

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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SPECIAL PUBLIC MEETING

+ + + + +

TUESDAY

NOVEMBER 25, 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
CURTIS ETHERLY, JR., Vice Chairperson
RUTHANNE MILLER, Board Member
DAVID ZAIDAIN, Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

JOHN G. PARSONS, Commissioner

OFFICE OF ZONING STAFF PRESENT:

Clifford Moy, Office of Zoning
Beverley Bailey, Office of Zoning

OTHER AGENCY STAFF PRESENT:

Sherry Glazer, Office of Planning

D.C. OFFICE OF CORPORATION COUNSEL:

Lori Monroe, Esq.

<u>AGENDA ITEM</u>	<u>PAGE</u>
<u>FOREIGN MISSIONS BZA - NOTICE OF PROPOSED RULEMAKING AND DETERMINATION AND ORDER</u>	
<u>No.17051</u>	3
<u>APPEAL APPLICATION OF HENRY P. SAILER, et.al.</u>	
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<u>APPEAL APPLICATION OF ADVISORY NEIGHBORHOOD COMMISSION 2E.</u>	
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P-R-O-C-E-E-D-I-N-G-S

9:47 a.m.

CHAIR GRIFFIS: Good morning, ladies and gentlemen. Please forgive our delay this morning.

I would like to call to order the Special Public Meeting of 25 November, 2003 of the D.C. Board of Zoning Adjustment.

My name is Jeff Griffis. I am Chairperson. With me today is the Vice Chair Mr. Etherly and also Mayoral Appointment Ms. Miller. Representing the Zoning Commission on one of our decision makings this morning will be Mr. Parsons. Or perhaps two. Well, we'll see how that rolls.

And then we have representing the National Capital Planning Commission with us today, and not on the first decision, Mr. Zaidain.

Of course, from the Office of Zoning we have Ms. Bailey and Mr. Moy, who are with us today.

If we could call the first case for our decision making this morning, we'd move right into it.

We have three cases to decide this morning. Of course, the public meeting, it has no additional testimony. It's the deliberation of the Board.

For those here for the morning session of

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1 public hearings, we will get quickly to that and call
2 those hearings. And I fully anticipate that we'll get
3 everybody out of here, at the latest 12:00.

4 So with that, Ms. Bailey or Mr. Moy?

5 MR. MOY: Good morning, Mr. Chairman and
6 members of the Board. As you said, this is the
7 foreign missions portion of the BZA.

8 On September 30, 2003 the Board voted not
9 to disapprove the application and to issue a proposed
10 rulemaking. This is the application 17051 of the
11 Republic of Tajikistan pursuant to 11 DCMR ? 1002 to
12 locate a chancery in the R-5-E District at premises
13 10005 New Hampshire Avenue, Northwest (ground and
14 second floors) (Square 53, Lot 11).

15 The action before the Board is to rule or
16 adopt the notice of final rulemaking and determination
17 and order. And a copy of that is in your case folder.

18 And that completed my briefing, Mr.
19 Chairman.

20 CHAIR GRIFFIS: Thank you very much, Mr.
21 Moy.

22 I'm sorry, did you also mention we have an
23 additional submission from the ANC-2A which was
24 received on the 3rd of October as Exhibit 33, which is
25 the file and on the record?

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1 Board members, I think we can clearly go
2 through as it was a very straightforward application
3 and met all the merits, as was discussed on the dias.
4 And I would move that we adopt the final rulemaking
5 and determination and order for the Foreign Missions
6 BZA application 17051 of the Republic of Tajikistan.
7 Is there a second?

8 VICE CHAIR ETHERLY: Second, Mr. Chair.

9 CHAIR GRIFFIS: Any deliberation,
10 discussion from the Board? Not noting any, then let
11 me ask for all those in favor signify by saying "aye."

12 ALL: Aye.

13 CHAIR GRIFFIS: And opposed? Abstained.

14 Why don't we record the vote.

15 MR. MOY: The staff would record the vote
16 as 4-0-0 on the motion to adopt final rulemaking by
17 the Chair, seconded by Mr. Etherly, Ms. Miller, Mr.
18 Parsons in favor to adopt.

19 We also have a proxy from Mr. Gallagher.
20 And the proxy is to approve.

21 And that gives a final vote 5-0-0.

22 CHAIR GRIFFIS: And we can keep moving on.

23 MR. MOY: The next decision case is Appeal
24 Application 17054 of Henry P. Sailer, et.al., pursuant
25 to 11 DCMR ? 3100 and 3101, from the administrative

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1 decision of the Zoning Administrator in the issuance
2 of Building Permit No. B4485048 to Brian Logan dated
3 January 29, 2003, for the construction of a new
4 single-family detached dwelling. The Appellant
5 alleges that the Zoning Administrator erred by issuing
6 the building permit without applying the applicable
7 provisions under subsection 1567, Lot Occupancy and
8 Ground Coverage Restrictions, subsection 1568, Tree
9 Removal Restrictions, etc) of the Chain Bridge
10 Road/University Terrace Overlay (CBUT). The CBUT/R-1-
11 A zoned subject premises are located at 3101 Chain
12 Bridge Road, N.W. (Square 1427, Lot 870).

13 If the Board will recall, on November 18,
14 2003 the board rescheduled its decision to November
15 25th. So this is before the Board to act on the issue
16 of timelessness, staff reminds the Board that if the
17 appeal is dismissed, the public hearing on the merits
18 of the appeal will be scheduled for January 27, 2003
19 in the afternoon session.

20 That completes my briefing, Mr. Chairman.

21 CHAIR GRIFFIS: Thank you, Mr. Moy.

22 I think the best way to start the
23 discussion on timeliness, of course, is to look at the
24 rulemaking order 0201. And just to refresh the Board,
25 it starts, of course, in section A "Is the appeal

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1 shall be filed within 60 days from the date of the
2 person appealing an administrative decision which had
3 notice or knowledge of a decision complained of, or
4 reasonably should have had notice or knowledge of the
5 decision complained of, whichever is earlier."

6 Having that framed at the beginning of the
7 discussion and deliberation on the motion for
8 timeliness, I think we have extensive amount of
9 information in terms of dates attendant to this
10 project.

11 First of all, 29 January or 0B448548, the
12 original base permit was issued. We do have the
13 filing of appeals in July, and then we have subsequent
14 actions and milestones as we go through.

15 I think it would be appropriate to talk
16 about the original permit to begin with as we go
17 through, and then Board members can, of course, add
18 other dates, times, milestones that might be
19 pertinent.

20 And so I will open up the discussion to
21 the Board as people see fit.

22 BOARD MEMBER MILLER: Mr. Chairman?

23 CHAIR GRIFFIS: Ms. Miller?

24 BOARD MEMBER MILLER: I'd be happy to
25 start the discussion here.

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1 I think we start with the decision that's
2 being appealed, and in this case the appeal is of the
3 January 29, 2003 permit. And as you stated, the
4 appeal was filed July 2, 2003, which was five months
5 later.

6 So I think we look at January 29, 2003 as
7 the starting date and I don't think we can assume that
8 the appellants knew that the permit was issued the
9 date that it was issued. So then I think we've got a
10 lot of facts in this record. One pertinent fact, I
11 think, is February 8, 2003 was the date of demolition
12 on the property. And this Board and the Zoning
13 Commission and the courts have recognized construction
14 or demolition as notice to start the time for the date
15 for which an appeal could start to run. But then
16 again, then later we have two days later there was a
17 stop work order. And I think that raises a question
18 as to whether the appellants should have -- the time
19 should continue to run for them to be on notice about
20 this appeal during the stop work order.

21 So, as I was looking through the facts in
22 this case, I came to March 24th, which was the date
23 that the stop work order was rescinded. And we have
24 evidence in the record that construction began at
25 least within the next week. But I think that what's

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1 pertinent is there are a lot of dates in March where
2 it seems like the parties had notice at least of the
3 original building permit and the issues that are
4 raised in that permit.

5 During the hearing I asked Mr. Sailer if
6 he knew that there was construction in March. And he
7 said yes, but we asked about it. That was on page 164
8 of the transcript.

9 Mr. Paul, who represented DCRA, said that
10 Arthur Levy who was also a Plaintiff in this case,
11 contacted him late in March about the original permit.

12 And Mr. Sailer also said that he knew as early as
13 March 24th about the stop work order and problems with
14 that.

15 I think also pertinent in March was an
16 article in the *Palisades* newspaper which specifically
17 alluded to permits being mistakenly issued.

18 So I think that the parties in this case
19 were on notice in March that there were problems with
20 the original permit. But I don't think that goes to
21 the whole appeal in this case. There are later
22 permits that were issued; the May 20th pool permit and
23 the June 13th revised permit which they obviously
24 couldn't have been aware of before May.

