DISTRICT OF COLUMBIA BOARD OF APPEALS AND REVIEW

APPEAL OF J. BRENDAN HERRON, JR.

RE: PERMITS AT 2900 AND 2902 ALBEMARLE STREET, NW

DOCKET NO 025863-CI

APPELLANT'S SUPPLEMENTAL MOTION FOR EMERGENCY STAY OF RAZE PERMIT B446310 (2900 ALBMARLE STREET) and/or B446316, (2900 ALBEMARLE STREET) and B446312 (2902 ALBEMARLE STREET), PENDING APPEAL

Pursuant to D.C. Mun. Regs. Tit. 1 § 503.11, J. Brendan Herron Jr. ("Appellant"or"Herron") hereby respectfully request that the Chairperson of the Board of Appeals and Review ("BAR") issue a Stay on the Raze Permit B446310 at 2900 Albemarle Street ("Raze Permit") and /or on the Building Permits B446316, (2900 Albemarle Building Permit) and B446312 (2902 Albemarle Building Permit), (B446316 and B446312 collectively "Building Permits") Pending Appeal.

As required under D.C. Mun. Regs. Tit. 1 § 503.7 and under Section 122.1.2 Action of Appeals of the DC Construction Code, two request have previously filed with DCRA for a Stay on the Raze and Building Permits. The first was sent on July 3, 2002 to which DCRA acknowledged receipt but never provided a response (Exhibit A) and the second was sent on October 11, 2002 directly to the Director of DCRA, Mr. David Clark.[1]

[1] Building Code Section 122.1.2 Action of an Appeal mentions the use of a form for an appeal. I inquired of Mr. Joseph McCarley, Customer Service Advocate, DCRA if a form existed. He indicated he was not aware of any such form.

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Again, he acknowledged receipt but never provided a response. (Exhibits B and C).

Under the DC Building Code Section 122.1.2 Action of an Appeal

Within three (3) working days of receipt of the appeals for, the reviewing official shall affirm, modify or reverse the previous action or decision. If the reviewing official affirms or modifies the previous action or decision, the claimant may request a review of the matter by the Director. The Director will act on the request within an additional three (3) working day. The decision of the Director shall be the final decision of the Department. If the Director does not act within the three working days or denies the appeal, the claimant may appeal the matter directly to the Board of Appeals and Review. (Emphasis supplied) DC Building Code 122.1.2

As three days have passed since July 3, 2002 and since October 11, 2002 and no response has been received to the request for an appeal from DCRA or Mr. Clark or a denial of the request for stay or stop work order on, or to vacate the permits, I am exercising my right to request a Emergency Stay directly to the Chairperson of the BAR.

Raze Permit

It would appear that the Raze Permit has been issued to a legal entity ZB, LLC, which is not and has never been the owner of 2900, or 2902 Albemarle Street. ZB, LLC does not appear to even be a legal or insured entity. In fact, it would appear that the Raze Permit application filed on 3/1/02 contains 20 incorrect answers including the name of the property owner and signatures (See Exhibit D attached application with yellow highlights of incorrect answers). According to DC land records and the deed included in the Property Owner's previous filings (Property Owner's filing of July 18, Exhibit J), Ilene R. Baylinson owned 2900 Albemarle Street as of 3/01/02. The property is now owned by Zuckerman Brothers, Inc. (a separate legal entity from ZB, LLC). ZB, LLC does not own and has never owned the subject property. ZB LLC has not entered a cross appeal or an objection to this emergency request. The insurance information on the permit

application was not completed and no evidence of insurance has been submitted. This alone should be grounds for an emergency stay as, if this entity, which may not exist or be insured, would cause damage to the city streets or the neighbors, neither the city nor the neighbors would have any legal recourse against this entity or any insurance policy. In addition, the Raze permit had an inaccurate EIF form. In questions 1 and 2, the applicant indicated that they did not own nor plan to acquire the adjoining property when in fact they intended to create the adjacent lot at 2902 Albemarle. They also failed to submit a site plan to the EIS coordinator as required under the positive answer to Question 3.

By this motion, I request an immediate stay or stop work order on or to vacate the Raze permit. I also request that DCRA require a new Raze Permit application that contains no incorrect information.

