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Advisory Neighborhood Commission 3F
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24 February 2003

Members of the Board of Zoning Adjustment
441 4th Street, NW – Suite 200
Washington, DC 20001

RE: Case No. 16982
APPEAL OF J. BRENDAN HERRON, JR. AND ANC 3F
VS.
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
Regarding 2900 and 2902 Albemarle Street, NW

Dear BZA Members:

On February 20, 2003, we filed our Opposition of Appellants to Motion to Dismiss.

Regrettably, all the hard copies filed and mailed had two page 3s and no page 2 (although copies e-mailed to counsel for Zuckerman Brothers, Inc. and the Department of Consumer and Regulatory Affairs had the correct pages).

Attached please find corrected copies of our Opposition of Appellants ANC 3F and J. Brendan Herron, Jr. to Motion to Dismiss which provide the right pages (and also correct some spelling errors). Please substitute the attachment (which is marked "corrected" in the upper right hand of the first page) for the February 20 filing.

Thank you.

Respectfully submitted on behalf of the Appellants,

David J. Bardin, Secretary, ANC 3F

c:
David Clark, Director, DCRA
Karen Edwards, Esquire, General Counsel, DCRA, and
Laurie Gisolfi Gilbert, Esquire, Agency Counsel, DCRA
Department of Consumer and Regulatory Affairs
941 North Capitol Street, NE – Room 9500
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John T. Epting, Esquire, counsel for Zuckerman Bro
Shaw Pittman LLP
2300 N Street, NW
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BZA
Case No. 16982
Exhibit No. 21
Board of Zoning Adjustment
District of Columbia
CASE NO. 16982
EXHIBIT NO. 21

corrected

BEFORE THE DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

CASE NO. 16982

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

REGARDING 2900 AND 2902 ALBEMARLE STREET

OPPOSITION OF APPELLANTS ANC 3F AND J. BRENDAN HERRON, JR.
TO MOTION TO DISMISS

On January 9, 2003, would-be intervenor, Zuckerman Brothers, Inc. (Zuckermans), filed a Motion to Dismiss (Motion),[1] for consideration by the Board of Zoning Adjustment (BZA) at the public hearing scheduled for March 4, 2003. That Motion should be denied.

Zuckermans challenge timeliness of the Appeals under standards recently codified by the Zoning Commission (ZC) in 11 DCMR § 3112.2, published on February 7, 2003 (and effective as of that date), in 50 DCR 1200.[2]

Appellee, the Department of Consumer and Regulatory Affairs (DCRA), has not joined in the Motion to Dismiss (at least not directly).

The Motion to Dismiss should be denied because these Appeals are timely under the standards of 11 DCMR § 3100.2(a), (c) and (d). Rather than being "frivolous" (Motion at 1, 2) these Appeals expose both DCRA's indifference to Zoning Regulations of the District of Columbia and exceptional patterns of secrecy and deception that this Board should address now, lest it be inundated with more appeals from DCRA's failure to implement the Zoning Regulations (thereby passing the buck to this Board to make developers comply).

SUMMARY OF FACTS

The Appeals concern DCRA's grant of two building permits at a site in Advisory Neighborhood Commission (ANC) 3F and related orders and decisions of DCRA that refused to implement the Zoning Regulations.

The site, originally Lot 9 in Square 2043 (2900 Albemarle Street, NW, on the southwest corner of 29th Street), had a house on it. That site was in Single-Member District (SMD) 3F01,

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[1] Zuckermans call their single document "Motions for Leave to Intervene and Dismiss."

[2] The ZC acted by its Order No. 02-01 (adopted at a public meeting on September 9, 2002) which explains the new rule, rejects certain interpretations urged by the law firm of Holland and Knight LLP, and declines to add a discussion proposed by that law firm of laches and estoppel (equitable doctrines which may be invoked only by one who comes with "clean hands").

represented by Commissioner Kogan, prior to redistricting, and, since the turn of this year, in SMD 3F03, represented by Commissioner Maudlin.

DCRA subdivided the site on April 17, 2002 (twelve days after Zuckermans' request), into Lots 18 and 19 (2900 and 2902 Albemarle Street).

On April 4 and 18, 2002, Zuckermans submitted materials to DCRA which, they allege, constituted two complete building permit applications.

On April 19, 2002, the ZC set down the Forest Hills Tree and Slope Protection Overlay for public hearing.

In ways described below (see "WITHHOLDING OF INFORMATION," page 8, below)

- DCRA frustrated attempts by Appellant J. Brendan Herron, Jr. (Herron) -- who lives at 2901 Albemarle Street and submitted his first Freedom of Information Act (FOIA) request on April 22 -- and attempts by ANC 3F -- which sought to meet with Zuckermans on April 23 -- to find out exactly what was before DCRA; and
- Zuckermans withheld from DCRA information that Zoning Regulations (at issue here) and the Building Code required them to submit.

Zuckermans did not volunteer information sought by ANC 3F and, after agreeing in March to schedule an informal meeting between their principals and Commissioners Kogan and Maudlin on April 23, 2002, canceled that meeting at the last minute on advice of counsel.

DCRA granted permits to build on each of those Lots and to raze the existing structure on June 13, 2002 (Motion, Exhibit M) -- the day after DC's Office of Documents in the Office of the Secretary overturned DCRA's denial of Herron's FOIA request.

On July 3, 2002, Herron put Zuckermans on notice that he intended to exercise all his "administrative and legal rights ... to appeal and overturn the issuance of these permits and to have any construction performed at the site taken down" because he believed DCRA had violated "the DC building code, the DC zoning regulations and DC Statute 6-641.09". Motion, Exhibit O. Herron appealed to the Board of Appeals and Review (BAR) the same day.