25 So anyway, that's what I'd like to throw

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1 out to start.

2 CHAIR GRIFFIS: Okay. And so what I
3 understand you're saying, first of all, there was Mr.
4 Levy, you mentioned a name which actually is a
5 participant in the appeal that's before us. And
6 therefore, there was evidence in the record that there
7 was knowledge if not before, certainly in March.

8 And you've had quite a bit of discussion
9 on this stop work order. And let me see if I
10 understand you correctly. It's not the action of the
11 stop work order that sets the tolling of the time or
12 stops the clock, however you want to put it, but
13 rather that not only did we see in February 8, '03
14 demolition on the property, but your point is when the
15 stop work order was issued, there probably wasn't
16 activity but then it started up again, and that was in
17 March?

18 BOARD MEMBER MILLER: Right. I wouldn't
19 be prepared right now to say whether or not the time
20 was tolled during the stop work order, because I don't
21 think we have to reach that issue. Because I think in
22 March we have substantial evidence to show that the
23 parties knew about the building permit separate from
24 the stop work order issue.

25 CHAIR GRIFFIS: And you wouldn't tie it

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1 all the way back to 8 February where actual machinery
2 and construction -- or rather demolition of the
3 existing building was begun?

4 BOARD MEMBER MILLER: Well, I would put
5 them on notice at that point. But then there's the
6 issue of whether the time should stop running or not.

7 And I'm suggesting that we don't need to reach that
8 issue because if we decide that in March there was
9 sufficient information for them to bring their appeal,
10 60 days later brings them to before the date that they
11 even filed their notice of intent to appeal.

12 CHAIR GRIFFIS: But I think we ought to be
13 clear, because the regulations don't say when you have
14 sufficient information to bring an appeal. It
15 actually and very directly states is when you
16 originally should have known. So it's not when all
17 your documents are in order and everyone's lined up
18 and you're ready to roll. But rather when you
19 reasonably should have had notice.

20 BOARD MEMBER MILLER: I concur with that.

21 CHAIR GRIFFIS: Okay.

22 BOARD MEMBER MILLER: And I think there's
23 a variety of information in the record that shows that
24 they either knew or should have known in March.

25 CHAIR GRIFFIS: March. Okay.

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1 Mr. Parsons?

2 BOARD MEMBER PARSONS: I have a different
3 view on that, so I appreciate the opportunity to speak
4 now.

5 The Zoning Commission when they adopted
6 these regulations and this specific regulation about
7 knowledge of the decision complained of or should have
8 reasonably known did not anticipate obstructionist
9 behavior on the part of the District of Columbia. And
10 this case I am absolutely persuaded from the initial
11 contacts made with DCRA, they have stonewalled the
12 citizens of this community to the point that they did
13 not know what was going on.

14 Now, to say that on March 21th the stop
15 work order was lifted and that construction started
16 again on March 24th, which it did apparently, and to
17 say the citizens then should have realized the stop
18 work order was released, they tried to gather whether
19 it was released or not and could not get an answer to
20 that until June.

21 And my presumption would have been the man
22 is acting illegally. He's under a stop work order and
23 he's decided to proceed unless DCRA had been
24 forthcoming and told them that the work order had been
25 lifted. And knowledge of that construction is

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1 certainly there, that the individual was proceeding
2 with construction. But that doesn't mean that they
3 had any help from the DCRA as to tell them what the
4 circumstance was. And that's why I disagree with the
5 newspaper accounts and that kind of thing as notice.

6 I'll just summarize by saying it was the
7 intent of the Zoning Commission, and should be the
8 intent of the Zoning Commission and I think the BZA to
9 say if we discover that the District of Columbia is
10 not cooperating in letting the citizens know what's
11 going on in their community, then they don't have
12 reasonable notice. They see things, but they don't
13 have evidence of what's going on in a regulatory
14 sense.

15 So, I simply believe that we should return
16 back to January 29th and grant the appeal.

17 BOARD MEMBER MILLER: Mr. Parsons, I think
18 your points are well taken. I just don't reach the
19 same conclusion when I look to the regulation which
20 says that that action should have substantially
21 impaired the Appellant's ability to file an appeal. I
22 just conclude that they had enough information to file
23 the appeal.

24 CHAIR GRIFFIS: And I think evidence in
25 the record speaks of that directly. Part of the

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1 testimony that we heard was from the representative of
2 the Chain Bridge Road that was having community
3 meetings or at least was an organization that was
4 tracking this. And we asked for them to put in their
5 meeting agenda. And their first meeting agenda that
6 they submitted is from 10 March, '03. And the third
7 agenda item on it reads: "Chair's report, 3101 Chain
8 Bridge Road violation February 8th."

9 BOARD MEMBER PARSONS: Well, the violation
10 they're talking about is what they think is being
11 violated and is the tree ordinance. I mean, that's
12 what the whole community is talking about up until
13 June when they finally have enough evidence to realize
14 that that appeal was necessary to stop this or attempt
15 to stop it.

16 CHAIR GRIFFIS: I understand that point.
17 I don't know if it was just limited for all those
18 involved to the tree violation. Certainly that was the
19 initial impact. But actually if we go far enough back
20 to trace that one -- well, in any case I think --

21 BOARD MEMBER PARSONS: Well, here's a
22 community that has finally gotten a tree overlap and
23 slope ordinance in their community and that's the
24 subject of the concern. Here this ordinance is now
25 being violated; what can we do to stop it? He's

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1 cutting trees down, whatever is going on. Not the
2 particulars of when they should do this or that and
3 the other and they're being stonewalled by DCRA.'And
4 as you well know, it's so easy to review the case and
5 lay it out over a six month period of time in a
6 hearing format, as we have. And I'm trying to get to
7 the issue of equity here.

8 CHAIR GRIFFIS: Right.

9 BOARD MEMBER PARSONS: And the clear line
10 of the law takes me away from pinning these citizens
11 down and saying you should have known and let's go
12 back and hear this case and get to the bottom of it.

13 CHAIR GRIFFIS: I think that's an
14 excellent point. And I think the struggle with motions
15 of this nature is that we don't get into the merits or
16 start to decide the merits of it, but rather do and
17 are somewhat -- or are very restrained with the
18 regulations that are set forth for us in determining
19 the motions and whether to uphold or dismiss them.

20 Ms. Miller?

21 BOARD MEMBER MILLER: Yes. I also want to
22 add the point that we're dealing here with a statute
23 of limitations and it's jurisdictional and mandatory
24 and it doesn't give us quite as much leeway as we
25 might want. And if we find that there was substantial

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1 evidence in the record that they knew enough to file
2 their appeal by a certain date, then we can't extend
3 it unless we find that they were impaired from doing
4 so.

5 VICE CHAIR ETHERLY: If I could, Mr.
6 Chairman, perhaps as a bridge between Mr. Parsons'
7 position and the comments of my colleague, Mrs.
8 Miller?

9 I'm interested in my colleagues' answer to
10 the question of was there enough in the January 29th
11 building permit to set forward this entire project?
12 Part of what I think is Mr. Parsons is perhaps hitting
13 at is that not only the exceptional circumstances
14 piece, but was there enough in the January 29th
15 building permit to, shall we say, take this out of the
16 system error or the system perspective, which is the
17 permits were done in a piecemeal basis such that the
18 Appellants here did not have an opportunity to, shall
19 we say, understand the full impact or full scope of
20 the project being contemplated until the final permit
21 was issued at some point.

22 CHAIR GRIFFIS: I'd be happy to take that
23 one up.

24 I don't think there's any correlation or
25 comparison existing in this case. Certainly it was

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1 brought up in terms of, as you indicated, and it was
2 part of the court's ruling in terms of the
3 piecemealing, and I think it was the Board's also
4 deliberation. There was no piecemealing here.

5 There was a base building permit on 29
6 January 03B448548 that had the full scope of the
7 project attendant to the proposed development. There
8 was not portions of the primary structure that were
9 not part of the base building that then came under a
10 totally independent and separate permit.

11 To pull a separate permit for sheeting and
12 shoring or foundation work is perfectly appropriate
13 and is often an industry standard. And we have found,
14 actually this Board that I don't know if it's a full
15 precedent, can recall a case where we found that the
16 foundation permit had nothing to appeal before this
17 Board because it had no zoning issues attendant to it.

18 Meaning, it didn't come out of the ground, therefore
19 how did it impact the zoning.

20 There are, and I think what you're going
21 to -- oh, and we have the tree removal permits. And,
22 of course, those are also something that can be done
23 separately and in fact have a different process.

