GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 16531 of Father Flanagan's Boys Town of Washington, pursuant to 11 DCMR § 3104.1 for a special exception for the construction of four youth residential care buildings under Section 303, each housing not more than six persons, and an addition to an administrative building; or, in the alternative, the construction of four youth residential care buildings, each housing not more than six persons, and the conversion of the existing residential unit into administrative use in the R-2 District at premises 4801 Sargent Road, N.E. (Square 3977, Lot 811).

HEARING DATES: January 19, 2000; February 23, 2000

DECISION DATES: April 5, 2000; April 12, 2000; October 3, 2000; February 6, 2001

ORDER DENYING POST-HEARING MOTIONS

After the issuance of the final Decision and Order in the above-referenced case on December 21, 2000, Advisory Neighborhood Commission (ANC) 5A filed a request, dated January 10, 2001, for an extension of time in which to file a motion for reconsideration and rehearing, as well as a request for reconsideration and rehearing, dated January 16, 2001. The Concerned Neighbors of North Michigan Park (CNNMP), through its attorney, filed a motion on January 16, 2001, to obtain party status *nunc pro tunc*. As discussed in the Board's Ruling on ANC 5A's Request for an Extension of Time and Notice Regarding Pending Motions, dated January 24, 2001, the Board allowed the ANC until January 16, 2001, in which to file a motion for reconsideration or rehearing and scheduled both the ANC's motion and the CNNMP motion for its public decision meeting on February 6, 2001. Following review at the February 6, 2001, public meeting, the Board denied both motions.[1]

Motion to Obtain Party Status *Nunc Pro Tunc*

[1] All three mayoral appointees to the Board were present for the decision on the motions. The Zoning Commission representative on the Board, Kwasi Holman, who had attended all of the hearing on the application, voted absentee pursuant to 11 DCMR 3105.14, 47 DCR 7853 (1999). The Court of Appeals upheld the validity of absentee voting under the Board's Rules of Procedures in Dupont Circle Citizens Association v. District of Columbia Board of Zoning Adjustment, 345A.2d 610,614-15 (D.C.1976). The National Capital Planning Commission representative on the Board was not present for the decision on the motions.

Board of Zoning Adjustment
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CASE NO.16531
EXHIBIT NO.90

The Board's Rules of Practice and Procedure provide in 11 DCMR § 3106.2, 47 DCR 7853 (1999), that in order to participate as a party in a proceeding before the Board, an affected person must file a written request with the Board at least 14 days before the date set for the earing on the application. The Board considers such written requests as a preliminary matter at the hearing on the application.

CNNMP did not file a written request for party status prior to the hearing, and did not orally request party status during the hearing or otherwise attempt to act as a party.[2] CNNMP now states that if granted party status, it would seek to file a motion for reconsideration or rehearing of the Board's final Decision and Order.

Consistent with the Board's rules and practices, the Office of Zoning mailed a notice of hearing to the owners of all property within 200 feet of the subject property and published a notice of hearing in *D.C. Register*. The notice stated the date of the hearing and provided information on how to contact the Office of Zoning concerning questions about the application. The persons receiving the mailed notice and the general public were provided with the same notice and had the same access to the Office of Zoning and the Board's Rules of Practice and Procedure in 11 DCMR ch. 31; and thus the same opportunity to ascertain how to participate in the hearing. The fact that the Office of Zoning has since improved the notice of hearing form to specifically advise the public regarding the Board's party status procedures does not establish that the former notice was defective. Further, the fact that CNNMP received a courtesy copy of the Office of Zoning's Memo to File dated April 21, 2000, is not indicative of party status. In any event, CNNMP was not denied the opportunity to request party status. It participated fully in the hearing as an interested person in opposition to the application, submitting oral and documentary evidence that the Board carefully considered in making its final decision. Based on the above, the Board determined that the motion should be denied.

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[2] For example, at the conclusion of the applicant's presentation of direct testimony, the chairperson asked if there were any parties other than the ANC in the case. CNNMP did not come forward at that time. The transcript reads as follows:

> CHAIRPERSON REID: All right, thank you. ANC do you have cross-examination questions for these witnesses?
>
> MS. BROADNAX: Yes.
>
> CHAIRPERSON REID: Please come forward. And we have no other parties in this case, right? Just ANC, okay thank you. The only people who can cross examine in this particular case is the ANC, they're a party in the case.
>
> And if you have any questions or concerns, or a question, then it would have to be done through the ANC representative. You can give them a note or whatever, I have no problem with that.

Tr. at 114-15 (Feb. 23, 2000).

VOTE: 3:1 (Sheila Cross Reid, Robert N. Sockwell, and Kwasi Holman, by absentee vote), to deny the motion to obtain party status *nunc pro tunc*; Anne M. Renshaw, to grant the motion).

Motion for Reconsideration and Rehearing

ANC 5A requests reconsideration and rehearing of this case. Under 11 DCMR § 3126, a motion for reconsideration must state specifically all respects in which a final decision is claimed to be erroneous, while a motion for rehearing must demonstrate that there is new evidence that could not reasonably have been presented at the original hearing.

The ANC first states that it was not provided an opportunity to present closing arguments during the hearing. Since the applicant bears the burden of proving all the prerequisites for special exception relief, 11 DCMR § 3119.2, the Board's rules in 11 DCMR § 3117.11(b)(7) afford the applicant the opportunity to present rebuttal and a closing statement. To the extent an ANC wishes to make a closing argument in connection with its report or any evidence that it presents at the hearing, the ANC may do so at the conclusion of its presentation. In the instant case, ANC 5A had submitted a written report and the ANC chairperson presented additional oral comments during the hearing. At the conclusion of the chairperson's oral comments, the Board members asked the ANC chairperson an extensive series of questions. The ANC was thus afforded many opportunities to make its concerns and issues known. There was no cross-examination by the applicant, and the ANC chairperson did not request the opportunity to make any further or closing remarks. *See* Tr. at 129 –146. In light of the above, the Board concludes that the ANC was not prejudiced by the Board's hearing procedures.