But one day before, on July 2, he also asked DCRA to confirm whether zoning issues should be appealed to this Board instead. Attachment A-1/A-2.[3] DCRA's Deputy Director and Chief of Staff, Theresa Lewis, e-mailed back the next day that,

> "By close of business on Tuesday, July 9, 2002, you will be notified by Denzil Noble, Acting Zoning Administrator and Deputy Administrator [of the Building and Land Regulation Administration (BLRA)] regarding the procedures for appealing the decision to issue building permits ..." Attachment A-1.

[3] By "Attachment A-1" we mean page A-1 in Attachment A. "A-1/A-2" refers to two pages.

July 9 came and went, without further word from DCRA. So, on the morning of July 19, Mr. Herron sent another e-mail to Deputy Director Lewis reminding her that,

> "I also did not receive any indication of my appeal rights. While you know that I have filed an appeal with the BAR, I would also like to know of other appeal rights I may have." Attachment A-3.

That very same afternoon, DCRA (at the direction of its Director, David Clark) responded that BAR was Herron's only recourse: "The procedures for appealing decisions to issue building permits is contained in the attached photocopy of (Vol. 46 – NO. 47) DC Register DCMR 12A, Section 122.0 Appeals" which provides for appeals to the BAR – but not appeals to this Board. Attachment A-5.

In the meantime, on July 18, 2002, Zuckermans asked the BAR to dismiss Herron's appeal, asserting that this Board has exclusive jurisdiction over appeals concerning zoning regulations. Motion, Exhibit Q.

Counsel for DCRA (the Appellee before the BAR as here) remained mute, neither supporting Zuckermans' motion -- which contradicted DCRA's advice given to Mr. Herron – nor opposing it.

On October 23, 2002, DCRA Director Clark turned down Herron's appeal: "Therefore, your request for a[n] ... order to revoke permits ... is hereby formally denied by DCRA." Motion, Exhibit T.

And on October 28, 2002, the BAR dismissed Herron's appeal as to zoning regulation issues, including his contention that DCRA violated 11 DCMR § 3202.5, the "vesting" rule. Motion, Exhibit V.[4] The BAR regarded this Board's jurisdiction as exclusive, not optional. (For statutory definition of this Board's jurisdiction, see Appendix I at page 14, below.)

Herron notified Zuckermans on November 14, 2002, of his intent to appeal to this Board. Attachment B-1.

On November 20, 2002, Zuckermans' counsel, Mr. Epting, provided to Herron and ANC 3F, for the first time, most of the documents that DCRA had failed to provide in the months since Herron's first FOIA request and ANC 3F's first approaches to DCRA and Zuckermans.

On November 25, 2002, Zuckermans began razing the existing structure.

The present Appeals were filed with this Board on December 19, 2002.

Appendix II (at page 15, below) sets out a more detailed time line.

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[4] ANC 3F sought to intervene before the BAR on December 27, 2002, after it discovered that BAR procedures would not allow an ANC even to review the BAR record in a pending case unless it became a party to that case. (The BAR has not acted on ANC 3F's request.)

SOPHISTICATION AS IT BEARS ON ISSUES HERE

Herron, is not sophisticated in matters of zoning, although he is learning. He is not a lawyer and is not represented by counsel.

Zuckermans are sophisticated developers with years of experience in the District of Columbia and ready access to the most sophisticated zoning attorneys (being represented by at least two of the outstanding zoning firms in the City). They know the ropes (as witness, for example, their success in getting DCRA to subdivide the site in twelve days when DCRA's web site says that subdivision "turnaround is four to six weeks.")

ANC 3F is only slightly more sophisticated than Herron, but also learning. For example, ANC 3F did not know (contrary to the Motion at pages 14 and 21) of a clear split of *exclusive* appellate jurisdictions between this Board and the BAR. Before this dispute, we knew of no precedent or statute making this Board's appellate jurisdiction to be *exclusive*, not just an option. (In our defense, DCRA told Herron that appeal to this Board was *not even an option*.)

The Board may best judge Appellee, DCRA's sophistication for itself.

STANDARDS GOVERNING WHY THE MOTION TO DISMISS MUST BE DENIED

The new regulation, 11 DCMR § 3100.2, requires this Board to deny the Motion to the extent that Appellants

> filed their appeal within 60 days from the date of any of the administrative decisions of which they complain [11 DCMR § 3100.2(c)]; or
>
> filed their appeal within 60 days from the date they had knowledge (or should have had knowledge, whichever date is earlier) of any of the administrative decisions of which they complain [11 DCMR § 3100.2(a)]; or
>
> if appellants demonstrate that there are exceptional circumstances that are outside of appellants' control and could not have been reasonably anticipated that substantially impaired appellants' ability to file an appeal to this Board, and that an extension of time will not prejudice the parties to the appeal [11 DCMR § 3100.2(d)].

Admittedly, Director Clark issued his "formal" decision that DCRA had made no errors and would not revoke the permits on October 23, 2002, well within the 60-day window of 11 DCMR § 3100.2(c). Motion, Exhibit T. That decision should be reviewed here on the merits (insofar as the Director approves of DCRA's implementation of the Zoning Regulations). Otherwise, this Board may anticipate more confusion and errors at DCRA – and more frequent appeals to this Board at the earliest stages of DCRA's processes.

DCRA Director Clark had sent letters to Herron on July 9 and October 18 assuring Herron that DCRA was reviewing his request to overturn the building permits and would

respond in the future. Attachments A-6 and A-7. Director Clark's "formal" decision came on October 23. Appeal to this Board followed, 57 days after the date of that decision (and 52 days after Herron received it). This Board has rejected timeliness arguments just like those in the Motion after hearing previous appeals timely taken from DCRA final decisions -- including decisions that declined to revise grant of a building permit months earlier. *Appeal of Darrel J. Grinstead*, BZA Case No. 16764 (motion to dismiss denied at hearing on October 23, 2001, Transcript page 142-51); *Sisson v. DC Board of Zoning Adjustment*, 805 A.2d 964, 971 (D.C. 2002).

