BEFORE THE DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

CASE NO. 16982 [set for public hearing March 4, 2003]

APPEAL OF J. BRENDAN HERRON, JR. AND ANC 3F
VS.
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

REGARDING 2900 AND 2902 ALBEMARLE STREET

PRE-HEARING STATEMENT OF ANC 3F AND J. BRENDAN HERRON, JR.

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This Case concerns decisions by the Department of Consumer and Regulatory Affairs (DCRA) regarding property in Square 2043 which is in the area of Advisory Neighborhood Commission 3F (ANC 3F) across Albemarle Street from the home of J. Brendan Herron, Jr. (Herron), who resides at 2901 Albemarle Street.

Herron and ANC 3F (Appellants) appealed to the Board of Zoning Adjustment (BZA) in this Case on December 19, 2003. They rely on the Zoning Regulations of the District of Columbia to challenge final decisions of DCRA in favor of Zuckerman Brothers, Inc. (Zuckermans). Zuckermans filed a motion to intervene on January 9, 2003.

Appellants have previously responded to other motions tendered by Zuckermans.

Appellants file this Pre-Hearing Statement pursuant to 11 DCMR § 3112 .10.

BZA JURISDICTION OVER THIS APPEAL

Congress has assigned to this Board jurisdiction over: "Appeals …by any person aggrieved, … , by any decision … granting … a building permit … , *or any other decision based* in whole or in part *upon any zoning regulation or map adopted under" the Zoning Act*. DC Code § 6-641.07 (2001) [emphasis added]. See Appendix I (at page __, below) for the context.

DCRA ERRORS UNDER APPEAL

Misinterpreting the Zoning Regulations' "vesting" rule, 11 DCMR § 3205.5, and related Zoning Regulations, DCRA refused to implement them. The Zoning Commission (ZC) adopted the "vesting" rule, and amended it from time to time, in order to regulate decisions by DCRA as developers race to try to acquire rights to proceed under old zoning regulations even as the ZC is moving toward amendment of those very regulations. In this case, the ZC was moving toward approval of a tree and slope protection overlay.

DCRA also failed to implement the ANC Law, which requires DCRA to give ANC 3F proper notice, give it opportunity to comment, and give "great weight" to advice it offers DCRA. DC Code 1-309.10 (2001). Without meaningful opportunities to inspect and receive copies of critical documents (which DCRA withheld), "great weight" melts away.

BZA
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Exhibit No. 20

Board of Zoning Adjustment
District of Columbia
CASE NO. 16982
EXHIBIT NO. 20

And DCRA violated the Freedom of Information Act (FOIA), which Herron invoked to try to pierce a veil which hid what was really happening.

Consequently, DCRA erroneously and in violation of the Zoning Regulations:

- Subdivided Lot 9 into Lots 18 and 19 (2900 and 2902 Albemarle Street, respectively);
- Granted two building permits and a raze permit to Zuckermans;
- Formally refused to correct its errors.

DCRA's errors involved acts and omissions by the Director of DCRA and his subordinates, the Surveyor and the Administrator of the Building and Land Regulation Administration (BLRA), and by the BLRA Administrator's subordinate, the Zoning Administrator (ZA).

HEARING *DE NOVO*

This Board decides appeals from the DCRA *de novo*, on a new record.. (Ruling of the BZA from the bench on January 28, 2003, after consultation with Corporation Counsel, in Appeal of Kuri Brothers, Inc. v. DCRA, Case No. 16947) It is not limited to the record made before the DCRA. *Id.* Nor does the BZA seek to determine whether the DCRA violated its own regulations -- but only whether it violated the Zoning Regulations. *Id.*

TIMELINESS

This appeal is timely under the standards of 11 DCMR § 3112.2(a), (c), and (d) (published on February 7, 2003, and effective as of that date) in 50 DCR 1200.[1] See "Opposition of Appellants ANC 3F and J. Brendan Herron, Jr. to Motion to Dismiss" (filed February 20, 2003), which we incorporate by reference. See, also, the D.C. Court of Appeals decision sustaining this Board in *Sisson vs. DC BZA*, 805 A.2d 964, 971 (D.C. 2002); also *Appeal of Darrel J. Grinstead*, BZA Appeal No. 16764, Decision and Order (May 22, 2002) at pages 4-7, 11-12.

ERRORS ON APPEAL AND THE "VESTING" RULE

On April 19, 2002, the ZC set down for hearing a map and text amendment, the Forest Hills Tree and Slope Protection Overlay (Overlay). The ZC thereby brought into play the full force of 11 DCMR § 3205.5. That Overlay amendment had been sought by an application filed April 5, 2002, by the Forest Hills Citizens Association (FHCA). Earlier still, Zuckermans had learned that an application for a tree and slope overlay would soon be filed.

The Zuckermans are sophisticated developers with years of experience in the District of Columbia and with ready access to the most sophisticated zoning experts. They set out to beat the "vesting" rule. And they knew what they were up against:

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[1] The ZC acted by its Order No. 02-01 (adopted at a public meeting on September 9, 2002).

- If Zuckermans failed to file any application for building permits until *after* the ZC set an overlay down for hearing, the Zoning Regulations would have forbidden DCRA from granting permits that were at odds with the *proposed* overlay. 11 DCMR § 3205.5(b).

- If Zuckermans properly filed everything required to support building permits *before* a ZC "set down" decision, that would end the matter; the overlay would have no impact.

As it turned out, Zuckermans submitted some materials before April 19 (the critical "set down" date) and other materials after April 19, 2002. Moreover, their pre-April 19 submittals are dubious.

So the issue before this Board is whether Zuckermans had done *enough* before April 19 to count *under the Zoning Regulations*?

The answer turns on two questions that Zoning Regulations known as the "vesting" rule pose: Had Zuckermans submitted an "application" that was "accompanied"

- "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 that are required to permit complete review of the entire application under any applicable District of Columbia regulations"?
- and "by any fee which is required"?[2]

If the answer -- to either question -- is, No, then the pre-April 19 submittals vest no rights in the Zuckermans and the building permits were granted in violation of the Zoning Regulations that govern applications pending during the period when the ZC is amending zoning equirements (such as a tree and slope protection overlay).

How these Zoning Regulations were adopted and amended shows that they must be strictly interpreted, to hold developers accountable -- not leniently interpreted as DCRA would have it, to give developers opportunities to correct every gaping gap in their pre-"set down" submissions.