Second, the ANC asserts that there is new evidence regarding the environmental impact of the proposed project on the Anacostia Watershed Network. The existence of such new information would not warrant rehearing the case in light of condition number 4 in the Board's final Decision and Order, which requires the applicant to provide effective storm water management controls for the construction approved in the order. As specified in the order, the applicant's storm water management plans and controls are subject to review and approval by the District of Columbia agencies responsible for erosion control and storm water management.

Third, as a result of a recent roadkill incident involving a deer, the ANC is concerned about the project's impact on wildlife and wildlife habitat. While it is doubtful that a correlation can be made between the death of a single deer and the subject property, the building permit process will take into account the environmental impacts of the proposed construction not already considered by the Board.

Fourth, the ANC asserts that since it did not receive a copy of the Decision and Order until January 4, 2001, it has not had sufficient time to respond to the Decision and Order. Under 11 DCMR § 3126.2, any party, which includes the ANC, may file a motion for reconsideration or rehearing within ten days from the issuance of the Board's final written order. As explained in the Board's Ruling on ANC 5A's Request for An Extension of Time and Notice Regarding

Pending Motions dated January 24, 2001, the Board granted the ANC until January 16, 2001, in which to file its motion but did not find good cause for any further extension of time.

Fifth, the ANC indicates that if CNNMP is not granted party status, the ANC will have a greater burden in representing the interests of the residents within the ANC area. While the Board has denied CNNMP party status, the Board notes that the ANC's concerns and issues are substantially similar to those advanced by CNNMP. Both the ANC and CNNMP concerns and issues were fully explored during the hearing and addressed in the Decision and Order.

Sixth, the ANC states that the Decision and Order does not accurately detail the specific community complaints about the applicant's operations. The District of Columbia Administrative Procedure Act requires that every decision and order in a contested case be accompanied by findings of fact and conclusions of law. D.C. Code § 1-1509(e) (1999). The Administrative Procedure Act does not require the Board to restate the ANC and community's concerns, but rather provides that the "findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact." *See id.* The Board must reach sufficiently detailed findings on basic factual issues to demonstrate that it has considered and ruled upon each of the party's contentions. *Draude v. District of Columbia Bd. of Zoning Adjustment*, 527 A.2d 1242, 1251 (D.C. 1987). The Board made detailed findings of fact on all the issues of concern to the ANC and the community, discussed those concerns in its conclusions of law and opinion, and crafted numerous conditions to its order of approval designed to address those concerns.

Seventh, the ANC is concerned that the Board did not address the issues and concerns that the ANC raised in its September 19, 2000, report or take seriously the applicant's failure to comply with conditions in the Board's order in BZA Application 15805. As discussed at page 11 of its Decision and Order, the Board did not find the ANC's final recommendation to deny the application persuasive, since the applicant, proceeding diligently and in good faith, had made substantial progress in completing the interim measures required by the Board. The Board also discussed at page 12 the applicant's compliance with the prior order. Finally, the Board incorporated certain conditions in its order directly in response to ANC and community concerns, including conditions relating to completion of the storm water management controls, noise controls, and security plan and to the establishment of operating procedures for the community advisory liaison committee.

Eight, the ANC complains that finding of fact number 17 is incorrect in that it refers to an increase from 15 to 24 in the number of youth to be housed at the proposed facility. Finding of fact number 7 recognizes that while the applicant is authorized to house up to 15 persons in the youth residential care facility, the applicant has limited the number of youths presently living at the facility to six. Therefore, finding of fact number 17, which refers to the proposed increase in the facility's authorized capacity, is not in error.

Finally, the ANC is concerned about community representation on the community advisory liaison committee. The ANC had previously brought this concern to the Board's attention in its September 19, 2000, report. The Board, on page 12 of its Decision and Order,

concurred with the ANC that the committee would benefit from having clearly defined community representation. Condition number 14 of the order requires the applicant to bring before the committee for discussion and action, no later than the committee's first regularly scheduled meeting after the issuance of the Decision and Order, a proposal relating to community representation and rules of procedure. Since the Board's order requires that the applicant convene the committee on a quarterly basis, the Board believes that it is premature to conclude that the applicant's efforts to establish the committee have been ineffective.

Based on the above, the Board concludes that its final decision was not erroneous, and that there is no new evidence that could not have been reasonably presented at the original hearing that would warrant a rehearing. Accordingly, the ANC's motion for reconsideration and rehearing is denied.

VOTE: 3:1 (Robert N. Sockwell, Sheila Cross Reid, and Kwasi Holman, by absentee vote), to deny the motion for reconsideration and rehearing; Anne M. Renshaw, to grant the motion).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member has approved the issuance of this Order Denying Post-Hearing Motions and has authorized the undersigned to execute this Order on his or her behalf.

ATTESTED BY: _____
JERRILY R. KRESS
Director

FINAL DATE OF ORDER: FEB 26 2001

UNDER 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6 OF THE DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT RULES OF PRACTICE AND PROCEDURE AND UPON ITS FILING IN THE RECORD AND SERVICE ON THE PARTIES.

MS/SMP

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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BZA APPLICATION NO.16531:

As Director of the Office of Zoning, I hereby certify and attest that on FEB 26 2001, a copy of foregoing Decision and Order in BZA Application No. 16531 was mailed first class, postage prepaid, or via D.C. Government interoffice mail, to each party who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning