). By letter dated December 27, 1988, DCRA transmitted the seven building permit applications to the Commission for approval.

4. By letter dated January 25, 1989, the Commission informed DCRA that it disapproved of the plans for the seven new houses. Nonetheless, construction proceeded. The United States, on behalf of the Commission subsequently requested a Temporary Restraining Order (TRO) to halt the construction on five of the lots - 41, 42, 43, 45 and 46. No injunction was sought for lots 37 and 38 because the Commission believed the error to be that of the DCRA and substantial construction had taken place on these lots. The TRO was issued on February 10, 1989 by the United States District Court for the District of Columbia.

5. Area residents became aware of the construction and the developer's failure to submit plans to the Commission for approval. On March 23, 1989, the Woodland-Normanstone Neighborhood Association was certified as a nonprofit corporation composed of residents of Massachusetts Avenue Heights, an area bounded by Rock Creek Park to the east, Massachusetts Avenue to the south and west, and Calvert Street, Cleveland Avenue and Woodley Road to the north. The purpose of the Association is, inter alia, to preserve and enhance the physical and aesthetic characteristics of the Heights by encouraging widely spaced residential development and the maintenance of an attractive parklike setting.

On March 23, 1989, the Association formally requested that Hampton Cross, Administrator, Building and Land Regulation Administration, issue a stop-work order for all construction on the subject site on the grounds that construction on the site was not faithful to the building plans approved by the District of Columbia and that the developer was constructing residences in accordance with plans found on the site which had never been reviewed by either the District of Columbia or the Commission of Fine Arts.

6. A stop-work order was issued for work on all lots. On April 4, 1989, the developer filed revised plans with DCRA which reflected the actual development taking place on-site. On the same day, the revised plans were approved, revised building permits were issued, the stop-work order was lifted and construction proceeded.

7. On May 29, 1989, the Association filed an appeal of the decision of the Zoning Administrator, Joseph Bottner, and of Hampton Cross to approve the revised plans and to issue the revised building permits on April 4, 1989, allowing for continued construction on lots 37 and 38 according to the revised plans.

8. On June 5, 1989, Advisory Neighborhood Commission (ANC) 3C filed an appeal of the Zoning Administrator's decision of June 17, 1988 to approve the subdivision plan of the property and the subsequent decision to allow the proposed development of lots 37, 38, 41, 42, 43, 45 and 46.

9. By letter dated August 10, 1989, the appellants moved to consolidate their appeals. The motion was granted and both appeals were set for hearing on September 27, 1989. The owner/developer, Woodland Limited Partnership, participated as an intervenor.

10. On September 26, 1989, the intervenor moved for dismissal of both appeals. In its memorandum in support of the Motion to Dismiss Appeal No. 15129, the intervenor argues that the appeal was filed in an untimely fashion. Intervenor stated that construction began on the project about two weeks after issuance of the building permits on August 11, 1988. At that time, the neighbors could see that development was in progress. They were, therefore, charged with notice that building permits had been issued. Intervenor argues that the appeal should have been filed within a reasonable period of time thereafter.

11. Responding in opposition to the Motion to Dismiss, the Association stated that it is appealing the decision made on April 4, 1989 to approve the revised plans for lots 37 and 38. The Association points out that the appeal was filed on May 26, 1989, less than two months after this decision was made.

12. The intervenor stated, however, that the errors alleged by the appellant in the appeal relate to rear yard, side yard, use and height requirements. The only revision made to the plans respecting the claimed errors was in connection with the rear yard. There were no changes respecting side yard, use or height. These remained unchanged from the plans for which the original permit was issued on August 11, 1988. Therefore, the intervenor maintains that the appellant is actually appealing the original decision. Since the appeal was filed more than nine months after the original decision date and notice of the decision, the appeal is, in the intervenor's view, untimely.

13. In the memorandum supporting the Motion to Dismiss Appeal No. 15136 of ANC 3C, the intervenor stated that ANCs receive notice when subdivisions are approved and when applications are made for building permits. The intervenor stated that ANC 3C knew in August 1988 that the property had been subdivided and that building

permits were sought to develop the site. However, the ANC waited until June 5, 1990 to file the appeal, approximately ten months after notice was received.

