DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

J. Brendan Herron, Jr.,	)	
	)	
Appellant,	)	
	)	
vs.	)	**Case No. 16982**
	)	
Department of Consumer and Regulatory Affairs,	)	
	)	
	)	
Appellee.	)	

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MOTION TO DISMISS
FOR FAILURE TO COMPLY WITH PROCEDURAL REQUIREMENTS OF 11 DCMR § 3110 *et seq.*

On February 20, 2003, Appellants submitted a document entitled Opposition of Appellants ANC 3F and J. Brendan Herron, Jr. to Motion to Dismiss. On February 21, 2003 Appellants submitted a statement entitled Pre-hearing Statement of ANC 3F and J. Brendan Herron, Jr. Because both documents were untimely filed, they do not satisfy the filing requirements of 11 DCMR § 3112.10. Accordingly, Intervenor Zuckerman Brothers, Inc. ("Zuckerman") asks that this Board strike both documents from the record as untimely filed and dismiss the appeal for failure to meet the filing requirements.

Facts

The public hearing in this case is scheduled for March 4, 2003. Appellants filed their statement in opposition to Intervenor's Motion to Dismiss on February 20, 2003 –

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Board of Zoning Adjustment
District of Columbia
CASE NO. 16982
EXHIBIT NO. 22

only twelve (12) days prior to the public hearing. Appellants filed their pre-hearing statement the following day, February 21, 2003 – only eleven (11) days prior to the public hearing.

Discussion

Section 3112.10 of the Zoning Regulations requires that an appellant file all additional materials at least fourteen (14) calendar days prior to the public hearing. That section provides:

> No later than fourteen (14) days before the date of the hearing for the appeal, the appellant shall file with the Board any additional statements, information, briefs, reports, (including reports or statements of expert and other witnesses), plans, or other materials that the appellant may wish to offer into evidence at the hearing. ...

11 DCMR § 3112.10.

Accordingly, the Appellants were required to file all additional materials no later than February 18, 2003. As discussed below, because the District of Columbia government was closed on that day, the material should have been filed no later than February 19th, when the District government re-opened. Because Appellants filed their additional materials several days late, without even the pretext of an explanation or "good cause," these materials should be stricken from the record and returned to the Appellants, and this appeal should be dismissed.

The filing deadlines contained in the Zoning Regulations apply equally to applicants, appellants, community organizations, Advisory Neighborhood Commissions, and parties who are individuals. The Zoning Regulations should be applied consistently to all applicants, appellants, and parties.

The Appellants cannot argue that they were unaware of the filing deadlines. Based on its status as an advisor to the government of the District of Columbia, Appellant ANC 3F should be well aware of the filing deadlines that are clearly set forth in § 3112.10. Mr. Herron also should have been aware of the existence of filing deadlines, given his numerous appeals and submissions. Notably, the untimely Pre-Hearing Statement submitted by Mr. Herron and ANC 3F stated that it was filed pursuant to 11 DCMR § 3112.10, but ignored the clear filing date, which is jurisdictional, contained in that section.

All of the appellant's additional materials could have been filed on February 19, 2003. The District of Columbia government offices were closed on February 17, 2003, fifteen days prior to the scheduled hearing, because of the Presidents' Day holiday. The following day, the date all additional materials were due, the District of Columbia government was closed due to the recent snow storm. The District of Columbia government offices were open on Wednesday, February 19, 2003. Section 3110.2 provides that, in computing any period of time, the last day of the period shall be included unless the day is a Saturday, Sunday, or District of Columbia holiday. Intervenor does not contend that Appellants could have filed their additional submissions

on February 18, 2002. However, they should have filed them on the first available day thereafter – February 19, 2003. Thus, the Appellants' Opposition to Intervenor's Motion to Dismiss and Pre-Hearing Statement should be stricken from the record as untimely filed, and the appeal dismissed.

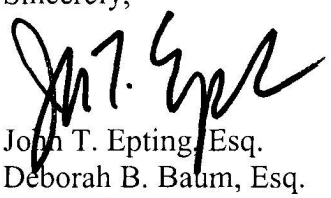
The missed filing date is of even more concern in this case, because Appellants' only previous filing is the Appeal form citing an October 23, 2002 letter of David Clark, Director of DCRA, related to Mr. Herron's appeal under the Building Code (12 DCMR), which is not relevant to this appeal.

Conclusion

The Appellants have not filed one paper in this appeal in a timely fashion. The appeal itself was filed over six months late. ANC 3F did not join in any appeal of the permits at issue in this case until six months after they were issued. Appellants have disregarded the procedures of this Board by filing their required submissions late. Accordingly, Intervenor respectfully requests that this Board strike both the Opposition of Appellants ANC 3F and J. Brendan Herron, Jr. to Motion to Dismiss filed by Appellants on February 20, 2003, and the Pre-hearing Statement of ANC 3F and

J. Brendan Herron, Jr. filed by Appellants on February 21, 2003, and accordingly, that it dismiss this appeal for failure to comply with the filing requirements.

Sincerely,



John T. Epting, Esq.
Deborah B. Baum, Esq.
Ashleigh Dale Horne, Esq.
Shaw Pittman LLP
2300 N St, N.W.
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Dated: February 24, 2003

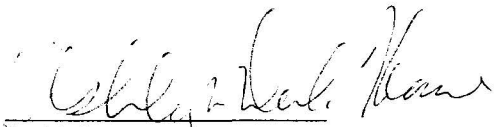
I hereby certify that on February 24, 2003, a copy of the foregoing Motion was mailed first class, postage prepaid, to the following:

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