All Permits

As previously noted in my other filings, I believe that the building permits that were issued incorrectly. Some of the significant points are summarized below. It is requested that an immediate stay or stop work order on be issued, or an order to vacate the Building Permits and that DCRA require new permit applications prior to allowing any work to proceed on the site be issued.

In addition to the inaccuracies with the Raze Permit application described above, several errors were made by DCRA in issuing the Subject Permits. These errors include:

1. DCRA allowed Zuckerman Brothers, Inc. (Zuckerman) to file an incomplete building permit application that did not comply with Sections 107.12, 107.13 and 107.15 of the DC Building Code. (Note: Appeal

mistakenly referenced section 107.14 instead of 107.15 of the DC Building Code, reference is corrected here). In addition, upon review of new documents provided by Property Owner, permit application did not also comply with 107.1.1 and 107.16. DCRA made an error in not reject the application as required under Section 108.1 of the DC Building Code.

2. Owner incorrectly completed the Environmental Impact Form (EIF) that must accompany the application for a building permit. DCRA made an error in accepting an incomplete and incorrect EIF and thus did not fully evaluate the project under the DC Environmental Policy Act of 1989.

Each of these three areas is summarized below.

1. **DCRA allowed Zuckerman to file an incomplete building permit application that did not comply with Sections 107.12, 107.13 and 107.15 of the DC Building Code. (Note: Appeal mistakenly referenced section 107.14 instead of 107.15 of the DC Building Code, reference is corrected here). In addition, upon review of new documents provided by Property Owner, permit application did not also comply with 107.1.1 and 107.16. DCRA made an error in not reject the application as required under Section 108.1 of the DC Building Code.**

Herron's appeal is based on the fact that the building permit application, filed on April 4, 2002, did not comply with Sections 107.1, 107.12, 107.13, 107.15 and 107.16 of the DC Building Code. In addition, the application submitted was not complete. DCRA made an error in not rejecting this non-compliant application as required in Building Code Section 108.1.

DCRA, itself was aware of this non-compliance as noted on a Plan Correction List dated 5/13/02 (See Exhibit E) that indicates

i. The dimensions on the D.C. Survey Plat Plan and submitted plans do not agree. Please co-ordinate. (Exhibit E)

This is a violation of DC Building Code Section 107.16.1 that requires that

> The applicant shall show upon the building plat, completely dimensioned and drawn in ink to the same scale as the plat, the outline of all buildings, additions, or other structures existing and to be constructed. The accuracy of the representation of the location of the structures on the plat shall be self-certified by the owner or authorized agent for the owner of the lot of record or parcel of land, who shall sign a certificate in a form prescribed by the code official, printed on the building plat.
>
> (Emphasis supplied) DC Building Code 107.16.1

According to Exhibit E, this violation was not corrected until 5/17/02

ii. Complete items Nos. 48 thru 52 of the building permit application form. (Exhibit E)

This is a violation of DC Building Code Section 107.1.1 that requires that

> Form of Application: The application for the permit shall be submitted in the form prescribed and provided by the code official, and shall be accompanied by the fee required in Section 112.0. Submittal requirements shall be in accordance with Sections 107.12 through 107.16.
>
> (Emphasis supplied) DC Building Code 107.1.1

According to Exhibit E, this violation was not corrected until 5/14/02. In addition, according to Exhibit F, the permit fees were not paid until 5/13/02 and 6/4/02.

iii. Please submit site plan with utilities shown as per sec 107.13.1 of the DC Construction Code (Exhibit E)

iv. Submit energy conservation calculations complying with energy code as per sec 107.12-4 of 1999 D. C. Const. Code (Exhibit E)

Items iii. and iv from Exhibit E are self-explanatory and obviously the application did not comply with these code sections.

Additionally, as seen from the date of April 30, 2002 on the Existing Site Plan (See Exhibit G attached), it would appear the Site Plan required under DC Building Code Section 107.15 was not submitted until after April 30, 2002.