24 I think we do have attendant to the 29
25 January, '03 base building permit a revision. And a

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1 revision, of course, is also another standard
2 procedure in construction. As areas of a construction
3 project need to be revised, then they make revisions
4 on drawings and go through the permitting process for
5 that revised scope. And that, of course, was done 13
6 June, '03 I believe the date was when that was issued.

7 There's a separate stand alone permit,
8 which was the pool permit which was dated, I believe,
9 20 May, '03 which was testified in the hearing that is
10 also to be submitted independently and separately.
11 And there is a specific review for that more on
12 mechanical, electric, plumbing that would be attendant
13 to it.

14 So, I think the two answers to the
15 excellent point that you brought up, Mr. Etherly, and
16 that is is there a comparison to ** in terms of
17 piecemealing so that the entire scope of this project
18 could not have been known. And I would say
19 definitively that that is not the case in this appeal.

20 Now, I believe I've also heard the Board
21 say or there seems to be an argument being made that
22 is fairly strong that the 29 Jan, '03 full scope of
23 the base building permit is not timely based on the
24 filing of the appeal of 2 July, '03. And I think what
25 we need to now discuss are the other milestones to

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1 flush out the Board's perspective on all of those; and
2 that is perhaps a separate permit for the pool, but
3 also the 13 June, '03 revision to the existing base
4 building.

5 Mr. Zaidain?

6 BOARD MEMBER ZAIDAIN: Well, actually
7 where more of my thinking becomes a little bit clearer
8 on this issue.

9 I'm very sympathetic to actually Ms.
10 Miller and Mr. Parsons' arguments. It's very touch
11 when we deal with these timeliness issue in regards to
12 the permits because we have to get into who knew what
13 when. And I think Mr. Parsons mentioned equity, and
14 that's what we're trying to do here is balance the
15 interests of the developer with the community.

16 And I think where I come in is what this
17 Board has done before in these situations in a sense.

18 Building permit issued, an extraordinary amount of
19 time has elapsed between the issuance of that permit
20 and the appeal that's been filed. Clearly we're
21 outside of this 60 day window when it comes to the
22 January 29th permit.

23 I think what's still valid to me is,
24 first, the revision which was issued on June 13th. We
25 felt in the past that anytime there's been a revision,

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1 an appeal period is open to appealing that revision or
2 that revised permits for only those issues contains
3 therein. It doesn't give somebody a rebite at the
4 apple or another bite the apple. So I think that the
5 issues for which the revised permit, which was again
6 issued on June 13th, I think those are ripe for
7 appeal.

8 Now one thing that I'm struggling with is
9 the in ground swimming pool permit issued on May 20th.

10 You know, that permit was technically cited in the
11 appeal, however issues have been raised by the
12 Appellants that deal with that pool. I think it's a
13 side yard issue, if I remember correctly.

14 I am not of the view that we need to take
15 this technical approach and say well that permit was
16 not cited on the appeal even though you raised issues
17 pertaining to that in your application. I think that
18 the appeal because it does raise issues dealing with
19 the pool permit is timely on that issue. Because the
20 permit was issued May 20th, the appeal was filed July
21 2nd I believe, and they are raising issues that deal
22 with that permit. So I am of the opinion that the May
23 29th permit is eligible for appeal.

24 CHAIR GRIFFIS: Okay. So if I follow you,
25 Mr. Zaidain, you're finding that there are no

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1 exceptional circumstances that take the 29 January
2 permit to make it -- there are no exceptional
3 circumstances that we could see to make the entire
4 base building permit timely for this appeal. However,
5 with the revision to the base building in June and the
6 appeal filed of the base building permit in July, that
7 clearly the scope of change of the base building
8 permit is timely. Is that correct?

9 BOARD MEMBER ZAIDAIN: Well, if I
10 understand what you're saying, you're saying it is my
11 opinion that I do not find extraordinary circumstances
12 to withhold the whole entire base building permit?

13 CHAIR GRIFFIS: Right.

14 BOARD MEMBER ZAIDAIN: You know, I
15 reluctantly say no I do not see any extraordinary
16 circumstances. I mean, this is a touch issue that we
17 have to deal with. I mean, I wish there were a cleaner
18 way. Maybe, you know, extending the time frame from
19 when a permit is issued that the Zoning Commissioner
20 could look into my help to coincidence with when
21 ground must be broken after a permit is given so that
22 there's a clear window of when a permit is issued and
23 when a community will know that something is being
24 done in a property.

25 CHAIR GRIFFIS: That's an interesting

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1 point. What you're saying is the timeliness should not
2 just be 60 day from you knew or should have known, but
3 rather there's a time period of which makes a timely
4 appeal based on two dates. And that is, the issuance
5 of the permit and then a required construction start
6 time based on that issuance of the permit. Then it
7 would move from those two dates somehow defined not
8 putting a time to it?

9 BOARD MEMBER ZAIDAIN: I'm not trying to
10 rewrite the zoning regulations while I'm up here. But
11 if you think about we hear a lot of testimony on when
12 communities will know about a permit issued.

13 CHAIR GRIFFIS: Right.

14 BOARD MEMBER ZAIDAIN: And that's always a
15 gray area.

16 CHAIR GRIFFIS: Right.

17 BOARD MEMBER ZAIDAIN: Some people know,
18 some people don't. But if you think about when a
19 permit is issued and then it's my understanding
20 there's an amount of time that one must have to begin
21 constructing project before the project expires.

22 CHAIR GRIFFIS: Right.

23 BOARD MEMBER ZAIDAIN: So it seems to me
24 that within the time ground is going to be broken. So
25 once that project starts, once ground is broken and

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1 foundation being is poured whatever, you would
2 logically conclude that somebody knows something is
3 going on. And it seems to me that that would be
4 appropriate time frame for when an appeal could be
5 filed.

6 CHAIR GRIFFIS: Understood. And that
7 actually goes directly to this in terms of the 8
8 February, '03 in terms of establishing the time as to
9 the base building. But let me see if I'm
10 understanding you then.

11 You're holding a position that 13 June,
12 '03 the revision to the base building permit is
13 timely?

14 BOARD MEMBER ZAIDAIN: Right. Definitely.

15 CHAIR GRIFFIS: And so if I understand you
16 correctly, that you would make a motion perhaps of
17 dealing with this motion for timeliness?

18 BOARD MEMBER ZAIDAIN: Well, I'd like to
19 hear what the rest of the Board thoughts are in
20 regards to the May 20th permit. I believe it should
21 be heard. And, like I said, I'd like to hear what
22 everybody thinks about that. But I think clearly the
23 pool is an issue. It was raised in the Appellant's
24 pre-hearing statement. So obviously they're trying to
25 include this as part of the appeal, however it's

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1 technically sided.

2 CHAIR GRIFFIS: I think we ought to have
3 it under a motion. If I understand you correctly, Mr.
4 Zaidain, a motion might be framed to deny in part and
5 to uphold in part the motion of timeliness.

6 BOARD MEMBER ZAIDAIN: You could frame a
7 motion that way, yes.

8 CHAIR GRIFFIS: Okay. Would you like to
9 entertain that?

10 BOARD MEMBER ZAIDAIN: Not without some
11 more discussion.

12 CHAIR GRIFFIS: Okay. Discussion on
13 whether in fact the 30 May, '03 would be timely, Board
14 Members?

15 VICE CHAIR ETHERLY: Well, if I could, Mr.
16 Chair, I appreciate this --

17 CHAIR GRIFFIS: I'm sorry. It should be 20
18 May.

19 VICE CHAIR ETHERLY: I appreciate the
20 desire to kind of clarify our discussion by the
21 motion. But let me recap a little bit just to be sure
22 I understand where we are.

23 And I think I'm in agreement with where we
24 are, but I still want to be sure I satisfactorily, for
25 my own self, put to bed Mr. Parsons' comments and

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1 where Ms. Miller was.

2 With respect to the base rule, of course,
3 60 days from the date of the administrative decision
4 where you had notice or knowledge of the decision
5 complained of, I think we're all in agreement that
6 there was no notice of the January 29th building
7 permit. There was no actual notice, let me start with
8 that, or I should say had notice or knowledge of the--

9 BOARD MEMBER ZAIDAIN: What do you mean
10 actual notice?

11 VICE CHAIR ETHERLY: Now wait, let me
12 finish. Had notice or knowledge of the decision
13 complained of. The earliest that there could have
14 been notice would be, I think we're in agreement, the
15 January 29th permit issuance. And I don't think I
16 hear anyone saying that there is notice of that permit
17 issuance.

18 CHAIR GRIFFIS: Well, I think what you're
19 going to hear is that there is not total agreement on
20 when the time started running?