14. The intervenor stated that under the Supplemental Rules of Practice and Procedure of the Board, an appeal from a determination of the Zoning Administrator must be made "timely." (Title 11 DCMR 3315.2). Compliance with this rule is jurisdictional and in an absence of a timely appeal, the Board is without authority to consider it. Goto v. District of Columbia Board of Zoning Adjustment, 423 A.2d 917, 923 (D.C. 1980).

Further, the District of Columbia Court of Appeals has ruled that the question of timeliness of an appeal to the Board is based upon a standard of reasonableness. The time for filing an appeal commences where the appellant is chargeable with notice or knowledge of the decision. Woodley Park Community Association v. District of Columbia Board of Zoning Adjustment, 490 A.2d 628 (D.C. 1985). This Board has held that delays of 10 1/2 months (appeal of California Steak House, BZA Appeal No. 13967, November 22, 1983); eight months (BZA Appeal No. 11872, February 14, 1975); seven months (appeal of Arthur H. Fawcett, Jr., BZA Appeal No. 11158, July 22, 1976); and nine months (appeal of Christian Embassy, Inc., BZA Appeal No. 12142, June 18, 1976) were unreasonable delays and concluded, therefore, that the Board was without jurisdiction. The Office of the Corporation Counsel, in applying the standard of reasonableness set forth in Goto, concluded that an appeal filed ninety (90) days or more after an appellant can be charged with notice is untimely. Based on this standard of reasonableness, the intervenor argues that the ANC's appeal was filed after an unreasonable period of time.

15. Advisory Neighborhood Commission (ANC) 3C maintains that the appeal should not be dismissed for a number of reasons. First, the ANC stated that it did not receive notice from the Surveyor's Office that a subdivision was applied for in June or in October 1988. The ANC first became aware of the subdivision in connection with the Commission of Fine Arts' litigation after the building permits were rejected and during the injunction. It was not until April 1989 that the ANC learned that the development plans disregarded the subdivision of record. The ANC acquired this information from deposition testimony taken on March 30 and 31, 1989 in connection with the Commission of Fine Arts lawsuit. The appeal was filed about two months later.

16. ANC 3C argued that its case can be distinguished from Woodley Park where an appeal was filed after certificates of occupancy had been issued on some of the units in the hotel. The ANC argues that in the subject appeal, however, about 70 percent (five lots) of the property remains vacant. The ANC pointed out that the developer was already enjoined from construction on almost

three-fourths of the project and therefore, it was not harmed by the timing of the appeal. It is the ANC's view that the appeal should not be dismissed because timing was reasonable given the particular circumstances.

17. The Board finds merit in the Motion to Dismiss, particularly as it relates to lots 37 and 38. For reasons more fully set forth in the conclusions of law, the Board finds that Appeal Nos. 15129 and 15136 are untimely filed as they relate to lots 37 and 38. Therefore, the Board need not address the merits of either appeal related to lots 37 and 38 in this order.

FINDINGS OF FACT:

1. The properties that are the subject of this appeal are known as premises 2805 and 2815 Normanstone Drive, N.W. and 2600, 2610 and 2620 Rock Creek Drive, N.W.

2. The appellant, ANC 3C, first alleges that the Zoning Administrator erred in certifying that the subdivision complies with the Zoning Regulations because some of the lots fail to meet the minimum lot width of 75 feet as required by 11 DCMR 401.3. Secondly, ANC 3C alleges that the Zoning Administrator erred in approving the issuance of building permits for the erection of seven houses on the subdivided lots. At least one of the lots will later be reconfigured by metes and bounds and conveyed by the owner in a way that no longer complies with the Zoning Regulations.

3. ANC 3C maintains that the construction of seven houses on a lot that formerly contained a single-family dwelling would injure the aesthetics, property values and character of the neighborhood as well as the integrity of the Zoning Regulations.