This is a violation of Section 107.15 of the DC Building Code that requires

> **Building Code 107.15 Zoning Compliance Review Data:** The applicant shall provide to the Zoning Division of the Department not less than four (4) copies of plans drawn to a scale indicated numerically as well as depicted graphically, showing orientation of the property as to true North, and the following:
>
> > **1.** The shape, dimensions and topography of the lot to be built upon, in sufficient detail to allow determination of heights above existing and proposed finished grade of all proposed structures, so as to allow determination of compliance with pertinent height limitations of Title 11 DCMR, Zoning Regulations.
> > **2.** The width of all public streets and public rights-of-way contiguous to the lot, with elevations at measuring points along them sufficient to determine compliance with the Height Act of 1910, as amended.
> > **3.** The shape and location in plan of all existing and proposed structures, fully dimensioned, including orientation and distances to lot lines so as to define without ambiguity the dimensions and location of said structures.
> > 4. The elevations of all existing and proposed structures, fully dimensioned so as to define without ambiguity the dimensions of said structures.
> > 5. The parking and loading plans and the basis for computation of the facilities shown on those plans.
> > 6. Other information necessary to determine compliance with Title 11 DCMR, Zoning Regulations.
>
> (Emphasis supplied) DC Building Code 107.15

DCRA made an error in allowing the permit process to continue in direct violation of DC Building Code Section 108.1 that states

> **Building Code 108.1 Action on Application:** The code official shall examine or cause to be examined all applications for permit and amendments to applications within a reasonable time after filing. The applicant shall have the option of providing for a third-party reviewing agency, at the applicant's expense, to perform a code compliance review of the project and provide the code official with a certified report to the

> findings of the review, in a format acceptable to the code official. The code official shall accept such reports from approved plans review agencies, provided that the code official determines that such agencies satisfy the qualification and reliability requirements established by the code official and all agency reports are certified by architects or professional engineers with qualifications equivalent to those required in Section 108.0 for design professionals. If the application or the plans do not conform to the requirements of all pertinent laws, the code official shall reject such application in writing, stating reasons for the rejection, citing specific Code sections, and stating the applicant's right of appeal under Section 122.0
> (Emphasis supplied) DC Building Code 108.1

As it would appear that the application and the plans did not comply with Sections 107.1, 107.12, 107.13, 107.15 and 107.16 of the DC Building Code, DCRA should have rejected the application and required Zuckerman to submit a new application that complied with the DC Building Code.

It should be noted that, in many cases, the date of the filing and any subsequent adjustments to the filing does not have any significance. However, in this particular case, The Forest Hills Tree and Slope Overlay District was set for a hearing by the Zoning Commission on April 19, 2002. This Zoning Commission action triggered DC Mun. Regs. tit. 11 § 3205.5 that states

> 3202.5 If an application for a building permit is filed when the Zoning Commission has pending before it a proceeding to consider an amendment of the zone district classification of the site of the proposed construction, the processing of the application, and the completion of work pursuant to the permit, shall be governed as follows:
>
> (a) The application shall be accompanied by any fee which is required, and by the plans and other information required by §3202.2, which shall be sufficiently complete to permit processing without substantial change or deviation, and by any other plans and information which are required to permit complete review of the entire application under any applicable District of Columbia regulations;
>
> (b) If the application is filed after the date on which the Zoning Commission has made a decision to hold a hearing on the

> amendment, the application may be processed, and any work authorized may be carried to completion, only in accordance with the zone district classification of the site pursuant to the final decision of the Zoning commission in the proceeding or in accordance with the most restrictive zone district classification being considered for the site.

(Emphasis supplied) DC Mun. Regs. tit. 11 § 3205.5

Thus while Zuckerman's council has argued that the regulations allow for a vesting of applications pending prior to the date of the Zoning Hearing (in this case, April 19, 2002), the regulations require that the application should have been accompanied by a paid fee and shall be "sufficiently complete to permit processing without substantial change or deviation, and by any other plans and information which are required to permit complete review of the entire application under any applicable District of Columbia regulations" (Emphasis supplied) DC Mun. Regs. tit. 11 § 3205.5. As noted above, in this case, the fee was not paid until 5/13/02 and 6/4/02. In addition, as noted above, the application did not comply with Sections 107.1, 107.12, 107.13, 107.15 and 107.16 of the DC Building Code as of April 19, 2002 and thus should not be allowed to proceed under DC Mun. Regs. tit. 11 § 3205.5 (a).

As noted in DC Building Code Section 107.15, DCRA has responsibility for assuring compliance with the Zoning Code. It should also be noted that according to Exhibit F, DCRA signed off on the zoning compliance on April 26, 2002. This would also appear to be an error because, as shown above, the application as of April 26, 2002 did not comply with DC Mun. Regs. tit. 11 § 3205.5 and because the information required under Building Code Section 107.15 (i.e. Zoning Compliance Review Data) that would seem to be necessary to make a zoning determination was not filed until at least April 30, 2002.

