

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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SPECIAL PUBLIC MEETING

+ + + + +

TUESDAY

MARCH 11, 2003

+ + + + +

The Special Public Meeting convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:00 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
ANNE MOHNKERN RENSHAW	Vice Chairperson
CURTIS ETHERLY, JR.	Board Member
DAVID A. ZAIDAIN	Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

CAROL J. MITTEN	Commissioner
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BZA STAFF PRESENT:

BEVERLEY BAILEY	Office of Zoning
CLIFFORD MOY	Office of Zoning
JOHN NYARKU	Office of Zoning

D.C. OFFICE OF CORPORATION COUNSEL:

COREY BUFFO, ESQ.

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First Order of Business

APPEAL APPLICATION OF J. BRENDAN HERRON, JR. and
ADVISORY NEIGHBORHOOD COMMISSION

16982 ANC 3F

WITNESS

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FINAL ACTION

Curtis Etherly 10

Anne Mohnkern Renshaw 14

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P-R-O-C-E-E-D-I-N-G-S

9:24 a.m.

CHAIRPERSON GRIFFIS: Good morning, ladies and gentlemen. Let me call to order the Special Public Meeting of the Board of Zoning Adjustment on 11 March 2003. Let me save introductions for our opening session of hearings, but just wish good morning to everybody and to the board and staff.

Mr. Moy, if you would call to our attention the first order of business?

MR. MOY: Yes, sir. Good morning, Mr. Chairman, members of the Board. The first case is the Appeal Application #16982 of J. Brendan Herron, Jr. and the Advisory Neighborhood Commission (ANC) 3F, pursuant to 11 DCMR 3100 and 3101, from the administrative decision of the Department of Consumer and Regulatory Affairs (DCRA), in the issuance of building permit numbers B446310, B446316 and B446312, issued on June 13, 2002, to Zuckerman Brothers allowing the construction of two single-family dwellings in an R-1-A District.

Appellant alleges that DCRA erred by not taking into consideration the provisions of the Forest Hills Tree and Slope Overlay, the plans to violate the side yard requirements, and the ANC was not given

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1 statutory notice of the filing of the permit
2 applications. The subject premises is located at 2900
3 and 2902 Albemarle Street, N.W., and that's in Square
4 2043, Lots 9, 18 and 19.

5 At the public hearing on March 4th, the
6 Board heard the facts of the appeal and scheduled a
7 meeting for this morning, March 11, 2003. So the
8 action before the Board this morning are the motions
9 filed by the intervenor and appellee to dismiss the
10 appeal based on timeliness.

11 Finally, as a note, the Board allowed two
12 submissions to the Board, one being the complete
13 October 11, 2002 letter with attachments by J. Brendan
14 Herron, and that was received on March the 4th, and
15 that's in your package as Exhibit 31. Finally, the
16 Board also allowed ANC 3F to provide a stamped copy of
17 the Storm Water Management Plan that was on file at
18 DCRA, and that was received by the Board on March 5,
19 2003, and that's in your folders as Exhibit 38, and
20 that completes my briefing, sir.

21 CHAIRPERSON GRIFFIS: Thank you, Mr. Moy.

22 Okay, Board members, clearly we're here to entertain
23 and deliberate on the one motion remaining, and that
24 is for either to uphold or deny the motion to dismiss,
25 based on timeliness. There is a motion before us that

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1 indicates that this appeal is filed untimely before
2 this Board.

3 I would like to begin deliberations and
4 start off with hearing some discussion on how Board
5 members are thinking in terms of what that milestone
6 is. What was the date at which the filer should have
7 known or did know the information substantial enough
8 to file an appeal? We have extensive chronologies in
9 the record to indicate several dates of import. We
10 also have had the time, and I know all Board members
11 did take the time, to review the DRCA package that was
12 submitted to Mr. Herron on the 26th of July, I believe
13 that date is correct, yes, 2003, with the other
14 filings, of course.

15 I found great substance in looking at
16 that. I think the critical dates that we're talking
17 about, frankly, are the June 13th, perhaps the July
18 18th, and then the October 23rd. October 23rd is a date
19 that is on the letter from DCRA. There was the
20 correspondence from Holland and Knight to Mr. Herron
21 indicating that he should properly be before BZA and
22 not the BAR, in terms of the zoning issues.

23 Of course, the June 13th, which is of 2002,
24 the issuance of the permit, in my mind it's best to
25 start with the first and see if you progress to the

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1 second or third, and the time line as submitted,
2 actually, I don't think there is any controversy or
3 contradiction in time lines that were submitted on
4 some of the critical dates. There may be some in one
5 and not in the other and vice versa.

6 However, if you look prior to the 13 June,
7 you see there is an extensive list of correspondence,
8 correspondence written, email and also of meeting
9 form. This to me goes to a very lengthy communication
10 process, and it establishes two things in my mind.
11 The first is that DCRA was on fairly good notice that
12 there was some concern about the permit. Clearly, I
13 think, and it is substantiated with the DCRA 26 July
14 package that we have, there was special attention put
15 to processing this.

16 In fact, there were if not one, I think I
17 saw two, it may have been a copy, memos in this
18 package that indicates that this permit is not to be
19 issued without formal approval by, I think it was, Ms.
20 Lewis, that was listed. That, to me, is not my
21 understanding of a normal processing of a permit, but
22 rather one that took special attention, and was
23 clearly being looked at extensively.

24 In addition to that, we have DCRA actually
25 contacting the individuals involved in looking at this

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1 permit, contacting them in terms of their schedule to
2 issue the permit, and what does that say? That
3 indicates that the DCRA has looked at it, and looked
4 at it extensively, and found that they can, in fact,
5 issue this permit. That to me establishes, I think
6 quite frankly, a very strong milestone of which action
7 should have and could have been taken, in terms of
8 filing appeals.

9 One could look at the discussion of well,
10 they did, in fact, pursue an appeal at BAR for the
11 permit. Again, I think you can look at that and say
12 there was some recourse being followed. There is
13 precedent that says that one cannot rely on pursuing
14 one avenue of appeal and when it fails or does not
15 complete in time that you then take to another and ask
16 that the time line be started fresh.

17 Let me digress a bit, but there was a case
18 that was cited by Mr. Herron or the ANC, I don't
19 necessarily know, but it's in the case file. It's
20 Felicity, Inc. v. DCRA. It was the ANC. The issue
21 with this case, when one looks at it specifically, is
22 the fact that the direction to go to the BAR for
23 zoning issues came very formally, and it was formally
24 from the Administrative Law Judge. That to me is
25 something that anyone would take seriously and think

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1 was correct.

2 In this particular case, that did not
3 happen, and I don't believe that it gives us anything
4 to stand on, in terms of establishing the 23rd October
5 as the deadline. You know, perhaps the lawyers won't
6 appreciate this, but I think in cases like this you
7 really have to sit back and look at common sense. How
8 would one logically proceed? What would one logically
9 expect? And if an individual, as this is the case
10 here, has had extensive conversations and coordinating
11 and granted, everything may not have been forthcoming
12 and I can imagine it wasn't the most enjoyable period
13 of letter writing.

14 But when one sees the process moving
15 forward, and then there is the formal decision that
16 the permits are acceptable and actually are approved,
17 I don't know what makes you sit back and say well,
18 clearly, there's a more definitive answer coming.
19 Clearly, there is something more substantial, more
20 deadline than the issuance of the permit itself.

21 Now, if one doesn't trust DCRA, and that
22 is in the record, that has to be factored in. If one
23 doesn't trust the attorney representing the developer,
24 I can factor that in. But with the amount of people
25 that we're focusing on from the ANC to Mr. Herron to

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1 the conversations with DCRA, if you'll just look back
2 on in the summertime, you know, the June, July period,
3 and look at what's being told to me and what is
4 actually happening, I think one would question that
5 they're not doing absolutely everything available, and
6 I think that questioning happened.

7 I think we need to discuss, well, they
8 didn't really know what it was or the entire substance
9 of the problem. What was appealable? What was it
10 that they should have known? Again, I go through the
11 26th July and anything that's being discussed in the
12 record, at this point, as to the appealable issues. I
13 have no question that you would have been able to
14 substantiate that with the documentation that was
15 given. We have in these records the whole chronology
16 of the processing of this, from the raze permit to the
17 subdivision plan to the permit applications.

18 So, again, I would go back and say how?
19 And I know this Board has wrestled with this in other
20 cases, and clearly the timeliness has been a
21 longstanding issue that the Zoning Commission has
22 picked up. I think it's important that we do look
23 back on what is the definitive time. I think it's
24 important for us to reinforce that there is a process
25 by which everyone is aware, by which everyone can then

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1 fit into. If we continually take this up somewhat
2 piecemeal, then there is no real processing then.

3 The Government has nothing to really
4 understand of what they are supposed to do, and more
5 importantly, the community and the communities
6 concerned doesn't understand what the framework is
7 within which we should all be dealing. This, to me,
8 is a very strong case to say that the definitive
9 answer of DCRA is to approve a permit, and that is the
10 point at which all further action should occur, and
11 that being appeals.

12 But let me pause there and hear from
13 others.

14 BOARD MEMBER ETHERLY: Mr. Chairman, I'll
15 just note for the record, I'm in complete agreement
16 with your statements. I think the issue here is a
17 close one, but I think a very clear one from a case
18 precedent standpoint. When you have waste management,
19 which clearly sets forth the timeliness standard by
20 which we measure whether or not appeals have been
21 appropriately filed, that standard does allow for the
22 consideration of exceptional circumstances to enable a
23 potential appellant to nevertheless come before this
24 body, if they are demonstrating such a set of
25 circumstances that would suggest, essentially,

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1 "waiving" that time line. I don't think we have that
2 set of exceptional circumstances here.

3 You noted, of course, that we are
4 struggling with the existence of some precedent which
5 might be troubling, whether that's Felicity or whether
6 that's Grinstead or other matters. You know, I simply
7 would just note that I think the important issue here
8 going forward is one of finality, and, as you said, in
9 order for the process to work effectively, you have to
10 have clear parameters by which finality is determined,
11 and I think the finality here, very clearly, in this
12 case and as would be the case with any part of the
13 process before an agency, is the agency action, and
14 that marker is the June 13th permit issuance.

15 There's a substantial amount of record key
16 dates that have been presented by both parties, and I
17 think what's very clear is the issue had a substantial
18 amount of activity on the part of both the appellant
19 and the appellee leading up to and prior to the June
20 13th issuance of the permit. That activity, to me,
21 suggests that everyone was on notice that this was
22 clearly a hot potato, and the fact that the party did
23 not take advantage of the opportunity to appeal the
24 permit when it was issued on June 13th, I think, is a
25 fault of the party.