4. The subject appeals raise two issues: (1) whether the method of calculating lot width used by the Zoning Administrator was erroneous; and (2) whether the Zoning Administrator erred in approving the subdivision where the owner later intends to create a tax lot that will not comply with the Zoning Map.

Issue 1: Lot Widths

5. Pursuant to 11 DCMR 401.3, the lot width in an R-1-A District shall be a minimum of 75 feet. Recognizing that land is sometimes irregularly shaped, the Zoning Regulations define "lot width" as:

> The distance between side lot lines, measured along the building line; except that, in the case of an irregularly shaped lot, the width of the lot shall be the average distance between the side lot lines. (11 DCMR 199)

The Zoning Administrator has identified four methods to determine average lot width. None of these methods are specified in the Zoning Regulations.

A. "Average": add up the lengths of the front and rear lot lines, divide the total by two.

B. "Ten-foot interval": take measurements of the lot width every 10 feet, add them, then divide the total by the number of measurements. The measurements can be taken either from the front of the lot to the back or from the back of the lot to the front.

C. "Mean depth": add the lengths of the side lot lines, divide by two, and divide that result into the total lot area.

D. "Greatest depth": take the greatest depth (or farthest distance) of the lot and divide that into the total lot area.

6. A professional land surveyor testified as a witness for the appellant. Both the surveyor and Joseph Bottner, Zoning Administrator, gave an opinion about the validity of the methods described. The surveyor testified that the greatest depth method is not valid in most cases and is usually useful only as a quick means to approximate a lot width. The Zoning Administrator's testimony generally concurred. The surveyor stated that the averaging method is not valid unless the front and rear lines are parallel, or their divergence is within a few degrees. The Zoning Administrator generally agreed.

Both the Zoning Administrator and the surveyor testified that the ten-foot interval method is generally valid and that the mean-depth method is usually the best method for determining lot width.

7. The Zoning Administrator testified that he decides on the method to use based on the Zoning Regulations and the particular proposal under review.

8. The Zoning Administrator testified that a technician in the Office of the Zoning Administrator conducted the initial lot width calculations on the proposed plans. The appellant pointed out that the technician used the averaging method for all of the lots and found a minimum 75-foot lot width for each.

9. The initial subdivision was approved by Edgar Nunley, Acting Deputy Zoning Administrator, rather than the Zoning Administrator. However, the Zoning Administrator granted approval of the revised subdivision, and after the appeal was filed, he

recalculated the lot dimensions previously approved by Mr. Nunley to ensure compliance with the Zoning Regulations. To calculate lot width, the Zoning Administrator used only the mean depth method and found each lot to meet the minimum requirement.

10. The appellant's surveyor calculated the width of each lot using each method and found that lots 41, 42, and 43 comply using all methods, and that Lot 45 complies with all except the greatest depth method. The Board finds that no error was committed in calculating the lot widths for these lots because lots 41, 42 and 43 comply under all methods, and the Board finds that in calculating the width in Lot 45, the Zoning Administrator did not use the least valid, greatest depth method - the only method under which this lot fails to comply. The only remaining lot at issue is Lot 46.

11. Lot 46 is an irregularly shaped lot located at the northeast corner of the subdivision with Woodland Drive to the north and Rock Creek Drive to the east. Lot 45 is located to the south and Lot 38 is to the west.

12. Based on the findings of the appellant's surveyor, the appellant argues that the Zoning Administrator erred in calculating the lot width for Lot 46. The surveyor determined the lot width under each method. For each of the methods used, he considered the front of the property to be Woodland Drive rather than Rock Creek Drive. He maintains that this is consistent with the siting of the building, and it is opposite the rear yard in accordance with the building permit application approved by the Zoning Administrator and Department of Consumer and Regulatory Affairs. The surveyor stated, however, that Lot 46 complies with all methods if Rock Creek Drive is used as the front of the lot.

13. Averaging: The surveyor testified that by adding the front and rear lines of Lot 46, and dividing the total by two, the result was greater than 75 feet. However, because the front lot line is an arc, this averaging method was not valid for this lot.