HISTORY OF THE "VESTING" RULE

The context in which the ZC adopted its Orders Nos. 516 (January 5, 1987), 546 (October 13, 1987, emergency order), and 562 (January 19, 1988, permanent order) demonstrate that the ZC was concerned that developers would try to outrace zoning changes and wanted to place a heavy burden on developers. Previously, the "race" was conducted between developers filing

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[2] Pertinent "vesting" rule provisions are codified at 11 DCMR § 3202.5(a) for building permits and at 11 DCMR § 3202.7(a) for certificates of occupancy. Our Opposition to Motion to Dismiss (footnote 8 at page 7) should have referred (in quotes) to "any" fees required, rather than "all" fees required. We apologize for that error.

applications and the ZC adopting zoning changes by emergency orders (which went into effect and were then considered for permanent status).[3] The ZC explained:

> "The ongoing process through which the [ZC] will be considering action which may reduce development potential is a process that inherently and inevitably creates an incentive for a prospective developer to expedite preparations, to the end of securing approval to construct a building of a size and density which may later be precluded."

ZC Order No. 516 at 3. From 1958 until emergency rulemaking in 1986 that culminated in Order No. 516 in 1987, "vesting" provisions of the zoning regulations allowed developers to apply for and be granted a permit to construct a building allowed by the regulations in effect at the time of filing -- even if a proceeding to change those regulations was then pending before the ZC which "thereafter took timely action to reduce that size, density or range of uses." Order No. 516 at 3. The ZC held that this

> "vesting rule ... was substantially more favorable to owners and developers of land than the general rule that would otherwise apply under general principles of law, and of zoning law in particular. In most jurisdictions in the United States, the right to construct a building that would be barred by an amendment to the Zoning Regulations does not vest unless a building permit has been issued, and some work has been carried out under the authority of the permit."

Order No. 516 at page 4. Although the ZC rejected proposals "to establish an event which occurs earlier in the course of a map amendment case, such as the filing of a petition for an amendment, as the event that triggers the operation of the proposed rule" (sticking instead to the ZC decision to have a public hearing as the trigger, Order No. 516 at page 5), the ZC decided to adopt the following rule:

> "If an application for a building permit is filed when the [ZC] has pending before it a proceeding to consider amendment of the zone district classification of the site of the proposed construction, the processing of the application, and the completion of the work pursuant to a permit, shall be governed as follows:
>
> (a) If the application is filed on or before the date on which the [ZC] makes a decision to hold a hearing on the amendment, the processing of the application and completion of the work shall be governed by sub-sections 3202.4 and 3202.5; and
>
> (b) If the application is filed after the date on which the [ZC] has made a decision to hold a hearing on the amendment, the application may be processed, and any work authorized by a permit may be carried to completion, only in accordance with the zone district classification of the site pursuant to the final decision of the [ZC] in the proceeding, or in

[3] "The repeated consideration of emergency downzonings is not an acceptable alternative." ZC Order No. 516 at 3.

accordance with the most restrictive zone district classification being considered for the site."[4]

Later that same year, however, the ZC amended the rule after DCRA implementation undermined the rule's purpose:

The ZC acted by emergency order, "to make it clear that a building permit application must be complete, and the required fee paid, in order for the filing of the application to vest a right to build pursuant to 11 DCMR 3202.5." ZC Order No. 546 at page 1. The ZC found it necessary to amend the new rule so soon because

> "[t]hese provisions have been administratively applied [by DCRA] to so operate even if the applicant has not filed a complete application, or paid the fee which is required for the processing of the application;"
>
> "It is anomalous to allow the vesting of construction rights on the basis of an application which is incomplete or unfinished, and therefore is not sufficient for the issuance of a building permit;"

Id. at pages 1-2, 3. The ZC therefore amended its regulation to prescribe that: "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*." (*Id.*, emphasis added.) The ZC made that amendment permanent by Order No. 562, explaining that it addressed the following concerns expressed by ANC 3C:

> "The regulations should be clear as to what act constitutes the filing of a building permit application under the [vesting] regulation: merely the filing of appropriate forms, or the filing of substantially complete and final plans together with the payment of application fees? These different acts can occur on different dates, and this ANC recommends that the latter action constitute the meaning of 'application.'"

The ZC agreed. And that remains the governing Zoning Regulation today.

SPECIFICATION OF ERRORS

DCRA made no effort to determine what was on file by 19 and what was submitted only afterwards. DCRA did not care. DCRA's General Counsel later rationalized that so long as gaps were filled by June 13, the date DCRA granted permits, nothing mattered. (Attachment C, November 20, 2002, letter from its General Counsel to Herron; see, especially, paragraphs __ and ___. Prior to November 20 neither Herron nor ANC 3F knew that DCRA was effectively disregarding the standard of completeness.)

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[4] Order No. 516 at pages 6 and 7. That provision, originally numbered § 3202.6, is the source of the present, renumbered § 3202.5.

It is now up to this Board to make its own, independent determination (or to require DCRA to try all over again).

The Zuckermans' submittals before April 19 failed under the "vesting" rule for at least the following reasons:

- Zuckermans had selected a very steep site, at the southwest corner of Albemarle and 29th Streets, with neighbors upslope on Albemarle Street, west of the site, and downslope on 29th Street, south of the site. (The site sloped sharply toward Soapstone Valley and toward the Valley of Rock Creek). Zuckermans' "Description of Proposed Work" said: "CONSTRUCT NEW SFD AND RETAINING WALLS." Yet DCRA found, on April 17 that Zuckermans failed to provide retaining wall details and on May 13 that they still failed to submit cost and height of retaining walls.[5]

- Zuckermans did not pay the $350 fee for a retaining wall until June 12.

- Zuckerrmans did not pay the $50 fee for a Projection until May 13.

- The required information about Projections was still missing as late as May 13.[6]

- Zuckermans submitted *no* storm water management plan at all until April 30, 2002 (or days later), even though "applicable District of Columbia regulations" require a storm water management plan and do not allow DCRA to complete its review without such plan. The seven-page storm water management plan *did not even exist on April 19*: It was *prepared* on April 30.[7]

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[5] Zuckermans submitted two DCRA forms entitled "Application for Construction Permits on Private Property." One for 2900 Albemarle (designated 615B by DCRA) and the other for 2902 Albemarle (designated 616B). These are three page forms with blocks for 144 items of information. (For example, "Description of Project Work" is Item #12.) We do not know exactly how much was filled in as of April 19 and how much only later, because DCRA allowed Zuckermans to come in and amend their application after April 19 -- and because DCRA did not keep a copy as of April 19 and Zuckermans have not provided one. However, we do know that some items were blank on April 19. Even as of May 13 Zuckermans had not filled in Items #84 and #96, regarding retaining walls (as well as other items, concerning different issues). We know that only because DCRA staff's deficiency notations show that some of the blocks now filled in were originally empty. (See Appendix III, at page __ below) All versions of these application forms available to Appellants include information clearly added *after* April 19. See Opposition to Motion to Dismiss at pages 7-8.

[6] Items nos. 48 through 52 on the DCRA application forms were identified by DCRA staff as still missing on May 13. See Appendix III, below.

[7] Zuckermans appear to have submitted this plan on May 2 to the Environmental Health Administration in the Department of Health (DOH). This review function, formerly exercised under DCRA), was transferred to DOH a few years ago.