It should also be noted that there are no provisions in the Building Code that allow for any amendments or supplemental filings to an application. The only section of the Building Code that applies to Amendments is Building Code Section 107.5 that states

> 107.5 Amendments to Permit: The holder of a valid active building permit shall be authorized to amend it or to amend the plans, application or other records pertaining to it, by filing at any time before completion of the work for which the original permit was issued, an application for revision of a building permit, accompanied by two (2) sets of the revised plans or documents. Once such amendments are approved and the revision permit is issued, it shall be deemed part of the original permit and shall be kept therewith in the official records of the Department. A revision permit shall become invalid upon expiration of the original building permit it amends. The extension provisions of Section 112.8.1 shall apply to the original building permit and shall only affect the respective revision permits to the extent that the original building permit is extended.
>
> (Emphasis supplied) DC Building Code 108.1

This provision only applies to valid issued building permits and not applications. Zuckerman did not have a valid active building permit and thus would not be allowed Amendments authorized under this clause. Additionally, as DC Mun. Regs. tit. 11 § 3205.5 (a) (noted above) requires that there not be "substantial change or deviation," to an application, any Amendments would not be allowed for the permit to be allowed to vest.

In summary to appeal issue 1., DCRA has made numerous errors in accepting Zuckerman's incomplete application and plans and in allowing Zuckerman to modify such plans and pay the fees owed on such plans after the date of the Zoning Hearing in direct violation of DC Building Code 108.1 and DC Mun. Regs. tit. 11 § 3205.5.

2. **Zuckerman incorrectly completed the Environmental Impact Form (EIF) that must accompany the application for a building permit. DCRA made an error in accepting an incomplete and incorrect EIF and thus did not fully**

evaluate the project under the DC Environmental Policy Act of 1989.claims that DCRA did not make an error in accepting the Environmental Impact Form (EIF) filed by Zuckerman with the building permit applications.

The result of this incorrect EIF was that the DCRA did not fully evaluate the project under the DC Environmental Policy Act of 1989. Line or Question 1 of the EIF (that was filed for 2900 Albemarle Street) asks, "Does the owner of this site own adjacent or abutting property?" The answer checked was NO. However, Zuckerman clearly owns 2902 Albemarle Street, the adjacent property as it is the subject of one of the permits. Thus, this answer is incorrect. In addition, an EIF for 2902 also answers NO to Question 1. As a Yes answer on the EIF requires the submission of a site plan to the EIS Coordinator of DCRA and as a site plan was not produced until April 30, 2002 (See date of Exhibit G) and as DCRA determined that additional Environmental Impact Screening Form was not required without having a Site Plan on April 4, 2002, DCRA made an error in making this determination as a result of the incorrect statement on the EIF by Zuckerman.

Conclusion

For the foregoing reasons, a Motion to vacate the permits or to issues a Stop Work Order or Stay of the permits is justified because the permits and the accompanying certifications contained material inaccuracies and did not comply with the laws and Regulations of the District of Columbia. An emergency request should be granted because of the potential for an uninsured and possibly non-existent legal entity to demolish a building that is located in a neighborhood with a six small children under the age of two living in the adjacent properties. As the individuals submitting the permit request could not even

accurately complete the applications, there is absolutely no assurance that they will comply with the DC Building Code in either demolishing the existing structure or in building new structures. This lack of compliance places the neighbors at great risk and thus emergency action is required. A similar risk of injury to the children as well as the potentially substantial negative impact on the neighbor's property values from having a partially demolished or constructed building should demolition and/or construction start and Herron win the appeal provides the justification for the stay on the building permits.

Dated: October 29, 2002

Respectively Submitted,



J. Brendan Herron Jr.
2901 Albemarle Street
Washington, DC 20008
(202) 248-9837

Order

Board of Appeals and Review hereby orders the Department of Consumer and Regulatory Affairs and Zuckerman Brothers, Inc. to:

1. DCRA immediately issue a Stop Work Order at 2900 and 2902 Albemarle Street on the Raze Permit B446310 at 2900 Albemarle Street ("Raze Permit") and on the Building Permits B446316, (2900 Albemarle Building Permit) and B446312 (2902 Albemarle Building Permit), (B446316 and B446312 collectively "Building Permits").
2. DCRA vacate the Raze Permit B446310 at 2900 Albemarle Street and require the property owner to reapply for a new raze permit.
3. Zuckerman Brothers, Inc to comply with the Stop Work Order immediately.