The Board notes that an arc is not parallel to a straight line, and that an arc creates a longer distance than a straight line between two points.

14. Ten-foot Interval Method: Using this method the surveyor found that Lot 46 has an average width of only 73.87 feet. He testified that in using the ten-foot interval method, he drew lines parallel to the rear lot line (a straight line) rather than the front lot line (an arc).

15. Mean-Depth Method: The surveyor testified that the lot width averaged only 71.40 feet using the mean-depth method.

16. Greatest Depth Method: Finally, using this method, the surveyor calculated an average lot width of 71.01 feet.

17. The Zoning Administrator maintains that he made no error in calculating the lot width for Lot 46. The Zoning Administrator testified that he considered Rock Creek Drive as the front of the property and, using the mean-depth method, he arrived at an average lot width of 111.26 feet. Defending his method, the Zoning Administrator testified that for a corner lot, it is appropriate to use one set of side lot lines to calculate lot width and to use the other set of side lot lines to determine other dimensions on the property. He stated that the practice in the Zoning Administrator's office is to use whatever lot lines are most advantageous to the applicant and apply whatever method will make the lot comply. He further stated that there is nothing in the Zoning Regulations to prohibit this practice.

18. The appellant argues that the ten-foot interval method should have been used for Lot 46 since it is a skewed lot and this method provides a more accurate calculation for irregularly shaped lots. Using this method, Lot 46 would not comply. Appellant also contends that using different side lot lines for different purposes violates the intent, purpose and integrity of the Zoning Regulations.

19. Responding to the appellant, the Zoning Administrator testified that he was reluctant to use the ten-foot interval method after the Board's decision in Appeal No. 14649 in which the Board found this method to be inappropriate when the lot has a pan handle. The Zoning Administrator further testified that because Lot 46 complied using the mean-depth method, it was unnecessary to use an alternate method. The Zoning Administrator stated that there is no requirement to use the same method for all lots, nor is there a preference for one method over another and, because the Zoning Regulations do not prohibit the Zoning Administrator from calculating lot dimensions in the manner that he does, the intent, purpose and integrity of the Zoning Regulations are not impaired.

Issue 2: Record Lots vs. Tax Lots.

20. After the intervenor received approval of the subdivision plan for the proposed record lots, the appellant learned that the intervenor intended to later create an assessment and taxation lot out of the panhandle on record Lot 43 and convey it to the owner of Lot 42. The intervenor stated that he included the panhandle in Lot 43 because when it was part of record Lot 42, that lot failed to meet the minimum lot width requirement. Lot 43, however, does meet this requirement with the panhandle included. The intervenor also stated that to sell the panhandle as part of Lot 42 will make living better for that lot owner.

21. The appellant argues that the Zoning Administrator erred in approving the subdivision because the tax lot will not comply with the Zoning Regulations. The Zoning Administrator testified that tax lot and record lot systems are entirely separate. Record lots are buildable lots recorded in the D.C. Surveyor's Office. Only record lots are examined by the Zoning Division to determine whether a development proposal complies with the Zoning Regulations. Tax lots relate to who owns a particular piece of property. He stated that he can do nothing to prevent a property owner from creating a tax lot that may be inconsistent with the Zoning Regulations by using a metes and bounds description.

22. On October 20, 1989, the intervenor entered into a settlement agreement with the Commission of Fine Arts. This agreement constitutes settlement of the lawsuit between the Commission and the intervenor. After entering into this agreement, the intervenor proceeded with the development of Lot 46 pursuant to the agreed upon terms.

23. On October 24, 1989, the intervenor filed a motion requesting the Board to reopen the record to allow a copy of the settlement agreement to be made part of the record in the appeal. Responses supporting the motion were submitted by both appellants.

24. On November 6, 1989, the appellants filed a motion requesting the Board to enter an order staying all construction on Lot 46 until the Board enters an order on the appeals. The intervenor expressed opposition to the emergency stay requested by the appellants.