- As of April 19, Zuckermans also had not submitted "information required by § 3202.2" (a provision that has been in the Zoning Regulations at least since 1958), including the following: "(a) Scaled drawings showing ... : (1) The exact ... topography ...; (2) The plan, elevation, and location by dimensions of all existing ... structures ... ; (3) ... ; (4) ... ; (b) An official building plat, ... , upon which the applicant shall indicate in ink and to the same scale dimensions of the following: (1) All existing ... structures; (2) ... ; (3) ...."[8]

- Moreover, in order to qualify for two building permits, the Zuckermans had to subdivide a single lot into two lots. Their application to DCRA (Attachments A and B) did not disclose that there was an existing structure -- a residential building -- in the middle of the original lot and that the proposed new lot line would run through the middle of that house in violation of the Zoning Regulations (11 DCMR §§ 101.6 and 405.9). Obviously, full disclosure of an existing structure in the middle of the lot could have brought Zuckermans' subdivision express train to a stop and, with it, undermined Zuckermans' changes of beating out the tree and slope overlay (because the Zoning Regulations forbid DCRA from issuing building permits for two principal structures on a single, undivided lot. 11 DCMR § 3203.3).

- Zuckermans also made a fee payment on June 12 (the day before DCRA issued permits) for "remaining new construction." (Appellants are uncertain whether that fee was really due upon application or calculable only at the end of DCRA review. But the explanation of DCRA's General Counsel, Attachment C, ¶ 2, may well cover this fee; it does not seem to cover the others.)[9]

Appreciating the sensitivity of the area in which the site was located, but unable to find out what was really going on, ANC 3F was unable to act as "eyes and ears" for DCRA and give it recommendations that would have helped it to nip these violations of Zoning Regulations in the bud. ANC 3F tried to get DCRA (as well as Zuckermans) to share information from the outset. But these efforts failed. See Attachment D. Herron tried the same, also with poor results. Only on November 20 did Zuckermans and DCRA finally give up most of the information needed to give soundly-based advice. That information shows that DCRA's actions, which its Director had formally and finally endorsed on October 23, violate the Zoning Regulations.

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[8] DCRA is well aware of these requirements, and it has mandated them in its own Building Code Regulations, 12 DCMR § 107.15 ("Zoning Compliance Review Data").

[9] Also, as of April 19, there were still discrepancies between dimensions in the Site Plan under 11 DCMR § 3202(a) and the version drawn on the site plat under 11 DCMR § 3202(b).

CONCLUSION

The orders of the DCRA should be reversed.

Respectfully submitted,

BY: 

David J. Bardin, Secretary, ANC 3F, on behalf of both Appellants

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

Commissioner Robert V. Maudlin
2906 Ellicott Terrace
Washington, DC 20008

Commissioner David J. Bardin
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Washington, DC 20036
(202) 857-6089

21 February 2003

Appendices:

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II	TIME LINES IN 2002 [partial] --- Pre- and Post-4/19/2002	Page 10
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IV	WHEN HERRON RECEIVED CRITICAL DOCUMENTS	Page 11

List of Attachments:

A	Zuckermans' April 5, 2002, subdivision application to DCRA and
B	-- accompanying preliminary sketch
C	DCRA General Counsel's letter of November 20, 2002, explaining DCRA's positions
D	Commissioner Kogan's December 8, 2002, letter (ANC 3F Ltr 02-06)

APPENDIX I: BZA JURISDICTION OVER THIS APPEAL

Congress has conferred jurisdiction upon this Board by DC Code § 6-641.07 (2001) which includes the following definition:

> "(f) Appeals to the Board of Adjustment may be taken by any person aggrieved, ... by any decision of the Inspector of Buildings[10] granting or refusing a building permit or granting or withholding a certificate of occupancy, or any other decision based in whole or in part upon any zoning regulation or map adopted under this subsection ... The Mayor of the District of Columbia may require and fix the fee to be charged for an appeal, ...; provided, that no citizens' association, or association created for civic purposes and not for profit shall be required to pay said fee. There shall be a public hearing on appeal.
>
> (g) Upon appeals, the Board of Adjustment shall have the following powers:
>
> (1) To hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, or determination, or refusal made by the Inspector of Buildings or the Mayor of the District of Columbia or any other administrative officer or body in the carrying out or enforcement of any regulation adopted pursuant to this subchapter ... ;
>
> (2) ...
>
> (3) ...
>
> (4) In exercising the above-mentioned powers, the Board of Adjustment may, in conformity with the provisions of this subchapter ... reverse or affirm, wholly or partly, or may modify the order, requirement, decision, determination, or refusal appealed from or may make such order as may be necessary to carry out its decision or authorization, and to that end shall have all the powers of the officer or body from whom the appeal is taken."

The Zoning Regulations summarize (but do not define) the BZA's jurisdiction in the BZA Rules of Practice and Procedure: "The Board, pursuant to provisions of the Zoning Act, also shall hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination or refusal made by any administrative officer or body, including the Mayor, in the administration or enforcement of this Title." 11 DCMR § 3100.2.

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[10] Functions of the Inspector of Buildings were transferred to DCRA. DC Code § 6-641.07, Miscellaneous Note (2001).