21 VICE CHAIR ETHERLY: Right. That's the
22 question.

23 CHAIR GRIFFIS: You know, I think Ms.
24 Miller was of the opinion that, if I understood her
25 correctly, that it was February 8th.

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1 VICE CHAIR ETHERLY: Yes.

2 CHAIR GRIFFIS: I'm not sure if I entirely
3 agree with that, but I think that's --

4 VICE CHAIR ETHERLY: Right. And I might
5 even say Ms. Miller was going a little further in
6 saying it may be March.

7 CHAIR GRIFFIS: Right.

8 VICE CHAIR ETHERLY: But all I'm doing is
9 just kind of trying to make sure I understand the
10 methodology and the thinking here.

11 CHAIR GRIFFIS: All right.

12 VICE CHAIR ETHERLY: It sounds like
13 January 29th we're all fairly in agreement that that's
14 not the start date.

15 Then you get into the issue of --

16 BOARD MEMBER ZAIDAIN: I don't know
17 whether it's consensus.

18 VICE CHAIR ETHERLY: Okay. Okay. Well
19 let kind of say where I'm at.

20 CHAIR GRIFFIS: Right.

21 VICE CHAIR ETHERLY: All right. In terms
22 of my thinking I think it perhaps is probably in my
23 mind safe to say that that's not the start date. I
24 typically tend to like bright line rule approaches and
25 would be desirous of at some point perhaps seeing the

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1 actual issuance of the permit being the trigger for
2 the clock. But I won't go there just yet in this
3 particular instance.

4 If you then move to one of your next
5 milestone dates, February the 8th, which would be the
6 demolition of the existing structural property, i.e.,
7 you have construction, you have ground being turned
8 over, you have all kind of stuff happening; that to me
9 I think definitely gets you into the reasonably should
10 have had notice or knowledge of the decision
11 complained of at the earliest. And I think Ms. Miller
12 is perhaps suggesting that the stop work order may
13 have had some impact there, but I don't think we have
14 to go there.

15 So, if it's either February or March, you
16 know, I'm fine. I think either way. I'm leaning
17 towards February.

18 Now, if you then however come to Mr.
19 Parsons' point, which is but wait a minute we have
20 some exceptional circumstances here part of which may
21 be the conduct of DCRA in some instances or perhaps
22 the piecemeal permit approach which we had some
23 discussion from the Chair regarding the distinction
24 between the circumstances here in the Sisson case. I
25 think I'm inclined to agree with Mr. Zaidain's

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1 position and perhaps where Ms. Miller is with respect
2 to the base permit appeal. But I am still struggling
3 with Mr. Parsons' position with respect to, shall we
4 say, the DCRA role and the ability of the Appellant's
5 to adequately understand what has taken place here.

6 In particular there, of course, is a great
7 deal of back and forth. There's a FOIA request which
8 we have from May 13th. There are several attempts to
9 review the file at DCRA, which apparently went
10 unsuccessfully during April into early May time frame.

11 And I'm perhaps interested in just a little bit of
12 discussion, perhaps from Ms. Miller on her thinking
13 about that time period as to whether or not that
14 speaks to any exceptional circumstances.

15 I'm kind of inclined to think that it may
16 be a stretch, Mr. Parsons, but I'm just interested in
17 hearing a little more discussion perhaps on the
18 thinking about DCRA's role in this.

19 BOARD MEMBER MILLER: I certainly don't
20 condone DCRA's inaction in this case. But I don't
21 think that their inaction rises to the level of
22 impairing the community's ability to bring forth the
23 appeal. They were very aware of certainly the tree
24 violations and the building permit because they were
25 interacting with DCRA at that time. I believe they

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1 were the ones that asked for the stop work order,
2 which showed that they were aware of the problems.

3 I don't think that we can hold that the
4 statute of limitations has tolled until DCRA issues a
5 decision. Because even in this case we asked DCRA for
6 submissions and they failed to provide submissions to
7 us. So, I mean, I think that the city could come to a
8 halt waiting for DCRA to act.

9 CHAIR GRIFFIS: Well, I think there's
10 another important to look at that in terms of if we're
11 looking at establishing the timeliness for appeals of
12 when all the documents you want are served to you.
13 You know, the clock would never stop. Everything
14 would always be timely because you probably wouldn't
15 always have exactly what you needed or found what you
16 needed, or asked for the right thing. That just seems
17 to be too undefined.

18 I agree, though, I mean it is frustrating
19 and we've run into this a lot whether proper documents
20 are being shown or not.

21 VICE CHAIR ETHERLY: And I know Mr.
22 Parsons wants to get in here, but just to kind of put
23 a pin in my thinking; I think that's now where I'm
24 struggling, Mr. Parsons. I think Ms. Miller's point
25 and the Chair's point about if you want to appeal this

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1 thing, then do it in February. Okay. Fine if you
2 don't have the full picture. But preserve that right
3 and get in there in February or at the latest March
4 and don't even, shall we say, allow the rigmarole with
5 DCRA to jeopardize your right to an appeal. So that's
6 kind of what I'm struggling with.

7 You don't get to the rigmarole with DCRA
8 until really into April and May. So why not go in in
9 February, preserve that right, get it on paper and
10 then move forward.

11 BOARD MEMBER PARSONS: Well, a couple of
12 thoughts here. I presumed from what the citizens were
13 telling us is that they believed that the ordinance
14 that they were dealing with, that the tree and slope
15 overlay, had a provision in it that said that if you
16 cut trees down improperly and a stop work order was
17 issued, you couldn't build on that property for 7
18 years. And they were relying on that as an ordinance
19 that overlaid their community.

20 And to presume at this point that they
21 knew what they should be appealing. They just knew
22 that somebody had cut trees down and they didn't feel
23 it was proper. So to say that they should have done
24 something at that point, they did something at that
25 point. And then when they began to inquire on February

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1 -- excuse me. Get my dates mixed up here if I'm not
2 careful. In March that he started construction again
3 and was stonewalled from that point forward by DCRA as
4 to what they had done or hadn't done, or where the
5 plans were and so forth.

6 So for a period of three months while
7 construction is proceeding, I'm presuming they
8 presumed that he was behaving at his own risk under a
9 stop order that existed. No permit was posted on the
10 properties, as was testified to.

11 And my concern is that we're rewarding
12 obstructionist behavior. And if DCRA feels this is the
13 way they can do business and keep it from the citizens
14 so they aren't able to appeal within 60 days, then we
15 are down a real slippery slope.

16 BOARD MEMBER MILLER: I just want to just
17 address Mr. Etherly and Mr. Parsons' comments just for
18 the record.

19 I'm not finding that February that they
20 knew everything they should have known or that was the
21 time. I was just going through the different time
22 elements here.

23 I've found that by March that they had
24 sufficient information to make an appeal, that they
25 didn't need the information from DCRA. And I think the

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1 newspaper article in the *Palisades* newspaper is
2 telling where it specifically says they're aware of
3 violations. And I think that's significant.

4 Okay. At this point I would like to make
5 a motion to grant in part and deny in part
6 intervenor's motion to dismiss the appeal on grounds
7 of timeliness.

8 I would move that the issues raised by the
9 building permit of January 29, 2003 are untimely, but
10 the building permit of May 20th and June 13th 2003 are
11 timely.

12 VICE CHAIR ETHERLY: I would second that.

13 CHAIR GRIFFIS: Thank you.

14 Speaking to the motion? Any addition,
15 deliberation?

16 VICE CHAIR ETHERLY: I'll just note in
17 terms of additional brief discussion, Mr. Chair, that
18 I think the -- let me just speak in terms of my
19 interpretation of what I think the Zoning Commission
20 was trying to get at. But this is just my opinion, of
21 course. We have representations. I'll of course hear
22 Mr. Parsons. But my thinking is that the important
23 issue here is a global one as to process, and I think
24 you alluded to it earlier, Mr. Chair, and that is the
25 need to ensure that the process keeps moving. That

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1 there is clarity on both sides of the fence, but as it
2 relates to the efforts to develop or deal with
3 properties here in the District of Columbia and as
4 well the ability of the citizenry to respond to
5 concerns or problems that are raised by development in
6 any of our communities.

7 I think the important piece is trying to
8 give some specificity around what the start point is.
9 And I think, of course, the Zoning Commission really
10 struggled with language that was going to do that.