_____

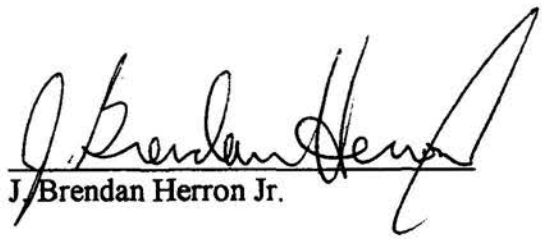
David H. Merlin
Chairperson
Board of Appeals and Review

Date:_____

To be served to J. Brendan Herron Jr. at 2901 Albemarle Street, Washington, DC 20008, Zuckerman Brothers, Inc. at Ste 550, 2 Wisconsin Circle, Chevy Chase, Md 20815, to Zuckerman Brothers, Inc.'s Counsel, John T. Epting, Esq., Shaw Pittman LLP, 2300 N Street, NW, Washington DC 20037 and to David Clark, Director, DCRA at DC Department of Consumer and Regulatory Affairs, 941 North Capitol St., NE, Room 2200, Washington, DC 20002.

Certificate of Service

I hereby certify that a copy of the foregoing Appeal was sent via messenger on October 29, 2002 to the Board of Appeals and Review. A copy was sent via messenger on October 29, 2002 to the Owner at Ste 550, 2 Wisconsin Circle, Chevy Chase, Md 20815, to Owner's Counsel, John T. Epting, Esq., Shaw Pittman LLP, 2300 N Street, NW, Washington DC 20037 and to David Clark, Director, DCRA at DC Department of Consumer and Regulatory Affairs, 941 North Capitol St., NE, Room 2200, Washington, DC 20002.



J. Brendan Herron Jr.

Table of Exhibits

Exhibit A Appeal letter to and response from DCRA on July 3, 2002

Exhibit B Appeal letter to David Clark on October 11, 2002

Exhibit C Response from David Clark to October 11, 2002 appeal

Exhibit D Raze Permit and Raze Permit application

Exhibit E Plan correction list

Exhibit F Application for building permits at 2900 and 2902 Albemarle Street

Exhibit G Site plan

V

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW

J. Brendan Herron, Jr. Appellant	)	
v.	)	Docket No. 02-5863-BP
Department of Consumer and Regulatory Affairs, Appellee	)	

DECISION AND ORDER

This appeal was filed on July 8, 2002 by J. Brendan Herron, Jr. ("Appellant"), challenging the issuance by the Department of Consumer and Regulatory Affairs ("DCRA") of demolition and building permits for the properties located at 2900 and 2902 Albemarle Street, N.W. Appellant asked the Board to vacate the permits and to issue an order stopping work at the properties pending a hearing on this matter.

On July 18, 2002, Zuckerman Brothers, Inc., owner of the properties in issue, filed a submission styled a "cross-appeal" and motion to dismiss. The purported "cross-appeal" by Zuckerman Brothers, Inc. does not take issue with any action by appellee DCRA. Therefore, it is not properly designated a "cross-appeal." See D.C. Mun. Regs. tit. 1 § 503.3(c). However, the Board treated the purported cross-appeal as a motion to intervene and has granted Zuckerman Brothers, Inc. status as an intervenor in this appeal.

On October 11, 2002, DCRA submitted the administrative record to the Board.

The Board issues the following rulings on preliminary matters:

1. **Appellant's request for a Stop Work order.** Appellant's request that the Board issue a Stop Work order is equivalent to a request that the Board stay implementation of the permits until it rules on the merits of the appeal. The Board's rules provide that application for stay "shall ordinarily be made in the first instance to the Director" of the agency whose action is under appeal. D.C. Mun. Regs. tit. 1 § 503.6. A motion for stay filed with the Board "shall state that an application for a stay to the Director is not practicable, or that the Director has denied an application for a stay." D.C. Mun. Regs. tit. 1 § 503.7. The record contains no indication that appellant has sought a stay from DCRA or that it would be impracticable to do so. For that reason, the Board denies the request for a stay.