APPENDIX II: TIME LINES IN 2002 [partial] --- Pre- and Post-4/19/2002

Date	Exhibit to Motion	Description
BEFORE April 19, 2002:		
March 1		Zuckermans apply for raze permit
March 18		ANC3F Open Forum: Alex Walworth reports subdivision into two lots, large trees cut down
March		ANC Commissioner Kogan begins to schedule meeting with Zuckermans
March 23	A	Zuckermans close on property, Ilene R. Baylinson signs deed
April 4		Zuckermans apply for 2 building permits for 2 houses with retaining walls – no known copy; -- existing house not shown on any plan (property not yet subdivided); -- projections not mentioned in application; fee for projections not offered
April 5		Zuckermans apply for subdivision - existing house not shown
April 17	C	DCRA subdivides
April 17		DCRA staff identifies deficiencies in Zuckermans' filings
April 18		Zuckermans file plans with projections beyond BRLs but do not amend application; do not provide plans required under Section 3202(a).
April 19	F	ZC sets down FH TSPO for hearing
AFTER April 19, 2002:		
April 22		Herron FOIA request to DCRA
April 23		Commissioners Kogan and Maudlin scheduled to meet with Stuart Zuckerman, who aborts on advice of counsel
April 29	H	ANC 3F meets, adopts Res 02-23 and 02-24; Zuckermans elect not to attend
April 25		Some residents visit DCRA, briefly see a few of the plans, given no copies, do not represent ANC, no commissioners present, Herron not present
April 25	G	Herron writes DCRA to request information not seen by or given to his neighbors
April 30	D	Zuckermans for first time files with DCRA existing conditions site plan, showing existing house
April 30		Zuckermans for first time files storm water management plan required by DC regulations
April 30		Zuckermans for first time files plans that comply with Section 3202(a)
May 3	I	Commissioner Kogan writes DCRA transmitting Res 02-23, saying DCRA holds back information
May 6		Commissioner Kogan writes City Administrator Koskinen about DCRA secrecy
May 9	J	DCRA Deputy Director Lewis emails Commissioner Kogan and Heron that overlay will have "no impact" because applications filed before April 19
May 13		DCRA staff identifies more deficiencies in Zuckermans' filings, including discrepancies between Drawing on survey plat and building plans and continuing failure to fill out items regarding Projections
May 13	B	Zuckermans amend application forms to add Projections; they then pay the fee
May 14	E	Zuckermans revise drawing on survey plat to conform to building plans
May 28		Commissioner Kogan, Herron, and some neighbors meet with Deputy DCRA Director Lewis; plans are not available ("out for modification"), despite Herron request before meeting that DCRA make plans available
June 11	L	DCRA Deputy Director Lewis notifies Commissioner Kogan and Herron that permits will issue and that storm water management plan has been filed and approved (she does not disclose when filed)
June 12	M	Commissioner Kogan, Herron briefly meet DCRA's Lewis, see only a few plans, given no copies of plans
June 12		DC Office of Documents overturns DCRA denial of FOIA request
June 13		DCRA grants construction permits and raze permit
July 2		Herron asks DCRA guidance on whether to appeal to BZA as well as BAR
July 3	O, P	Herron appeals to BAR
July 18	Q	Zuckermans file motion to dismiss with BAR
July 19		DCRA advises Herron appeal is only to BAR
July 23		DCRA supplies a few of FOIA documents, not including critical materials
Oct 23	T	DCRA formally denies Herron request to revoke permits
Oct 28	V	BAR rules BZA has exclusive jurisdiction over zoning issues, agreeing with Zuckermans -- (DCRA having remained silent)
Nov 14		Herron notifies Zuckermans that he will appeal to BZA
Nov 20		Zuckermans supply many (but not all) of documents that DCRA withheld
Nov 20		DCRA General Counsel Edwards writes Herron with DCRA's "rationales" for denying relief
Dec 19		Herron and ANC 3F appeal to BZA

APPENDIX III: PLAN CORRECTIONS LISTS OF 4/17 AND 5/13/2002

4/17/02 by Robert Chen:

1. Provide 1 hr fire separation between garage and adjacent space (vert. & Horiz.) Need UL No. & Cut sheet.

2. Need projection permit.

3. Provide Retaining Wall details.

5/13/02 by Robert Chen:

1. The dimensions on the D.C. Survey plat plan & submitted plans do not agree. Please co-ordinate.

2. Complete items nos. 48 thru 52 of the building permit application form.

3. Indicate the cost of retaining wall under item #84 and also indicate the height of retaining wall under item #96 of the building permit application form

4. Please submit site plan with utilities shown as per sec 107.12.1 of D.C. 1999 Const. Code.

5. (First word illegible) submit energy conservation calculations complying with energy code as per sec. 107.12-4 of 1999 D. C. Const Code.

APPENDIX IV: WHEN HERRON RECEIVED CRITICAL DOCUMENTS

Date Received By Herron	Critical Documents to Case (in order first received, whether from DCRA or Zuckermans)
Never	Building permit applications as filed on April 4
Never	Building permit applications as on file on April 19
Never	Subdivision request with preliminary sketch showing existing building per 10 DCMR 2703.1(b)
11/20/02	Building plat for Lot 9 [i.e., pre-subdivision] dated 4/4/02 assumed filed with initial plans
11/20/02	Building plat dated 4/18/02
11/20/02	Subdivision application with preliminary sketch showing no building [submitted to DCRA 4/5/02]
11/20/02	Topographic map (seven pages) required under 11 DCMR 3202(a); includes storm water management plan
11/20/02	Evidence of filing fee payments, showing dates and amounts paid
7/23/02	FOIA response, including: permits, final applications (as amended after April 19), supporting energy calculations, some DCRA correspondence
7/23/02	DCRA Plan Correction List for applications 615B and 616B dated 5/13/02
7/18/02	Copy of Permit B446310 (2900 Albemarle Raze Permit)
7/18/02	Copy of Permit B446316 (2900 Albemarle Building Permit)
7/18/02	Copy of Permit B446312 (2902 Albemarle Building Permit)
7/18/02	Permit Applications 615B and 616B for 2900 and 2902 Albemarle (as amended after April 19)
7/18/02	Existing Conditions Site Plan (Sheet 7 of Plans) dated 4/30/02 – reduced size (difficult to read)
7/18/02	Subdivision record for Square 2043 approved by Tax & Revenue 4/11/02 and Surveyor 4/17/02
7/18/02	Plat with drawing for Square 2043, lots 18 and 19 (2900 and 2902 Albemarle) – revised 5/14/02
7/18/02	Deed dated March 29, 2002 for purchase of property in Square 2043
6/12/02	DCRA Plan Correction List for applications 615B and 616B dated 4/17/02

Revised: July 23, 1999

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION
OFFICE OF THE SURVEYOR

REQUEST FOR SUBDIVISION

Initial fee: $150.00**
**** An Additional fee will be charged for more difficult lots**

Order No. 7538
Sub. _____

I hereby furnish the following information and request that a plat of subdivision be prepared as hereinafter described:

LOCATION:

Square 2043 Lots 9

OWNERS OF RECORD (Please Type or Print) Historic ___ Yes X No ~~Initials~~

(a) If Corporation

ZB, LLC
(Corporation Name)

Steven M. Zuckerman
Managing Member
(Name and Title of President or Vice-President)

Stuart A. Zuckerman
Managing Member
(Name and Title of Corporate Secretary)

(b) If Partnership or Joint Venture (Give Names and Titles)

(Association Name)

(c) If Individual

(d) Other

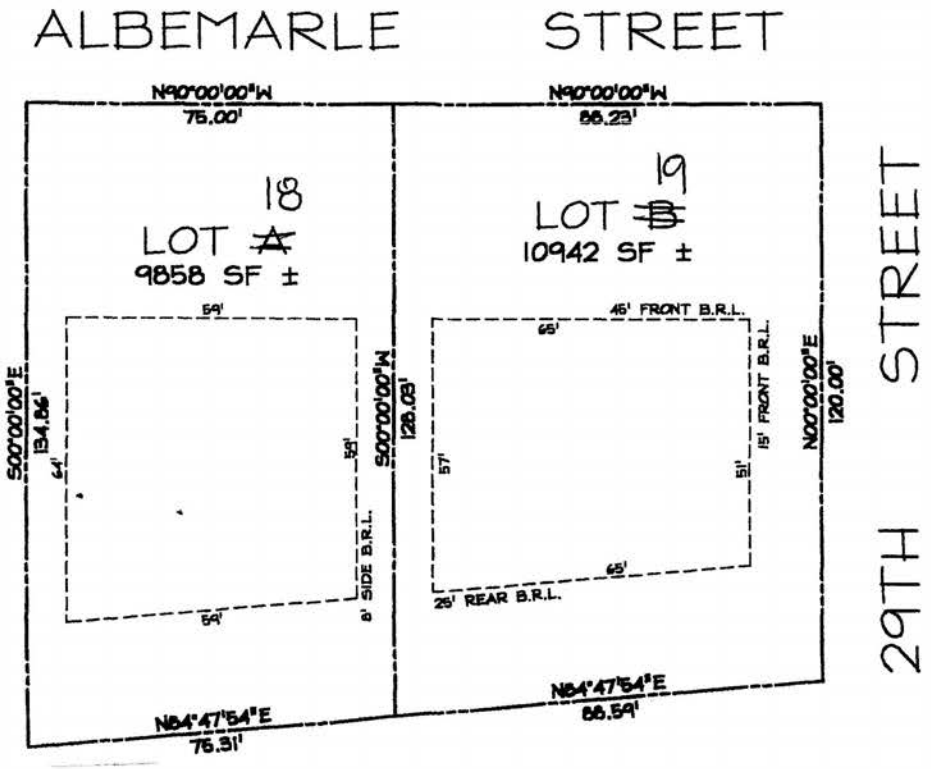
If additional space is required, please attach a supplemental sheet. It should be noted that the above information must be accurate because these names will appear on the subdivision plat, and they must be the owners of record as of the date of signing and recording the subdivision. **ANY INACCURACIES MAY RESULT IN DELAY AND/OR ADDITIONAL EXPENSES.**

I certify that the above information is true, complete and correct to the best of my knowledge and belief.

Karen Martino
Signature of Owner or ~~Authorized~~ Agent

CAS ENGINEERING
108 W. Ridgeville Blvd
Address
Mt. Airy MD 21771
Phone Number
(301) 607-8031

A



B

PRELIMINARY
SUBDIVISION SKETCH

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

Office of the General Counsel

November 20, 2002

J. Brendan Herron, Jr.
2901 Albemarle Street, N.W.
Washington, D.C. 20008

Re: 2900 and 2902 Albemarle Street, N.W.
Raze Permit #B446310
Building Permits #B44316 and B446312

Dear Mr. Herron:

This letter is in response to your most recent e-mail to Mr. Clark and others dated October 30, 2002. It will address the various issues you have raised with respect to the above-reference raze permit and building permits issued by DCRA for 2900 and 2902 Albemarle Street, N.W.

1) Adequacy of Plans. You have urged that DCRA is required to deny an application for a building permit, if all plans and supporting documentation are not complete and ready to be approved without modification, at the time of filing. 12 DCMR §108.1, which you have cited, requires DCRA to reject an application, which does not conform to the requirements of all pertinent laws. As we interpret this provision, an application must be rejected if the applicant fails to meet the requirements, after having been informed of the deficiencies and given an opportunity to correct them. It may be rejected sooner if it fails to meet basic requirements (for example, if application is not signed or if no plans are submitted). However, §108.1 does not require DCRA to reject an application because it does not fully satisfy all requirements on the filing date. In the vast majority of cases involving demolition and construction of a residence or other building, the applicant is required to make modifications and submit additional required documentation during the course of the review process.

2) Payment of Fee. You have alleged that the building permit applications should have been rejected because they were not accompanied by the required permit fees at the time of filing, citing 12 DCMR §107.1.1 which references §112. Pursuant to §112.3.1 only the filing deposit ($1 per $1,000 of estimated construction costs up to a maximum of $2,000) must be paid at the time of filing. As required, the filing deposit fees were paid on the date of filing, April 4, 2002. (See attached receipt.) Pursuant to §112.1, all required fees must be paid prior to issuance of the permit. These fees were paid, as indicated on the permit application.

3) Forest Hills Tree and Slope Overlay. You have also claimed that DCRA violated 11 DCMR §3202.5 by not rejecting the permit based upon allegations that the owners did not pay required fees or file adequate plans. However, as stated above in paragraph #1, DCRA considered the plans adequate for

filing purposes, and as stated in paragraph #2, the application was "accompanied by any fee which is required." Thus, there was no reason to reject the application. Further, you claim that if the application had been rejected, the new application would have been subject to the Forest Hills Tree and Slope Overlay, which was set down for hearing before the Zoning Commission on April 19, 2002. This argument is purely speculative. If, for example, the applications had been rejected on April 4, 2002, the applicant could have filed new revised applications and plans at any time prior to April 19, 2002, and would still not have been subject to the Forest Hills Tree and Slope Overlay provisions.

4) Ownership of Property. You have complained that Zuckerman Brothers did not own the property at the time application was made for the raze permit. DCRA accepts permit applications on their face when filed and does not independently verify each statement in the application. While ZB, LCC has not established that it was acting as an agent for the prior owner, the property was purchased by Zuckerman Brothers, Inc. on March 29, 2002. From that date forward, ZB, LLC acted as the agent or representative of Zuckerman Brothers, Inc., the owner. The critical point is that Zuckerman Brothers owned the property prior to issuance of the permit. Although you alerted DCRA to the fact that Zuckerman Brothers did not own the property at the time of filing, this deficiency had already been cured by the time DCRA became aware of it.

5) Insurance Coverage. You have complained that ZB, LLC, the raze permit holder, is not covered by insurance and that the District in not named on the policy. However, Zuckerman Brothers, Inc., the owner of the property, did submit proof of insurance prior to issuance of the permit. In addition, in response to your concerns, the owners have submitted a new insurance certificate, which also lists ZB, LLC as an insured and the District of Columbia as certificate holder. (Copy attached.)

6) ZB,LCC, Raze Permit Holder. You have urged that ZB, LLC, "may not even exist." ZB, LLC obtained a Certificate of Registration from DCRA, in compliance with the Limited Liability Company Act, on September 16, 1998 and listed a registered agent with DCRA on August 13, 1998.

7) FOIA. With respect to your claim under the Freedom of Information Act, you have acknowledged that a series of documents were provided to you on July 23, 2002, after your appeal was granted. With respect to the storm water management plans which were not available on that date, those plans are now available for your review in Mr. Robert Henry's office. The survey plat is also available. With respect to the site plan, which you claim was not made available, we are informed that this is included in the plans that were provided to you. The curb cut permit is a public space permit issued by Mr. Anthony Downing in the Public Space Permit office, Department of Public Works, located on the second floor at 941 N. Capitol Street, NE. Assuming a curb cut permit exists, it may be obtained from that office.

8) Environmental Intake Form and Environmental Impact Screening. You have urged that the Environmental Intake Forms (EIF) were incorrectly filled out and that an Environmental Impact Screening Form (EISF) should have been required. We disagree. At the time the raze permit application and first EIF were filed the lot for 2900 Albemarle Street had not yet been subdivided. Thus, there was no misrepresentation in response to the question, which asks if the owner intends to acquire additional adjoining property. The building permit applications for 2900 and 2902 Albemarle Street were filed on the same

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date and were each accompanied by an EIF which clearly showed the subdivision into 2 lots. Therefore, DCRA clearly understood that Zuckerman Brothers owned both lots. Further, residential structures within R-1 through R-5-A zoning districts, are specifically exempt from the requirement to prepare an EISF pursuant to 20 DCMR 7202.2 (k) (Class 11). §7202.2(c), which you have cited, is not applicable. It refers to building of two or more residential units in an R-5-B or higher (commercial or manufacturing) zone district.

9) ANC Review and Great Weight. You have complained that the ANC was not granted a 30-day period to review final plans and that DCRA did not respond to each of the issues raised by the ANC in the two resolutions adopted by ANC 3F on April 29, 2002. First, it should be noted that DCRA did provide 30 days notice to the ANC of the pending raze permit application. With respect to permits for construction of individual single family residences, which are matter of right in a residential zone district, it is DCRA's position that 30 days notice and giving great weight to ANC comments is not legally required under the Advisory Neighborhood Commission Act and governing case law. However, in response to ANC concerns, on May 9, 2002, Ms. Theresa Lewis, Deputy Director of DCRA, advised Mr. Phil Kogan, ANC Commissioner, in writing that DCRA would withhold issuance of the permits until June 3, 2002. Further, in a letter dated June 11, 2002 addressed to you and to Mr. Kogan, Ms. Lewis addressed the issues raised in the ANC resolution pertaining to the alleged deficiencies in the plans accompanying the permit applications. In addition, a face-to-face meeting took place on June 12, 2002. (The June 11, 2002 letter is attached and incorporated by reference.) In fact, the permits were not issued until June 13, 2002. Thus, DCRA gave ample and serious consideration to the concerns raised by the ANC.

10) Specific Environmental Concerns. You have urged that your environmental concerns have not been addressed. As stated above, there is no legal requirement for the filing of an Environmental Impact Screening Form or an Environmental Impact Statement for a single family residence in an R-1 through R-5-A zone district. With respect to your concerns about lead, there are no legal requirements for a lead inspection or for removal of lead prior to demolition of a single-family residence in the District (unless it is owned or financed by HUD). (See D.C. Official Code Sec. 8-115.04) The general requirement of wetting down a demolition site is considered adequate to protect residents from any potential dangers of dust particles from lead paint. With respect to asbestos, the premises were inspected by Mr. Jeffrey Edwards, an inspector in the Department of Health, Bureau of Environmental Quality, Air Quality Division, who filed a report stating that there were no federal or District regulations governing removal of the asbestos from a single family residence. However, according to Mr. Edward's report "an asbestos inspection was conducted by Apex Environmental" (a reputable environmental consulting firm) and "an asbestos abatement, by a licensed contractor had taken place based on Apex's findings." Storm water management plans for the site were carefully reviewed by the Department of Health (DOH) Environmental Health Administration, Watershed Protection Division, prior to being approved. We are informed by DOH staff that they gave special attention to nearby Soapstone Creek and made sure there would be no negative impact. In fact, Mr. Kari Kari, Branch Chief of the Sediment, Stormwater and Technical Services Branch, met with Ms. Cathy Wiss, Chair of ANC 3 F to respond to her concerns.

11) Fine Arts Commission Review. You have urged that this project should have been reviewed by the Fine Arts Commission. The Fine Arts Commission is responsible for determining the extent of its jurisdiction under applicable

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law. DCRA has properly relied upon the map and square index provided by the Commission. The map and square index do not include the square in which 2900 and 2902 Albemarle Street are located. Further, after reading the statutory provisions upon which you rely and reviewing the location of the subject square, DCRA is not persuaded that Fine Arts Commission review is intended for this square.

We believe that this letter squarely addresses the issues that you have raised with respect to the above-referenced matters. Because an appeal is currently pending before the DC Board of Appeals and Review, DCRA will respond to any additional issues that you wish to raise through the B.A.R. appeals process (except that you may proceed to review the storm water management plans and survey plat as indicated in paragraph #7 above).

With respect to the execution of the raze permit that has been issued, once Zuckerman Brothers or their representative presents proof of a current rodent control clearance, they will be permitted to proceed. A stop work order will not be issued unless, during the course of the demolition, there is a violation of the conditions of the raze operations permit.

Sincerely,

Laura Gisolfi Gilbert
Agency Counsel

Karen M. Edwards
General Counsel

cc: Anthony A. Williams, Mayor
John Koskinen, Deputy Mayor/City Administrator
Eric Price, Deputy Mayor for Planning and Economic Development
Arabella Teal, Interim Corporation Counsel
Kathy Patterson, Councilmember Ward III
Penny Pagano, DC Council

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Ltr 02-06

ANC 3F Forest Hills/North Cleveland Park/Tenleytown

December 8, 2002

Board of Appeals and Review
441 4th Street NW
Suite 540S
Washington, DC 20001

Re: Docket No. 025863- CI, J Brendan Herron, Jr., Appellant v. Department of Consumer and Regulatory Affairs, Appellee

Dear Members of the Board:

ANC 3F resolution 02-38 (see enclosed) was adopted by a unanimous 7-0-0 vote at a duly noticed public meeting on November 18, 2002. This resolution supports in part, the appeal of J. Brendan Herron before the Board of Appeals and Review, Docket No. 025863-CI. Mr. Herron is appealing the decision by the Department of Consumer and Regulatory Affairs (DCRA) to the issue raze permits and construction permits for the property located at 2900 and 2902 Albemarle Street NW.

Mr. Herron's appeal of DCRA's decision to issue construction permits B446316, 2900 Albemarle Street NW, and B446312, 2902 Albemarle Street NW, should be upheld, at least in part, because DCRA violated statutory requirements pertaining to the issuance of these permits. In the first instance of violation, DCRA denied ANC 3F the statutorily required 30 days to review the application for these permits. In the second instance, by denying ANC 3F the 30 day review DCRA also placed itself in non-compliance with the statutory requirement that ANC 3F's comments on the application for the permits be accorded "great weight" in DCRA's decision to issue the permits. Since ANC 3F was denied access to see the application and supporting documentation, it was effectively precluded from reviewing and commenting on the application. Absent the ability to comment, ANC 3F was prevented from receiving the required "great weight."

The denial of the 30 day review period was based on DCRA's erroneous interpretation of privacy requirements and equally erroneous and incorrect interpretation of the requirements of the Freedom of Information Act (FOIA). Shortly after Zuckerman Brothers Development Corporation filed an application for construction permits for 2900 and 2902 Albemarle Street NW, Commissioner Robert Maudlin of ANC 3F visited the Permit Application Center at DCRA to review the application. During this visit DCRA denied Commissioner Maudlin the opportunity to review the plans and drawings accompanying the Albemarle Street application. This denial was based on the erroneous assertion by DCRA staff that the plans and drawings are protected by the privacy rights of the applicant. Numerous telephone conversations between Commissioner Maudlin and Commissioner Kogan and DCRA officials were required over a 15 day period before DCRA relented and admitted that it had erred on the matter of privacy rules. But the exclusion of ANC 3F from reviewing the application did not end here.

In a May 9, 2002, e-mail (see enclosed) Theresa Lewis of DCRA notified Commissioner Kogan that ANC 3F's right to review the application during the agency review process is exempt from FOIA requirements. This second denial of ANC 3F's right to review the application is based on an erroneous and incorrect reading of the FOIA requirements. In fact, the FOIA specifically limits the pre-decisional exemption to "inter-agency and intra-agency memorandums and letters", none of which were at issue

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since ANC 3F was simply seeking an opportunity to review the applicant's filing. Further, DC Code Section 1-309-01 entitles ANC 3F pursuant to FOIA to all public data "that are material to the exercise of its recommendations to the District government". DCRA's interpretation of FOIA was not only incorrect and erroneous but it also had the effect of taking from ANC 3F a statutorily enacted authority to review the application and a statutory authority to receive information pertaining to such a review under FOIA, the very same statute that DCRA was citing as a basis for denying the information.

In her May 9 e-mail Ms. Lewis asserts that

even though the proposed construction of the two single family dwellings [which are requested in the application] is a "matter of right", the Department will withhold the issuance of the building permits until June 3 2002, to allow you and your organization time to fully review the application.

Taken by itself, Ms. Lewis' statement appears to grant to ANC 3F the review time it had requested. However, this is patently not the case. The Board should note that in the same e-mail in which she establishes the June 3 decision date, Ms. Lewis continues to deny ANC 3F access to the application based on DCRA's incorrect and erroneous interpretation of FOIA. Because DCRA prevented ANC 3F from reviewing the application, it effectively prevented ANC 3F from exercising its statutorily granted review authority and consequently denied ANC 3F the opportunity to receive "great weight." The Board should also note that at no time did Ms. Lewis deny that ANC 3F should have received notice of these permits, nor at any time did she deny that the views of ANC 3F should receive "great weight." The suggestion by Appellee that notice and "great weight" do not apply in this case (see below) came after access to the application and supporting documentation was made based on privacy and FOIA requirements.

Intervenor Epting in a brief filed on behalf of Zuckerman Brothers points to Ms. Lewis' e-mail and states that ANC 3F was "provided with more that thirty days to review and comment on the plans." Intervenor is in error on this point since the statutory 30 day review can only occur if ANC 3F is able to review the application. ANC 3F was not able to review the application and supporting documentation when they were filed because of DCRA's erroneous and incorrect application of privacy and FOIA requirements. Without access to the application as filed, ANC 3F was denied a right to review that is granted by statute. Further, Intervenor fails to recognize that a consequence of the denial of the right to review is that the statutory requirement that "great weight" be given to the ANC's comments on the application as filed is also denied since in the absence of a review, there can be no comments within the meaning of the statute; and without comments, again within the meaning of the statute, there can be no granting "great weight". Therefore, Intervenor is incorrect in suggesting that "great weight" was granted to ANC 3F's comments. Intervenor has misread ANC 3F Resolution 02-23 and Commissioner Kogan's letter to DCRA dated May 3, 2002, as constituting comment on the application. (See enclosed May 3, 2002, letter from Commissioner Kogan forwarding Resolution 02-23 to DCRA Director David Clark.) In fact, these documents, which also communicated to DCRA a number of concerns raised by citizens in ANC 3F, are a protest against DCRA's denial of access to the application and supporting documentation, a denial which prevented ANC 3F from executing its statutory review responsibility.

A decision by Board of Appeals and Review that would be based on the interpretation of Intervenor would have the effect of shredding the statutory requirements for "great weight" since DCRA would be free in future cases to simply withhold relevant information from ANC 3F during the 30 day review period and thereby relieve itself of both the notice requirement and the "great weight" requirement. The Board should not take such a step. Intervenor's interpretation is also wrong in that Ms. Lewis's response does not reference or even suggests that it is intended to address the statutory "great weight" requirement.

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ANC 3F takes strong exception to the assertion in Appellee's brief that 30 days notice and "great weight" are not legally required for applications for construction of individual single family residences which are matter of right in residential zones. Appellee misinterprets prior Court of Appeals decisions and makes broad and unsupported assumptions in seeking to create a rationale for DCRA to circumvent statutory requirements. Appellee also fails to recognize that statutory requirements contained in the Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000, which was enacted following the issuance of the cited Court of Appeals decision, takes precedence over this decision.

We understand that decisions by the Court of Appeals have defined and refined the requirements for 30 day notice and "great weight". However, in Office of the People's Counsel v. Public Service Commission, the Court did not grant unbridled administrative discretion which would allow DCRA to limit the number of permit actions that require 30 days notice and "great weight". In this decision the Court states that while

matters not requiring a hearing could 'be sufficiently significant to neighborhood planning and development to warrant special notice to an ANC, we did not suggest in any way that the kinds of neighborhood maters requiring special notice. . .could go beyond the kinds of matters specifically listed in §1-261(c).

In other words, the Court recognizes that the statutory list of requirements continues to define the actions that trigger the notice and "great weight" requirements. The Court's decision says nothing that would support DCRA's attempt to limit the statutory requirements to a narrow list of permit actions. While we agree with the actions cited by DCRA as requiring notice and "great weight", any limitation of the statutory requirements by DCRA, in order to be valid, would require legislative approval or administrative rule making in accordance with the Administrative Procedures Act. Since neither of these have occurred, the action of DCRA in attempting to limit the application of lawfully enacted statutory requirements must be rejected by the Board of Appeals and Review. DCRA, in effect, is attempting to conduct rule making "on the fly", bypassing established due process requirements to change statutory requirements to suit its own narrow needs while at the same time trampling on the rights of neighborhood citizens and ANC's, the principal recipients of the benefits conveyed by ANC legislation. This should not be allowed.

We would argue as well that the permit applications at issue in this case clearly fall into the category of "matters of significance to neighborhood planning and development." The Forest Hills neighborhood is an environmentally sensitive area which adjoins Rock Creek Park, part of the National Park Service, and also contains Soapstone Park, also part of the National Park Service, within its borders. The Forest Hills neighborhood is distinguished by the large number of mature trees that populate the neighborhood and is treasured for this characteristic. In recent years development in the neighborhood has been characterized by practices which threaten its legacy as a neighborhood of trees. These involve clear cutting of lots and the removal of large numbers of trees. The purpose is to make way for construction of very large houses that make maximum use of the lots and reduce the amount of land available for planting new trees to replace those that have been destroyed. It is, in part, this threat to Forest Hills' legacy of trees that gave rise to consideration by the Zoning Commission of a special protective tree and slope overlay for the neighborhood. The Commission is expected to publish its proposed overlay for public comment in the very near future with the intent of creating a protected zone for the Forest Hills neighborhood. Within this context the Board of Appeals and Review should recognize that development of new single family homes in the Forest Hills neighborhood has been a great concern to ANC 3F and citizens of the neighborhood for a number of years. For this reason, any new development of single family homes must be considered a "matter of significance to neighborhood planning and development" which warrants that notice and "great weight" be given to the ANC within the meaning of the People's Counsel decision.