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1 Tough as that may be, once again, when you
2 have such a clear amount of information in the record
3 that speaks to just how significant a concern this
4 issue was for the community, for the parties involved,
5 it is incumbent upon parties to protect their rights
6 at all times, and I think everyone was clearly aware
7 that the permits had been issued, and that is the
8 action which should have been appealed in a timely
9 fashion.

10 The exceptional circumstances, once again
11 for me, I'm just not finding that argument to be a
12 very plausible one given the amount of discourse and
13 activity that took place leading up to the permits.
14 And once again, from the standpoint of the finality
15 discussion, you have to think about the practical
16 outcome of allowing letter upon letter or email upon
17 email the discourse that takes place between a citizen
18 and an arm of the District of Columbia Government. If
19 each of those actions, in and of itself, starts a
20 separate appeal's time table, you have to wonder at
21 what point do you have a final action, which
22 essentially starts a clock.

23 I think the most workable scenario here is
24 the one that's outlined in waste management, which
25 mandates that you have a final agency action. That

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1 action shouldn't be undermined or overtaken by
2 subsequent efforts on the part of the citizenry to
3 communicate with an arm of the District Government. I
4 don't want to preclude that kind of discussion, so I'm
5 not saying that it shouldn't take place, but I think
6 the practical outcome of a decision in the alternative
7 direction is that essentially what you're going to
8 mandate is that an arm of the District Government,
9 after a permit is issued or after a final order is
10 issued, every arm of the District Government is just
11 going to simply have to close up its doors, close up
12 its shutters and not interact with the citizens, and I
13 don't think that's the outcome that we want to have
14 here.

15 Thank you, Mr. Chairman.

16 CHAIRPERSON GRIFFIS: Good. To follow-up
17 just briefly on that, because you're listing a lot of
18 cases that you rely on, and I think that's important,
19 and I think that this Board can also rely on its
20 decision in Larriman, which did find that the appeal
21 rights attach themselves to one decision by the DCRA,
22 and not that you wait until you have every
23 correspondence or every decision being made. And so I
24 think that's where you're going with that is what,
25 well, one could logically take as a final decision. I

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1 think that's important. And I think there was a
2 substantial amount of information that even was
3 indicating to the community that the final decision
4 had been made, and it's time to go.

5 I'm noting again the submission in the
6 record by Shaw Pittman on page 9, and I read on June
7 20, 2002 Holland and Knight, which was the counsel, at
8 that point, mailed the letter to the ANC 3F, Mr.
9 Herron and other nearby property owners informing them
10 that permits had been issued. I mean, even more so
11 that look, there is DCRA action on this that, frankly,
12 you're put on notice. It's time to mount the forces
13 in whatever direction you're taking it.

14 Ms. Renshaw?

15 VICE CHAIR RENSHAW: Yes, thank you, Mr.
16 Chairman. For me, the final action was October 23rd,
17 and I think under the Grinstead decision the tolling
18 starts at that point. We have been talking about what
19 is a permit, and there seems to be the feeling of you,
20 Mr. Chairman, and Mr. Etherly, that the issuance of
21 the permits back on, let's see, June the 13th are key
22 dates. However, I believe that the appellant had
23 tried, and that means Mr. Herron here, to get to the
24 attention of DCRA, and the October 23rd letter could
25 have been sent from DCRA to Mr. Herron much earlier.

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1 However, DCRA elongated the process by not
2 responding to Mr. Herron in an timely fashion. In his
3 October the 11th letter, he notifies DCRA that there
4 was no response to his July 3rd request, and we can
5 only understand that this citizen wanted to get a
6 definite write-off from DCRA as to those permits.
7 Now, you ask yourself what is a permit. Well, a
8 permit is a piece of paper that yes, says something is
9 going to happen. But that permit can be readily
10 revoked or stopped or set aside or appealed, and here
11 is a case where Mr. Herron and then the ANC stepped in
12 to say we want this matter looked into, and we want
13 the work stopped and these permits pulled back.

14 So then what transpired was a lot of time
15 and effort on the part of both sides, but DCRA could
16 have sent that October 23rd letter earlier, but it did
17 not, and therefore October 23rd was the date, the final
18 date, in my mind, and at this time the bell started to
19 toll.

20 Now, just another point here is that I
21 don't know why DCRA strung this out very much, but you
22 talked, Mr. Chairman, about the correspondence or the
23 little notation that Theresa Lewis, within DCRA, put
24 on some of the DCRA paperwork, and you used that as an
25 example that that was getting special attention. But

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1 that was getting special attention within DCRA. It
2 did not necessarily mean that that special attention
3 was also extended to the member of the community who
4 wanted action on what he was requesting of DCRA.

5 I'll stop at that point and let Mr.
6 Zaidain cut in and then I'll be back.

7 BOARD MEMBER ZAIDAIN: First, I have a
8 question. It seems to me that you're seeing the
9 definite write-off as I think you termed it was in the
10 October letter from DCRA.

11 VICE CHAIR RENSHAW: Yes.

12 BOARD MEMBER ZAIDAIN: If that's the case,
13 and everything was still kind of up in the air, and
14 there was nothing definitive, I don't understand the
15 BAR appeal then. What were they appealing to the BAR
16 if there was not a definitive? If you don't consider
17 the permits to be a definitive output of DCRA, then
18 how could they appeal that to BAR?