25. At a Special Public Meeting on November 15, 1989, the Board granted the emergency stay until December 6, 1989, the date on which the Board would decide the appeals.

26. On November 28, 1989, the appellants filed a second joint motion for an emergency stay of all construction on Lot 46 either until the appellants receive a favorable Board decision or until an unfavorable Board decision is appealed. The intervenor was opposed to the motion.

27. At its Public Meeting of December 6, 1989, the Board reopened the record to receive the settlement agreement in which the intervenor agreed, inter alia, to build no more than three houses on lots 41, 42, 43 and 45. This would require a resubdivision of these lots. The intervenor pointed out that such a resubdivision will render moot any issues raised by the appellant over the creation of a tax lot on Lot 42. The agreement also provided that the parties would move to dissolve the outstanding temporary restraining order.

28. In deciding the merits of the appeal, the Board effectively rendered moot the motion for an emergency stay dated November 28, 1989.

CONCLUSIONS OF LAW AND OPINION:

The Board concludes that both appellants are chargeable with constructive notice of the right to appeal when construction began on lots 37 and 38. The failure to receive actual notice from the Surveyor's Office or from DCRA does not alter the fact that the appellants' members were aware that construction had begun, that the property must have been subdivided and that building permits must have been issued. It was then the obligation of the appellants to proceed expeditiously to inquire about the appropriateness of the subdivision and the decision to issue building permits. To the contrary, when the appeals were filed, approximately eight months later, the houses on lots 37 and 38 were substantially complete.

The Board therefore concludes that the appeals, as they relate to lots 37 and 38 were filed after an unreasonable period of time given the circumstances. The Board therefore will dismiss Appeal No. 15129 in its entirety and any aspect of Appeal No. 15136 which relates to lots 37 and 38. The Board concludes that the remaining portion of Appeal No. 15136 related to lots 41, 42, 43, 45 and 46 was filed in a timely fashion and will, therefore, be decided on the merits.

Based on the foregoing findings of fact and evidence of record, the Board concludes that the Zoning Regulations do not set forth the various methods for calculating lot width. Consequently, no preferred method has been established in these regulations. Although Lot 46 is a skewed lot, nothing in the Zoning Regulations prohibits the use of the mean-depth method for calculating the width of such a lot. It is the opinion of the Board that the Zoning Administrator's decision to use the mean-depth method was reasonable and not inconsistent with the Zoning Regulations. The Board concludes that the subdivision, as approved by the Zoning Administrator, complies with the Zoning Regulations and that the Zoning Administrator did not err in calculating the lot widths as alleged by the appellant.

As to the issue of tax lots, the Board concludes that record lots, not tax lots, are used to ascertain compliance with the Zoning Regulations. The Board further concludes that the Zoning Administrator acted properly in determining that the record lot subdivision meets the Zoning Regulations and that the possibility that a tax lot will subsequently be created was not germane to his decision.

Based on the foregoing, it is the decision of the Board to **DISMISS** in part and **DENY** in part the appeals and uphold the decision of the Zoning Administrator.

VOTE: 5-0 (Maybelle Taylor Bennett, Charles R. Norris, Paula L. Jewell, William F. McIntosh and Carrie L. Thornhill to dismiss Appeal No. 15129 and portions of Appeal No. 15136 related to lots 37 and 38).

VOTE: 5-0 (Charles R. Norris, Maybelle Taylor Bennett, Paula L. Jewell, William F. McIntosh and Carrie L. Thornhill to deny the remainder of Appeal No. 15136).

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

ATTESTED BY: Madeliene H. Robinson

MADELIENE H. ROBINSON
Acting Director

FINAL DATE OF ORDER: APR 24 1992

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 BEFORE THE BOARD OF ZONING ADJUSTMENT."

15129 & 15136 Orders/bhs

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 15129 & 15136

As Acting Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on APR 24 1992 a copy of the order entered on that date in this matter was mailed postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

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Madeliene H. Robinson

MADELIENE H. ROBINSON
Acting Director

DATE: APR 24 1992

15129 & 15136Att/bhs

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