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February 3, 2003

MARY CAROLYN BROWN
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VIA HAND DELIVERY

Board of Zoning Adjustment for the
District of Columbia
441 4th Street, N.W., Suite 210 S
Washington, D.C. 20001

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Re: BZA Appeal No. 16934
922 Constitution Ave., N.E.

Dear Members of the Board:

This office was recently retained as co-counsel by Christopher's Row, LLC, the owner of the property at 922 Constitution Avenue, N.E., to represent it before the Board of Zoning Adjustment ("Board or "BZA") in the above-referenced appeal case. By application dated November 14, 2002, Christopher's Row moved to intervene in this matter.

In accordance with the Board's scheduling order set forth at its November 14, 2002, hearing, we are submitting herewith Christopher Row's Motion to Dismiss and Statement in Opposition to the Appeal. This Motion supplements the substantive arguments being submitted separately by co-counsel Richard Schmitt of Kass, Mitek & Kass, PLLC.

We look forward to the hearing on this matter scheduled for February 18, 2003.

Respectfully submitted,

Carolyn Brown

Carolyn Brown

Enclosure
cc: John Casey, Christopher's Row, LLC

WAS1 #1155949 v1

BZA
Case No. 16934
Exhibit No. 33

Board of Zoning Adjustment
District of Columbia
CASE NO.16934
EXHIBIT NO.33

BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of:	)	
Advisory Neighborhood Commission 6A	)	
From the Administrative Decision of the Zoning	)	
Administrator and the District of Columbia	)	**BZA Appeal No. 16934**
Department of Consumer & Regulatory Affairs	)	**Hearing: February 18, 2003**
To Issue Building Permit No. B445856 for a	)	
Foundation Only at 922 Constitution Ave., N.E.,	)	
Washington, D.C. (Square 939, Lot 27)	)	

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INTERVENOR'S MOTION TO DISMISS AND STATEMENT IN OPPOSITION TO APPEAL

I. INTRODUCTION

Christopher's Row, LLC, through undersigned counsel, hereby moves to dismiss the appeal of Advisory Neighborhood Commission ("ANC") 6A from the decision of the Zoning Administrator and the Department of Consumer and Regulatory Affairs ("DCRA") to issue Building Permit No. 445856 for a foundation only at 922 Constitution Avenue, N.E., Washington, D.C. (Square 939, Lot 27). The Board of Zoning Adjustment ("Board" or "BZA") lacks jurisdiction to hear the appeal because the ANC was not authorized to file the appeal until four months after its issuance and, therefore, failed to appeal the permit in the requisite 60-day time period. Moreover, the redistricting of the ANC boundaries for Ward 6 invalidates whatever authorization the ANC may have had. Finally, even if the ANC were properly authorized to file an appeal and did so in a timely manner, the ANC appealed the wrong building permit because the foundation only permit did not authorize construction of the row dwelling walls that purportedly violate the side yard requirements of section 405.3 of the Zoning Regulations.

Should the Board find that it does has jurisdiction to hear this appeal, the appeal should be denied because the Zoning Administrator properly interpreted section 405.3 as not requiring a side yard for a row dwelling that shares only one common division wall. The plain meaning and legislative history of section 405.3 clearly demonstrates that the requirement for a side yard only applies if a building does not share at least one common division wall. Accordingly, the Board's decision in BZA Appeal No. 16811 (appeal of David and Jane Pritchard from the Zoning Administrator's decision for issuance of a building permit at 1018 Constitution Avenue, N.E., ("*Pritchard*"), should be overturned as inconsistent with the plain meaning of the regulation.

Alternatively, the Board should deny this appeal because the building at 922 Constitution Avenue, N.E., does, in fact, share two common division walls, thereby obviating the need for any side yard under section 405.3 of the regulations.

II.
MOTION TO DISMISS APPEAL

A. Appeal Should be Dismissed for Lack of Jurisdiction

The Board lacks jurisdiction to hear the appeal of ANC 6A because the record before the Board reflects that the ANC did not authorize the filing the appeal until four months after the issuance date of the foundation only permit, and thus did not meet the requisite 60-day timeframe for filing an appeal. *See* Exhibit No 25 of Appeal Case No. 16934 (referencing the ANC action on November 7, 2002). Moreover, whatever authorization the ANC did have is no longer valid due to the redistricting of the ANC boundaries in Ward 6. None of the ANC Commissioners who are referenced in the file are on ANC 6A, and the Vice-Chairman who signed the letters is now on another ANC. Note also that Virginia Gaddis, who purportedly represents the ANC, separately submitted a request for party status, which further supports the contention that she did not act on behalf of the ANC.

Even if the ANC were properly authorized to file an appeal, and did so in a timely manner, the ANC appealed the wrong building permit. The foundation only permit that is the subject of this appeal did not authorize construction of the row dwelling walls that purportedly violate the side yard requirements of section 405.3 of the Zoning Regulations.