2. Intervenor's Motion to Dismiss. Turning to intervenor's motion to dismiss, for the reasons discussed below, the Board agrees that it lacks jurisdiction as to appellant's allegations that issuance of the permits violated District zoning regulations.

Appellant alleges that DCRA violated section 11-3202.5 of the D.C. Municipal Regulations by issuing the building permit without applying the restrictions proposed in the Forest Hills Protective Tree and Slope Overlay District petition filed with the Zoning Commission on April 5, 2002, and set down for hearing by the Zoning Commission on April 19, 2002. The record shows that appellant presented this argument to DCRA, which found that the restrictions proposed through that petition did not apply because the permit applications were filed on April 4, 2002. *See* correspondence from Theresa Lewis of DCRA to ANC Commissioner Phil Kogan dated May 9, 2002 (Ex. C to appellant's Notice of Appeal). The issue that appellant raises in this appeal is whether the apparently incomplete permit applications submitted to DCRA on April 4, 2002 were "filed" on that

date within the meaning of section 11-3202.5(a). Resolution of this issue thus requires interpretation of section 11-3202.5.

Section 11-3202.5 is a zoning regulation; Therefore, as to this issue, the instant appeal is an appeal from a DCRA order granting a building permit based on an interpretation of a zoning regulation. It is the Board of Zoning Adjustment ("BZA"), rather than the Board of Appeals and Review, that has jurisdiction over such appeals. *See* D.C. Code § 6-641.07(f) (2002); *see also* D.C. Code § 2-1803.1 (appeals involving infractions of . . . the District of Columbia Zoning Regulations shall be entertained and determined by the District of Columbia Board of Zoning Adjustment").

As the intervenor noted in its brief, the District regulation establishing minimum lot widths also is a zoning regulation. *See* D.C. Mun. Regs. tit. 11 § 401.3 (2002). Therefore, the BZA, and not this Board, also has jurisdiction over the portion of this appeal that alleges that DCRA's issuance of the building permit to intervenor violated District lot width requirements. Accordingly, the Board must dismiss these aspects of the appeal.

With respect to the remaining issues that appellant has raised (including appellant's claims that issuance of the permits was inconsistent with provisions of the Construction Codes of the District of Columbia, in violation of D.C. Code Ann. § 6-1405.01; violated provisions of law concerning review by the relevant Advisory Neighborhood Commission; and violated D.C. Code Ann. § 6-611.01, concerning review by the Commission on Fine Arts), the Board will retain jurisdiction and will issue its

ruling after briefing is completed and after oral argument (if any). If any party believes that there are other jurisdictional issues, it may address those issues in further briefing.

WHEREFORE the Board dismisses the appeal in part. The dismissal is as to the allegations that issuance of the permits violated sections D.C. Mun. Regs. tit. 11 §§ 3202.5 and 401.3.

Because the appellant and intervenor have already substantially briefed the issues, the Board establishes the following expedited briefing schedule:

Counsel for appellee shall enter an appearance, and serve notice of entry of appearance on appellant and intervenor, as soon as possible (and, in any event, before November 18, 2002).

Appellee shall submit its brief, and appellant and intervenor may submit any additional briefs, by November 18, 2002. Any party that requests oral argument shall so state in its brief.

Appellant may submit a reply brief by December 2, 2002.

Oral argument, if requested, will be held on December 9, 2002 at 10 a.m. or as soon thereafter as is convenient for all parties.

SO ORDERED this 28th day of October, 2002

Phyllis D. Thompson

Phyllis D. Thompson, Legal Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW

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J. Brendan Herron, Jr.
2901 Abermarle Street, NW
Washington, DC 20008

BAR Docket No: 02-5863-BP

CERTIFICATE OF SERVICE

I hereby certify that the attached Order, rendered on October 28, 2002 for the above referenced case was mailed, postage pre-paid, on October 29, 2002 to the Appellant, at the address listed above.

J. Maddox-Levine
for the Board of Appeals and Review

cc: David A. Clark, Director
Department of Consumer and Regulatory Affairs – Appellee
941 North Capitol Street, NE
Washington, DC 20002

John T. Epting, Esq. - Intervenor
Shaw Pittman LLP
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Washington, DC 20037