19 VICE CHAIR RENSHAW: Well, they got the
20 guidance, and let me look at the time line here as to
21 when Mr. Herron went to the BAR. July 19th DCRA
22 advised Mr. Herron appeal is only to the BAR. So he
23 went that route in July.

24 BOARD MEMBER ZAIDAIN: Well, there was
25 also subsequent communication. Let me raise my issues

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1 real quick.

2 VICE CHAIR RENSHAW: Yes.

3 BOARD MEMBER ZAIDAIN: I'm more in the
4 camp with the Chair and Mr. Etherly for several
5 reasons. One, if you look at where this started, it
6 started with an issue with the TSP overlay which is,
7 as somebody who observed this from wearing my NCPC
8 hat, almost a pure zoning issue, who is going to the
9 Zoning Commission as a tax owner to the Zoning
10 Regulations. I really don't see the ambiguity between
11 that being a zoning issue and that being a building
12 code issue.

13 I mean, you're talking about specifically
14 structures and things such as that. It's something
15 that was going to be amended to the Zoning Code. So I
16 have a hard time understanding why it was not appealed
17 to the BZA from the get go.

18 Furthermore, Mr. Herron was informed from
19 several sources that the building permit was being
20 issued. Mr. Herron and the ANC, for that matter. He
21 was also informed in July that there was a possibility
22 that the issues that he was raising could go to the
23 BZA. Also, I find it hard to understand why the ANC
24 is now joining this as this started back in March.
25 There was numerous correspondence going between

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1 everybody, and the way I read the correspondence, the
2 ANC really was being informed, did not take a stance
3 in the BAR, but now they are coming forward and saying
4 they want to appeal it almost, you know, seven or
5 eight months after the fact.

6 I don't understand that process,
7 especially considering the ANC, which has always
8 seemed to be very versed in zoning issues when they
9 had been before us.

10 VICE CHAIR RENSHAW: That was explained,
11 though, during the last session.

12 BOARD MEMBER ZAIDAIN: What was explained?

13 VICE CHAIR RENSHAW: The reasons that the
14 ANC came in when it did, and the ANC is an ANC that
15 needs its plans. It needs to review those plans in a
16 public meeting.

17 BOARD MEMBER ZAIDAIN: See, I still --

18 VICE CHAIR RENSHAW: And it didn't get
19 that.

20 BOARD MEMBER ZAIDAIN: I still don't
21 understand that, because the testimony I --

22 VICE CHAIR RENSHAW: Did you --

23 BOARD MEMBER ZAIDAIN: The testimony that
24 I remember hearing from the ANC was that they did not
25 take a position in the BAR review, although the issue

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1 is still the same from back in March. So why did they
2 not take a position then and take a position now? I
3 don't understand that.

4 As I said, there was numerous
5 correspondence between the applicant, the ANC, DCRA
6 counsel. Counsel even wrote a letter to all the
7 affected parties that the permits were being issued.
8 To me, and this will be my final statement, I think as
9 a general policy for this Board if there's going to be
10 any meeting given to the doctrine of known or should
11 have known under waste management, I don't see how we
12 can let this go on, because there was just numerous,
13 numerous correspondence between everybody about what
14 the issues were.

15 As a matter of fact, Mr. Herron has
16 demonstrated that he really got into the regulations
17 and did a good job figuring out what's going where to
18 the BAR and things like that. I just find it hard to
19 believe that the issue of the BZA was not raised at
20 any point concerning the correspondence that was going
21 back. We have to balance the right between the
22 affected property owners, the property owners who have
23 a right to improve their property and also have a
24 right to say, at some point, all the appeals have
25 exhausted and I can have some level of comfort to

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1 proceed.

2 I don't think that this Board wants to say
3 that we don't want to hear appeals about DCRA permits,
4 because you know there has been numerous testimony
5 that DCRA does make mistakes, that there are things
6 that need to come to us, but we have to hold steady a
7 time line. And in this instance, I think with the
8 numerous amount of correspondence going back and forth
9 that I think there are four or five dates that could
10 arguably be the beginning of the clock, but they are
11 in June, they are in July, and I just don't see the
12 October letter being the final determination. So
13 that's my position.

14 CHAIRPERSON GRIFFIS: Good. Mr. Zaidain,
15 actually, on a point that you brought up that you're
16 concerned that they took action, went to the BAR, it's
17 interesting if you keep that in mind and read the
18 October 23rd letter from DCRA, signed by David Clark,
19 the last paragraph indicates, and this is the way I
20 read it, I can hear other interpretations, but Mr.
21 Clark is saying, you know, sorry, we didn't send you
22 this letter. We didn't think it was needed. You've
23 taken action and are appealing to the BAR.

24 He says because DCRA is of the opinion
25 that these permits were properly issued, a stop work

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1 order stay will not be issued, and the permits will
2 not be vacated or revoked. Since you have already
3 appealed to the D.C. Board of Appeals and Review, it
4 appears that we will need to wait for the outcome of
5 our appeal. And then he says, you know, and you can
6 go and do any other legal action that you deem
7 appropriate.

8 VICE CHAIR RENSHAW: So they have appealed
9 to us.

10 CHAIRPERSON GRIFFIS: Yes, but you are
11 giving so much stature to Mr. Clark or DCRA allowing
12 somebody to go do that, where I think that is not
13 essentially what he is saying. You know, we ran into
14 this problem in some of the other cases when the DCRA,
15 the kind of generic ending of it is, and I won't say
16 it exactly, but it said something to the effect of
17 contract us with any questions or problems you may
18 have continuing with this case. And that people held
19 onto as see that, there's no definitiveness. They
20 want to continue this process. And I say, no.

21 I think there are definitive actions and
22 directions and decisions, is really what it comes down
23 to.

24 VICE CHAIR RENSHAW: On July 19th, Mr.
25 Herron asked DCRA about his appeal rights, and I think

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1 what he was looking for back in July was to get some
2 definitive word from the director of the department,
3 and instead he gets an email from a DCRA customer
4 service advisor regarding procedure, which was not all
5 that clear in the correspondence, in the email. So
6 it's just a matter of the final word from DCRA, in my
7 view, did not come in until October 23rd and that was
8 the cutoff.

9 We are wondering here, Mr. Zaidain asked
10 and he has a hard time, why it was not appealed to the
11 BZA earlier, and we had some testimony in our last
12 session about prophylactic appeals to the BZA, but you
13 have to ask yourself what would we do with it here if,
14 for instance, back in July Mr. Herron and/or the ANC
15 came to us with this and we would say looking in the
16 file there may not have been enough information, and
17 we would say well, gee whiz, there's not enough here
18 for us to go on or we're going to have to get DCRA in
19 to ask for this, this and this.

20 And it would be set aside, and I really
21 don't know if that kind of a que system here whereby
22 we would, you know, set it aside for several months
23 until October 23rd when we get something from the
24 director of DCRA. So I see Mr. Herron and then the
25 ANC coming in on it to push for some kind of a final

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1 conclusion from DCRA, which came on October 23rd, and
2 then the appeal to the BZA which was timely under
3 Grinstead.

4 BOARD MEMBER ZAIDAIN: I understand Ms.
5 Renshaw's point about whether or not there had been
6 enough information, but I think in this instance that
7 point is almost the termination of the argument to me,
8 because the issue that we would be hearing is on the
9 set down of the TSP overlay and when the permits were
10 issued in relation to that, at least as far as I know.

11 I mean, we have not gotten into the merits of it.

12 VICE CHAIR RENSHAW: That's when we would
13 hear it.

14 BOARD MEMBER ZAIDAIN: No, I mean, bumped
15 them up from the information we have received on the
16 merits, that issue was in April, and nothing has
17 changed on that issue. The set down date was not
18 changed. The CSP proceeded through the Zoning
19 Commission process, and that started in April. So if
20 an appeal would have been filed to us in May, for
21 example, it would have been absolutely right to hear
22 the appeal.

23 CHAIRPERSON GRIFFIS: Okay. Others?

24 VICE CHAIR RENSHAW: But it wasn't until
25 June that all of this started to -- well, until the

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1 permits were issued. And when I took a look at this
2 July 26th packet that was delivered to Mr. Herron and
3 we got in our packets this week, I was struck by the
4 fact that the subdivide for two lots, for instance, I
5 found on two pieces of paper here with a Lot 18 and a
6 Lot 19, and yet, reference to that was not in the
7 permits at all, unless someone can direct my eyes to
8 another piece of paper.

9 So you can see here as a citizen going
10 through all of this material or going down to DCRA and
11 asking for material, that you get bits and pieces and
12 you have to piece it all together. But I thought to
13 myself that there would be, in this July 26th packet,
14 something that would talk about the subdivision, other
15 than having somebody look out his window and say
16 yikes, there are two houses going up. But that DCRA,
17 for instance, did not ask for something and have to
18 put down something on paper that would notify everyone
19 through an official permit that one structure was
20 being taken down, and two structures were being put
21 up, other than two permits, one, 2900 Albemarle and
22 the other one 2902. So I just --

23 CHAIRPERSON GRIFFIS: I'm not sure if I
24 understand what your concern is.

25 VICE CHAIR RENSHAW: Well --

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1 CHAIRPERSON GRIFFIS: But let me see if I
2 can clarify, Ms. Renshaw, in terms of the 26th package
3 of information. First of all, there were drawings
4 attached to that. Secondly, if you look at page --

5 VICE CHAIR RENSHAW: And there were plans.

6 CHAIRPERSON GRIFFIS: Good. Yes. If you
7 look, there's a handwritten page in our package, page
8 13, at page 20, and I think that's probably all that
9 go to that issue for you. The clear demarkation of
10 separate lots, Lot 18 and Lot 19, if one had a concern
11 with -- I guess where you're going is the subdivision.

12 VICE CHAIR RENSHAW: Yes.

13 CHAIRPERSON GRIFFIS: They could have
14 logically been able to look at this, look at the
15 permit and look at the property as they would well
16 know the property and say or evidence that there was a
17 problem or there was an issue.

18 BOARD MEMBER ETHERLY: Mr. Chair, if I
19 may, that's why I think the step of prosecuting your
20 appeal soon after, if not on June 13th or on June 14th,
21 protects you against that very scenario. I understand
22 where my colleague, Mrs. Renshaw, is trying to go with
23 the submission, but rather than go through that
24 discourse, that rigmarole, if you will, with DCRA you
25 take the most appropriate step, which is to preserve

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1 your appeal right by filing that appeal, you come
2 before this body, and you attempt to sort it out.

3 I fully appreciate this ANC's or any ANC's
4 effort to ensure that they have all their facts
5 straight before coming before this Board or anybody.
6 I think that's a very admirable goal to aspire to.
7 But unfortunately, we don't have a section in the
8 regulations that allow you time to get your stuff
9 together before your appeal becomes right. I think
10 the absence of such a section is a very important
11 absence. You have to have some finality in order for
12 the process to continue to work.

13 Under the scenario that you're outlining,
14 Mrs. Renshaw, and at this juncture I'm very close to
15 making my motion, but under the scenario that you're
16 working under, Mrs. Renshaw, I'm just really concerned
17 that we run the risk of a process that just simply
18 doesn't work.

19 VICE CHAIR RENSHAW: But what about
20 Grinstead?

21 BOARD MEMBER ETHERLY: Because they never
22 made any point.

23 VICE CHAIR RENSHAW: What about Grinstead?

24 BOARD MEMBER ETHERLY: I'll say it very
25 precisely.

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1 VICE CHAIR RENSHAW: Speak to this.

2 BOARD MEMBER ETHERLY: Grinstead, in my
3 opinion, was wrong and I'm very happy to stand by that
4 here on the record and say that.

5 VICE CHAIR RENSHAW: All right. And I
6 feel that --

7 BOARD MEMBER ETHERLY: That's my opinion.

8 VICE CHAIR RENSHAW: -- Grinstead was very
9 much on target, and when you say you have to have
10 finality, Mr. Etherly, I think the appellants here
11 were looking for finality from DCRA and they got it
12 with that October 23rd letter. But just to remind the
13 Board that we have been reminded that DCRA never
14 furnished the original subdivision request to Herron
15 or the ANC 3F until on or about November 20th. And so
16 it's just the fact that this information, as
17 requested, came in bits and spurts.

18 And I don't see that this July 26th packet
19 was perhaps the complete packet. A lot of it was
20 duplication. I took a look at the plans. I hope you
21 noticed that the plans were mostly 2902 with maybe
22 four pages, five pages having to do with 2900, and so
23 I don't see this as complete in any way. But
24 finality, to me, is October 23rd, the bell starts
25 there, and they are before us now with a timely

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1 application.

2 CHAIRPERSON GRIFFIS: Okay.

3 VICE CHAIR RENSHAW: A timely appeal.

4 CHAIRPERSON GRIFFIS: Well, clearly, we've
5 had a substantive discussion on the milestones of when
6 information should have been known in order to file an
7 appeal. I think if anyone is so inclined, we can move
8 this along.

9 BOARD MEMBER ETHERLY: Mr. Chair, if it
10 would be appropriate, at this time, I would move that
11 we grant the motion of the appellee to dismiss the
12 appeal, because it was untimely filed, and would
13 invite a second.

14 BOARD MEMBER ZAIDAIN: I'll second.

15 CHAIRPERSON GRIFFIS: Discussion?

16 BOARD MEMBER ETHERLY: As you know, Mr.
17 Chair, I think we've had substantial discussion on
18 this matter. My concern here is two fold. One, I
19 believe that we had, in this instance, a very
20 sophisticated ANC. As we all are aware, we have a
21 number of ANCs which come before us with varying
22 levels of experience dealing with the complicated
23 morass of DCRA and other District agencies.

24 I think in this particular instance we had
25 a fairly well-established, very experienced ANC. Now,

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1 clearly, there's a substantial amount of paper in this
2 matter as it relates to key dates, as it relates to
3 documentation that both the ANC and Mr. Herron was
4 trying to chase down here. But as we've talked about
5 this issue of finality, I think the important thing to
6 keep in mind is that finality is a two way street.

7 On the one end, we're talking about what's
8 the final action of the District agency at issue here,
9 DCRA. And I think, for clarity sake and for sake of
10 maintaining a workable process, that final action has
11 to be the granting of the permit. But the appeal
12 process is essentially, I think, a very important
13 arrow in the quiver of any prospective appellant, and
14 that is that you can help spur along finality by
15 bringing an appeal in a timely fashion if you have
16 concerns about the agency action that was taken in
17 this case. That's kind of the first part of where I'm
18 coming out here.

19 The second part here is that once again
20 it's my concern that under the scenario that Ms.
21 Renshaw's position would create, you run the risk of
22 never having finality, because of the potential for
23 ongoing communication between a member of the
24 community and DCRA. And I think that in turn would
25 create the very unacceptable consequence of freezing

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1 out or chilling if it were any type of interaction
2 between District agencies going forward, and members
3 of the community, for fear that after any permit or
4 any action has been taken by the District of Columbia
5 Government, if there's an email, if there's a phone
6 call, if there's any type of written communication
7 that's undertaken between the agency and the member of
8 the community, that communication is going to begin
9 the clock again for an appellate action. And I think
10 that outcome is one that this Board needs to be very
11 sensitive to.

12 As it relates to Grinstead, once again
13 I'll say it for the record. I think Grinstead was in
14 error here. That's just the opinion of one Board
15 member. Waste management sets forward a very clear
16 rule. You have the ability to demonstrate exceptional
17 circumstances, which I don't believe we have in this
18 particular instance, and in the absence of those
19 exceptional circumstances, Larriman and other cases
20 support the waste management rule that says you have a
21 certain time under which to bring your appeal. In the
22 absence of exceptional circumstances, the clock is
23 tolled, and your appeal rights have died.

24 I think it is a very clear workable
25 standard that my motion supports, and I would

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1 encourage my colleagues to support it. Thank you.

2 CHAIRPERSON GRIFFIS: Thank you, Mr.
3 Etherly.

4 VICE CHAIR RENSHAW: Mr. Chairman?

5 CHAIRPERSON GRIFFIS: Yes?

6 VICE CHAIR RENSHAW: I cannot support this
7 motion, because, as I have stated, I feel that the
8 cutoff date is October the 23rd. I feel that Grinstead
9 holds and I am sorry that this Board is going to step
10 on that precedent, because I think that that is a huge
11 mistake.

12 We have exceptional circumstances here.
13 In my mind, the exceptional circumstances go to the
14 fact that Mr. Herron, the appellant, was trying so
15 desperately to get information and to hold back the
16 tides, so to speak, from DCRA, DCRA was continuing to
17 move forward with the developer. There has been a
18 great deal of confusion. There has been a great deal
19 of misunderstanding. And that has a lot to do with
20 the fact of how DCRA handled this case.

21 And it even went to the information given
22 to or not given to the appellant regarding his appeal
23 rights to the BAR. DCRA could have at any time have
24 put into a letter this is the final statement the DCRA
25 is making on this case, but it didn't do that. And it

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1 did that only on October 23rd, and that is when you get
2 the gleaning that that's it, from my reading of this
3 material.

4 You read other material differently. This
5 is how I read this piece of material. But that is the
6 final letter, so, therefore, the dates start there.
7 That is the pivotal date. You talked about the ANC
8 very sophisticated and very experienced. Yes, ANC 3F
9 is that. But keep in mind, as was referenced at our
10 last meeting, the ANC was looking for the plans. It
11 was also in a situation where that particular area was
12 in the confusion of redistricting and the commissioner
13 was leaving the ANC, and a commissioner was taking
14 over that particular area.

15 That was not a good time, not a settled
16 time for the ANC. We are still confused in our ANCs,
17 because there are no maps. So that is another
18 circumstance that leads into this. But I urge you all
19 to look to the Grinstead precedent and not walk over
20 it, because I think that we will be retracing our
21 footsteps if we do that. October 23rd is the date.

22 CHAIRPERSON GRIFFIS: Good. Thank you.
23 Mr. Zaidain, anything?

24 BOARD MEMBER ZAIDAIN: I really don't have
25 anything to add. I think my position was clear. I do

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1 think that this Board is, and this is more of a
2 general comment, being put in the position of where we
3 have to solicit testimony and look through the entire
4 submittal of correspondence and things just to
5 determine when the final decision of DCRA was issued,
6 and whether or not the applicant knew what was going
7 on. I think in this case it works against the
8 appellee.

9 But Ms. Renshaw actually touched on
10 something that I was thinking about as I was reviewing
11 the case, and that was it might be nice, and this is
12 like I said a general comment, if DCRA could somehow
13 put in their correspondence this is the final decision
14 with a date, so that it could significantly help this
15 Board in knowing when their internal review process is
16 final.

17 That being said, I do think in this case
18 that works. So we're put in a position where we have
19 to solicit testimony. We need to track down all the
20 correspondence to determine when that decision was
21 made and what the appellant knew, and so that kind of
22 puts us in a tough position, but it would be nice if
23 DCRA, as a policy, could help us, in that instance,
24 and help the citizens by informing them this is our
25 final decision. There's no chance of us reversing it.

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1 You need to exercise your appeal rights. And that's
2 just a general statement on the issue.

3 CHAIRPERSON GRIFFIS: I think that's an
4 excellent point. However, you run into the fact that
5 here we are asking DCRA, one, to be more open and
6 communicative so we don't run into all this
7 difficulty, and, two, then you're saying, you know, at
8 some point they have to stop communication and just
9 say in letter form. I would say that better milestone
10 is the permit. That's when DCRA signs off on
11 everything, says that this is properly approved and
12 buildable.

13 And the issue then we do have the relief
14 that says there are special circumstances whereby one
15 can bring our attention to the Board that you were not
16 aware or did not have what you needed in order to
17 understand that, your appealable rights or the
18 information to appeal. Even if we look and delve in
19 for special circumstances in this case, we would move
20 the date of deadline or milestone to the 26th of July
21 where there was ample information delivered to
22 construct an appeal before this Board.

23 What's interesting, Ms. Renshaw, you also
24 touched upon the verbiage of prophylactic appeal, and
25 Mr. Etherly touched on it in terms of insuring your

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1 right for appeal. I think they are both important to
2 look at. This is a bit of a digression, but in my
3 reading now, I'm still looking for what are the issues
4 that are under appeal. I think we tried to explore a
5 little bit in the past hearing to the motions, and I
6 think if you look at it, this may well be exactly what
7 is happening, a second recourse of trying to examine
8 all that.

9 That being said, let me just address also,
10 because it's an important point, for us to assess ANC
11 and their sophistication or nonsophistication. I
12 think Mr. Etherly's point is just specific with this,
13 and not necessarily that one would have a different
14 measuring stick for any other ANC. I think we are
15 very consistent, but I think it supports your opinion,
16 as I have heard you discuss it today, that above and
17 beyond all the information that's delivered to the ANC
18 and the correspondence that goes on, this is not an
19 ANC unfamiliar with these issues.