And §§ 3100.2(a) and (d) also come into play.

Appellant Herron appealed to the BAR within 60 days of the June 13 grant of building permits and asked DCRA whether his issues under the zoning regulations belonged with this Board instead. DCRA misled him on July 19 by advising that the BAR procedure governed. Only when the BAR itself ruled, on October 28, 2002, could Mr. Herron sort out the discrepancy between when DCRA had told him and what the Zuckermans had told the BAR. And then he promptly appealed to this Board, within 60 days of the BAR decision.

The Board should keep in mind that even after DCRA received a copy of Zuckermans' July 18 motion to the BAR to dismiss for want of jurisdiction over zoning issues, DCRA said nothing at all, much less did it correct its misleading information to Mr. Herron. Had DCRA spoken up then, Mr. Herron still had time to appeal to the BZA within the 60-day window of subsection § 3100.2(c) (to paraphrase the Motion at 20). Either DCRA paid no heed to what advice it gave a citizen, or DCRA set up a virtual bait-and-switch operation. Either seems unthinkable, yet objectively, isn't that what Mr. Herron faced?

And DCRA's and Zuckermans' withholding of information *about the applications,* preventing both Appellants from "get[ting] copies of plans" and finding out what was really going on, created "exceptional circumstances" contemplated by 11 DCMR § 3100.2(d)(1) -- as expressly foreseen by the ZC (see "HOW THE ZC EXPLAINED 'EXCEPTIONAL CIRCUMSTANCES'", at page 11, below) -- and precluded Zuckermans from claiming "prejudice" under 11 DCMR § 3100.2(d)(2).[5]

CONTEXT: WHAT THE ZONING REGULATIONS REQUIRED OF DCRA

To understand issues of timeliness correctly, one must recognize how Zoning Regulations and Building Code provisions come up in the context of this case.

Zuckermans were in a race with time. They wanted to get applications filed and to secure rights under the "vesting" rule, 11 DCMR § 3202.5, before the ZC set a tree and slope protection overlay down for hearing. They knew that such action was imminent and that to avoid its strictures they had to act fast and put enough down as an "application" at DCRA to satisfy the Zoning Regulation test of an application.

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[5] Zuckermans had unmistakable notice from Herron, throughout these proceedings, that he would pursue every issue, including zoning regulation issues (contrary to the Motion at 21).

DCRA should have implemented the "vesting" rule firmly as of its controlling date: April 19, 2002, in this case. But DCRA did not.

DCRA simply did not understand that the "vesting" rule has its own definition of what a permit application must contain *and* requires a procedure *at odds with* DCRA's normal way of processing applications. Even if both the Zoning Regulations and the Building Code define the same contents for what permit applications must contain, in a "vesting" rule case the Zoning Regulations govern *as to process and timing* as well as content.

Let us explain:

DCRA normally does not care, according to its General Counsel, how incomplete an building permit application may be.[6] DCRA normally, it appears, holds applicants' hand and helps them correct and amend applications until the revised application passes muster and a construction permit can issue.

But under the "vesting" rule the issue was what had Zuckermans filed as of April 19, 2003. Was it complete? Could it be processed as is?

The answer here was plainly, No. But DCRA chose to disregard that fact. DCRA focused on its Building Code procedures and norms, but seems to have made no effort to carry out the "vesting" rule requirements. Whether out of ignorance or callousness, DCRA did not do its job.

If Zuckermans had filed their entire applications for building permits at issue in this appeal *after* April 19, 2002, the Zoning Regulations would have forbidden DCRA from granting the permits. 11 DCMR § 3205.5(b). If they had properly filed everything before April 19, there would be no basis for appeal under the Zoning Regulations. (There might still be issues under the ANC Law.)

In fact, however, the Zuckermans submitted some materials before April 19 and other materials after April 19, 2002, and even their pre-April 19 submittals are dubious.

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[6] "1) ... As we interpret [Building Code section 12 DCMR § 108.1] 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.* .... In the vast majority of cases involving demolition and construction of a residence ... the applicant is required to make modifications and submit additional required documentation during the course of the review process." Letter dated November 20, 2002, from Karen Edwards, Esquire, to Herron [emphasis added]. Attachment C-1. Her letter then reasoned: "You also claim 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 [the language quoted], DCRA considered the plans adequate for filing purposes." *Id.* But the Zoning Regulations do not provide for giving applicants opportunities "to correct" big gaps *after the vesting date.* That's the difference.

The basic question was whether they had submitted enough before April 19 to count -- under the Zoning Regulations -- as 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"?

11 DCMR § 3202.5(a). DCRA did not ask itself that critical question because of DCRA's cultural commitment to give applicants endless opportunities "to correct" deficiencies. See footnote 6, above. No DCRA document shared with Herron or ANC 3F analyzes that Zoning Regulations question.

If the answer is, No (as we contend), 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 requirements (as it was by its consideration of a tree and slope protection overlay).

DCRA DID NOT IMPLEMENT THE "VESTING" RULE

Twice DCRA staff identified missing pieces in Zuckermans submissions. On April 17 and again on May 13 staff issued Plan Correction Lists. See Appendix III (at page 16, below) for the three items on the first list and the five items on the second (a list that repeats and amplifies one item, regarding Projections, on the first list).[7] Without that information, DCRA staff said the applications could not be processed to completion. What could be clearer?

But DCRA did not care.

Although the Motion claims (at page 3) that its Exhibit B reproduces the "April 4 ... Permit Applications" – that statement is untrue. In Exhibit B, items 48 through 52 of the Application Form, regarding "Projections", are filled in and signed by Zuckermans. But, as *both* Plan Correction Lists observed, these items were *missing* prior to April 19. Zuckermans did not initially acknowledge *any* Projections. They left that part of the application form *blank*. They did not pay the "Projections" fee that would have been required if they had filled in the form.[8]

DCRA does not even have a copy of the original application form, or the form as it existed in DCRA's files on April 19. Zuckermans may claim that they kept no copy of the

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[7] DCRA staff did not identify storm water management plan as a missing item.

[8] Zoning Regulation § 3205.5(a) requires that an application be accompanied by "all" fees required (as well as by "plans and other information"). Zuckermans paid the Projections fees *after* April 19. (Moreover, Projections could raise other legal issues that Zuckermans might have had an interest not to expose).

original form either. DCRA apparently let Zuckermans amend the *original form* after May 13 at DCRA.[9] Why Zuckermans would not keep a *file copy* of the original, however, is intriguing.

Yet in response to Herron's complaints DCRA's General Counsel reasoned that required items missing on the key date of April 19 (such as the storm water management plan that was first supplied on or after April 30) were no problem, brushing aside the issue because they had been supplied before the construction permits issued *on June 13*; because they had been "carefully reviewed" before *June 13*; and because they had been "approved" and "given special attention" before *June 13* – all the time ducking the Zoning Regulations issue that these plans *were not submitted by April 19*. DCRA's General Counsel signed that response on behalf of DCRA Director Clark, justifying his final formal decision four weeks earlier. See Attachment C-3, ¶ (10). She did not address the *Zoning Regulation* strictures of 11 DCMR § 3202.5(a) and the *Zoning Regulations'* critical date of April 19. Nor did Director Clark so much as allude to them in his final formal decision letter of October 23, 2002, which is here on appeal.[10] To dismiss these Appeals, as the Motion urges, would allow both DCRA and permit applicants to flout Zoning Regulations.

WITHHOLDING OF INFORMATION

This Board should not think that Herron and ANC 3F knew all about the data we now discuss. They did not because DCRA's and Zuckermans' behavior (whether cagey or stupid) blocked inquiry at every turn. Yet Herron continued to dialogue with DCRA all the way to October 23 and DCRA could have corrected its errors and oversights at any time before these Appeals.[11]

The Motion says that ANC Commissioner Kogan "acknowledged that some ANC members had reviewed the plans on April 25, 2002" (Motion at page 6). That is untrue. Commissioner Kogan referred to "some of our neighbors" (i.e., constituents), not to some ANC commissioners. Motion, Exhibit I. On April 25, no ANC Commissioners, and no one representing them saw any plans; only three individuals were very briefly shown some plans at

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[9] We assume DCRA did not allow Zuckermans to remove and amend *application forms*; although they did remove and amend *plans* accompanying application forms.

[10] Frustrated at not having heard back from DCRA Director Clark, whose October 23 letter did not arrive until October 28, Herron turned for help to the Mayor on October 26 and the Mayor promised a response addressing his issues, which DCRA sent almost four weeks later in the form of General Counsel Edwards' letter of November 20, 2002 – DCRA's first and only attempt to articulate a rationale (or rationalization) for their acts and omissions.

[11] In addition, Herron upon initially hearing of the permit being issued appealed to David Clark, director of DCRA requesting both a review of the issuance of the building permits and his appeal rights. David Clark had sent letters to Herron on several dates, including July 9, 2002 and October 18, 2002 (Attachments A-6 and A-7) indicating that Herron should expect a further response from DCRA. The Director's formal response was not sent until October 23, 2002 and not received until October 28, 2002.

DCRA four days before an ANC meeting. They received no copies that they could take back to the ANC, to Mr. Herron, or to use themselves. As Commissioner Kogan aptly summarized the matter:

> "ANC 3F was denied a right to review that is granted by statute. ... [A] consequence of the denial of a 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'."

Attachment D, Ltr 02-06 dated December 8, 2002, and ratified by ANC 3F on December 16, 2002. As he there went on to explain, the ANC 3F Resolution 02-23 which communicated to DCRA a number of concerns raised by citizens of ANC 3F were not the ANC's comment on the applications but, rather, "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." *Id.*

Indeed, when DCRA furnished some plans, it did not include the critical materials needed to comment intelligently on Zuckermans' failures to comply with the Zoning Regulations or DCRA's refusal to implement them. Appendix IV (at page 16, below) shows that the most significant disclosures to the ANC and Herron did not come until November 20, 2002, and these came from counsel Epting, on behalf of Zuckermans (and not from DCRA charged by law with implementing the zoning regulations).

On the same day, November 20, DCRA's General Counsel admitted that the storm water management plans had not been made available to Herron, but were "now available for review in Mr. Robert Henry's office". Attachment C-2.[12]

For another example, the Zoning Regulations, 11 DCMR § 3202.2 required Zuckermans to identify existing structures on a plan submitted with their applications. They did not do so until *after* April 19. What were the consequences?

When DCRA reviewed Zuckermans' subdivision request, the preliminary sketch filed with that request on April 5 *did not show* the existing structure, much less that the proposed subdivision line would run through the building. (See Attachment E.) Nor did anything else on file with DCRA prior to April 19. But DCRA never furnished the original subdivision request to Herron and ANC 3F; and Zuckermans only furnished it on November 20, 2002 (apparently under threat of subpoena in another case) – less than a month before these Appeals were filed.

Zuckermans held back *any* plan showing an existing structure from DCRA until April 30, 2002 (see Motion, Exhibit D), long after April 19, 2002 (and never submitted a *Surveyor's plat* showing the existing structure).

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[12] As to other plans at issue, DCRA General Counsel relied on the data that "were provided to you" -- meaning "were" going to be provided that very same day, by Mr. Epting. *Id.*

As Zuckermans well knew before April of last year (but ANC 3F has learned only this year), DCRA does not independently check other sources or make a field inspection; it simply relies on what an applicant provides on paper. So an applicant who omits an existing building from a preliminary sketch submitted with his subdivision application may well get away with it, as Zuckermans have so far here:

- DCRA subdivided the lot on April 17, just before the critical ZC set down date.
- That violated 11 DCMR § 101.6, which forbids subdivisions that create a non-conformity. [13] DCRA unwittingly did exactly that. It created a non-conformity because its subdivision violated the side yards provision applicable in the R-1-A zoning district in which the lot was located. 11 DCMR § 405.9. [14]

If DCRA had not subdivided the lot before April 19, Zuckermans could not have applied for two building permits, because of 11 DCMR § 3203.3.[15] And Zuckermans would have lost their race with the ZC's set down.

But neither Appellant knew what was going on:

- Unlike this Board (and other regulatory bodies), DCRA does not placard subdivision or building permit applications.
- Unlike this Board, DCRA does not share with the public its interpretations of Zoning Regulations – much less any rationale for its interpretations.
- In the past, DCRA had given ANCs access to its files, but suddenly, just as this case came up, DCRA scuttled its former practice (see Motion, Exhibit I; Attachment D):
  - DCRA first refused ANC 3F access to Zuckermans' filings on the specious ground that they were "proprietary."
  - Later, when DCRA admitted that was wrong, and apologized, it still did not grant access on the grounds that DCRA staff were working with the materials and could not let them be examined. Motion, Exhibit I; Attachment D-1.
- In the meantime, Zuckermans elected (as they were free to do) not to provided copies to the ANC and even cancelled an informal meeting scheduled with two Commissioners.

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[13] "When a lot is divided, the division shall be effected in a manner that will not violate the provisions of this title *for yards*, courts, other open space, minimum lot width, minimum lot area, floor area ratio, percentage of lot occupancy, parking spaces, or loading berths applicable to that lot or any lot created." 11 DCMR § 101.6 [emphasis added].

[14] DCRA regulations provides for including "[m]an-made features such as buildings" in the preliminary sketch, 10 DCMR § 2703.1(b). And that information is requisite to enable DCRA to enforce the Zoning Regulations about subdivisions. But if an applicant such as Zuckermans leaves the information out, DCRA's own staff will not likely catch that omission.

[15] "A building permit shall not be issued for the proposed erection, construction, or conversion of any principal structure ... unless the land for the proposed erection, construction, or conversion has been divided so that each structure will be on a separate lot of record." 11 DCMR § 3203.3.

Most developers cooperate with our ANC, supplying copies of applications and coming to our ANC's monthly business meetings to explain their plans and answer questions.

Applicant Herron sought relief via the Freedom of Information Act on April 22, 2002. After DCRA turned him down, the DC Office of Documents reversed and remanded to DCRA on July 12, 2002. Mr. Herron promptly renewed his request. Attachment A-3. But DCRA did not respond until July 23, when it dribbled out a few documents but omitted such critical documents as the existing and proposed site plan, the storm water management plan, and the application for the subdivision. (See Appendix IV at page 16, below.) These documents were necessary to determine what was on file at the April 19 critical date.

These examples concern but a couple of the requirements of 11 DCMR § 3202.2. Others will be presented to this Board at the March 4, 2003, public hearing.

HOW THE ZC EXPLAINED "EXCEPTIONAL CIRCUMSTANCES"

The ZC's hearing record in adopting the timeliness rule (11 DCMR § 3112.2) mirrors the situation leading up to these Appeals to this Board (i.e., DCRA despite a FOIA request, an ANC request, a successful FOIA appeal, and a threatened subpoena refused to turn over records needed for this appeal until late November, 2002, when Zuckermans, not DCRA, provided some of the missing documents). Consider the following colloquy on May 13 between ZC Chairperson Mitten and ZC Secretary Bastida regarding deadlines for appeals to this Board:

"CHAIRPERSON MITTEN: .... Mr. Bastida, at the end of our hearing on this subject, we had asked that --- there was a concern that was raised in the hearing, the DCRA was not making permit plans that had been filed available to the public, which would certainly affect the timing of this, and did you do any investigation into that?

SECRETARY BASTIDA: Madam Chairman, I contacted several officials from DCRA], and they said that was not the way they were doing business; in fact, that they wanted to have the community involved, and they even went further to say that they want to have the Office of Zoning involved in that matter. Accordingly, I didn't draft a letter regarding that; matter.

CHAIRPERSON MITTEN: All right. So their policy is what their policy has been, a long-standing policy, which is if someone comes down and asks to see plans that have been filed, they're made available; is that correct?

SECRETARY BASTIDA: That's what I was told.

CHAIRPERSON MITTEN: All right. And I would also say that the language of this text amendment is such that *if for some reason an appellant were unable to get copies of the plans, then that would certainly be an exceptional circumstance outside the appellant's control.*

SECRETARY BASTIDA: That's what the Office of Zoning believes."[16]

[16] ZC Hearing on Case No 02-01, May 13, 2002 pages 49-50 [emphasis added].

Unfortunately, DCRA's behavior throughout this case belies its near-contemporaneous assurances to the ZC.[17] Here, Appellants were "unable to get copies of the plans" they needed until November 20, 2002.

THE PROPER ROLE OF ANCs VS. "PROPHYLACTIC" APPEALS TO THIS BOARD

An ANC should act as "eyes and ears" for DCRA, for this Board, and for other agencies established to serve the public interest. An ANC cannot do that without access to information, which the law requires agencies to furnish. DCRA created circumstances that are both exceptional and deplorable.

When DCRA blind-folded ANC 3F's eyes, and plugged up its ears – or played peek-a-boo at best – DCRA really crippled itself, so that it stumbled into violating the Zoning Regulations.

The culture of ANC 3F is to do its homework before offering advice. For example, when neighbors told ANC 3F that DCRA had not shown them the storm water management plan (which DC regulations require), ANC 3F reported *their* concern in its Resolution 02-23; but it did not jump to the conclusion that Zuckermans had failed to submit such a plan before April 19. Motion, Exhibit H. After all, that plan might simply have been out of the building (e.g., at the Department of Health which now reviews such plans). So, too, when DCRA's Deputy Director responded to the reported concerns by writing that a "Storm Water Management Plan was submitted and approved by the Department of Health. The file includes a stamped and approved plan for storm water management." (Motion, Exhibit L) She simply did not disclose *when* Zuckermans submitted. And DCRA did not supply copies, neither to ANC 3F nor to Herron.

Only after Mr. Epting supplied a copy on November 20 did ANC 3F see that the plan had been prepared on April 30. So whenever Zuckermans submitted it *must have been after April 19.* ANC 3F appealed to this Board within a month of learning critical facts previously withheld.

---

[17] Herron and ANC 3F first received a copy of the plans required under 11 DCMR § 3202.2, (the code section underlying the appeal), the request for a subdivision (count 2 of the appeal), and a copy of the required payment receipts on or around November 21, 2002. Some documents (such as the documents required under section 11-3202 (b)) still have not been supplied by DCRA or Zuckermans. This despite Herron's FOIA to DCRA, which DCRA denied (erroneously, but Herron had to appeal that to the Mayor), and a ruling by the Secretary of the District of Columbia on June 12, 2002, requiring DCRA to turn over the plans and other correspondence as well as numerous attempts by the ANC and a resolution requesting access to the plans which DCRA denied. While DCRA turned over limited information on July 23, 2002, Herron noted to DCRA then its significant omissions. As Appendix IV shows (at page 16, below), most of the critical information for this appeal was not produced until late November, after several follow-up attempts by Herron. As this information was necessary to see whether the property complied with the Forest Hills Tree and Slope Overlay (which it did not) and whether Zuckermans had a complete application on file on April 19, it would have been bootless to file an appeal prior to receiving that information. It must be noted that count 3 of the appeal also directly deals with DCRA not providing the ANC with access to the plans.

ANC 3F appealed right after it had the facts. Zuckermans' Motion says we should not have waited for the facts, but appealed blindly instead, by filing a place-holder, "prophylactic" appeal (in August) – and perhaps other appeals as well – while Herron valiantly tried to pierce a veil of secrecy, stonewalling, obtuseness, or inertia. That is not what this Board has required in the past, as witness the *Appeal of Daryl J. Grinstead*, cited above, in which ANC 3F and DCRA also participated. If this Board now encourages or requires "prophylactic" appeals, it should brace itself for plenty of them.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Board of Zoning Adjustment deny Zuckermans' Motion to Dismiss, either as a preliminary matter or after hearing the merits of the appeals.

Respectfully submitted,

BY: /s/ *David J. Bardin*

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
c/o Arent Fox
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 857-6089

20 February 2003

Appendices:

I	BZA JURISDICTION OVER THIS APPEAL	Page 14
II	TIME LINES IN 2002 [partial] --- Pre- and Post-4/19/2002	Page 15
III	PLANS CORRECTIONS LISTS OF 4/17 AND 5/13/2002	Page 16
IV	WHEN HERRON RECEIVED CRITICAL DOCUMENTS	Page 16

List of Attachments:

- A Documents relating to DCRA's advice to Herron that only BAR had jurisdiction
  - A-1 July 3 email response of Deputy Director Lewis to Herron and his July 2 email to her
  - A-3 July 19 email of Herron to Director Clark and Deputy Director Lewis
  - A-5 July 19 email response to Herron at direction of Director Clark
  - A-6 July 9 email response of Director Clark to Herron
  - A-7 October 18 email response of Director Clark to Herron
- B Herron's letter dated November 14, 2002 notifying Zuckermans he would appeal to BZA
- 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)
- E Zuckermans' April 5, 2002, subdivision application to DCRA (E-1) with preliminary sketch (E-2)

APPENDIX I: BZA JURISDICTION OVER THIS APPEAL

Whether this Board's jurisdiction be exclusive or not, Congress has clearly 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). This section, includes the following definition of this Board's jurisdiction:

> "(f) Appeals to the Board of Adjustment may be taken by any person aggrieved, ... by any decision of the Inspector of Buildings 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.

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

Brendan Herron

From: Lewis, Theresa (DCRA) [Theresa.Lewis@dc.gov]
Sent: Wednesday, July 03, 2002 9:49 AM
To: 'Brendan Herron'; Lewis, Theresa (DCRA); Noble, Denzil (DCRA); Douglas, Lennox (DCRA); Ferguson, Stephanie (DCRA)
Cc: Clark, David (DCRA); Love, JGregory (DCRA)
Subject: RE: Appeal of Issuance of permits at 2900 and 2902 Albemarle Street

Importance: High

Permits for 2900 and 2902 Albe...

Dear Mr. Herron:

By close of business on Tuesday, July 9, 2002, you will be notified by Denzil Noble, Acting Zoning Administrator and Deputy Administrator regarding the procedures for appealing the decision to issue building permits for 2900 and 2902 Albemarle Street, N.W., along with information requested regarding the demolition permit and public space permit.

You also indicate that you have not received formal notice rejecting your claims and is requesting that one be provided. Attached to this e-mail you will find a copy of the e-mail that was forwarded to you on June 11, 2002 addressing each of your concerns. This e-mail also notified you that the permits would be issued on the next day (June 12, 2002). Further, the attached e-mail invited you other to meet with my staff and I to discuss the approved plans and to answer any questions you may have. On June 12, 2002 you, along with a neighbor and ANC Commissioner Phil Kogan met with my staff and .

Should you require further information and/or assistance, please feel free to contact me.

Sincerely,

Theresa D. Lewis, CPM
Deputy Director for Operations/Chief of Staff
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E.
Washington, D.C. 20002
(202) 442-8947

Attachment

-----Original Message-----
From: Brendan Herron [mailto:bherron@pathlore.com]
Sent: Tuesday, July 02, 2002 10:08 PM
To: Lewis, Theresa (DCRA); Noble, Denzil (DCRA); Douglas, Lennox (DCRA); Ferguson, Stephanie (DCRA)
Subject: Appeal of Issuance of permits at 2900 and 2902 Albemarle Street
Importance: High

I have received notice that from Holland and Knight that the permits for 2900 and 2902 Albemarle Street have been issued. I intend to file an appeal

A-1

of those permits tomorrow and want to confirm that the appeal should be filed with the Board of Appeals and Review for issues relating to the Building code and to the BZA for issues relating to the zoning code.

If there is an alternative appeal within DCRA please provide me with that information as to how to file that appeal. Also, I do not believe that I have a formal notice from DCRA rejecting my claims and would request that one be provided if DCRA has formally rejected my claims.

It is also my understanding that the demolition or other construction cannot proceed (per the conditions listed on the site plan) until all permits have been issued. I also understand that the public space permit has not been issued and thus construction cannot proceed.

I would also request the name of the person responsible for issuing the public space permits.

Thank you for your help.

Brendan Herron
202 248 9837

A-2

Brendan Herron

From: Brendan Herron [bherron@pathlore.com]
Sent: Friday, July 19, 2002 8:51 AM
To: Lewis, Theresa (DCRA); Clark, David (DCRA)
Cc: Noble, Denzil (DCRA); Love, JGregory (DCRA)
Subject: RE: 2900 and 2902 Albemarle Street, N.W.

Dear Mr. Clark and Ms. Lewis - While I received a letter from David Clark indicating that by July 23, 2002 I would receive a response from the DCRA regarding my Appeal, I have not received any communication yet regarding who is responsible for the public space permit as promised in your July 3 email. I also did not receive any indication of my appeal rights. While you know that I have filed an appeal with BAR, I would also like to know of other appeal rights I may have.

In addition, I still have not received any response to the Final Decision by Beverly Rivers regarding the FOIA request that was sent to you on June 12 and ordered you to respond in 10 working days.

I am prepared to give you another 5 working days to respond. If I do not have a response by that time, I will be forced to intend to file further legal action, the consequence of which is that DCRA may be liable for my legal fees.

Thank you for your assistance and I look forward to your response.

Brendan Herron

-----Original Message-----
From: Lewis, Theresa (DCRA) [mailto:Theresa.Lewis@dc.gov]
Sent: Wednesday, July 03, 2002 9:49 AM
To: 'Brendan Herron'; Lewis, Theresa (DCRA); Noble, Denzil (DCRA); Douglas, Lennox (DCRA); Ferguson, Stephanie (DCRA)
Cc: Clark, David (DCRA); Love, JGregory (DCRA)
Subject: RE: Appeal of Issuance of permits at 2900 and 2902 Albemarle Street
Importance: High

Dear Mr. Herron:

By close of business on Tuesday, July 9, 2002, you will be notified by Denzil Noble, Acting Zoning Administrator and Deputy Administrator regarding the procedures for appealing the decision to issue building permits for 2900 and 2902 Albemarle Street, N.W., along with information requested regarding the demolition permit and public space permit.

You also indicate that you have not received formal notice rejecting your claims and is requesting that one be provided. Attached to this e-mail you will find a copy of the e-mail that was forwarded to you on June 11, 2002 addressing each of your concerns. This e-mail also notified you that the permits would be issued on the next day (June 12, 2002). Further, the attached e-mail invited you other to meet with my staff and I to discuss the approved plans and to answer any questions you may have. On June 12, 2002 you, along with a neighbor and ANC Commissioner Phil Kogan met with my staff and I.

Should you require further information and/or assistance, please feel free to contact me.

A-3

Sincerely,

Theresa D. Lewis, CPM
Deputy Director for Operations/Chief of Staff
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E.
Washington, D.C. 20002
(202) 442-8947

Attachment

A-4

Brendan Herron

From: McCarley, Joseph (DCRA) [Joseph.McCarley@dc.gov]
Sent: Friday, July 19, 2002 4:24 PM
To: 'bherron@pathlore.com'
Cc: Clark, David (DCRA); 'davidaclark@palm.com'
Subject: 2900 and 2902 Albermarle Street, N.W.

Importance: High

Dear Mr. Herron:

Please be advised that David A. Clark, Director of the Department of Consumer and Regulatory Affairs (DCRA), directed me to contact you with a response to your various inquires. Consistent with your recent communiqué, please be advised of DCRA's response in this regard:

1.) The procedures for appealing decisions to issue building permits:

The procedures for appealing decisions to issue building permits is contained in the attached photocopy of (Vol. 46 - NO. 47) DC Register DCMR 12A, Section 122.0 Appeals

2.) The responsible party for public space permits:

Please contact the office of Ms. Denise Turner, Public Space Manger District Department of Transportation (DDOT) at (202) 535-2982.

3.) A final decision on the June 12, 2002 FOIA request.

A response is forthcoming no later than Tuesday, July 23, 2002.

I shall take the liberty of contacting you to ensure receipt of this document. Should you have any further questions please contact me at (202) 442-8927. Thank you for your patients in this regard.

Sincerely,

Joseph McCarley
Customer Service Advocate

<<...OLE_Obj...>>

<<...OLE_Obj...>>

A-5

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

Office of Employee & Support Services

July 9, 2002

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

Dear Mr. Herron, Jr:

This letter is to acknowledge receipt of your letter dated July 3, 2002, regarding Appeal of Issuance of Permits at 2900 and 2902 Albemarle Street NW.

Please be advised that this matter has been referred to J Gregory Love, Administrator, Building and Land Regulation Administration. You may contact Mr. Love or his assistant Robert Henry on (202) 442-4455 or by e-mailing Robert.Henry@dc.gov.