11 I think here my message is that as soon as
12 you think you have something to worry about, get in
13 the door.

14 I believe the Zoning Commission's attempts
15 to provide for exceptional circumstances was very well
16 placed because clearly there are going to be instances
17 where the circumstances are going to rise to such an
18 egregious level that you just have to deal with them
19 and the impact on the citizenry's ability to appeal or
20 adequately determine what's at issue. But I don't
21 think getting in the door with your appeal requires,
22 shall we say, crystal clear specificity. I think we
23 have the ability as an appellate body once an appeal
24 has been filed if there is the need for additional
25 issues to be raised, I think we have the ability here

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1 in this body to deal with that eventually. And that
2 is, shall we say, the contingency that speaks to okay
3 well if the citizenry doesn't come through the door
4 with a full understanding of what's at issue, is there
5 an opportunity to get all that at the table. And I
6 think we can deal with. But I think the important
7 thing is trying to create some specificity around when
8 you need to get in the door and deal with an issue or
9 deal with your concerns.

10 And I think here this start date, either
11 February or March, I think somewhere in that time
12 frame we definitely are in the reasonably should have
13 known category. And I think the motion that's been
14 offered by Ms. Miller is a workable middle ground
15 here. Clearly it is, perhaps, a regrettable one in
16 terms of a number of the issues that in the minds of
17 the Appellants were raised by the January 29th permit,
18 but I think it speaks to that need to find a point at
19 which a project can move forward and at the same time,
20 the ability to file an appeal is, shall we say,
21 clarified.

22 So that is why I second motion. I just
23 simply believe that the February/March time frame
24 should have been it, and that comes before we really
25 get into, shall we say, the heart of some of the

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1 concerns that have been raised by Mr. Parsons with the
2 DCRA issue.

3 Thank you, Mr. Chair. And thank you, Ms.
4 Miller, for the motion.

5 CHAIR GRIFFIS: Others?

6 BOARD MEMBER PARSONS: Well, I just ask
7 you to consider what you feel -- not to continue the
8 debate. But I think this is -- what did the Zoning
9 Commission, what do these regulations anticipate with
10 the word "exceptional circumstances." And to me this
11 particular case rises to that, beyond the control of
12 the Appellant. I mean, they just had no way to get the
13 facts. And how can you structure an appeal if you
14 don't have the facts?

15 CHAIR GRIFFIS: Good. Thank you, Mr.
16 Parsons.

17 Perhaps the last word on this. I think
18 the motion is well stated with regards to this. I
19 think there was substantial amount of information that
20 they knew or should have known that would not make the
21 29 the full scope of the base building permit timely
22 before us. However, it has been found by this Board,
23 and in fact it's been upheld in the courts and I think
24 would be part BZA to set it strongly that revisions to
25 a base building permit are under a scope of which

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1 could be looked at, and therefore the time would start
2 when those revisions were made. So what I understand
3 that Board is saying three revisions to the original
4 permit were timely, and obviously that's the motion.

5 And it is very clear that the appeal, if
6 this motion passes, would be framed, would be defined
7 and limited to that information that would be evident
8 in the change from the base building and the
9 revisions.

10 The second point in the motion that I
11 understand of the 20 May, '03 of the pool permit, I
12 think I gleaned some of the information from the Board
13 in their discussion of that as saying how would --
14 there is an exceptional situation attendant to that.
15 And that is that how would someone have noticed that
16 that was a separate permit and not assume or run with
17 in their filing of the application. And here we're
18 asking them, you just got to take the step and file
19 whether you have all your information or not. But
20 what I'm understanding the Board to say is that
21 they've probably made an assumption that the
22 construction of the pool was attendant to the base
23 permit that was issued on 29, and as it was issued in
24 May the Board is finding it appropriate and timely.

25 Is that correct, Ms. Miller?

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1 BOARD MEMBER MILLER: I'm sorry, I was
2 thinking about another point. About something you
3 said about the revisions only dealing -- I'm sorry.
4 We can get back to your point.

5 CHAIR GRIFFIS: Okay.

6 BOARD MEMBER MILLER: You've called on me.

7 The revisions to the permit, what's at
8 issue when you're looking at the revised permits. And
9 I think that I would tend to say, and in my mind I'm
10 contemplating that it's not just what's changed but
11 what may be encompassed by the new permits. And I
12 raise that now, maybe so that we have this in
13 background. But --

14 CHAIR GRIFFIS: Is there a difference?

15 BOARD MEMBER MILLER: Well, I think so.
16 Because one of the issues that's raised in the
17 Appellant's prehearing statement is that all of the
18 building permits should have been reviewed for
19 compliance with the CBUT tree removal restrictions.
20 And I would tend to say that even though those issues
21 may have been encompassed by the original permit of
22 January 29, 2003, they are still encompassed in the
23 May 20th and June 13th permits. And we may be getting
24 to this prematurely, but --

25 CHAIR GRIFFIS: Yes.

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1 BOARD MEMBER MILLER: Okay. You made that
2 statement, though, that revisions.

3 CHAIR GRIFFIS: Indeed.

4 BOARD MEMBER MILLER: And I just wanted to
5 let you know that it may also be what's encompassed.
6 It could have been encompassed in the other permit as
7 well.

8 CHAIR GRIFFIS: Forecasting more exciting
9 arguments. Very well.

10 Further discussion, deliberations on the
11 motion?

12 The motion before us has been seconded.
13 I would ask then that all those in favor signify by
14 saying aye.

15 ALL: Aye.

16 CHAIR GRIFFIS: And opposed.

17 BOARD MEMBER PARSONS: No.

18 CHAIR GRIFFIS: Abstain? Very well.

19 MR. MOY: The staff would record vote as
20 4-1-0 to grant in part, deny in part the appeal on
21 timeliness January 29, 2003 as untimely. The May 20
22 and June 13 permits as timely. On the motion of Ms.
23 Miller, seconded by Mr. Etherly. Also in favor Mr.
24 Zaidain and the Chairman. Opposed Mr. Parsons.

25 CHAIR GRIFFIS: Thank you very much, Mr.

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1 Moy.

2 So with the passage of that motion, we
3 will see this appeal and its scope based on the
4 revision permit on 27 January of '03, is that correct?

5 MR. MOY: Yes, sir.

6 CHAIR GRIFFIS: An where is that on the
7 schedule?

8 MR. MOY: In the afternoon. The first case
9 in the afternoon.

10 CHAIR GRIFFIS: Okay. First case in the
11 afternoon.

12 MR. MOY: January 27th.

13 CHAIR GRIFFIS: Excellent. Thank you very
14 much.

15 I think we're ready the next one then.

16 MR. MOY: The next case is appeal
17 application 17034 of the Advisory Neighborhood
18 Commission 2E, pursuant to 11 DCMR ? 3100 and 3101,
19 from the administrative decision of the Zoning
20 Administrator in the issuance of a final and bidding
21 ruling letter dated July 12, 2001, to the law firm of
22 Shaw Pittman confirming the ability to develop three
23 lots on the east side of the 1500 block of 32nd
24 Street, N.W. with three row dwellings. Appellant
25 alleges that the Zoning Administrator's decision is

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1 flawed and contains factual and legal errors. The R-3
2 zoned subject premises are located in the 1500 block
3 of 32nd Street, N.W. (east side) (Square 1270, Lots 19,
4 20 and 21).

5 On November 18, 2003 the Board completed
6 testimony on the appeal application and scheduled its
7 decision for November 25th. The Board requested the
8 following post-hearing documents.

9 First, there's a plat showing the lot
10 improvements in 1957, and this document was submitted
11 by ANC-2E on November 20, 2003. And that's in your
12 case folders under Exhibit 23.

13 A plat identifying a law check of April
14 1957 and the written testimony that was provided by
15 Mr. ARmando Lourenco at the public hearing on November
16 18, 2003 was submitted by the Intervenor represented
17 by Shaw Pittman representing owners of Lot 19 and Lot
18 20. And that's in your case folder as Exhibit 20, 22.

19 And that completes my briefing, Mr.
20 Chairman.

21 CHAIR GRIFFIS: Thank you, Mr. Moy.

22 Very well. I think it may be expeditious
23 to run through this on the five points that were
24 brought in this appeal, as indicated that the
25 Appellant was claiming that the lots were not

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1 unimproved. Again, the day that the ruling was
2 issued they were in the same ownership. Some of the
3 calculations that the ZA did and also the ability of
4 applying the discretionary flexibility of the Zoning
5 Administrator.

6 Perhaps an initial discussion outside of
7 that may be appropriate in terms of -- well, I'll open
8 it up. Well, in terms of deliberating and hearing an
9 entire appeal on a Zoning Administrator's interpretive
10 letter. And I certainly think it would be appropriate
11 to have brief comments or deliberations on that.

12 BOARD MEMBER ZAIDAIN: Mr. Chair, I think
13 I'll take that one up. That was a big issue for me
14 coming into the hearing, and I was expecting a lot
15 more debate on that point. Because at least as far as
16 my tenure on the Board, that's the first time we've
17 seen an appeal of a ZA letter.