20 It doesn't necessarily rest on the fact
21 that an ANC that has never brought an appeal before us
22 would not have fallen, in terms of your opinion, with
23 the same reasoning.

24 VICE CHAIR RENSHAW: But this is an ANC
25 that would not come before us without full knowledge

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1 of the issues, and this is an ANC that was looking for
2 the full story and did not get it.

3 CHAIRPERSON GRIFFIS: Right. And that's
4 exactly what was stated, and I totally agree, and I
5 think they ought to be 100 percent prepared or let's
6 say 80 percent prepared in putting this together, and
7 I think this entire Board is understanding of the time
8 requirements for doing that, and the time the ANC
9 members put in. But even with that, and I think I
10 took that under great appreciation, I don't see how
11 the details and the facts weren't well-known by the
12 week after the 26th of July when they had an incredible
13 amount of, one, history of correspondence and, two,
14 now sufficient documentation to put a case together.

15 Let me hear final comments, final words,
16 and then I would like to have a vote on the motion.

17 VICE CHAIR RENSHAW: Just to remind the
18 Board that in the summer months, ANCs are not in
19 session, and so that swings it off until the fall.
20 And again, recouping after the fall you're into an
21 election season and so, hence, the confusion over ANC
22 commissioners. It is not unusual. It is not
23 surprising that this happened.

24 CHAIRPERSON GRIFFIS: Very well. Anything
25 else? Then I would ask for all those in favor of the

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1 motion, which would be to uphold the motion to
2 dismiss, based on the lack of timeliness, to indicate
3 by saying aye. Aye.

4 BOARD MEMBER ETHERLY: Aye.

5 BOARD MEMBER ZAIDAIN: Aye.

6 CHAIRPERSON GRIFFIS: And opposed?

7 VICE CHAIR RENSHAW: Opposed.

8 MR. MOY: Staff would record the vote as
9 3, 1, 0. We do have a proxy vote from Mr. Hannaham,
10 and his proxy vote is to grant the motion to dismiss
11 on timeliness, so that would put the final vote as 4,
12 1, 0. So the 4 being the Chairman, Mr. Etherly, Mr.
13 Zaidain and Mr. Hannaham, by proxy vote, and in
14 opposition to the motion would be Ms. Renshaw, the
15 Vice Chairperson.

16 CHAIRPERSON GRIFFIS: Good. Thank you
17 very much. We have one more issue for the morning
18 meeting. Board members if we can do this quickly, we
19 need to approve minutes. I'm going to start with the
20 February 4, 2003 minutes, and ask if there are any
21 comments, corrections or edits to be put into February
22 4?

23 Not seeing any error, that's approval of
24 February 4, 2003 minutes.

25 BOARD MEMBER ETHERLY: Second, Mr. Chair.

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1 CHAIRPERSON GRIFFIS: All in favor?

2 ALL: Aye.

3 CHAIRPERSON GRIFFIS: Trickling in
4 February 11, 2003, additions, corrections? All right.

5 Here we go. Let me hear opposition for exception to
6 the motion for the minutes on February 11, 2003. If
7 none stated, I'll take it in the sense to approve.
8 Let's go to the February 18, participating members are
9 all those here and Ms. Mitten with the Zoning
10 Commission.

11 Any comments or corrections from the Board
12 on these? Oh, right, I don't think we need her
13 consensus on that. That was the big blizzard of
14 February 18th.

15 BOARD MEMBER ZAIDAIN: What was it?

16 CHAIRPERSON GRIFFIS: Any opposition to
17 accepting those minutes of which we did not meet?
18 Very good. Let's move on. We'll take that as a
19 consensus to the February 25. Any comments, edits,
20 corrections?

21 There was one point I wanted just to bring
22 at issue and see if we can possibly add in. On the
23 Case #16938, the application was for Shore Prints,
24 Fall Grand Lodge. There is a brief outline of what we
25 often times list, at least witnesses, and I believe

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1 there was a Mr. Howard, who gave testimony. I think
2 it might be important.

3 VICE CHAIR RENSHAW: Did Mr. Howard give
4 testimony, do you remember for the applicant?

5 CHAIRPERSON GRIFFIS: If I recall
6 correctly, he was part of an organization that was in
7 support of the application. But I think we can look
8 into that. I just wanted to bring it to note, and see
9 if anyone else, in fact, felt strongly about that.

10 VICE CHAIR RENSHAW: Yes, I believe, we
11 had questions of Mr. Howard, didn't we?

12 CHAIRPERSON GRIFFIS: Yes, we did.

13 VICE CHAIR RENSHAW: And I think that some
14 reference to those questions should be made in the
15 minutes.

16 CHAIRPERSON GRIFFIS: Oh, okay. Well, all
17 right. What we can do is review the specific details
18 of those and see if we can appropriately and concisely
19 put them into the minutes. Okay.

20 Then let me ask for action on the February
21 25, 2003 that we would approve as noted and directed
22 for further information. Is there any concerned
23 opposition to that? Good. The consensus then is that
24 is done.

25 Thank you very much.

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I will adjourn the Special Public Meeting.

(The Special Public Meeting was adjourned
at 10:20 a.m.)