If you have not received a response by July 23, 2002, please feel free to contact Joseph McCarley, Customer Service Advocate on (202) 442-8947 for further assistance.

Sincerely,

David A. Clark
Director

cc: #IQ 134080
J Gregory Love

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

Office of the Director

October 18, 2002

J. Herron, Jr.
2901 Albemarle Street, NW
Washington, DC 20008

Dear Mr. Herron:

This letter is to acknowledge receipt of your letter dated October 11, 2002, regarding permits issued at 2900 and 2902 Albemarle Street.

This matter has been referred to J. Gregory Love, Administrator of the Building and Land Regulation Administration. You may contact Mr. Love or his assistant Robert Henry on (202) 442-4677 or by e-mailing Robert.Henry@dc.gov.

Please be advised that you should receive a response from Mr. Love within ten (10) business days from the date of this letter. If you have not received a response by October 28, 2002, please feel free to contact Joseph McCarley, Customer Services Advocate on (202) 442-8947 for further assistance.

Sincerely,

David A. Clark
Director

Cc: IQ#150200
J. Gregory Love

A-7

J. Brendan Herron Jr.
2901 Albemarle Street NW
Washington, DC 20008
(202) 248 – 9837
Bherron@ifstrat.com

November 14, 2002

Mr. Stuart Zuckerman
President
Zuckerman Brothers, Inc.
Suite 550
2 Wisconsin Circle
Chevy Chase, Md 20815

Dear Mr. Zuckerman:

RE: Appeal of Permits at 2900 and 2902 Albemarle Street

This letter is to put you on notice that I along with several community organizations intend to file an appeal with the Board of Zoning Appeals next week. This appeal is timely based on the recent receipt of a denial of my agency appeal with DCRA dated October 23, 2002 from Mr. David Clark, Director of DCRA. As previously stated, I believe that these permit have not been issued in compliance with the DC building code, the DC zoning regulations and DC Statute 6-641.09 ("collectively "Laws and Regulations").

You are also reminded the current demolition permit does not reflect the proper name, insurance and that certain environmental clearances have expired. The law requires an amended permit and you are put on notice that I intended to do everything in my power have that law complied with.

This notice is to remind you that I intend to exercise all my administrative and legal rights under these and any other Laws and Regulations to appeal and overturn the issuance of these permits and to have any construction performed at the site taken down. Accordingly, you are hereby notified that any demolition or construction prior to a ruling on my appeals is strictly at your risk and I will be seeking to reverse any demolition or construction and have the property restored. I also intend to hold you jointly and severely responsible for any and all damages that my family or I have or may incur as a result of your activities.

I may be reached at the above contact.

Sincerely

J. Brendan Herron Jr.

B-1

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

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

Laura Gisolfi Gilbert
Agency Counsel

Karen M. Edwards

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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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. 75386
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

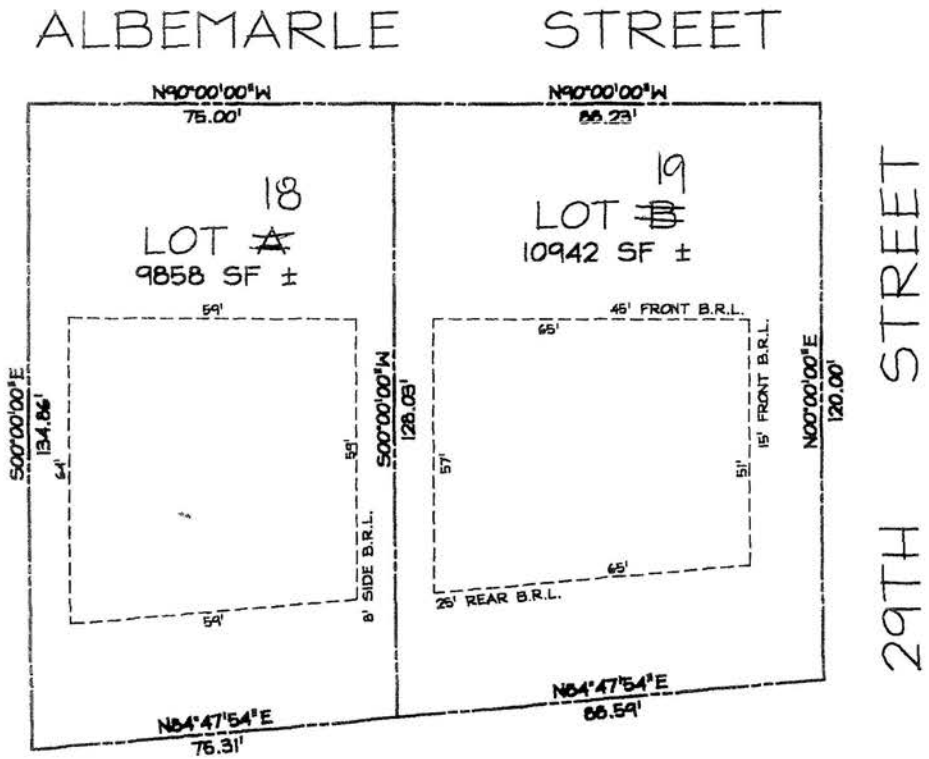
If additional space is required, please attach a supplemental sheet. It should be noted that the above information must be accurate because these names will appear on the subdivision plat, and they must be the owners of record as of the date of signing and recording the subdivision. **ANY INACCURACIES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

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PRELIMINARY
SUBDIVISION SKETCH

Certificate of Service

I hereby certify that a copy of the foregoing OPPOSITION OF APPELLANTS ANC 3F AND J. BRENDAN HERRON, JR. TO MOTION TO DISMISS was delivered on February 20, 2003 to the Board of Zoning Adjustment. A copy was sent by mail on February 20, 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.

/s/ *David J. Bardin*

David J. Bardin