18 And we've deliberated on the importance of
19 the letters, I know a lot when it comes to timeliness,
20 but we've never really tackled it when it's come to an
21 actual appeal. And I was of a -- well, I still am of a
22 particular opinion in regards to whether or not that's
23 worth appealing.

24 And I was hoping to hear a lot more
25 discussion from it in the hearing. I was actually

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1 anticipating a pretty good debate on it, but we didn't
2 really get much. I think it's because the parties are
3 kind of sensing that, I think, one's kind of taken the
4 position that it can be appealed. The other one's
5 taken the position that I'm not really sure, but we
6 need to deal with this issue either now or when a
7 permit is issued. And I can totally respect both
8 positions. But I think that expediency probably, I'm
9 not sure how expediency is a good for us to deliberate
10 on that point because once we take this up and issue a
11 decision, if we do, based on an appeal of a ZA letter,
12 they're going to start humming. And I want to make
13 sure at least my concern is addressed.

14 You know, I made it pretty clear in the
15 hearing that I didn't feel that it was appropriate to
16 take that up. But I was open minded to hear
17 otherwise, and unfortunately I really didn't hear much
18 otherwise.

19 CHAIR GRIFFIS: Very well. We appreciate
20 you bringing that up. And I think that what I've
21 understood in terms of hearing the Board is that
22 there's really two directions of thought on this
23 issue.

24 One is, I think, your position and that is
25 if I can extrapolate a little bit more on it, is that

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1 we have interpretative letter but what is the fruit of
2 us hearing an appeal of that?

3 BOARD MEMBER ZAIDAIN: Right.

4 CHAIR GRIFFIS: In that, it doesn't go
5 directly to the permit documents necessarily.

6 I think that's an excellent point.

7 BOARD MEMBER ZAIDAIN: Or would --

8 CHAIR GRIFFIS: If I can just summarize.
9 The second thought from the Board I think
10 is if you look at a very straight view of the
11 regulations, it is fairly clear and clearly laid out
12 that this is the Board that hears appeals of any
13 official administrative decision, even that of the
14 Mayor, that goes towards zoning and zoning issues.

15 And so this is an official decision. Does
16 it have standing?

17 BOARD MEMBER ZAIDAIN: But from a zoning
18 standpoint, does it? I mean, you know I pushed I
19 think it's Mr. Epting on the issue, and we kind of
20 going back and forth, it was kind of brought out that
21 this letter could be taken back to a Zoning
22 Administrator and the interpretation change. So --

23 CHAIR GRIFFIS: Right.

24 BOARD MEMBER ZAIDAIN: I think there are
25 two points to that issue. And that is: (1) Is it an

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1 official decision when it comes for zoning purposes?

2 Is it the equivalent of a permit?

3 CHAIR GRIFFIS: Right.

4 BOARD MEMBER ZAIDAIN: And secondly,
5 there's another standard in the regulations, and I
6 don't have them in front of me so somebody please
7 correct me if I'm wrong, and that is of aggrievement.

8 I'm still -- to me a community is aggrieved when a
9 developer has the ability to go out and construct and
10 tear up land, and whatever. And I don't see that right
11 stemming from the letter. It stems from a permit.

12 CHAIR GRIFFIS: I see.

13 BOARD MEMBER ZAIDAIN: And I guess I was
14 just disappointed in the proceeding because I was
15 anticipating a pretty good discussion on this to at
16 least bring some clarity to me, and it wasn't there.

17 And to couple this with a second issue is,
18 I was really disappointed with the lack of
19 participation from DCRA. Because a lot of the issues
20 that were raised were basically based on hearsay; what
21 one person thought DCRA meant by the letter, what
22 plans were probably reviewed. However, we did not get
23 that testimony from the person who actually reviewed
24 the documents and issued a letter.

25 I mean, not to get down to minutia, but

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1 you know there is even a typo in the letter from DCRA
2 that, if you look at it, does have some relevance. I
3 want to say well we really think that DCRA meant this.

4 I mean, so we have to take that face value.

5 I mean, I don't know how to get around
6 that.

7 CHAIR GRIFFIS: Right.

8 BOARD MEMBER ZAIDAIN: Maybe I'm a train
9 wrecking the debate before it even gets going. But I
10 think that there's some issues that got brought up
11 that I just don't think were clarified.

12 VICE CHAIR ETHERLY: If I may, Mr. Chair,
13 just to speak to Mr. Zaidain's points? I think he
14 raises an excellent point. The distinction of these
15 two cases are one after the other, even though they of
16 course stand on their own here, but this may very well
17 of course become the logical frontend extension of
18 where Sisson and the entire set of timeliness rules
19 go. Because I think Mr. Zaidain is absolutely right
20 in that you could very well see a lot more of these.

21 I am inclined, however, to move forward
22 and not necessarily deal with what I think is a good
23 question about the issue of aggrievement. But I would
24 tend to error on the side of getting in the door and
25 dealing with these issues at the earliest possible

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1 moment. And if it means a little more work for us,
2 then of course we'll deal with that. And I know Mr.
3 Zaidain's comments are not suggest that there's a
4 shyness of doing the work. But I think you raise a
5 good point, Mr. Zaidain. I, however, think that there
6 is, shall we say, enough of an agreement here that at
7 least let's move forward with discussion on the merits
8 of it and resolve it.

9 CHAIR GRIFFIS: Very well.

10 VICE CHAIR ETHERLY: Thank you, Mr. Chair.

11 CHAIR GRIFFIS: Thank you.

12 Anyone want to take it up?

13 BOARD MEMBER ZAIDAIN: Well, I don't know
14 how that will be handled from a procedural standpoint.
15 I'd maybe abstain from the merits of the case.

16 BOARD MEMBER MILLER: Just because we're
17 still concerned about that, I just wanted to say a
18 quick point. I don't think that the regulations
19 speaks to appeals of final decisions. I don't think
20 it has to be an equivalent of a permit. And I think
21 that --

22 CHAIR GRIFFIS: Yes, but we would have to
23 debate. I mean, final even makes it even more clear
24 in my mind.

25 BOARD MEMBER MILLER: Well, this is a

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1 decision that the ZA has made that the community and
2 the developer are both looking at and both relying on.

3 And I'll agree that they want a decision on this
4 decision because it's the green light to the
5 developer. It gives the developer the authority to go
6 forward as a matter of right.

7 BOARD MEMBER ZAIDAIN: That's not --

8 BOARD MEMBER MILLER: And if we grant the
9 appeal --

10 BOARD MEMBER ZAIDAIN: That's not the way
11 I read it, but go ahead.

12 BOARD MEMBER MILLER: Okay. That's the
13 way I read it.

14 BOARD MEMBER ZAIDAIN: Okay. Even if
15 something -- and somebody please correct me. If
16 something's a matter of right, is something to pull a
17 permit for. I mean, to me this letter granted -- the
18 only right that I saw that this letter granted was the
19 ability to rely on an opinion of the ZA to develop
20 plans further.

21 CHAIR GRIFFIS: I think that's well said.

22 BOARD MEMBER ZAIDAIN: I mean, if I'm
23 wrong, feel free to correct me. But that's --

24 BOARD MEMBER MILLER: I guess I don't see
25 the downside. Because if we were to grant the appeal

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1 now, then the developer would be on notice that the
2 BZA doesn't think that it is a matter of right and
3 take a different course, which would save resources
4 for the developer as well the community in battling
5 something that later on down the road would have been
6 a--

7 BOARD MEMBER ZAIDAIN: Well, you may be
8 right. But then, again, we may also see this again
9 once a permit is issued if people really don't like
10 the development. I mean this is -- you know, some
11 people -- we're hypothesizing on how useful this
12 proceeding will be.

13 CHAIR GRIFFIS: Good. But let's not
14 discuss that.

15 BOARD MEMBER ZAIDAIN: Right. Exactly.

16 CHAIR GRIFFIS: We have to assume we're
17 useful.

18 So with that, why don't we go into the
19 discussion of the appeal. I think it's been well
20 stated and the positions that are taken on the letter.

21 So let's move ahead.

22 First of all, I think there will be a
23 large amount of substantive discussion on whether the
24 lot was improved, not improved. And of course, we're
25 looking at 401.2.

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1 401.2 allows 80 percent of the lot area
2 width of the specified lot to be taken to make it
3 conforming. That is for lots that as written, that in
4 case of an unimproved lot and single ownership on
5 November 1, 1957 that has a lot area or width of not
6 less than that specified in 401.3 for the district in
7 which it is located and that does not adjoin another
8 unimproved lot in the same ownership.