B. ANC 6A Was Not Properly Authorized to File Appeal within Requisite Timeframe

On May 28, 2002, the Building and Land Regulation Administration ("BLRA") issued Building Permit No. B445856 for the construction of a foundation only at 922 Constitution Avenue, N.E. Fifty-five days later, on July 24, 2002, Ms. Virginia Gaddis filed an appeal purportedly on behalf of ANC 6A. However, Ms. Gaddis was not an elected member of the ANC at the time of the filing, but instead was a former member, and was not otherwise duly authorized to file the appeal on behalf of the ANC on July 24, 2002. Consequently, the ANC's appeal is defective and is not properly before the BZA, and should be dismissed accordingly.

The ANC attempted to correct this defect by a vote taken November 7, 2002, to elect Ms. Gaddis, and Commissioner-elect Ms. Karen Wirt as an alternative, to represent the ANC before the BZA. *See* BZA Exhibit No. 25 in Case No. 16934. This authorization, however, came over 160 days after issuance of the foundation permit, or 100 days after the time period for an appeal had expired. Pursuant to a D.C. Court of Appeals decision, appeals to the BZA must be filed within two months after a notice of a decision by an administrative agency. In *Waste Management of Maryland, Inc. v. D.C. Board of Zoning Adjustment,* the court stated that "in the absence of exceptional circumstances substantially impairing the ability of an aggrieved party to appeal – circumstances outside of the party's control – we conceive of two months between notice of a decision and appeal therefrom as the limit of timeliness." *Waste Management of*

Maryland, Inc. v. D.C. Board of Zoning Adjustment, 775 A.2d 1117,1122 (D.C. 2001); *see also* Zoning Commission Notice of Final Rulemaking and Order, September 9, 2002.

Here, there were no exceptional circumstances outside the control of the ANC that prevented the ANC from appointing a duly authorized representative to file its appeal when it initially voted on the matter at its June meeting. *See* Exhibit No. 7 in BZA Case No. 16934, at 2. Consequently, the appeal is defective and untimely, and should be dismissed.

C. ANC 6A Failed to Appeal the Appropriate Building Permit

Even if the ANC's appeal were not defective, the issues raised in the appeal are not properly before the Board because the ANC did not appeal the proper building permit. The ANC has only appealed a foundation permit, which does not address the issue of any side yard that may or may not be required for a detached, semi-detached or row dwelling. The foundation permit did not authorize the construction of any dwelling walls, which might encroach upon any required side yard. The foundation that was poured under the appealed building permit did not enclose or otherwise remove any open space on the lot. Therefore, Building Permit No. B445856 cannot form the basis for addressing side yard issues under section 405.3 of the Zoning Regulations.

If the ANC wished the Board to address the issue of side yards for 922 Constitution Avenue, N.E., it should have appealed Building Permit No. B447067 issued on July 12, 2002, which authorized the construction of a two-family flat. The ANC, however, failed to do so. Because that permit was issued over six months ago, the time in which to appeal that permit has long since lapsed. Consequently, Building Permit No. B447067 and the issue of appropriate side yards under that permit, are now beyond the jurisdiction of the Board. Consequently, the appeal should be dismissed.

III.
CONCLUSION

The appeal in BZA Case No. 16934 is not properly before the Board for consideration because the appeal was not filed by a duly authorized representative of ANC 6A, and any resolution to cure the defect in the filing was untimely. Moreover, the redistricting of the ANC boundaries in Ward 6 invalidates whatever authorization the ANC may have had. Finally, the building permit now before the BZA is completely unrelated to any side yard issues and thus cannot form the basis for the appeal. Accordingly, the Board lacks the requisite jurisdiction to hear this case and therefore the appeal should be dismissed.

Alternatively, should the Board exercise jurisdiction over this matter, the appeal should be denied on substantive grounds. Because 922 Constitution Avenue, N.E., does share two common division walls on either side, it is in full compliance with section 405.3 of the Zoning Regulations.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: _____
Mary Carolyn Brown, Esq.

By: _____
Steven E. Sher, Director of Zoning
and Land Use Services

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Date: February 3, 2003

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Intervenor's Motion to Dismiss and Statement in Opposition to BZA Appeal No. 16934 were served by first-class mail, postage prepaid, on the following:

ANC 6A03
Cody Rice
310 9th Street, N.E.
Washington, D.C. 20002

Virginia Gaddis
238 11th Street, N.E.
Washington, D.C. 20002

and at

127 Saunders Street
Flovilla, Georgia 30216

Robert Kelly, Zoning Administrator
Building and Land Regulation Administration
D.C. Department of Consumer & Regulatory Affairs
941 North Capitol Street, N.W., Suite 2000
Washington, D.C. 20002

Carolyn Brown

Mary Carolyn Brown, Esq.

WAS1 #1156007 v3