In addition, it is clear in DC Code 1309.10(c)(3) that DCRA must notify ANC 3F with a list of applications for construction permits. No limits are placed on this obligation and DCRA, in fact, has been providing such as list to ANC 3F and other ANC's. 1309.10(c)(3) demonstrates that the clear intent of the DC Council in enacting the s of Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000, seven years after the People's Counsel decision, was to ensure that applications received by DCRA for construction and demolition, including the applications for the work at 2900 Albemarle Street, fall within the notice and "great weight" requirements. 1309.10(c)(3) requires the following.

The Department of Consumer and Regulatory Affairs shall ensure that each Advisory Neighborhood Commission is provided at least twice a month by first- class mail with a current list of applications for construction and demolition permits within the boundaries of that Advisory Neighborhood Commission. All notices shall also be provided to the Office of Advisory Neighborhood Commissions. Each Commission and the affected ward Councilmember shall also be provided at least twice a month with a current list of applications for public space permits.

Further, Section 1309.10(d)(1) requires that the ANC is entitled to make recommendations on building permits.

Each Commission so notified pursuant to subsections (b) and (c) of this section of the proposed District government action or actions shall consider each such action or actions in a meeting with notice given in accordance with § 1-309.11(c) which is open to the public in accordance with § 1-309.11(g). The recommendations of the Commission, if any, shall be in writing and articulate the basis for its decision.

And Section 1309.10(d)(3) establishes the "great weight" requirement.

The issues and concerns raised in the recommendations of the Commission shall be given great weight during the deliberations by the government entity. Great weight requires acknowledgement of the Commission as the source of the recommendations and explicit reference to each of the Commission's issues and concerns. (B) In all cases the government entity is required to articulate its decision in writing. The written rationale of the decision shall articulate with particularity and precision the reasons why the Commission does or does not offer persuasive advice under the circumstances. In so doing, the government entity must articulate specific findings and conclusions with respect to each issue and concern raised by the Commission. Further, the government entity is required to support its position on the record. (C) The government entity shall promptly send to the Commission and the respective ward Councilmember a copy of its written decision.

Thus, in the case of the 2900 Albemarle Street applications, DCRA had a statutory obligation to notify ANC 3F of the applications; to consider ANC 3F's recommendations in its decision, including the two resolutions passed by ANC 3F; and to give "great weight" to the views of ANC 3F within the meaning of the statute. As we have documented, DCRA failed to meet these statutory obligations.

The Board of Appeals and Review must grant ANC 3F "great weight" in reaching its decision in this case. The Board is being asked to rule on a matter involving issuance of a permit. Section 1309.10 of the DC Code (Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000), specifies the requirements for assigning "great weight" to ANC comments. Instances where "great weight" must be given include actions by "boards" with respect to "permits" affecting the ANC area in question. In the referenced case, the BAR is being asked to rule on a permit decision within ANC 3F's area. It is clear from the legislation that the BAR must give "great weight" to ANC 3F in the referenced case. As stated above, such an interpretation is consistent with the case history which defines the "great weight" requirement.

In the view of ANC 3F, DCRA's actions in processing the application for permits B446316 and

B446312 were egregious in that DCRA failed to meet its statutory responsibility to allow ANC 3F 30 days to review the applications and consequently denied to ANC 3F the right to have "great weight" given to its recommendations. Initially, DCRA relied on what it has since admitted is an incorrect interpretation of privacy rules to deny ANC 3F and members of the public access to the application. Having retreated from this erroneous position, DCRA denied ANC 3F the opportunity to review the application a second time. In this second denial DCRA used an erroneous and incorrect interpretation of the FOIA as the basis for its actions. DCRA's actions in invoking incorrect and erroneous statutory interpretations had the effect of denying ANC 3F its statutory right to review the application and to have "great weight" accorded its comments. One can only speculate as to the motives that moved DCRA officials to invoke these erroneous interpretations and deny ANC 3F that which had been granted by statute. Whatever the motives may be, the effect is clear. ANC 3F was precluded from exercising its statutory authority. In fact, DCRA's erroneous and incorrect application of privacy and FOIA requirements appears to be in direct violation of Section 1309-10(i)(1) which states that

Each Commission shall have access to District government officials and to all District government official documents and public data pursuant to §2-531 et seq. that are material to the exercise of its development of recommendations to the District government.

DCRA's egregious errors are compounded by Appellee's brief which incorrectly asserts that DCRA is obligated to provide notice and give "great weight" to ANC 3F in only the instances in which it determines these are to be granted. As we have shown, such an interpretation is not supported by the law. Further, when taken together, DCRA's denials of notice and "great weight" and Appellee's incorrect rationale for denying these to ANC 3F suggest that DCRA's does not wish to be burdened by these statutory requirements. If this is the case, DCRA's remedy is to obtain legislative action from the DC Council. Short of doing this, DCRA is obligated to implement the law as it is written.

The fair remedy in this case, a case which has been characterized by egregious errors on the part of DCRA in preventing the law from being properly applied during the application review process, is to ensure that ANC 3F is given the opportunity to exercise its right to review and comment and to and receive "great weight". This can be accomplished by granting Mr. Herron's request that new applications be submitted and processed in a manner that meets statutory requirements.

It is also noted that ANC 3F did not receive a written response to Resolution 02-24 regarding the raze permit for 2900 Albemarle Street and thus "great weight" was not given to the ANC's views on this resolution. Again, the issuance of this permit without "great weight" consideration is a violation of DC Code 1310.10(d)(3). (See enclosed May 8, 2002, letter from Commissioner Kogan forwarding ANC 3F Resolution 02-23 to DCRA Director David Clark.)

Sincerely,

Phil Kogan
Commissioner, ANC 3F01

Enclosures

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Certificate of Service

I hereby certify that a copy of the foregoing PRE-HEARING STATEMENT OF ANC 3F AND J. BRENDAN HERRON, JR. was delivered on February 21, 2003 to the Board of Zoning Adjustment. A copy was sent by mail on February 21, 2003 to Counsel for Zuckerman Brothers, Inc.,

John T. Epting, Esquire
Shaw Pittman LLP, 2300 N Street, NW
Washington DC 20037

and to representatives of Appellee

David Clark, Director, DCRA,
Karen Edwards, Esquire, General Counsel, DCRA, and
Laurie Gisolfi Gilbert, Esquire, Agency Counsel, DCRA
DC Department of Consumer and Regulatory Affairs,
941 North Capitol St., NE, Room 9500
Washington, DC 20002.

David J. Bardin