9 Now, of course, we are all very well aware
10 of numerous issues that are attendant to those two --
11 or rather one sentence. So, I would like to have
12 discussion from the Board on those or any other issues
13 as listed in the merits of the appeal.

14 VICE CHAIR ETHERLY: I believe, Mr. Chair,
15 that we had some discussion in the written submissions
16 regarding the issue of the unimproved lot component of
17 401.2. And I would simply note that I do have some
18 concerns as to whether this particular parcel meets
19 that particular component. I apologize for not having
20 the direct cite back to the Intervenor's statement in
21 opposition. And I don't have an exhibit number for
22 it. But --

23 CHAIR GRIFFIS: What are you trying to
24 find?

25 VICE CHAIR ETHERLY: There were some

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1 discussion regarding the unimproved status of the
2 subject property at, I believe it was at page 3 of the
3 submission. And there was discussion regarding what
4 constitutes improved.

5 CHAIR GRIFFIS: Right.

6 VICE CHAIR ETHERLY: And I believe that we
7 did have testimony to the fact, or at least we have
8 some discussion at page 4, regarding the fact that
9 there was construction which had commenced by November
10 1, 1957 but was not completed on the subject property.

11 CHAIR GRIFFIS: Right. I think that goes
12 right to it. I think it's an uncontested fact that
13 there was construction on and it is trying to hit the
14 point of what is the definition or how does one look
15 at for the regulation purposes that it was improved or
16 unimproved.

17 And I think what Mr. Lourenco's testimony
18 was speaking is the fact that it is unimproved until a
19 certificate of occupancy for a structure erected is
20 granted, meaning an improvement to a property goes to
21 a finished project or an occupiable building not the
22 process to get there or any other aspects. But it's a
23 very definitive point in time.

24 He indicated in his testimony that this
25 was, in fact, consistently accepted standard use for

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1 the enforcement of zoning regulations and in, and I'm
2 actually reading his testimony, in the vesting of the
3 grandfathered rights. In the case of the
4 improved directed in parts on Lots 19, 20, 21 the
5 certificate of occupancy number B1923 was not issued
6 until January 14, 195. Of course, that would establish
7 the fact that it was based on his understanding and
8 argument an unimproved lot in November 1957.

9 Ms. Miller?

10 BOARD MEMBER MILLER: I think that the
11 basic issue in this case is whether or not the
12 property was "improved" as of November 1, 1957. And I
13 think that the Appellant has obviously put substantial
14 evidence in the record that nobody rebuts that there
15 was in fact a building there that was substantially
16 built as of that date.

17 And Mr. Lourenco I believe said that the
18 certificate of occupancy sanctions completion of
19 improvements and thereby authorizes use. I don't
20 think that the word "completely improved." We didn't
21 have any authority cited by the Intervenor as to what
22 improvement means or unimproved. And I believe that
23 the Appellant referred to *Webster's*. And I did some
24 research on my own to see what authority was out
25 there. And *Black's Law Dictionary* defines unimproved

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1 land as follows: "A statutory term which includes
2 lands once improved that have reverted to a state of
3 nature as well as lands that have never been
4 improved."

5 CHAIR GRIFFIS: It sounds idyllic.

6 BOARD MEMBER MILLER: Yes, I think it is
7 supposed to be idyllic. And I think *Webster's* also
8 refers to unimproved land as not built upon or
9 otherwise improved for use, retained in the wild or
10 natural state.

11 And we have evidence in the record clearly
12 that this was not in the wild or natural state. That
13 in fact there was much construction on it as of
14 February --

15 CHAIR GRIFFIS: Not like buffalos kind of
16 roaming across the lot.

17 BOARD MEMBER MILLER: And also I looked
18 further. It seems that this term is used all the time
19 and very rarely defined as if everybody assumes that
20 unimproved means not built upon at all.

21 I've looked just for guidance. It's not
22 controlling on us. But D.C.'s real property tax
23 regulations set forth at 9 DCMR says that improvement
24 -- they consider a building improved when it is
25 considered taxable, when it's 65 percent complete.

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1 So I don't go along with the Intervenor's
2 conclusion that it has to be completed to have been
3 considered improved under these regulations.

4 CHAIR GRIFFIS: Good. Thank you.

5 And aside from my jokes, I think you bring
6 up the important aspect of we have an undefined term
7 which this whole section rests on. And so having to
8 find it within ourselves, essentially, on the
9 arguments that were presented to us I think your
10 additional information is appreciated by the Board.

11 Others speaking to that? So basically I'm
12 hearing that we have two different arguments and
13 perhaps two different directions to the Board. And
14 that is an improvement -- for a lot to be unimproved,
15 it is in its natural state. As you've outlined, that
16 may be wild grass. So that to anything of that
17 aspect, once you break ground, once you start
18 construction it is your opinion, Ms. Miller, in
19 looking at this that that is in fact an improvement to
20 the lot. Is that correct.

21 BOARD MEMBER MILLER: No. My conclusion
22 is based on the facts in this case that show in
23 February of 1957 we saw the five articles in the
24 newspaper showing a huge structure.

25 CHAIR GRIFFIS: So that's my point.

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1 BOARD MEMBER MILLER: Oh, okay.

2 CHAIR GRIFFIS: An improvement to a lot is
3 construction on it. It is not a certificate of
4 occupancy. It is not a roof. It's not all
5 inspections. It's not occupiable space. It's
6 construction.

7 So, is that correct?

8 BOARD MEMBER MILLER: That is correct.
9 But I'm not saying the first nail, necessarily, but in
10 looking at this case there is clearly a structure on
11 the property.

12 CHAIR GRIFFIS: Right. Right.

13 BOARD MEMBER MILLER: But I also want to
14 say that --

15 CHAIR GRIFFIS: Or the beginnings of a
16 structure.

17 BOARD MEMBER MILLER: I also think that
18 this letter is flawed because the Zoning Administrator
19 was finding that it is unimproved in the present and
20 he wasn't even making a finding about whether it was
21 improved or improved in 1957.

22 CHAIR GRIFFIS: Excellent point. And it
23 brings up a big piece of I think we need to not
24 necessarily deliberate on, but state as you have that
25 there are a lot of flaws in this letter which makes

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1 our task quite difficult. We have total different
2 interpretations of what a typo might be or missed text
3 might be. I think we can not even entertain that, as
4 I'm not sure how we'd ever derive the absolute truth.

5 But I think it's an important note to make.

6 Mr. Etherly, did you have further?

7 VICE CHAIR ETHERLY: No. Nothing further,
8 Mr. Chair.

9 CHAIR GRIFFIS: Mr. Etherly, is this an
10 improved lot as of on November 1, 1957?

11 VICE CHAIR ETHERLY: No, sir. I would
12 find that it is not.

13 CHAIR GRIFFIS: It is not unimproved?

14 VICE CHAIR ETHERLY: It is an unimproved
15 lot as of November 1, 1957. Thank you.

16 CHAIR GRIFFIS: It is. All right.

17 BOARD MEMBER MILLER: It was unimproved,
18 you mean not built on?

19 VICE CHAIR ETHERLY: There was -- it is my
20 belief that there was an improvement on this lot as of
21 November 1, 1957.

22 CHAIR GRIFFIS: Wow. Okay.

23 Further discussion on the other issue?

24 BOARD MEMBER MILLER: I think it's quite
25 telling that DCRA was not here to explain this

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1 decision of what unimproved means or how they came to
2 that conclusion.

3 CHAIR GRIFFIS: Okay. Do we need further
4 elaboration or deliberation on the ownership issue?
5 The findings of minimum lots, widths.

6 Is there a motion from a Board member?

7 VICE CHAIR ETHERLY: Mr. Chair, it would
8 be my motion to grant the appeal of application 17034,
9 the Advisory Neighborhood Commission 2E finding that
10 the Zoning Administrator's decision as outlined in the
11 July 12, 2001 letter is flawed and contains factual
12 and legal errors. And would invite a second of that
13 motion.

14 BOARD MEMBER MILLER: Second.

15 VICE CHAIR ETHERLY: I think we've had
16 ample discussion, Mr. Chair, regarding concerns that
17 have been outlined with respect to the July 12th
18 letter. And I will harken back to our discussion of
19 the improved versus unimproved language which, of
20 course, is a significant component of 401.2 in order
21 for that provision to be applied. And it would
22 continue to my contention that the lot in question was
23 indeed improved as of November 1, 1957. And that
24 would, therefore, prohibit the application of 401.2,
25 and that would be contrary to the finding of the

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1 Zoning Administrator as noted in the July 12, 2001
2 letter.

3 CHAIR GRIFFIS: Additional?

4 BOARD MEMBER MILLER: Well, I would concur
5 with Mr. Etherly. And I would suggest that we don't
6 need to reach all the other issues in the letter
7 because they would not be allowed to proceed as a
8 matter of right based on our finding that the property
9 was improved as of November 1, 1957 and that the
10 Zoning Administrator erred in only looking to whether
11 or not the property was unimproved at the time of his
12 decision.

13 CHAIR GRIFFIS: Very well.

14 Speaking against the motion, I think it
15 was strong argument by Mr. Lourenco and the
16 submissions that in fact one has to define and in
17 conventional standards as he has laid out and also
18 looking at 101.5, which forbids the use or
19 construction of a building except for compliance with
20 2203.1 forbids the use of any structure until a CFO is
21 issued for it, sets a definition of improvement to a
22 lot. And relying on that and the substantive
23 information given in terms of the time line, we can
24 have pictures of something being built on it, but it
25 does not reach the threshold of an improved lot until

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1 that in fact is issued.

2 The second, and I think we ought to run
3 through, is -- I think it's very clear on the other
4 issues that go through.

5 The last issue, I think, has absolutely no
6 merit that this might, in fact, by the ruling of the
7 ZA in this letter impair the intent and integrity of
8 the zoning plan. And I think that the role of the
9 Zoning Administrator is to answer these questions and
10 bring clarity. And I don't see how this ruling would
11 or would not, or the process of which would in fact be
12 detrimental.

13 In terms of use in a discretionary and
14 also the discretionary adjustment in 407.1, I think
15 that is a clear section that has some great value,
16 first of all. And I think it was appropriately
17 applied in this case.

18 And I think the calculations for the lot
19 width also with the 80 percent reduction, I think
20 there is some clarity that there was not a mistake
21 made in terms of it.

22 I have some hesitancy regarding the letter
23 itself. One, because I do think that Mr. Zaidain's
24 point has some merit.

25 Two, the unclear aspects of the letter

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1 make it very difficult to be a 100 percent definitive.

2 But I think I would rely on the Zoning Administrator
3 and his interpretation in his letter.

4 With that, any other comments?

5 BOARD MEMBER ZAIDAIN: Just very briefly.

6 Maybe I'm being the stubborn one on the Board today,
7 but I'm still a little troubled by the direction that
8 this is heading. And I may be a little surprised as
9 well, so I will be abstaining from the vote on the
10 merits because I don't feel like we should be hearing
11 this appeal.

12 CHAIR GRIFFIS: Very well.

13 Then I think the only left unless, Ms.
14 Miller, do you have some great words of wisdom?

15 BOARD MEMBER MILLER: No. I think I
16 probably have said this earlier, but I think maybe
17 it's more appropriate to say it now. That the fact
18 that we're being asked to validate a DCRA order and
19 DCRA does not even come in to present a defense of
20 this order I think is quite telling.

21 And I think it's also telling that another
22 intervenor, the Millers whose property is also at
23 issue, have not come forward to present a defense of
24 this letter. And I think that goes to the weakness of
25 the letter.

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1 BOARD MEMBER ZAIDAIN: And maybe that is a
2 reflection on much weight DCRA gives the letter. But,
3 I won't beat that point to a pulp anymore.

4 BOARD MEMBER MILLER: And I also don't
5 think we should be filling in the blanks where the ZA
6 write something and we're asked to uphold it by
7 speculating what he meant by it.

8 CHAIR GRIFFIS: Very well.

9 Then if there's nothing further to speak
10 to the motion, I believe the only thing left for us to
11 do is call a vote on this.

12 If everyone is prepared, I would ask for
13 those in support of the motion to grant the appeal to
14 signify by saying aye.

15 BOARD MEMBER MILLER: Aye.

16 VICE CHAIR ETHERLY: Aye.

17 CHAIR GRIFFIS: Opposed? Opposed and
18 abstaining.

19 BOARD MEMBER ZAIDAIN: Abstaining.

20 CHAIR GRIFFIS: Thank you.

21 Mr. Moy, would you record the vote on
22 that?

23 MR. MOY: How would the Chairman vote?

24 CHAIR GRIFFIS: I voted not to support the
25 motion.

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1 MR. MOY: The staff would record the vote
2 to grant the appeal of ANC-2E as to 2-1-1. That's on
3 the motion of Mr. Etherly, seconded by Ms. Miller,
4 abstaining is Mr. Zaidain, opposing the motion is the
5 Chairman. We have a proxy vote from Mr. Hood to deny
6 the appeal, which gives the final vote as 2-2-1.

7 VICE CHAIR ETHERLY: And it's my
8 understanding, Mr. Chair, a 2-2-1 vote would result in
9 the failure of that motion, correct?

10 CHAIR GRIFFIS: That is correct.

11 BOARD MEMBER MILLER: Mr. Chair, did you
12 say there's a proxy to deny the appeal?

13 CHAIR GRIFFIS: That's right.

14 BOARD MEMBER MILLER: Okay. I'm sorry.

15 CHAIR GRIFFIS: If I understand correctly,
16 the vote should then be recorded as 2-2-1, the motion
17 fails.

18 Leaving it still before us, there's no
19 action.

20 I would do this: First of all, we're way
21 delayed on this morning. Second of all, I think we've
22 well versed this and argued our each individual cases.

23 I don't think that anyone's going to be persuasive in
24 changing your vote on this.

25 I don't know another remedy except to set

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1 this again for deliberation, which is not something I
2 like to do, but clearly the Board has split on this
3 fairly definitively.

4 So, we could set this for next week,
5 Tuesday bring up the new argument. We could open the
6 record if Board members want to quickly access whether
7 there's additional information that is needed in the
8 record in order for it to be more persuasive. I'll
9 leave that quickly to the Board's discretion.

10 VICE CHAIR ETHERLY: I might be inclined
11 to suggest a reopening of the record for very limited
12 and focused discussion on the issue of agreement. I
13 believe Mr. Zaidain does raise a good point and there
14 might be indeed be some utility in having some written
15 dialogue on that particular point, and then perhaps
16 revisiting the specific criteria of 401.2 might also
17 be necessary. But I want to be careful with this,
18 because I don't want to invite a flood of submissions
19 that will weigh us further down in reading.

20 CHAIR GRIFFIS: And they need to be in by
21 3:00 today. That's if we'd set this for Tuesday.

22 VICE CHAIR ETHERLY: That is, of course,
23 if you hold to the desire to have it heard and decided
24 on next week.

25 CHAIR GRIFFIS: I don't see any reason --

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1 well, it might -- well there it is.

2 VICE CHAIR ETHERLY: I mean I would say in
3 light of Mr. Zaidain's strong concern here regarding
4 the issue of the aggrievement, that it might -- I
5 would just simply note that perhaps in light of Mr.
6 Zaidain's I think critical concern that it might call
7 to need a somewhat longer gestation period before
8 coming back to it.

9 CHAIR GRIFFIS: Okay. Understood.

10 I think we could, in fact, take it up
11 without opening the record and everyone focus on this
12 aggrievement issue as we're celebrating great peace
13 and thanks.

14 But other opinions? Open the record,
15 additional submissions that are required for this in
16 order for expeditious deliberation?

17 BOARD MEMBER ZAIDAIN: I am sorry. We
18 were discussing something for a second.

19 You're opening for the record just to --

20 CHAIR GRIFFIS: No. The quick decision I
21 need is --

22 BOARD MEMBER ZAIDAIN: Don't focus it on
23 my issue. I mean, obviously, we've got some very
24 divisive opinions on the Board aside from mine.

25 CHAIR GRIFFIS: Very well. I say we do

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1 this, we set this for again to be brought up in a
2 meeting on next Tuesday. At that time we will have
3 Mr. Hood in attendance, so he might participate in the
4 deliberation. That may sway numerous members of the
5 Board with his impassioned plea to support his
6 direction. And we will certainly look for that, and
7 it will be quite exciting. So --

8 BOARD MEMBER ZAIDAIN: I'll just note in
9 advance, Mr. Chairman, I suspect we're going to run
10 into a very similar outcome. But, that being said,
11 let's step up to the plate and see what happens next
12 week.

13 CHAIR GRIFFIS: Yes. That's all I see we
14 can do at this point. And there it is.

15 In which case, is there anything else for
16 us in the Special Public Meeting? Mr. Moy?

17 MR. MOY: No. That's it. That concludes
18 the Special Public Meeting.

19 CHAIR GRIFFIS: Good. Thank you
20 very much.

21 Then let us conclude the Public Meeting of
22 25 November.

23 (Whereupon, the Special Public Meeting was
24 adjourned at 11:08 a.m.)
25

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